Master's Thesis
in Law

Accountability of International Institutions

A Quest for Controls for the Exercise of Public Power

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1 Introduction

In an increasingly more compact world the role of international organizations (IOs) and other international actors is growing. A change in governance has followed the globalization of recent years and public power that has traditionally been exercised by states is now increasingly falling under the domain of international institutions. This can result in individuals being adversely affected by decisions of those international actors without the checks and balances that have often been put in place where states exercise public powers. The focus of this thesis will be on a particular issue that results from this, the accountability of international institutions, which has been the subject of much discussion in recent years.

In order to comprehensively address this issue there is need to explain what is meant by globalization and governance beyond the state and highlight instances where international actors do affect individuals. In this respect the European Union (EU) has a unique status as an international organization with its exercise of public power in a variety of fields. The governance activities of a number of other international institutions have a strong impact on both domestic issues and individuals at the domestic level. Such examples include a World Heritage Regime and the United Nations Security Council's ('UNSC' or 'Security Council') targeting of individuals for sanctioning.

A premises for this thesis is "the principle that all entities exercising public authority have to account for the exercise thereof."[1] A conceptual framework for the concept of accountability has been provided by the International Law Association (ILA) Committee on Accountability of International Organizations where the concept's multifaceted aspects are emphasized. The Committee describes the accountability of IOs as consisting of three "interrelated and mutually supportive" levels. The first level is identified as the internal and external scrutiny and monitoring of the IO's activities, the second level as tortious liability and the third one as responsibility for a breach of international or institutional law.[2] This framework will be at the centre of the thesis analysis.

The body of principles and rules applicable to international organizations will be discussed in some detail, especially those putting limits on ways to hold such organizations accountable. The status of international institutions as entities with international legal personality separate from their member states will be highlighted and their foundations of power explained. The jurisdictional immunities enjoyed by IOs will be assessed and the

[1] Erika de Wet: "Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review", p. 855.
[2] *Report of the Seventy-First Conference held in Berlin*, pp. 168-170.

possible limits they put on holding such actors accountable. Attention will also be paid to the possibility of looking beyond international institutions and seek accountability instead from their member states. Furthermore, ways for IOs to set up new organs will be assessed and the potential of such organs to provide individuals access to remedies against the organizations.

The idea of a limited government is at the core of the thesis and how this idea has been and can be conceptualized at the international level. A concept of a 'common zone of impact' will be introduced to justify assessing the international level in terms of concepts originally conceived in a domestic setting. Insights will be sought from different approaches that focus on the legitimacy of globalized governance, namely global constitutionalism and global administrative law.

The focus of Section 7 will turn to ombudsman procedures, a mechanism that has a potential for constraining the general exercise of public power. This choice of focus is inspired by the work of the ILA Committee that has adopted a set of recommended rules and practices that "are aimed at making accountability operational by *inter alia* restraining the use of power, fostering the effectiveness and appropriateness of the use of power and sanctioning the abuse or derailment of power."[3] In Part 4 of the Committee's proposals remedies against IOs are discussed and remedies for the different levels of accountability detailed.[4] In accordance with its multifaceted view of accountability the Committee makes specific proposals for non-judicial remedial action against IOs in this section. There it is stipulated that: "IO-s should establish, when appropriate, ombudsman offices to deal with claims of maladministration by organs or agents of the Organisation."[5] The potential of such procedures for enhancing the accountability regime of IOs will be assessed in a normative manner.

2 A Change in World Governance

2.1 Individuals and International Law

The atrocities of two World Wars in the first half of the 20th century fuelled the foundation of transnational legal regimes such as the United Nations (UN) and a new approach developed in international law with regard to the rights of individuals. The Universal Declaration of Human Rights[6] and later the International Covenant on Civil and Political Rights (ICCPR)[7] and the

[3] *Report of the Seventieth Conference held in New Delhi*, pp. 773-774.
[4] *Report of the Seventy-First Conference held in Berlin*, pp. 205-206.
[5] *Report of the Seventy-First Conference held in Berlin*, pp. 223. Italics in the original omitted.
[6] GA Res. 217A (III), 10 December 1948.
[7] 1966 International Covenant on Civil and Political Rights, 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights[8] are evidence of this new way of thinking about human rights.[9]

This movement has not only led to the establishment of new human rights regimes but also a change in the way individuals are viewed in the international legal system which has traditionally focused on states as its sole subjects and individuals as mere objects.[10] Subjects of international law have been understood to have direct rights and responsibilities, be able to bring international claims and "participate in the creation, development, and enforcement of international law."[11] Analysing the involvement of individuals as subjects of international law reveals that the rights of individuals are no longer closely related to states and the emergence of international criminal law has also resulted in individuals being more likely to be held responsible for their actions at the international level.[12] Venues for individuals to make international claims are also becoming more common especially in the fields of international human rights law and international economic law.[13] A similar trend can be identified by increased individual involvement in the development of international law. A good example of this is how the right to self-determination has evolved through individuals acting as groups.[14]

It is clear that individuals do not participate in the international legal system to the same extent as states but their role continues to expand.[15] They do, at least to a certain extent, fulfil the suggested criteria for being considered subjects of international law. However, the subject and object criteria for assessing involvement in the international legal system has come under criticism as it is difficult to conceive that there exists, as Martti Koskenniemi has put it, "one coherent explanation of the character of global social life and a coherent programme for world order."[16] It has been suggested that a better way to examine activity would be to look at participation.[17] The results of the subject analysis highlight the increasing participation of individuals and their prominence as players on the international plane without the involvement of states. This shift in focus from states to individuals can help explain other developments that are significant for the purpose of this thesis, namely a shift in governance away from states as well as other aspects of globalization. This shift in governance is apparent

[8] 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3.
[9] Ed Bates: "History", pp. 27-37.
[10] Robert McCorquodale: "The Individual and the International Legal System", p. 285.
[11] Robert McCorquodale: "The Individual and the International Legal System", p. 285.
[12] Robert McCorquodale: "The Individual and the International Legal System", pp. 289-292.
[13] Robert McCorquodale: "The Individual and the International Legal System", pp. 293-299.
[14] Robert McCorquodale: "The Individual and the International Legal System", pp. 299-301.
[15] Robert McCorquodale: "The Individual and the International Legal System", p. 306.
[16] Martti Koskenniemi: *From Apology to Utopia*, p. 559.
[17] Rosalyn Higgins: *Problems and Processes*, p. 49.

in the way international institutions are increasingly exercising power traditionally exercised by states and through those powers affecting the daily lives of individuals.

2.2 Global Governance

In recent years there has been a change in the way public affairs are conducted with international institutions playing an increasingly more prominent role in governance. This phenomenon is in line with the move away from a state centric approach to international legal structures as the changing status of individuals characterizes. The term global governance has been used to describe this.

Governance is a concept borrowed from economics[18] where governance beyond the state was already receiving attention in the early 1980s, especially in the form of private orderings that allow parties to a contract to opt out of the governance structures of the state. This has been seen as a response to the limits of the state system and has been the subject of economic studies.[19] The origins of the term global governance have been traced back to James N. Rosenau and Jan Kooiman.[20] The change in world politics following the end of the Cold War pushed new conceptions of global order to the spotlight and increased interest in how governance occurs on a worldwide scale.[21] The rapid change of society leading towards more dynamics, higher complexity and greater diversity has resulted in the adequacy of traditional ways of governance being called into question.[22] It has been claimed that "political governance in modern societies can no longer be conceived in terms of external governmental control of society but emerges from a plurality of governing actors."[23]

Different characteristic traits of the concept of global governance, when used as an analytical perspective to describe the conduct of world affairs, have been identified. Global governance emphasizes the importance of international institutions and that governance activities are not exclusive to public actors. It takes note of increased informality and that actors involved in governance often escape established legal procedures. The relevance of actors is diminished with focus shifting to structures and procedures. Finally, the multilevel

[18] Armin von Bogdandy, Philipp Dann & Matthias Goldmann: "Developing the Publicness of Public International Law: Towards a legal Framework for Global Governance Activities", p. 7.
[19] See Oliver E. Williamson: "The Economics of Governance: Framework and Implications", pp. 195-223 & Oliver E. Williamson: "Credible Commitments: Using Hostages to Support Exchange", pp. 519-540.
[20] Armin von Bogdandy, Philipp Dann & Matthias Goldmann: "Developing the Publicness of Public International Law: Towards a legal Framework for Global Governance Activities", p. 7.
[21] James N. Rosenau: "Governance, Order, and Change in World Politics", pp. 1-2.
[22] Jan Kooiman: "Findings, Speculations and Recommendations", pp. 249-250.
[23] Bernd Marin & Renate Mayntz (eds.): *Policy Networks*, p. back flap. Quoted in Jan Kooiman: "Findings, Speculations and Recommendations", p. 258. Italics in the original omitted.

character of governance activities is highlighted and that such activities are neither restricted to the domestic nor international level.[24]

Global governance seems to capture important aspects of world politics and to overcome certain limits to the traditional state-centric account of international law. It reveals an on-going phenomena of governance activities beyond the state but still it is not without problems. The way global governance reduces the importance of individual actors and is understood as a continuous process rather than specific acts makes it difficult to attribute authoritative acts to specific responsible actors. This has raised concerns regarding the legitimacy of global governance activities especially where international institutions are involved. Such activities can have deep impact on individuals without the safeguard of judicial review or procedural principles usually present at the domestic level.[25] Thus both the concept itself and its shortcomings help identify an important issue of modern international law. Governance activities are taking place outside traditional state structures and those activities have resulted in calls for the implementation of principles familiar to domestic law systems. For the purpose of this thesis focus will be on the legitimacy of these governance activities and in particular on the accountability of actors involved in decision-making. Before turning to examples of how public powers are exercised by international institutions and to the issue of accountability in that respect there is need to further reflect on the phenomena of governance beyond the state. For that purpose guidance will be sought from a cosmopolitan outlook.

2.3 Cosmopolitanism

The term cosmopolitanism originates with the Stoics and is multidisciplinary in nature so any comprehensive definition of it would be broad.[26] Cosmopolitanism's two main aspects have to do with identity and responsibility. It emphasizes that different cultures influence ones identity and that obligations are not merely local but are also owed to distant others when they can be affected by ones actions.[27] This idea of a world citizenship, allegiance being owed to all other human beings, is at the root of cosmopolitanism. With regard to justice it has been interpreted by Samuel Scheffler to mean "that the norms of justice must ultimately be seen as governing the relations of all human beings to each other, and not merely as applying within

[24] These characteristics are identified in Armin von Bogdandy, Philipp Dann & Matthias Goldmann: "Developing the Publicness of Public International Law: Towards a legal Framework for Global Governance Activities", p. 7.
[25] Armin von Bogdandy, Philipp Dann & Matthias Goldmann: "Developing the Publicness of Public International Law: Towards a legal Framework for Global Governance Activities", pp. 8-10.
[26] Fabian Amtenbrink: "The Multidimensional Constitutional Legal Order of the European Union. A Successful Case of Cosmopolitan Constitution-Building?", p. 5.
[27] Gillian Brock & Harry Brighouse: "Introduction", pp. 2-3.

individual societies or bounded groups of other kinds."[28] Cosmopolitanism can thus be seen as a doctrine of universal justice, where the validity of norms of justice is measured by the world population as a whole rather than confined to a specific community.[29]

This modern conception of cosmopolitanism as is also referred to "as the moral and political outlook that offers the best prospects of overcoming the problems and limits of classic and liberal sovereignty"[30] is closely related to and influenced by Immanuel Kant's contribution. Kant proposed that "[t]he greatest problem for the human species […] is that of attaining a civil society which can administer justice universally."[31] He believed that the system of independent sovereign states established by the Treaty of Westphalia[32] could not abolish external threats and that there was need to have sufficient regard for cosmopolitan values.[33] Kant was critical of the of celebrated natural law theorists such as Hugo Grotius and Samuel von Pufendorf "whose justifications of the supremacy of state sovereignty were unable to provide for a lawful and peaceful community of nations based on universal law" according to him.[34] Still it has been suggested that Kant did not break from the natural law tradition even though he was critical of it and that his criticism rather served to modernize natural law by putting central focus on the idea of right, attacking "the old order of servitude, inequality and superstition."[35]

Kant suggests that by upholding cosmopolitan values "continents distant from each other can enter into peaceful mutual relations which may eventually be regulated by public laws, thus bringing the human race nearer and nearer to a cosmopolitan constitution."[36] This has been understood as advocating for systematically entrenching cosmopolitan principles at the foundation of law eventually leading to rightful authority being reconceived "so that states would no longer be regarded as sole centers of legitimate power within their borders, as is already the case in many places."[37] Such legal cosmopolitanism does not require commitment

[28] Samuel Scheffler: *Boundaries and Allegiances*, p. 113.
[29] Fabian Amtenbrink, "The Multidimensional Constitutional Legal Order of the European Union. A Successful Case of Cosmopolitan Constitution-Building?", p. 7.
[30] David Held: "Law of States, Law of Peoples. Three Models of Sovereignty", p. 24.
[31] Immanuel Kant: "Idea for a Universal History with a Cosmopolitan Purpose", p. 45.
[32] 1648 Treaty of Westphalia. Peace Treaty between the Holy Roman Emperor and the King of France and Their Respective Allies.
[33] Garrett Wallace Brown & David Held: "Editor's Introduction", p. 8.
[34] Robert Fine: "Cosmopolitanism and Natural Law: Rethinking Kant", p. 149.
[35] Robert Fine: "Cosmopolitanism and Natural Law: Rethinking Kant", p. 149.
[36] Immanuel Kant: "Perpetual Peace. A Philosophical Sketch", p. 106.
[37] David Held: "Law of States, Law of Peoples. Three Models of Sovereignty", p. 33.

to a political ideal of a world state and should rather be seen as facilitating the promotion of universal values through both a legal and an institutional framework.[38]

Valuable lessons can be learnt from the cosmopolitan outlook as it directs attention towards international actors that are increasingly exercising power beyond the state. These actors are not subject to the same monitoring mechanisms that generally apply to the governance activities of state bodies. Cosmopolitanism highlights this post-national condition but it does not necessarily justify it. Properly understood it is a reminder that there is need for a certain framework to secure values such as accountability of the actors involved in decision-making. Checks and balances that are often taken for granted within states need to be introduced at the international level and where such methods are already in place their strengthening must be considered. Focus will now turn to specific instances where public power is being exercised beyond the state.

3 The Exercise of Public Power beyond the State

3.1 Introduction

The previous Section has aimed to identify a change in world governance. While sovereign states are still at the centre of the international legal order the role of other actors is constantly increasing. Individuals are no longer regarded as mere objects of international law and governance activities are moving beyond the state as the activities of international institutions is evidence of. The exercise of public power once primarily restricted to states is now increasingly shifting to international institutions and in this section a few examples of such exercise of power will be discussed. In some instances this can lead to individuals being adversely affected by the institutions' exercise of public power. Such instances are of particular concern for this thesis. The following discussion will be limited to a few illustrative examples and a more comprehensive overview remains outside the scope of the thesis.

3.2 World Heritage Governance Regime

The complex governance regime established by the World Heritage Convention[39] serves as a mere example of the impact the governance activities at the international level can have on domestic institutions. This regime was established as a response to increased threats to cultural and natural heritage both by causes of decay and changing social and economic

[38] Fabian Amtenbrink: "The Multidimensional Constitutional Legal Order of the European Union. A Successful Case of Cosmopolitan Constitution-Building?", p. 8.
[39] 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, 1037 UNTS 151 (1977).

conditions. Its premises is "that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole."[40] The governance activities of the World Heritage Committee established under the Convention include the establishment and updating of a World Heritage List and another list of World Heritage in Danger.[41] The results of the inclusion of a site in the latter list are that special assistance becomes available and the site can be deleted from the heritage list if its values are irretrievably lost.[42] There are no sanctions or other enforcement mechanisms applied in order to get state parties to comply with the Convention but the risk of delisting does have a major impact. This is clear from the United States Government's swift action to address the issues at hand when Yellowstone National park was included on the list of World Heritage in Danger.[43]

Another example regarding the construction of a bridge in the Dresden Elbe Valley in Germany shows how the governance activities of the Committee can affect domestic authorities and potentially upset local level decisions reached by means of direct democracy. The Valley was included on the World Heritage List in 2004 and on the list of World Heritage in Danger in 2006 as a result of the planned construction of a bridge.[44] The World Heritage Committee made efforts to influence the construction project through political means and threatened to remove it from the World Heritage List.[45] This influenced the Dresden City Council that decided to halt the project[46] and a legal battle before German courts followed, although not involving the Committee itself. Ultimately the German Constitutional court gave more weight to a binding local referendum that had voted in favour of constructing the bridge than to the pleas of the World Heritage Committee that the project be stopped.[47] The Committee continued urging an end to building of bridge[48] but its efforts were fruitless and the continuation of the project resulted in the delisting of the site in 2009.[49]

[40] Preamble World Heritage Convention.
[41] Article 11(1) & 11(4) World Heritage Convention.
[42] S. Javed Maswood: "Kakadu and the Politics of World Heritage Listing", p. 357.
[43] S. Javed Maswood: "Kakadu and the Politics of World Heritage Listing", p. 358.
[44] "Dresden is deleted from UNESCO's World Heritage List", http://whc.unesco.org/en/news/522.
[45] "World Heritage Committee threatens to remove Dresden Elbe Valley (Germany) from World Heritage List", http://whc.unesco.org/en/news/265.
[46] "Dresden City Council Votes Against Bridge Construction at World Heritage Site", http://whc.unesco.org/en/news/272.
[47] Diana Zacharias: "The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution", pp. 335-336.
[48] "World Heritage Committee keeps Dresden Elbe Valley on UNESCO World Heritage List, urging an end to building of bridge", http://whc.unesco.org/en/news/447.
[49] "Dresden is deleted from UNESCO's World Heritage List", http://whc.unesco.org/en/news/522.

The World Heritage regime is representative of the exercise of public power by international institutions and the lack of possibilities to review Committee decisions has its shortcomings. A system of dispute settlement allowing for such review could have been beneficial in the case of the Dresden Elbe Valley, providing a platform for scrutinizing the Committee's decision.[50]

In even greater need for a system that provides checks to public powers exercised by international institutions are individuals that are more likely to be adversely affected by decisions of such institutions. Two examples of such institutions will now be discussed, first the European Union that does have an elaborate system of checks and balances in place and second the UN sanctions regime which does need an improved system for monitoring the exercise of public power if individuals are to be allowed recourse to a proper review mechanism.

3.3 The European Union

The European Union is an international organization that is unique both in the number of ways it can directly affect individuals and in its efforts to monitor how public power is exercised through its institutions. Because of the uniqueness of the EU legal order it has been questioned whether it can rightly be conceived as an IO of a type similar to a confederation or whether it is more correctly described as an embryonic federal state or a federation of states.[51] Leaving such questions aside it is clear that the EU is a legal structure beyond the state that is capable of directly affecting individuals in a multitude of circumstances through the Union's institutions. EU law plays a central role in this respect as individuals are both subject to it and can base claims on it. The principle of conferral holds a central place in EU law and puts down the limits of the Union's power to act and guarantees that the EU cannot extend its competences without prior consent by its member states. Article 5(2) of the Treaty on European Union[52] (TEU) prescribes that:

> [T]he Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

The competences that have been conferred upon the Union cover diverse areas and in certain instances these competences are exclusive to the EU. The member states can thus not

[50] Diana Zacharias: "The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution", pp. 334-335.
[51] Alina Kaczorowska: *European Union Law*, pp. 103-108.
[52] 2008 The Treaty on European Union. Official Journal of the European Union, C 115/13.

act in matters concerning areas such as the customs union, competition rules for the internal market, the common fisheries policy and the common commercial policy.[53] Therefore it is inevitable that individuals will be directly affected by action and inaction of the EU in these areas such as the fisherman in the United Kingdom that can only fish in accordance with the common fisheries policy and the wine producer in Spain that relies on the protection of competition rules when selling his or her product throughout the internal market. Individuals can also be directly affected by the EU's exercise of competences that are either shared with its member states or where the Union plays a supportive role.

It is not only the vast scope of competences awarded to the EU that is unique for an international organization but also the protection of individuals that has been put in place with a system of checks and balances through which the Union's exercise of public power is monitored. Article 2 TEU provides that the EU is founded on fundamental human rights that are also seen as general principles of EU law. This has been recognized by the Court of Justice of the European Union (ECJ) that has taken account of both the constitutional tradition of the member states as well as their international human rights obligations. The Charter of Fundamental Human Rights[54] of the European Union increases the visibility of human rights protection within the EU and has now been given legal force in Article 6 TEU. Fundamental rights protection is also guaranteed through the European Convention on Human Rights to which all EU member states are parties. The EU itself is also set to accede to the Convention in accordance with Article 6(2) TEU.[55]

Individuals as well as companies that do suffer damages as a result of EU action or inaction can bring direct actions in the elaborate judicial system that is in place at the EU level. The judicial system is not the only accountability mechanism in place at the EU level as adversely affected individuals can also have recourse to the European Ombudsman. Without directly addressing whether the mechanisms in place provide sufficient protection for individuals adversely affected by the EU's exercise of public power it is evident that some care has been taken to provide a number of ways to secure such protection. Attention will now turn to a regime that lacks a similar level of protection and how being targeted for sanctions by the United Nations Security Council affects individuals.

[53] Article 3, 2008 The Treaty on the Functioning of the European Union. Official Journal of the European Union, C 115/47 (TFEU).
[54] 2010 Charter of Fundamental Human Rights of the European Union. Official Journal of the European Union, C 83/389.
[55] Alina Kaczorowska: *European Union Law*, pp. 235-237.

3.4 The United Nations Security Council & the Al-Qaida Sanctions List

3.4.1 Introduction

The Security Council has a unique position within international law. It is at the centre of maintaining international peace and security and the UN Charter provides it with many tools to do so. The Council's main powers are stipulated in Chapter VII. Article 39 tasks it with determining the existence of a threat to the peace and to decide what measures shall be taken. Article 41 and 42 indicate that such measures can be very wide ranging even allowing for the use of force if other measures prove inadequate. The only limits to these wide powers are that the Security Council has to "act in accordance with the purposes and principles of the United Nations"[56] and that they can only be exercised in order "to maintain or restore international peace and security."[57]

3.4.2 The Al-Qaida Sanctions List

It is unique for a body of an international organization to possess as wide ranging powers as the UNSC does and the exercise of these powers have allowed the Security Council to take action greatly affecting individuals. An example of this is the sanction regime first established by UNSC Res. 1267, 15 October 1999. Subsequent UNSC resolutions have modified the regime that establishes a list of individuals currently referred to as the Al-Qaida Sanctions List[58] in an effort to combat international terrorism impacting the rights and freedoms of those targeted. In a series of resolutions the Security Council has ordered all UN member states to target individuals listed on the Al-Qaida Sanctions List and "[f]reeze […] the funds and other financial assets or economic resources of these individuals", "[p]revent the entry into or transit through their territories of these individuals" and to "[p]revent the direct or indirect supply, sale, or transfer to these individuals […] of arms and related materiel of all types."[59]

The human rights affected thus include the right to property, the freedom of movement and the freedom of association. The sanction regime may also affect the right to respect for family and private life and the right to seek and to enjoy in other countries asylum from persecution as well as the right to reputation.[60] The UN member states are bound to carry out these resolutions in accordance with Article 25 of the UN Charter and the obligations prevail over obligations under any other international agreement as Article 103 of the UN Charter

[56] Article 24(2) UN Charter.
[57] Article 39 UN Charter.
[58] UNSC Res. 1989, 17 June 2011, Paragraph 1.
[59] See UNSC Res. 1390, 16 January 2002, Paragraph 2, UNSC Res. 1989, 17 June 2011, Paragraph 1 & UNSC Res. 2083, 17 December 2012, Paragraph 1.
[60] Bardo Fassbender: "Targeted Sanctions Imposed by the UN Security Council and Due Process Rights", p. 467.

stipulates. These far reaching results from the exercise of UNSC powers have received attention in a body of literature and will now be subject to more detailed analysis.

The Security Council has delegated its responsibilities to a subsidiary organ, the Al-Qaida Sanctions Committee, established in accordance with Article 29 of the UN Charter. The Committee consists of all members of the Security Council and has the mandate to undertake the tasks prescribed in the various UNSC resolutions covering the sanction regime.[61] It administers the list of terrorist suspects and decides on listing and delisting in accordance with the decision-making guidelines.[62] The UN member states make suggestions for individuals to be included on the sanction list that are then considered by the Committee.[63] A detailed statement should accompany a listing suggestion and form its justification.[64] Decisions are made by consensus of the Committee's members, including listing and delisting. If the Committee fails to reach a consensus further consultations take place in an attempt to facilitate agreement.[65]

3.4.3 Applicability of Human Rights

It is apparent that being included on the Sanction List has significant impact on individuals and it is possible that individual human rights are infringed in the process. This raises the question how human rights and other legal obligations under international law relate to the Security Council's decision making, a question that remains debated.[66] One position is that the Security Council is not bound by human rights when exercising Chapter VII powers. This is supported by the broad wording of Chapter VII of the UN Charter that makes no reference to human rights and it is said that the maintenance of international peace and security overrides all other obligations. It is claimed that this was the intention of the drafters of the UN Charter and further support of the argument is sought in the wording of Article 1 UN charter. It is argued that the sequence of purposes listed indicates their importance and thus

[61] Security Council Committee Pursuant to Resolutions 1267 (1999) and 1989 (2011) Concerning Al-Qaida and Associated Individuals and Entities. Guidelines of the Committee for the Conduct of its Work, 7 November 2002, latest amendment 15 April 2013. (Hereinafter: 'Committee Guidelines, 15 April 2013.'), paragraphs 1(b) & 2.
[62] Committee Guidelines, 15 April 2013, paragraphs 4, 6 & 7.
[63] Committee Guidelines, 15 April 2013, paragraphs 6(a).
[64] Committee Guidelines, 15 April 2013, paragraphs 6(h).
[65] Committee Guidelines, 15 April 2013, paragraphs 4.
[66] A short outline of the different opinions is provided in Clemens Feinäugle: "The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?", pp. 107-108.

that greater emphasis is placed on the maintenance of peace and security, the first purpose listed, rather than respect for human rights which is listed in Paragraph 3 of the Article.[67]

This reliance on a historical interpretation of the UN Charter ignores developments that have taken place within the UN system. The drafters of the UN Charter could hardly foresee that the UN Security Council would directly sanction individuals and the UN Charter provides no mechanisms to protect those affected.[68] Customary law and general principles of law apply equally to states and IOs and a reading that finds the Security Council not bound by human rights seems illogical as it would allow states to escape their legal obligations merely by creating an IO.[69] The UNSC itself has confirmed that UN member states must abide by international human rights when implementing the Council's resolutions.[70] It has further been argued that the duty to respect human rights can be read from the UN Charter as it provides the framework that the Security Council has to operate within.[71]

Article 24(2) UN Charter provides that in discharging its duties the Security Council has to "act in accordance with the Purposes and Principles of the [UN]," which can be found in Article 1. Article 1(1) refers to the primary goal of the UN, the maintenance of international peace and security and to bring about the peaceful settlement of international disputes in accordance with principles of justice and international law and Article 1(3) places the obligation on the UN to respect human rights. It has been argued that there exists a principle of equitable estoppel that applies to all international organizations as a general principle of law. Thus, in combination with the good faith principle found in Article 2(2) UN Charter the organs of the UN are barred from acting in a way that conflicts with the human rights they must respect in accordance with Article 1(3) UN Charter.[72] Further credence is laid to this line of reasoning by the International Court of Justice (ICJ) that has elaborated on good faith as "[o]ne of the basic principles governing the creation and performance of legal obligations"

[67] Clemens Feinäugle: "The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?", p. 107.
[68] Clemens Feinäugle: "The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?", p. 108.
[69] August Reinisch: "Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions", p. 858.
[70] This is explicitly stated in the context of counter-terrorism in UNSC Res. 1456, 20 January 2003, Paragraph 6.
[71] For this line of argument see Erika de Wet: "Holding the United Nations Security Council accountable for human rights violations through domestic and regional courts: A case of 'be careful what you wish for'?", pp. 143-144.
[72] Erika de Wet: "Holding the United Nations Security Council accountable for human rights violations through domestic and regional courts: A case of 'be careful what you wish for'?", p. 144.

and that unilateral declarations have a binding character that interested parties can rely on "and are entitled to require that the obligation thus created be respected."[73]

It has been suggested that "core human rights elements from the human rights instruments developed under the auspices of the United Nations itself" elaborate on the human rights vision found in Articles 55-56 UN Charter and that they constitute the human rights that the organization must promote and respect in accordance with Article 1(3) of the Charter.[74] The argument is that since the UN has propagated these human rights norms it has created the legitimate expectation that the organization itself should respect their core content. The same should apply for the Security Council's members when acting on behalf of the organ even when those acts are in the interest of international peace and security. Thus, core human rights must be respected when individuals are targeted for sanctions.[75]

Of particular relevance is the existence of due process rights for individuals targeted by Chapter VII sanctions. In a study commissioned by the UN Office of Legal Affairs it was found that the UN has a responsibility for the direct impact on the rights and freedoms of individuals that stems from UNSC resolutions.[76] This results from the non-discretion of UN member states in implementing these resolutions. The obligations prevail over any other in accordance with Article 103 UN Charter and a member state "may not invoke the provisions of its internal law as justification for its failure to perform" as is provided in Article 25 of the Vienna Convention on the Law of Treaties.[77] This creates a situation where persons concerned have the legitimate expectations that the UN will observe due process standards.

Furthermore, the study finds that the UN would contradict itself by not observing such standards in its own action while constantly pushing its members to do so. This would violate the legal maxim that "[n]o one is allowed to act contrary to, or inconsistent with, one's own behaviour"[78] which is a general principle of law as recognized by Article 38(1)(C) of the ICJ Statute.[79] The concepts of international personality and implied powers of IOs, discussed in Section 5 of the thesis, further support this finding. The ICJ has referred to that the duties of

[73] *ICJ, Nuclear Tests Case, 20 December 1974, ICJ Reports 1974,* p. 268.
[74] Erika de Wet: "Holding the United Nations Security Council accountable for human rights violations through domestic and regional courts: A case of 'be careful what you wish for'?", p. 144. For a non-exclusive list of these instruments see footnote 8 of the cited contribution.
[75] Erika de Wet: "Holding the United Nations Security Council accountable for human rights violations through domestic and regional courts: A case of 'be careful what you wish for'?", pp. 144-145
[76] Bardo Fassbender: "Targeted Sanctions Imposed by the UN Security Council and Due Process Rights", pp. 466-469. The following discussion is based on this study.
[77] 1969 Vienna Convention on the Law of Treaties, 8 ILM 679 (1969).
[78] Bardo Fassbender: "Targeted Sanctions Imposed by the UN Security Council and Due Process Rights", footnote 67. Also referred to as *venire contra factum proprium*.
[79] 1945 Statute of the International Court of Justice, 33 UNTS 993. See Bardo Fassbender: "Targeted Sanctions Imposed by the UN Security Council and Due Process Rights", pp. 468-469.

IOs "must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[80] When these purposes and functions develop "in a way that it exercises direct authority over individuals, a corresponding duty of that organization to observe standards of due process arises under international law."[81]

This argument for the applicability of human rights to measures adopted by the Security Council is convincing. It is of particular importance for the purpose of this thesis to establish that the core human rights of individuals adversely affected by such measures should be respected. Here it is concluded that this is the case even if the adoption of targeted sanctions in the interest of international peace and security can put some limits on the rights of individuals. It is not accepted that the Security Council can completely deviate from international human rights standards nor is it accepted that the Council is only bound by *jus cogens* norms.[82] For the individuals affected their access to legal protection is of particular concern. Attempts to secure such protection have been made at the national level and more recently measures for the protection of individuals have also been implemented at the international level.

3.4.4 Legal Protection for Affected Individuals at the National Level

The UN member states need to implement and enforce sanctions against individuals listed on the Al-Qaida Sanctions List and this gives those affected an opportunity to challenge this implementation. Such challenges have raised particular issues concerning whether obligations under the UN Charter should prevail over any conflicting obligation, as provided in Article 103 of the Charter, to the extent that human rights should be inoperative in domestic or regional courts. This is the reasoning the General Court of the European Union (EGC) based its conclusion on in the *Kadi*[83] case.

The view was taken that action was needed by the European Union in order to implement the sanctions regime for the Union's member states.[84] Regulation 2002/881/EC was adopted to impose "certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban" with the aim to

[80] *ICJ, Reparation for Injuries Suffered in the Service of the United Nations, 11 April 1949, ICJ Reports 1949*, p. 180.
[81] Bardo Fassbender: "Targeted Sanctions Imposed by the UN Security Council and Due Process Rights", p. 469.
[82] Erika de Wet: "Holding the United Nations Security Council accountable for human rights violations through domestic and regional courts: A case of 'be careful what you wish for'?", p. 145
[83] EGC, *case T-315/01, ECR 2005, p. II-3649.*
[84] EGC, *case T-315/01, ECR 2005, p. II-3649,* para. 26.

implement UNSC Resolution 1390.[85] The applicant in this case, Yassin Abdullah Kadi, had been included by the Sanctions Committee on the list of persons who must be subjected to the freezing of funds. In accordance with this he was included on the list of persons, groups and entities in Annex I to Regulation 2002/881/EC and as such subject to the freezing of funds imposed by Article 2. Kadi challenged this and claimed that the Regulation should be annulled in so far as it related to him. He based this claim on that his fundamental rights had been violated, namely the right to a fair hearing, the right to respect for property and the right to effective judicial review.[86] In coming to the conclusion that Kadi could not rely on these fundamental rights to have the regulation annulled the Court relied on the succession doctrine, "according to which the Union may be bound by the international obligations of its Member States."[87] As a consequence of this approach the General Court found that there were "structural limits, imposed by general international law […] on the judicial review which it falls to the [General Court] to carry out with regard to that regulation."[88]

In support of this the Court found that relying on fundamental principles of EU law to review the lawfulness of the contested regulation would "imply that the Court is to consider, indirectly, the lawfulness of [the UNSC Resolutions]."[89] The Court claimed "the origin of the illegality alleged by the applicant would have to be sought, not in the adoption of the contested regulation but in the resolutions of the Security Council which imposed the sanctions."[90] The Court further stated that if it were to grant the applicant's request for annulment of the regulation it would indirectly result in the Court reviewing whether the Resolutions of the Security Council infringed the fundamental rights protected by the EU legal order.[91] The Court thus refused to directly review the European Regulation because it would result in the indirect review of the UNSC Resolutions.

A constitutional rule that individuals should be able to challenge the legality of a European legislation when their human rights are violated can be implied from the status of the European legal order as "a constitutional order based on the rule of law."[92] There is some debate whether constitutional systems can allow for exceptions to this constitutional rule. With regard to the EU and whether fundamental rights might be limited by obligations owed

[85] Regulation 2002/881/EC, preamble.
[86] EGC, *case T-315/01, ECR 2005, p. II-3649,* para. 59.
[87] Robert Schütze: *European Constitutional Law*, p. 421.
[88] EGC, *case T-315/01, ECR 2005, p. II-3649,* para. 212.
[89] EGC, *case T-315/01, ECR 2005, p. II-3649,* para. 215.
[90] EGC, *case T-315/01, ECR 2005, p. II-3649,* para. 215.
[91] EGC, *case T-315/01, ECR 2005, p. II-3649,* para. 216.
[92] Robert Schütze: *European Constitutional Law*, p. 419.

to the UN the classic approach was laid down in the *Bosphorus* case.[93] There it was made clear that the EU member states need to comply with the EU legal order and the fundamental rights it protects when they seek to fulfil their international obligations through EU law.[94] This confirms the function of fundamental rights as a limit to the powers of public authority and that action of the EU itself needs to be in compliance with these rights. This can include judicial review of whether fundamental rights protection is breached by EU legislation. The appeal judgment in the *Kadi* case[95] is one of few examples where the Court of Justice of the European Union has conducted such a review. It was the first time the Court decided that the fundamental rights have to be respected in every EU action also when such action is based on international obligations.[96] The ECJ made efforts to remedy the General Court's conclusion, decided in line with the classic approach and rejected to allow the UNSC resolutions to enjoy primacy over EU law.

The ECJ found that the "obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional [principle]" that EU acts "must respect fundamental rights." The Court referred to its role in upholding this constitutional principle by reviewing the lawfulness of such acts and by doing so playing its part in the "complete system of legal remedies" under the EU legal order.[97] The Court emphasized that even if obligations owed to the UN might have primacy over secondary EU legislation that primacy would not extend "to the general principles of which fundamental rights form part."[98]

The Court analysed the protection offered at the international level at that time and noted the shortcomings of the process involved for individuals seeking to be removed from the sanctions list referring to the lack of real opportunity for the persons involved to assert their rights. The procedure before the Sanctions Committee was "in essence diplomatic and intergovernmental" and all decisions taken "by consensus, each of its members having a right of veto."[99] The ECJ noted other shortcomings as well. An individual "submitting a request for removal from the list may in no way assert his rights himself during the procedure before the Sanctions Committee,"[100] the Sanctions Committee was not required to communicate "to the applicant the reasons and evidence justifying his appearance"[101] on the sanctions list and if a

[93] ECJ, *case C-84/95, ECR 1996, p. I-3953.*
[94] Robert Schütze: *European Constitutional Law*, pp. 419-420.
[95] ECJ, *case C-402/05P, ECR 2008, p. I-6351.*
[96] Helena Raulaus: "The Charter of Fundamental Rights as a set of Constitutional Principles", pp. 193-194.
[97] ECJ, *case C-402/05P, ECR 2008, p. I-6351*, para. 285.
[98] ECJ, *case C-402/05P, ECR 2008, p. I-6351*, para. 308.
[99] ECJ, *case C-402/05P, ECR 2008, p. I-6351*, para. 323.
[100] ECJ, *case C-402/05P, ECR 2008, p. I-6351*, para. 324.
[101] ECJ, *case C-402/05P, ECR 2008, p. I-6351*, para. 325.

request for removal was rejected the Committee was "under no obligation to give reasons."[102] In light of this the Court found that there was need for the EU legal order to offer the protection lacking at the international level and that the EU judicature must review the lawfulness of EU legislation in light of fundamental human rights regardless of its origin. No exception could be made even if the EU legislation served to implement a resolution adopted by the Security Council under Chapter VII of the UN Charter.[103] The ECJ thus concluded that the General Court had erred in law when it found that the origin of the EU legislation resulted in that it "must enjoy immunity from jurisdiction so far as concerns its internal lawfulness."[104]

Here the ECJ shows its willingness to secure the fundamental rights protection of individuals adversely affected by international institutions and at the EU level it provides for a comprehensive human rights protection for individuals in such a situation. Still it leaves something to be desired as Erika de Wet has noted.[105] The conclusion of the ECJ was based exclusively on EU law rather than international law which can be contrasted with the General Court's approach that attempted to use international law to solve the case. This results in the continued relevance of the General Court's reasoning since the ECJ did not formally refute its findings pertaining to international law. This makes it unclear whether binding UNSC resolutions were violated by granting affected individuals access to judicial protection at the EU level. A violation that could result in the involved EU member states being internationally responsible and might trigger countermeasures by the Security Council.[106]

The centralized nature of the General Court and the ECJ gives them more resemblance to domestic rather than international courts.[107] This does not limit the possible spill-over effects of their decisions as note is generally taken of developments in different jurisdictions. The General Court's decision has already influenced decisions before different domestic courts,[108] one of which will now be examined.

The Swiss Federal Court adopted a reasoning similar to the General Court in a case concerning the Italian and Egyptian national, Youssef Moustafa Nada living in an Italian enclave surrounded by Swiss territory. Switzerland had implemented the UNSC Resolutions

[102] ECJ, *case C-402/05P, ECR 2008, p. I-6351*, para. 325.
[103] ECJ, *case C-402/05P, ECR 2008, p. I-6351*, para. 326.
[104] ECJ, *case C-402/05P, ECR 2008, p. I-6351*, para. 327.
[105] See Erika de Wet: "Holding the United Nations Security Council accountable for human rights violations through domestic and regional courts: A case of 'be careful what you wish for'?", pp. 143-168.
[106] Erika de Wet: "Holding the United Nations Security Council accountable for human rights violations through domestic and regional courts: A case of 'be careful what you wish for'?", p. 146.
[107] Erika de Wet: "Holding the United Nations Security Council accountable for human rights violations through domestic and regional courts: A case of 'be careful what you wish for'?", pp. 154-155.
[108] Erika de Wet: "Holding the United Nations Security Council accountable for human rights violations through domestic and regional courts: A case of 'be careful what you wish for'?", p. 161.

relating to the Sanctions Regime. When Nada was included on the sanctions list it resulted in that he was unable to move outside the Italian enclave. He alleged that this led to a number of his human rights being violated but the Swiss Federal Court found that Switzerland could not delete his name from the sanctions lists of its own motion despite the Court's finding that the delisting procedure before the Sanctions Committee failed to both meet the requirement of access to a court under Article 6(1) of the European Convention on Human Rights[109] (ECHR) and Article 14 ICCPR and that of effective remedy under Article 13 ECHR and Article 2(3) ICCPR.[110] Following this Nada brought the case before the European Court of Human Rights (ECtHR).

In its decision the ECtHR addressed issues relating to whether the application was compatible *ratione personae* with the ECtHR. This included dealing with questions of attribution of conduct[111] and the hierarchy of norms in international law. Relying on the Court's decision in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, discussed below in Section 5, the intervening French government argued that a similar reasoning should apply to the attribution of conduct even though the acts in question did not take place outside the territory of the respondent state. The government thus argued "that the measures taken by the member States of the United Nations to implement Security Council resolutions under Chapter VII of the Charter were attributable to the United Nations."[112] The Court did not accept this and found contrast between the cases, noting that in the cited decision it had found the conduct of a subsidiary organ of the UN to be directly attributable to the organization whereas in the present case the UNSC Resolutions "required States to act in their own names and to implement them at national level."[113] The Swiss authorities had denied Nada permission to enter into Swiss territory and the acts in question related to the national implementation of UNSC resolutions.[114]

Neither did the ECtHR accept, as the Swiss government argued, that Article 25 and Article 103 of the UN Charter should result in a finding that Nada's application was "inadmissible as being incompatible *ratione personae* with the [ECHR]."[115] The Court rejected the notion that Switzerland shared no responsibility for the way UNSC resolutions were implemented and decided that:

[109] 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, ETS 5.
[110] *Swiss Federal Court Judgment of 14 November 2007*, para. 8.3.
[111] See the discussion below in Section 5.7.
[112] *ECtHR, Nada v. Switzerland, 12 September 2012 (10593/08)*, para. 120.
[113] *ECtHR, Nada v. Switzerland, 12 September 2012 (10593/08)*, para. 120.
[114] *ECtHR, Nada v. Switzerland, 12 September 2012 (10593/08)*, para. 121.
[115] *ECtHR, Nada v. Switzerland, 12 September 2012 (10593/08)*, para. 102.

> The measures in issue were […] taken in the exercise by Switzerland of its "jurisdiction" within the meaning of Article 1 of the Convention. The impugned acts and omissions are thus capable of engaging the respondent State's responsibility under the Convention. It also follows that the Court has jurisdiction *ratione personae* to entertain the present application.[116]

The Court also addressed the apparent conflict between different legal obligations. Obligations under the ECHR on the one hand and under the UN Charter on the other. Rather than directly addressing the issue of hierarchy and the effects of Article 103 UN Charter the Court emphasized that "[w]hen creating new international obligations, States are assumed not to derogate from their previous obligations" and that where there appears to be conflict between obligations there is duty to "to construe them in such a way as to coordinate their effects and avoid any opposition."[117] Here the Court relied on the findings of the International Law Commission (ILC) on the fragmentation of international law[118] and found that it did not need to consider the potential hierarchy between the different obligations as Switzerland "failed to show that they attempted, as far as possible, to harmonise the obligations that they regarded as divergent."[119] The ECtHR thus avoided setting out its position with regard to the hierarchy of norms in international law in more abstract terms but there are limits to the potential of harmonization and it cannot solve genuine conflicts between legal obligations.[120]

The *Kadi* and *Nada* cases show that neither the ECJ nor the ECtHR are willing to stand idly by while the exercise of power by an international institution, the UN in this case, greatly affects the human rights of individuals. That is not to say that the courts are holding this institution directly accountable and it is the fact that action is needed by states and entities under their jurisdiction that allows them to offer affected individuals access to justice. Such a regime cannot comprehensively address accountability issues raised in connection with the UN Sanctions Regime.

The legal basis for the judicial review conducted by the courts can be challenged which makes it probable that different domestic or regional courts will reach different conclusions when it comes to adjudicating on matters relating to the UN sanctions regime. The possibility of access to judicial review is entirely dependent on the state implementing the UNSC Resolutions and the approach adopted by the courts that have jurisdiction over it. While these well-established regional courts, the ECJ and the ECtHR, have now confirmed that they do

[116] *ECtHR, Nada v. Switzerland, 12 September 2012 (10593/08)*, para. 122.
[117] *ECtHR, Nada v. Switzerland, 12 September 2012 (10593/08)*, para. 170.
[118] *ILC, Fragmentation of International Law.*
[119] *ECtHR, Nada v. Switzerland, 12 September 2012 (10593/08)*, para. 197.
[120] Aleksandar Momirov: "Nada v. Switzerland", http://blog.eur.nl.

offer this access it might be more difficult for a smaller domestic court to reach the same conclusion.

Given these facts, securing the affected individuals' right to remedy through domestic and regional courts must be deemed unreliable as it is likely to be coincidental. In any case even though this type of judicial review might provide relief for the affected individuals the accountability it enforces is directed at states and not the international institution taking the original decision leading to adverse effects for individuals. This situation along with pressure raised by judicial decisions such as *Kadi* and discussion in the literature has pushed the Security Council to improve the sanctions regime to take better account of the individuals affected. The legal protection offered at the UN level will now be discussed.

3.4.5 Legal Protection for Affected Individuals at the International Level

The international level is better suited for providing individuals access to effective remedy as it overcomes the shortcomings described in relation to national and regional levels and allows for more direct remedy. The Security Council has made some efforts to refine the sanctions regime to better comply with international human rights standards but these are focused on providing individuals with ways to challenge their inclusion on a sanction list rather than holding the actors involved in the original listing decision accountable. Thus the most significant developments have related to processes for delisting.[121] UNSC Res. 1730, 19 December 2006 established a focal point for receiving delisting requests.[122] This institution did not amount to much, it simply transmitted the received requests to the Sanctions Committee and the situation for the affected individuals was not really improved. Essentially they remained "without an avenue for asserting their rights."[123] Later the focal point was replaced with an Office of the Ombudsperson established in UNSC Res. 1904, 17 December 2009 with a role to assist the Sanctions Committee in considering delisting requests.[124] Annex II of that Resolution provides the mandate for the Ombudsperson which was further extended with UNSC Res. 1989, 17 June 2011.

Under this mandate the Ombudsperson can receive requests for delisting and is tasked with gathering any appropriate information relevant to such delisting requests. This

[121] Dire Tladi & Gillian Taylor: "On the Al Qaida/Taliban Sanctions Regime: Due Process and Sunsetting", p. 781.
[122] UNSC Res. 1730, 19 December 2006, para. 1.
[123] Dire Tladi & Gillian Taylor: "On the Al Qaida/Taliban Sanctions Regime: Due Process and Sunsetting", p. 781.
[124] UNSC Res. 1989, 17 December 2009, para. 20.

information is to be provided by concerned states and UN bodies.[125] The Ombudsperson should analyze the information gathered and draft a comprehensive report. Based on the Office's observations it should then "lay out for the [Sanctions] Committee the principal arguments concerning the delisting request."[126] The establishment of the Office of the Ombudsperson noticeably improves the situation for affected individuals by allowing them to argue their case before an independent and impartial authority.

Further improvements were then made in UNSC Res. 1989, 17 June 2011 by changing the procedures relating to delisting. If the Ombudsperson recommends delisting then that recommendation becomes effective 60 days later unless the Sanctions Committee decides by consensus that the individual or entity concerned should remain on the sanctions list. If there is no consensus individual Committee members can also request that the situation be referred to the Security Council for a decision on delisting.[127] This is a departure from the previous approach where such unanimous consent was required for the delisting itself. This gives greater weight to the recommendations of the Office of the Ombudsperson and increases the likelihood that delisting requests from individuals will be successful. The Resolution also provides that in the event there is consensus to reject delisting the Sanctions Committee is subject to a greater duty to state its reasons.[128]

These developments can be welcomed as a step in the right direction but this step remains limited and does not sufficiently address the accountability issues associated with the Security Council's exercise of power. It does offer individuals a way to seek delisting but the Ombudsperson's recommendations do not result in the actors behind the original decision to list the individual being held to account, in the sense accountability is conceptualized for the purpose of this thesis.[129] There is no naming and shaming involved and the activities of the Ombudsperson do not serve to scrutinize and monitor the decision making procedure in the sense of the first level of accountability described below. The Office does scrutinize the information provided to it in the event of a delisting request but even this role is limited since information is often withheld on the grounds of being classified or confidential. The Office itself has acknowledge these limits as "[o]ne of the major challenges in the work of the Ombudsperson" identifying the question of access to such information as critical for due

[125] UNSC Res. 1904, 17 December 2009, Annex II, para. 2.
[126] UNSC Res. 1904, 17 December 2009, Annex II, para. 6(c).
[127] UNSC Res. 1989, 17 June 2011, Annex II, para. 12.
[128] UNSC Res. 1989, 17 June 2011, Annex II, para. 13.
[129] See Section 4 below.

process when a listing is based on it.[130] The Ombudsperson has made efforts to rectify this through "agreements or arrangements for access to classified or confidential information" but they remain country specific and no general solution has been formulated.[131]

Despite these improvements the Ombudsperson procedure for delisting cannot be seen as a "guarantee of effective judicial protection" as was emphasized by the ECJ in a follow up decision to the original *Kadi* case.[132] The Court found that:

> The essence of effective judicial protection must be that it should enable the person concerned to obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed, that the listing of his name, or the continued listing of his name, on the list concerned was vitiated by illegality, the recognition of which may re‑establish the reputation of that person or constitute for him a form of reparation for the non-material harm he has suffered.[133]

Here the ECJ seems to indicate that it will continue exercising judicial review as long as no full-blown court procedure exists at the UN level. This sets the bar high and there are indications that it might have a negative impact for the rights of individuals as it has been noted that the Security Council is making its sanctions regimes less targeted. By doing so it becomes even "more difficult for those affected to challenge the measures in domestic or regional international fora."[134]

It has also been argued that the institutional design of the Office of the Ombudsperson fails to achieve its aim of repairing the human rights deficiencies of the sanctions regime. It should rather be seen as creating "novel procedures and hybrid appropriations of legal standards that fortify and legitimize the use of pre-emptive executive measures."[135] This has been said to be due to the fact that the limits of the office do not allow for a proper review process and that individuals are precluded from having their cases properly heard. These limits have been identified in that the Ombudsperson is not capable of taking binding decisions and also in the way the original decisions to list individuals are reviewed.

The Office of the Ombudsperson maintains that placing an individual on the sanctions list and removing that individual from it are two completely separate acts and that the Office only has a role in assisting the Sanctions Committee with the deciding on the latter, whether to

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[130] *Report of the Office of the Ombudsperson pursuant to Security Council resolution 1904 (2009)*, para. 33.
[131] *Report of the Office of the Ombudsperson pursuant to Security Council resolution 2083 (2012)*, para. 11-12.
[132] *ECJ, Joined Cases C‑584/10 P, C‑593/10 P & C‑595/10 P*, para. 133.
[133] *ECJ, Joined Cases C‑584/10 P, C‑593/10 P & C‑595/10 P*, para. 134.
[134] Antonios Tzanakopoulos: "Kadi Showdown: Substantive Review of (UN) Sanctions by the ECJ", http://www.ejiltalk.org.
[135] Gavin Sullivan & Marieke de Goede: "Between Law and the Exception: The UN 1267 Ombudsperson as a Hybrid Model of Legal Expertise", p. 852.

remove an individual from the list or not. The Ombudsperson does not review the original listing decision and has stated that doing so would be impossible since the Office does not have access to all the information relating to that decision. The focus is rather on the present and whether the continued listing of an individual can be justified on the basis of all the information available to the Ombudsperson.[136]

While this has probably facilitated the removal of individuals from the sanctions list the dangers of such an approach have been pointed out. First, this situation frees the actors involved in the original listing decision from explaining the underlying basis for such decisions. Second, it allows them to save face when "the original reasons for listing are either manifestly unfounded or unknown" as the Ombudsperson is a mechanism that allows for "annulling unfounded listing decisions" without the original decision being publicly scrutinized. Third, the fairness claimed to be associated with the access individuals are given to information regarding their listing through the Ombudsperson is limited to the same extent that the Office's access to information is limited. There is no guarantee that an individual can know why he or she was placed on a sanctions list if the concerned entities decide not to share this information with the Ombudsperson. At the end of the day the decision whether to delist an individual remains with the Sanctions Committee and even though its decision is supposed to be based on the same information available to the Ombudsperson there is no guarantee that the Committee will not consider "any number of pragmatic, political, or diplomatic reasons" for not following the Ombudsperson's recommendation.[137]

The Office of the Ombudsperson can be commended to the extent that it assists individuals in being delisted from the sanction list. However, the limits of the Office prevent it from truly holding the actors involved in listing procedures accountable for their decisions. The decisions of these actors are not scrutinized and there is no naming or shaming involved in the Office's procedures. The Ombudsperson's existence might even relieve pressure for true accountability mechanisms to be put in place. Thus, it can be argued that the Ombudsperson "accords a veneer of legitimacy to exceptional practices and renders it more difficult to question the political assumptions behind, and fundamental rights implications of, the 1267 listing regime."[138] Perhaps rigorous judicial review is essential for securing sufficient regard for the fundamental human rights of individuals affected by the sanctions

[136] Gavin Sullivan & Marieke de Goede: "Between Law and the Exception: The UN 1267 Ombudsperson as a Hybrid Model of Legal Expertise", pp. 842-843.
[137] Gavin Sullivan & Marieke de Goede: "Between Law and the Exception: The UN 1267 Ombudsperson as a Hybrid Model of Legal Expertise", pp. 844-845.
[138] Gavin Sullivan & Marieke de Goede: "Between Law and the Exception: The UN 1267 Ombudsperson as a Hybrid Model of Legal Expertise", p. 853.

regime but at least an ombudsman procedure more capable than the Office of the Ombudsperson could scrutinize decision making and increase the first level accountability as identified by the ILA Committee that will now be discussed. This could lead to the adoption of certain standards for future listing decisions that would better secure the protection of human rights.

4 Accountability

4.1 Conceptualizing Accountability

The previous Section has aimed to highlight specific instances where public power is being exercised by international organizations, in some cases adversely affecting individuals. The focus of this thesis is on the accountability consequences that follow and it is suggested "that all entities exercising public authority have to account for the exercise thereof."[139] To understand the issues related to the accountability of international institutions there is need to explore the law governing these actors but first the concept of *accountability* will be explained.

The concept of accountability has traditionally been used in the financial contexts of accountancy and audit but recently it has been expanding both in use and content.[140] In the reign of William I king of England in the late 11th century his subjects had to account for what they possessed. This first conception of accountability has since been reversed and today it is seen as referring to authorities being held accountable to their citizens. In this sense public accountability is seen as reflecting a fair and equitable governance and a way to enhance effectiveness and efficiency of public governance. It has become a symbol of good governance and increasingly it is seen as a goal in itself.[141]

In its core sense accountability has a rather restrictive meaning and refers to being called to account for one's action to some authority. Recently its usage has been expanding in a way that it "now crops up everywhere performing all manner of analytical and rhetorical tasks and carrying most of the major burdens of democratic 'governance'."[142] Accountability is a rather elusive concept and there is danger that the concept be diluted through overuse and overly broad application. When accountability is understood "as a general term for any mechanism that makes powerful institutions responsive to their particular publics" focus on its core

[139] Erika de Wet: "Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review", p. 855.
[140] Deirdre Curtin & André Nollkaemper: "Conceptualizing Accountability in International and European Law", p. 4.
[141] Mark Bovens: "Analysing and Assessing Accountability: A Conceptual Framework", pp. 448-449.
[142] Richard Mulgan: "'Accountability': An Ever-Expanding Concept?", p. 555.

components might be lost. Its status could be relegated to nothing more than a catch-all phrase representing something good that actors exercising public power should strive for and thus making it "imprecise and loaded with rhetorical overtones."[143]

Accountability loses its analytical value when used in a broad evaluative sense as a sort of tool to qualify the performance of an actor indicating virtuous behaviour. Although elements such as transparency, liability, controllability, responsibility and responsiveness have some relation to accountability their total inclusion as core elements of the concept only serves to obscure it. In such a broad sense accountability is a contested concept "because there is no general consensus about the standards for accountable behaviour, and because they differ from role to role, time to time, place to place and from speaker to speaker."[144] A more precise conception of accountability will be used in this thesis and guidance is sought from the following definition:

> Accountability is a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.[145]

This understanding of accountability as a narrow "obligation to explain and justify conduct"[146] aids in preventing that the concept loses its meaning. Regardless of the narrow approach there is need to understand the multifaceted aspects of accountability as has been emphasized by the International Law Association Committee on Accountability of IOs.[147] Here it is submitted that appreciation of these many aspects of accountability is crucial for properly analysing the increased role of international institutions in exercising public authority. An approach that places too great emphasis on external judicial review and awards it a role of central importance[148] fails to acknowledge the potential success of different methods of scrutiny and monitoring and the need for a comprehensive system to address different aspects of accountability.

The ILA Committee links accountability of international institutions to their authority and power and finds that where such power is present there exists a "duty to account for its exercise."[149] The Committee provides a conceptual framework for the concept of accountability where it describes the accountability of IOs as consisting of three "interrelated

[143] Richard Mulgan: *Holding Power to Account*, p. 8.
[144] Mark Bovens: "Analysing and Assessing Accountability: A Conceptual Framework", pp. 449-450.
[145] Mark Bovens: "Analysing and Assessing Accountability: A Conceptual Framework", p. 450. Italics in the original omitted.
[146] Mark Bovens: "Analysing and Assessing Accountability: A Conceptual Framework", p. 450.
[147] *Report of the Seventy-First Conference held in Berlin*, p. 168.
[148] Richard Mulgan: "'Accountability': An Ever-Expanding Concept?", p. 557.
[149] *Report of the Seventy-First Conference held in Berlin*, pp. 168.

and mutually supportive" levels.[150] The first level has to do with "the extent to which [IOs], in the fulfilment of their functions as established in their constituent instruments, are and should be subject to, or should exercise, forms of internal and external scrutiny and monitoring, irrespective of potential and subsequent liability and/or responsibility."[151] The other two layers identified by ILA have to do with "tortious liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international and/or institutional law"[152] and "responsibility arising out of acts or omissions which do constitute a breach of a rule of international and/or institutional law."[153] In this sense accountability can be described as an onion-like concept where the whole represents all three layers of accountability. Beneath the first and widest layer of internal and external scrutiny and monitoring there is a narrower layer representing liability for tortious acts. Responsibility for internationally wrongful acts is then at the core of the concept.

For a number of international institutions there seems to be a lack of accountability mechanisms which can result in individuals being adversely affected by the institutions' exercise of public power without the possibility to hold those actors to account. In line with the ILA Committee's reasoning that there must be a way to hold those exercising public power accountable it is suggested that some sort of mechanisms are needed for doing so. The multifaceted nature of accountability suggests that a variety of methods is needed to introduce an accountability regime that encompasses all of the concept's different elements. A system of judicial review would probably be best suited to address liability and responsibility, the second and third levels of accountability but international institutions seem to be reluctant to subject themselves to such review. Here it is suggested that IOs might be more willing to adopt mechanisms that provide for internal and external scrutiny and monitoring of the organizations' activities in the sense of the first level of accountability.

The benefits of such scrutiny and monitoring should not be overlooked and implementing accountability in this sense would be a step in the right direction and could greatly benefit affected individuals. In Section 7 of this thesis ombudsman procedures will be introduced as a mechanism that could contribute to this internal and external scrutiny and monitoring. For not only primary rules of international and domestic law put limits on the authority and power of IOs but also the rules of the IO itself.[154] Supervising and monitoring mechanisms play a

[150] *Report of the Seventy-First Conference held in Berlin*, pp. 168-170.
[151] *Report of the Seventy-First Conference held in Berlin*, p. 169.
[152] *Report of the Seventy-First Conference held in Berlin*, p. 169.
[153] *Report of the Seventy-First Conference held in Berlin*, p. 169.
[154] *Report of the Seventy-First Conference held in Berlin*, pp. 169-170.

particular role in this respect for which ombudsman procedures can be an ideal framework. Ombudsman procedures are common in many domestic systems and their reliance on naming, blaming and shaming rather than more direct sources of authority should encourage its adoption by international institutions and make it an ideal contender for enhancing their accountability regime. Following the blueprint of successful domestic variants of accountability mechanisms is an option that will be discussed later in this thesis.

4.2 Who is Accountable, to whom and for what?

There are at least three questions involved when accountability is discussed: "who should be accountable, to whom and, finally, for what should an account be given?"[155] The first question relates to the understanding that there is need for accountability when power is exercised and that calls for accountability increase in proportion with the level of public power enjoyed by the entity concerned.[156] In the previous Section accountability in relation to certain international actors has briefly been explored. The possibilities for enhancing accountability of these actors will also be assessed more generally with ombudsman procedures receiving special attention.

Secondly, despite the fact that a number of different entities can be affected by the exercise of public power by international institutions focus will remain on individuals and how those institutions can be held accountable to them. It is submitted that the stakes are higher when individuals are involved especially considering their human rights that might be adversely affected. Individuals are enjoying an increasingly more prominent position within international law and there is need to address ways in which they can directly hold international institutions to account. Ombudsman procedures are one alternative and its viability to fulfil such a role will be explored. Other options do exist but the unobtrusive nature of ombudsman procedures has its appeal as well as increasing its potential of being adopted by IOs.

Thirdly, emphasis is placed on how to hold international institutions accountable for acts that adversely affect individuals through the institutions' exercise of public power. In particular the account-giving should involve the core nature of public powers; that they are exercised to serve the common good and not the self-interest of the actor involved.[157] The demand for accountability relates to securing a minimum degree of safeguarding for the

[155] Aleksandar Momirov: *Accountability of International Territorial Administrations,* p. 30.
[156] Aleksandar Momirov: *Accountability of International Territorial Administrations,* p. 30.
[157] Philip Allott: "Five Steps to a New World Order", p. 107.

overall exercise of public power. Given the similarities between the exercise of public power by states and by IOs it has been suggested that this safeguarding should be "roughly equivalent to the basic set of safeguard inherent in any government limited by law and subject to scrutiny."[158] Section 6 will explore the relevance of principles governing the exercise of public power, originally aimed at states, for the similar exercise of public power by international institutions.

4.3 Accountability and Legitimacy

The legitimacy of governance activities has long been a central focus of political theory. Traditionally the focus has been on the legitimacy of domestic government but as the authority and importance of international institutions has grown so have concerns over the legitimacy of these actors.[159] This is a trend it shares with the concept of accountability and here it is suggested that there are also other similarities between the two concepts.

Legitimacy relates to the justification and acceptance of authority and can be conceived as "a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions."[160] Legitimacy goes beyond the mere assessment of legality and can be the basis for compliance with decisions when they are reached through legitimate processes even if they are lacking in aspects of legality. Legitimacy can thus be seen as not only reason for action but also a justification.[161]

Traditionally a connection has been made between legitimacy and the source of authority. At the domestic level either God or the people have been considered to be this source of authority.[162] The legitimatized state has in turn acted on the international level where state consent has long been the central basis of legitimacy.[163] The source of authority still plays a role in the overall assessment of legitimacy but focus is now more on substance and procedures. It has been suggested "that accountability and legitimacy are inherently interrelated" and that the institutionalization of accountability mechanisms can serve as a legitimizing factor for the exercise of public power by international institutions. This can be

[158] Aleksandar Momirov: *Accountability of International Territorial Administrations,* p. 31.
[159] See Daniel Bodansky: "The Legitimacy of International Governance: A Coming Challenge For International Environmental Law?", pp. 596-597 for an early discussion, these concerns have continued to grow.
[160] Mark C. Suchman: "Managing Legitimacy: Strategic and Institutional Approaches", p. 574. Italics in the original omitted.
[161] Daniel Bodansky: "The Concept of Legitimacy in International Law", pp. 309-311.
[162] Aleksandar Momirov: *Accountability of International Territorial Administrations,* p. 33.
[163] Daniel Bodansky: "The Legitimacy of International Governance: A Coming Challenge For International Environmental Law?", p. 624.

achieved when such mechanisms "serve to scrutinize the governing authorities and to uphold substantive benchmarks related to the exercise of public power."[164] The potential for ombudsman procedures to take on such a role will be addressed but first there is need to further explore the accountability concerns raised in relation to international institutions and how these concerns relate to the law governing these institutions.

5 Accountability and the Law of International Institutions[165]

5.1 Introduction

It goes beyond the scope of this thesis to give a full account of the law of international institutions but an understanding of some of its core elements is highly relevant to fully conceptualize the accountability concerns raised in relation to international institutions. International institutional law should also be conceived of as the legal framework that governs the exercise of public power by international institutions. It is suggested that the constituent instruments of such institutions are crucial in addressing their accountability issues, especially in the sense of internal and external scrutiny and monitoring as identified as the first level of accountability by the ILA Committee. If mechanisms such as ombudsman procedures are to be implemented there is need for appropriate provisions in the constituent documents of the concerned institution.

5.2 Definitional Considerations

It is difficult to define an international organization in a comprehensive manner and even impossible to capture all possible variations within a single definition. IOs are not creatures of nature but social constructs created by people in order to achieve some purpose.[166] Still there are specific characteristics that have been associated with IOs. The definition provided by the ILC in Article 2(a) of the Draft Articles on Responsibility of International Organizations[167] is a good summary of these characteristics:

> "[I]nternational organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.

[164] Aleksandar Momirov: *Accountability of International Territorial Administrations,* p. 35.
[165] This section benefits from the great overview provided in Jan Klabbers: *An Introduction to International Institutional Law*.
[166] Jan Klabbers: *An Introduction to International Institutional Law,* pp. 6-7.
[167] ILC Draft Articles on Responsibility of International Organizations, 30 May 2011.

A treaty refers to an "agreement concluded between States in written form and governed by international law."[168] As ILC's definition illustrates a different instrument than a treaty is equally capable of establishing an international organization but that instrument does have to be governed by international law in the same way as treaties. A legal act under a domestic legal system would not suffice in this respect. The organization created will be governed by international law since the instrument creating it is.[169]

Regarding the reference to a separate international legal personality the ILC has stated "that this is an essential precondition for international responsibility to arise for the international organization concerned."[170] The same reasoning can be applied with regard to the accountability of IOs of which responsibility is a part of. If there is no legal personality separate from the organization's members then accountability concerns would more appropriately be addressed to the members themselves. This relates to another aspect of IOs that serves to distinguish them from other forms of international co-operation, "that the organization must possess at least one organ which has a will distinct from the will of its member states."[171] If IOs are nothing more than tools in the hands of their member states then it is difficult to justify their special status within international law. Still, even if an individual member state does have considerable influence within an IO it is difficult to conceive a situation where these influences amount to an extent where the organization should be seen as a mere tool for securing the particular state's interests.

The third element of ILC's definition relates to the fact that states are not the sole members of IOs as can be seen by the membership of the European Union in the World Trade Organization (WTO).[172] Another aspect of this is that states can also create legal creatures that are not IOs. For example when such an entity is created under a domestic legal system.[173]

5.3 International Legal Personality

A key authority on the international legal personality of IOs is the *ICJ, Reparation for Injuries Suffered in the Service of the United Nations, 11 April 1949, ICJ Reports 1949, p. 174.* In this advisory opinion the ICJ found that the UN does possess an international legal personality and explained that this means "that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by

[168] Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties, 8 ILM 679 (1969).
[169] Jan Klabbers: *An Introduction to International Institutional Law,* pp. 9-11.
[170] *ILC, Eighth report on responsibility of international organizations*, p. 8.
[171] Jan Klabbers: *An Introduction to International Institutional Law,* p. 11.
[172] "The European Union and the WTO", http://www.wto.org.
[173] Jan Klabbers: *An Introduction to International Institutional Law,* p. 8.

bringing international claims."[174] The basis for this legal personality and the international legal personality of IOs in general remains somewhat debated. There are two main theories that both claim support in this advisory opinion.[175]

The 'will theory' gives paramount importance to the will of the founders of the organization. This will is considered to be reflected in the constituent instruments of an IO and the states establishing it can decide whether or not it should have international legal personality. The fact that relatively few constituent instruments explicitly address whether the IO in question should possess international legal personality remains a problem. There is for instance no mention of this matter in the UN Charter.[176] The 'objective theory' takes a different approach and claims that "as soon as an entity exists as a matter of law (i.e. meets the requirements that international law attaches to its establishment) that entity possesses international legal personality."[177] Under this approach the founders of the organization have no say in whether it does have international legal personality but it remains rather elusive what the requirements are.

In practice a more pragmatic approach of 'presumptive personality' is usually applied. That is "as soon as an organization performs acts which can only be explained on the basis of international legal personality, such an organization will be presumed to be in possession of international legal personality."[178] Support for this approach is also claimed to be found in the above mentioned advisory opinion where the ICJ stated that:

> [F]ifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.[179]

Here the Court did not specify whether the states had actually created an IO possessing international legal personality but presumed it to be the case.[180]

Where an IO is in a position to adversely affect individuals this can be taken as an indicator for its international legal personality. Other indicators include the treaty-making capacity of the organization, right to send and receive legations and the right to bring and

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[174] *ICJ, Reparation for Injuries Suffered in the Service of the United Nations, 11 April 1949, ICJ Reports 1949*, p. 179.
[175] Jan Klabbers: *An Introduction to International Institutional Law,* pp. 46-51.
[176] 1945 Charter of the United Nations, 1 UNTS XVI.
[177] Jan Klabbers: *An Introduction to International Institutional Law,* p. 49.
[178] Jan Klabbers: *An Introduction to International Institutional Law,* pp. 49-50.
[179] *ICJ, Reparation for Injuries Suffered in the Service of the United Nations, 11 April 1949, ICJ Reports 1949*, p. 185.
[180] Jan Klabbers: *An Introduction to International Institutional Law,* p. 50.

receive claims. Establishing that an international actor does have international legal personality is crucial for any discussion on accountability and responsibility. An actor without such personality can hardly be held responsible or to account for its actions. In such a situation it might be more appropriate to address accountability and responsibility concerns to the creators of the actor. For the purpose of this thesis it is presumed that the international institutions discussed do possess international legal personality.

5.4 Foundations of Power

5.4.1 Introduction

It is worth considering how exactly international organizations are capable of making decisions that negatively affect individuals. These organizations are awarded powers to act by their founders and those powers are reflected in the organizations' constitutive documents. The main idea is that IOs can only work on the basis of their legal powers and that going beyond those is an illegal, *ultra vires*, act. The origin and scope of the powers of IOs has received attention especially in various court decisions.[181] Three main theories on where IOs derive their powers from will now be discussed.

5.4.2 Attributed Powers

The theory of attributed powers focuses on the powers 'given' to the institution in its constitutive instruments. It is reflected in the advisory opinion of the Permanent Court of International Justice (PCIJ) regarding the European Commission for the Danube. In discussing the powers of the Commission the Court emphasized that as an international institution "it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it."[182] This is a positivistic approach and puts the will of the sovereign states establishing the organization in the forefront. The organization can do whatever is clearly stipulated in its constituent instruments but it cannot go beyond that.

There are at least two problems with this approach.[183] When the powers exercised by an IO are limited in this way it is "in effect, merely a vehicle for its members rather than an

[181] Jan Klabbers: *An Introduction to International Institutional Law,* p. 53.
[182] *PCIJ, Jurisdiction of the European Commission of the Danube between Galatz and Braila, 8 December 1927, 1927 PCIJ (Ser. B) No. 14*, at 64.
[183] As identified in Jan Klabbers: *An Introduction to International Institutional Law,* pp. 58-59.

entity with a distinct will of its own"[184] since the organization would not have a 'life' of its own. This leads to the questioning of the choice of this particular form for collaboration between the members as well as the need for a specific field of international institutional law. The second and greater concern relates to the dynamics of IOs and how their activities are constantly developing. The restrictions of the 'attributed powers' approach would put great burdens on IOs and there is need for some degree of flexibility for such organizations to function normally. It is impossible for the founders of IOs to foresee everything and some gaps in the constitutive documents are inevitable.

5.4.3 Implied Powers

The theory of implied powers[185] addresses these concerns as it emphasizes 'allowed' powers, not expressly given but by implication. Thus allowing IOs to fulfil their functions properly. There are two ways in which implied powers have been conceived.

The first relies on a rule of interpretation that holds the constituent instruments "must be interpreted so as to guarantee their fullest effect."[186] This is reflected in a dissenting opinion to the ICJ's advisory opinion in *Reparation for Injuries Suffered in the Service of the United Nations* where it is emphasized that "[p]owers not expressed cannot freely be implied" and that "[i]mplied powers flow from a grant of expressed powers, and are limited to those that are "necessary" to the exercise of powers expressly granted."[187]

The second and wider way to conceive implied powers links such powers to the function and objectives of an IO. The majority in the already mentioned advisory opinion reflects on this as it states: "[u]nder international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."[188] This approach to implied powers is the one that has prevailed. This theory has had a central importance in the law of international organizations and has helped justify most of the activities IOs have been involved in.[189]

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[184] Jan Klabbers: *An Introduction to International Institutional Law,* p. 58.
[185] Jan Klabbers: *An Introduction to International Institutional Law,* pp. 59-64.
[186] Jan Klabbers: *An Introduction to International Institutional Law,* p. 59.
[187] *ICJ, Reparation for Injuries Suffered in the Service of the United Nations, 11 April 1949, ICJ Reports 1949*, p. 174. Dissenting Opinion by Judge Hackworth, p. 198.
[188] *ICJ, Reparation for Injuries Suffered in the Service of the United Nations, 11 April 1949, ICJ Reports 1949*, p. 182.
[189] Jan Klabbers: *An Introduction to International Institutional Law,* p. 72.

5.4.4 Inherent Powers

A more controversial theory of inherent powers has been suggested as a third source of power for international institutions.[190] Under this theory, once an IO is established it has all the inherent powers it needs to perform all acts it needs to perform to fulfil its objectives and aims. Thus there is no specific source of power and the IO acts by virtue of organizationhood. As long as an act does not obviously go against the constitutive instruments it is deemed legal. This is a highly functional approach and helps IOs to realise their aims, enabling even more legal development than the theory of implied powers. Legal control is also easier, as long as an act aims to achieve the purpose of an IO and is not expressly prohibited it is considered legal. It is however not without problems as the theory allows for the possibility that IOs go against the wishes of their founders. The emphasis on the aims of IOs is also unrealistic as their purpose and objectives are often unclear. The theory relies on a solid vision of the nature of IOs that is difficult to comprehend.

5.4.5 Legality of Acts by International Organizations

It has previously been suggested that IOs are increasingly affecting individuals in a negative way through their exercise of power. The expanding role that international actors play in the everyday lives of individuals is not necessarily a bad thing and to an extent it is a logical consequence of globalization. A phenomenon that has increased the importance of international collaboration and decision making beyond the state. This section has explained different theories regarding the foundation of these IO powers and how their margin depends on which theory is applied. A possibility to question the legality of action taken by IOs does exist but it is dependent on how their powers are conceived.

Still, the ways in which this legality can truly be challenged by individuals are limited. The members of international organizations do play a large role and if an organization starts acting in blatant contradiction to the will of its founders then it is probable they will step in and even dismantle it. A resolve to such measures does seem unlikely as "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."[191] Thus it seems that public powers are wilfully being delegated to IOs by their member states that also condone the organizations' exercise of such powers. When this is the case challenges to the legality of IO action are likely to be fruitless and a more

[190] Jan Klabbers: *An Introduction to International Institutional Law,* pp. 66-69.
[191] Karel Wellens: *Remedies against International Organisations*, pp. 1-2.

productive view is to focus on how IOs exercise these powers. That is the approach taken in this thesis and a reason for focusing on how individuals can hold international institutions to account for their exercise of public power.

5.5 Privileges and Immunities

5.5.1 Nature of Privileges and Immunities

International organizations and the people who work for them enjoy certain privileges and immunities. As the customary law regarding the scope and nature of these privileges and immunities is not clear they are usually laid down in conventions, headquarters agreements and other instruments.[192] This section will explore the nature of the privileges and immunities and possible reasons for their existence. It will also be demonstrated that this system affects the possible ways for holding international actors to account.

The distinction between privileges and immunities is by no means sharp. The former has been said to refer to "all cases in which local legislation is not, or is differently, applicable" and the latter to the immunity from jurisdiction. In such a case "local legislation is fully applicable and no privileged position is granted. The only consequence of immunity from jurisdiction is that local courts cannot assess the applicability of the law in specific cases."[193] An exemption from taxation is usually considered the most important privilege.[194] One of the reasons for this exemption is that it is supposed to secure the independence of international civil servants which would be jeopardized if arbitrary tax could be imposed on their salary.[195] Other privileges that are considered necessary for international officials to execute their functions in foreign states include that they may freely enter the territory where the organization is seated and that exemptions are made from immigration restrictions for them and their families.[196]

5.5.2 Explaining Privileges and Immunities

There are similarities between the system of IO privileges and immunities and the international law on privileges and immunities of states and their representatives but the same terms are not necessarily suited to explain both systems. A concept of extraterritoriality has been used to explain immunities referring to the fiction that the immune entities "are deemed

[192] Malcolm N. Shaw: *International Law*, p. 776.
[193] Henry G. Schermers & Niels M. Blokker: *International Institutional Law*, pp. 257-258.
[194] Henry G. Schermers & Niels M. Blokker: *International Institutional Law*, p. 257.
[195] Henry G. Schermers & Niels M. Blokker: *International Institutional Law*, p. 381.
[196] Henry G. Schermers & Niels M. Blokker: *International Institutional Law*, pp. 383-384.

not to be within the territory of the sovereign where they are actually present."[197] In respect to states this relates to their sovereignty and the dignity associated with it. The international legal system has made legal equality the consequence of statehood and obligates "all States to respect each other's independence and equality."[198] Although these approaches can be of some relevance to IOs reliance on them can often be "regarded as examples of courts struggling to come to terms with the nature of international organizations" as such organizations are neither sovereign nor do they have territory of their own.[199]

The predominant standard for the privileges and immunities of international institutions is that of functional necessity, the idea that their independent functioning is secured and that they "enjoy what is necessary for the exercise of their functions in the fulfilment of their purpose."[200] This standard is broadly acknowledged by most scholars and has been explained in the following way:[201]

> Under international law, an international organization generally enjoys such privileges and immunities from the jurisdiction of a member state as are necessary for the fulfilment of the purpose of the organization, including immunity from legal process, from financial controls, taxes and duties.[202]

This theory is also generally accepted in legal practice and is based on the notion that no international organization could function properly if it was subject to the interference of its host state. Interference could for instance be in the form of preventing persons invited by the organization to enter the state's territory or by arresting the organization's personnel. There is need to protect international organizations from such undue interference in their own affairs by states. This is done by granting privileges and immunities. Just as the theory of functional necessity explains why privileges and immunities are granted it also helps determining their scope. Privileges and immunities should not extend beyond what is needed for an IO to function properly but as this extent is contested the theory cannot predetermine their specific scope and should rather be of guidance in this respect.[203]

Jan Klabbers has identified this as one of the weaknesses of the functional necessity doctrine. Its open texture allows for very different conceptions of what is necessary for an IO, it is essentially in the eye of the beholder to determine this. The doctrine also adopts a very

[197] "Extraterritoriality", http://www.britannica.com.
[198] Hazel Fox: "Restraints on the Exercise of Jurisdiction", p. 342.
[199] Jan Klabbers: *An Introduction to International Institutional Law,* p. 132.
[200] Jan Klabbers: *An Introduction to International Institutional Law,* p. 132.
[201] August Reinisch: "Privileges and Immunities", p. 136.
[202] *Restatement of the Law Third, the Foreign Relations Law of the United States*, p. 467. Quoted in August Reinisch: "Privileges and Immunities", p. 136.
[203] Henry G. Schermers & Niels M. Blokker: *International Institutional Law*, pp. 258-259.

instrumentalist view, ignoring that granting of privileges and immunities is usually based on an agreement between an IO and its host state. A third problem with the doctrine has been observed as the possibility for IOs to "commit violations of public order, or even of human rights, under the shield of its functional necessity."[204] This third problem closely relates to topic of this thesis on ways to hold international institutions to account and will as such receive special attention in the context of responsibility discussed below. First there is need to further examine the scope of the jurisdictional immunities IOs enjoy and the sources of privileges and immunities.

5.5.3 The Scope and Sources of Privileges and Immunities

Under the law on state immunity a theory of restricted immunity has become generally accepted, moving away from an idea of absolute immunity.[205] A distinction has been made between the governmental acts of a state, *acta jure imperii*, and its private and commercial acts, *acta jure gestionis* and under the restrictive approach immunity has been limited and made unavailable for acts of the latter type.[206] A similar distinction cannot be made with regard to international institutions as the underlying basis for their immunity is different. Applying the distinction would assimilate IOs to states which is not correct.[207] Rosalyn Higgins has suggested that:

> The relevant test under general international law is whether immunity from jurisdiction to prescribe is necessary for the fulfilment of the organization's purposes. That question cannot be answered by reference to whether it was, in respect of the matter under litigation, acting 'in sovereign authority' or 'as a private person'.[208]

Still a connection can be seen in the prodigious difficulties that national courts face when deciding whether an act falls within immunity from jurisdiction or not. With regard to states the key problem is how to distinguish between an *acta jure imperii* and an *acta jure gestionis* as it is not always self-evident into which category a specific act falls.[209] In a similar way it can be difficult for national courts to decide whether a specific act of an international institution is necessary for the institution's proper functioning and thus outside the courts' scope of jurisdiction.

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[204] Jan Klabbers: *An Introduction to International Institutional Law,* pp. 133-135.
[205] Malcolm N. Shaw: *International Law*, p. 708.
[206] Rosalyn Higgins: *Problems and Process*, p. 81.
[207] Rosalyn Higgins: *Problems and Process*, p. 93.
[208] Rosalyn Higgins: *Problems and Process*, p. 93.
[209] Rosalyn Higgins: *Problems and Process*, p. 82.

In practice national courts have generally been reluctant to exercise jurisdiction and awarded a general exemption of international institutions from their jurisdiction. August Reinisch's research suggest that significant exceptions to this approach can only be found in Italian and US case law. In fact those national courts often rely on the state immunity distinction between *acta jure imperii* and *acta jure gestionis* to decide whether immunity applies or not,[210] a practice that can be criticised applying Higgins's reasoning. Referring to the more common practice Reinisch has thus noted that the "prevailing concept of functional immunity often leads *de facto* to absolute immunity."[211] He has identified various reasons to explain this. He has noted that there is "tendency in some jurisdictions to interpret functional immunity as absolute immunity" which can partly be explained by how vague the generally accepted concept of functional immunity is. The immunity provided for in multilateral privileges and immunities treaties is often unqualified which results in absolute immunity regardless of reference to functional immunity in the constituent instruments of the concerned institutions. This may lead to national courts regarding "the more precise and detailed rules of the multilateral treaties as interpretations of what 'functional' means in respect to jurisdictional immunity."[212] Such agreements will now be discussed with special attention paid to the UN.

Privileges and immunities are usually stipulated in agreements between IOs and their host states. It has been suggested that the abundance of such agreements is evidence of both state practice and *opinio juris* required to establish a rule of customary international law to grant immunities and privileges to IOs. However, as the scope of these privileges and immunities varies between different agreements such a rule remains abstract.[213] Of particular importance in examining this practice are the agreements concerning the UN as they often provide the blueprint for other agreements.[214] In this respect the Convention on the Privileges and Immunities of the United Nations[215] is one of the most important sources. The main subjects it covers are the representatives of the UN Member States[216], officials of the UN[217] and experts on mission for the UN.[218] It also covers the organization itself. In Article II, Section 2 it is stated that:

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[210] August Reinisch: "Privileges and Immunities", p. 139.
[211] August Reinisch: "Privileges and Immunities", p. 138.
[212] August Reinisch: "Privileges and Immunities", pp. 138-139.
[213] Jan Klabbers: *An Introduction to International Institutional Law,* p. 149.
[214] Jan Klabbers: *An Introduction to International Institutional Law,* p. 135.
[215] 1947 Convention on the Privileges and Immunities of the United Nations, 33 UNTS 261.
[216] Article IV.
[217] Article V.
[218] Article VI.

> The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity shall extend to any particular case it has expressly waived its immunity.

This immunity is also reflected in Article 103 and Article 105 of the UN Charter. It is clear from the latter Article that the immunity enjoyed by the UN before national courts is of a functional nature as it is limited to what is "necessary for the fulfilment of its purposes."[219] While on the surface this might seem to put definite limits on this immunity, the lack of clear definition reveals a different picture. The unqualified immunity from suit stipulated in the quoted Article II, Section 2 results in an absolute immunity from jurisdiction for the UN. This has major consequences for possibilities to invoke the responsibility and accountability of the UN before national courts. Although the scope of agreements on jurisdictional immunities can vary between different IOs it is highly probable that severe restrictions are placed on such court proceedings in order to secure the proper functioning of the IO. In fact, many such agreements provide for an unqualified immunity from suit and "a large number of international organizations enjoy functional immunity which is not defined either in their constituent instruments or elsewhere." Absolute immunity of IOs has even been regarded as customary international law in many national courts.[220] Further light will be shed on this issue by examining a few court decisions.

5.6 Immunities and Responsibility

The choice to focus on the potentials of the internal and external scrutiny and monitoring of IOs as a way to enhance their accountability, identified as the first level of accountability by the ILA Committee, is partly influenced by the consequences of the jurisdictional immunities IOs enjoy. The other two layers of accountability identified by the ILA Committee have to do with tortious liability and the responsibility of IOs for breaching rules of law they are subject to.

Responsibility, the third level of accountability, has received special attention by the ILC that has conducted studies on both the responsibility of states and IOs. The established "principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form" as formulated in *PCIJ, Case Concerning the Factory at*

[219] Article 105(1) UN Charter.
[220] August Reinisch & Ulf Andreas Weber: "In the Shadow of Waite and Kennedy. The Jurisdictional Immunity of International Organizations. The Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement", pp. 60-61.

Chorzow, 26 July 1927, 1927 PCIJ (Ser. A) No. 9, p. 21 has guided the ILC in these studies. There are similar principles that govern both responsibility regimes as is evident from the likeness of the Draft Articles on Responsibility of States for Internationally Wrongful Acts[221] and the Draft Articles on Responsibility of International Organizations, the latter being adopted at a later day and mirroring many of the former's provisions. This is apparent in the general principle formulated with regard to IOs in the rule that: "Every internationally wrongful act of an international organization entails the international responsibility of that organization."[222] An international wrongful act is qualified as referring to a conduct that "(a) is attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that organization."[223] As subjects to the international legal order IOs:

> [H]ave 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.[224]

These international obligations of international institutions are relevant for the second and third levels of accountability but they do require some sort of judicial authority to be enforced. It is not evident which authority should take on that role as international courts rarely have jurisdiction over international institutions and in most circumstances they enjoy immunity from the jurisdiction of national courts.

In the special case of the UN the ICJ does have jurisdiction to give advisory opinions when authorized bodies of the organization request the Court to do so. These opinions can address any legal question but can hardly be seen as a way to hold these bodies responsible as it is for them to request the opinions rather than those affected by their action. This jurisdiction of the ICJ is also limited to the specific bodies of the UN and the Court does not have jurisdiction over other international organizations.[225] There is no international court that has general jurisdiction over international institutions in a way similar to the jurisdiction the ICJ can have over states and although such institutions are free to subject themselves to such jurisdiction it does not seem likely that a move in this direction will happen in the near future.

[221] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001.
[222] Article 3 Draft Articles on Responsibility of International Organizations see in comparison with Article 1 Draft Articles on Responsibility of States for Internationally Wrongful Acts.
[223] Article 4 Draft Articles on Responsibility of International Organizations see in comparison with Article 2 Draft Articles on Responsibility of States for Internationally Wrongful Acts.
[224] Karl Wellens: *Remedies against International Organisations*, p. 1.
[225] Chapter IV, 1945 Statute of the International Court of Justice, 33 UNTS 993.

In the rare event that international institutions are subject to the jurisdiction of an independent judicial body it is unlikely that individuals have standing before such a body which can consequently not be seen as a way to hold these international actors responsible to individuals affected by their exercise of power. An example of this is how the European Union is subject to the quasi-judicial dispute settlement procedures of the World Trade Organization. Procedures that individuals do not have access to but are internal to the WTO and a way for its members to secure the compliance of other members to agreements associated with the organization.[226] Although states are in the same situation as the EU with regard to this dispute settlement procedure the difference lies in that states usually allow individuals greater access to accountability mechanisms than international organizations. However, in the unique case of the EU the same does not apply since the accountability mechanisms in place can be compared with those of a state. The EU remains an exception in this respect.

With the expanding activities of international institutions and generally limited possibilities for individuals to invoke the responsibilities of these institutions at the international level the question arises whether certain circumstances warrant an exception to the immunities of these actors before national courts. A comparison can be made with an exception that has emerged in international criminal law to functional immunity enjoyed by officials that carry out conduct on behalf of a state. This exception relates to serious international crimes committed in the name of a state and relies in part on the proposition that "it would be incongruous for international law to protect the very conduct which it criminalizes and for which it imposes duties to prosecute."[227] The same argument cannot be made with regard to the responsibility of international institutions as criminal activity goes beyond mere responsibility. The fact that there is no functional immunity for genocide, crimes against humanity and war crimes in international law[228] does not equal that an exception should be made with regard to responsibility of IOs.

Functional immunities of states can also be contrasted with the immunities enjoyed by international institutions in that their scope is based on customary international law but the scope of the latter immunities is usually laid down in agreements. This does give room to clearly lay down for which functions the institution enjoys immunities and include certain exceptions. Where immunity agreements do not allow for exceptions to jurisdictional

[226] 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex II of the World Trade Organization Agreement, 1869 UNTS 401 (1999).
[227] Robert Cryer et al.: *An Introduction to International Criminal Law and Procedure*, p. 542.
[228] Robert Cryer et al.: *An Introduction to International Criminal Law and Procedure*, p. 545.

immunities, unless waived by the IO concerned, national courts would have to base such an exception on a specific legal rule of international law.

Here it is submitted that, apart from possible exceptions with regard to grave international crimes, such a rule does not exist in international law. This is supported by the findings of the International Court of Justice in *ICJ, Jurisdictional Immunities of the State, 3 February 2012 (not yet published)* a case concerning state immunity and in *ICJ, Case Concerning the Arrest Warrant of 11 April 2000, 14 February 2002, ICJ Reports 2002, p. 3* a case concerning the personal immunities of foreign ministers under international law. In the former case the Court emphasizes the important place the rule of state immunity occupies in international law and its connection with the sovereign equality of states[229] while in the latter case the Court's reasoning is more in line with the nature of the immunity of IOs. In that case the customary international law relating to immunities granted to ministers of foreign affairs is discussed in relation to "the effective performance of their functions on behalf of their respective States."[230] In that case the Court found that the nature of the functions of a minister of foreign affairs resulted in "full immunity from criminal jurisdiction" when abroad.[231]

The relevance of these cases has to be viewed in the light that neither of them directly discusses the immunities of IOs and the conclusions made relate to the specific subject matter of each case. Still it is submitted that the conclusion reached in both cases on the procedural nature of jurisdictional immunities also applies to the jurisdictional immunities of IOs. The *Arrest Warrant* case concerns the legality of an international arrest warrant issued by a Belgian investigating judge against an incumbent minister for foreign affairs in the Democratic Republic of Congo. As the issuing of this arrest warrant seems to have been an attempt to secure criminal responsibility the Court felt necessary to emphasize that jurisdictional immunity does not result in impunity in respect of possible crimes committed. Immunity from criminal jurisdiction is procedural in nature and needs to be considered before the substantive law which individual criminal responsibility falls under. This does not mean that the person involved is exonerated from all criminal responsibility.[232]

This conclusion is affirmed in the *Jurisdictional Immunities of the State* case:

[229] *ICJ, Jurisdictional Immunities of the State, 3 February 2012 (not yet published)*, p. 24.
[230] *ICJ, Case Concerning the Arrest Warrant of 11 April 2000, 14 February 2002, ICJ Reports 2002*, p. 21.
[231] *ICJ, Case Concerning the Arrest Warrant of 11 April 2000, 14 February 2002, ICJ Reports 2002*, p. 22.
[232] *ICJ, Case Concerning the Arrest Warrant of 11 April 2000, 14 February 2002, ICJ Reports 2002*, p. 25.

> [T]he law of immunity is essentially procedural in nature. […] It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful.[233]

In accordance with this the Court rejected Italy's argument that Italian courts could adjudicate on governmental acts, *acta jure imperii,* of Germany regardless of how serious the violations of international law committed by the German forces were. The ICJ also found that even if those acts constituted a breach of *jus cogens* rules[234] they should not prevail over the rules on immunity. The Court stated that there exists no "conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another" as "[t]he rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State."[235]

Although neither of these cases discusses the immunity of IOs they do discuss two different immunity regimes and provide evidence that immunities in general are of a procedural nature. The possibilities to hold international actors accountable before national courts are therefore limited regardless of the gravity of the alleged unlawful acts. The reasoning of the ICJ with regard to Italian courts can be adopted in more general terms with regard to international institutions:

> The application of rules of [IO] immunity to determine whether or not [national] courts have jurisdiction to hear claims arising out of [alleged illegal acts] cannot involve any conflict with the rules which were violated.[236]

The picture is not as clear when the jurisprudence of the European Court of Human Rights is assessed. The decision in *ECtHR, Waite and Kennedy v. Germany, 18 February 1999 (26083/94)* seems to indicate that there may be certain implications when immunity hinders individuals in holding IOs accountable. Two British nationals instituted proceedings before a German labour court alleging that they were in a labour relationship with the European Space Agency (ESA) and that the Agency had unlawfully terminated their employment. The individuals concerned claimed that by upholding the Agency's immunity from jurisdiction the German courts had denied them access and that their rights under Article 6(1) ECHR had been violated.

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[233] *ICJ, Jurisdictional Immunities of the State, 3 February 2012 (not yet published)*, p. 25.
[234] *Jus cogens* rules are those that "always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law." See *ICJ, Jurisdictional Immunities of the State, 3 February 2012 (not yet published)*, pp. 37-38.
[235] *ICJ, Jurisdictional Immunities of the State, 3 February 2012 (not yet published)*, p. 38.
[236] *ICJ, Jurisdictional Immunities of the State, 3 February 2012 (not yet published)*, p. 38.

While the ECtHR did not find that a violation had occurred in this case it did indicate that granting the IO immunity from German jurisdiction was not permissible under the ECHR unless "the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention."[237] Thus hinting at a duty for IOs to have alternative dispute mechanisms available and a possibility that immunities invoked would not be respected if that is not the case. The fact that the membership of the ESA is limited to states that are members of the EU and parties to the ECHR might have influenced this decision. Still, it is difficult to justify such a limitation to the immunities of IOs. The reasoning of the ICJ that immunities are of a procedural nature and need to be assessed before any rules of substantive law are addressed[238] is convincing in this respect. In line with this reasoning the immunities of international institutions should be respected when proceedings are brought against them before national courts unless it is revealed in the assessment of this procedural rule in each individual case that it does not apply.

The scope of immunities enjoyed by international institutions differs between them and depends on agreements made with the hosting state. These immunities should protect the independent functioning of the institutions but can be restricted in some ways. When that is the case national courts can assess if the immunities apply. This assessment needs to be exercised with care so that the functions of the IO are not unduly undermined. It is not until the careful analysis has revealed the non-applicability of the jurisdictional immunity that the courts can exercise their jurisdiction and address the rules of substantive law being disputed. These rules can have no impact on the initial assessment of immunity. The *Waite and Kennedy* decision is aimed at the state hosting the international institution in question and whether it violated the ECHR by the scope of immunities awarded to the ESA. Thus it cannot be seen as holding the institution itself directly accountable but it might influence states in limiting immunities awarded to the extent needed to secure individuals' access to justice.

More recently the ECtHR approach has been more in line with that of the ICJ in the *Jurisdictional Immunities of the State* case and the Court has not found exceptions to jurisdictional immunities in cases of alleged human rights violations nor in alleged violations of peremptory norms. This is highlighted in *ECtHR. Al-Adsani v. The United Kingdom, 21 November 2001 (35763/97)*. The case concerned a dual British/Kuwaiti national that had instituted civil proceedings in England for compensation against the State of Kuwait for damages suffered from being subject to torture in Kuwait. Al-Adsani alleged in his

[237] *ECtHR, Waite and Kennedy v. Germany, 18 February 1999 (26083/94)*, para. 68.
[238] *ICJ, Jurisdictional Immunities of the State, 3 February 2012 (not yet published)*, p. 25.

application to the ECtHR that the English courts had failed to secure his rights under Articles 3, 6(1) and 13 ECHR by granting immunity from suit to Kuwait. After careful analysis the ECtHR concluded that:

> Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.[239]

Granted the *Al-Adsani* case does concern state immunity and the *Waite and Kennedy* case indicates that the ECtHR might be willing to consider exceptions to the immunity of IOs. This willingness could contribute to more national courts exercising jurisdiction over international actors but such exercise of jurisdiction can hardly be seen as a reliable way for individuals to hold these actors to account. As long as the matter remains contested it will be difficult for individuals to rely on national courts granting exceptions to immunity. Development in that direction is further quelled by the ICJ's clear decision in the *Jurisdictional Immunities of the State* case and it is likely that immunity will be upheld in the majority of suits brought against IOs before national courts given the procedural nature of the concept. The situation is different when a dispute concerns matters that do not fall under the immunity enjoyed by the international institution. For a number of institutions, including the UN, this immunity remains unqualified and in practice close to absolute.

A prime example of the potentially conflicting approach of national courts with regard to jurisdictional immunities of IOs is how a case brought against the Netherlands and the UN by the Mothers of Srebrenica Association was handled by the different stages of the Dutch court system. The Association sought to hold the state and the UN partly responsible for the fall of the Srebrenica enclave in Bosnia and the subsequent genocide that was a consequence of its fall.

The District Court of The Hague[240] found that Article 105 UN Charter leaves no space for restriction of immunity as it should not be understood to be "at the discretion of a national court to give its opinion on the "necessity" of the UN actions within [UN's] functional framework."[241] The Court also dismissed the Association's claim that the absolute jurisdictional immunity of the UN prescribed in Article 105(1) was incompatible with certain mandatory international law standards and referred to the ECtHR's findings in the *Al-Adsani* case. The Court did not find it relevant that in this case the ECtHR was concerned with state

[239] *ECtHR. Al-Adsani v. The United Kingdom, 21 November 2001 (35763/97)*, para. 61.
[240] *Rechtbank 's-Gravenhage 10 July 2008 (295247 / HA ZA 07-2973).*
[241] *Rechtbank 's-Gravenhage 10 July 2008 (295247 / HA ZA 07-2973)*, para. 5.14.

immunity and specified that there exists no "hierarchy between different types of immunity."[242] Neither did the Court find that Article 6 ECHR and the right of access to a court of law it guarantees can be a ground for an exception to the absolute immunity enjoyed by the UN. In coming to that conclusion the Court qualified the *Waite and Kennedy* case and the possible duty for IOs to offer reasonable alternatives for the protection of human rights as not applying to the UN because of its special status in international law.

While the Court of Appeal[243] also came to the conclusion that an exemption from jurisdictional immunity should not be granted its approach was very different from that of the District Court. Having acknowledged the far-reaching immunity granted to the UN by Article II, Section 2 of the Convention on the Privileges and Immunities of the UN and Article 105 UN Charter the Court found that the fact that obligations under the UN Charter should prevail over conflicting obligations from another international treaty as provided in Article 103 of the Charter "does not preclude testing the immunity from prosecution against article 6 ECHR and article 14 ICCPR."[244] In support of this the Court referred to the *Waite and Kennedy* case and went on to assess whether immunity serves a legitimate goal and if the immunity granted to the UN was in proportion to that goal. The Court concluded this analysis by stating that "only compelling reasons should be allowed to lead to the conclusion that the United Nations' immunity is not in proportion to the objective aimed for."[245] The Court then examined whether such compelling reasons were present in the case before it but eventually it found none and upheld the UN immunity.

The approach taken by the Court of Appeal is in stark contrast with the procedural conception of jurisdictional immunities described above. The Supreme Court of the Netherlands[246] made efforts to correct this approach and adopted a reasoning more in line with the decision of the District Court. The Supreme Court emphasized the absolute nature of the UN immunity and that the gravity of underlying claims plays no role in assessing the applicability of immunity. It found support in both the *Al-Adsani* case and the *Jurisdictional Immunities of the State* case noting that:

> Although UN immunity should be distinguished from State immunity, the difference is not such as to justify ruling on the relationship between the former and the right of access to the courts in a way that differs from the ICJ's decision on the relationship between State immunity and the

[242] *Rechtbank 's-Gravenhage 10 July 2008 (295247 / HA ZA 07-2973)*, para. 5.20.
[243] *Gerechtshof 's-Gravenhage 30 March 2010 (200.022.151/01)*.
[244] *Gerechtshof 's-Gravenhage 30 March 2010 (200.022.151/01)*, para. 5.5.
[245] *Gerechtshof 's-Gravenhage 30 March 2010 (200.022.151/01)*, para. 5.7.
[246] *Hoge Raad der Nederlanden 13 April 2012 (10/04437).*

> right of access to the courts. The UN is entitled to immunity regardless of the extreme seriousness of the accusations on which the Association et al. base their claims.[247]

It is likely that the ICJ's decision will influence other national courts just as it influenced the Supreme Court of the Netherlands and that it will contribute to increased uniformity in not allowing exceptions to the immunities of IOs. It is worth emphasizing, as the ICJ did in the *Arrest Warrant* case, that immunity does not mean impunity. The functional necessity reasons for granting immunity to international institutions must be respected in order to allow them to operate properly.

It is conceivable that the wide-ranging effects of IO action might prompt certain parties to summon such institutions before national courts for the sole reason of hindering their activities. National courts must carefully assess the applicability of immunity in cases brought before them and should respect it when it clearly applies. There is need for a more comprehensive reform of the implementation of IO immunities if national courts are to play a more prominent role in holding international institutions responsible. The *Waite and Kennedy* decision seems to indicate a move towards certain exceptions to the jurisdictional immunities of international institutions but such a move remains highly controversial. Thus it is suggested to be worthwhile to explore other alternatives for enhancing the accountability of international institutions.

5.7 Attribution of Conduct

The immunities international institutions enjoy from domestic adjudication and lack of standing of non-state actors at most international judicial tribunals has resulted in attempts to hold the member states of such institutions responsible for international wrongful acts. This results from the usually greater potential for individuals to bring suits against states rather than IOs before domestic and international courts.

The possibility to do so depends on to whom such an international wrongful act can be attributed as is made clear in the ILC's studies on both the responsibility of states and IOs.[248] For individuals adversely affected by an international wrongful act the ECtHR offers an option to hold the actor involved responsible if that actor is a state that is subject to the Court's jurisdiction. A jurisdiction that Article 1 ECHR provides the basis for stating that: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." The lines between acts committed by a

[247] *Hoge Raad der Nederlanden 13 April 2012 (10/04437)*, para. 4.3.14.
[248] See Article 4 Draft Articles on Responsibility of International Organizations and Article 2 Draft Articles on Responsibility of States for Internationally Wrongful Acts.

state and an international institution it is member to are not always clear and the ECtHR has addressed such situations. For the Court to have jurisdiction it needs to be competent *ratione personae.* Such compatibility "requires the alleged violation of the Convention to have been committed by a Contracting State or to be in some way attributable to it."[249]

In *Admissibility Decisions ECtHR, Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway, 2 May 2007 (71412/01* and *78166/01)* it was disputed whether certain conduct that took place in Kosovo should be attributed to the UN or specific member states of the organization. UNSC Res. 1244, 10 June 1999 authorised the establishment of an international security presence in Kosovo by the UN's member states and relevant IOs.[250] The deployment was to be under the auspices of the UN[251] and "unified command and control" was made a requirement.[252] This security presence is referred to as Kosovo Force or KFOR. The Resolution also authorised the UN Secretary-General "to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo."[253] Referred to as United Nations Interim Administration Mission in Kosovo or UNMIK, an entity more closely connected to the UN than KFOR.

The *Behrami* case was concerned with the alleged violation of the right to life protected under Article 2 ECHR resulting from a failure to mark and/or defuse un-detonated cluster bomb units. The applicants argued that this was a task the French KFOR troops had a duty to perform under UNSC Res. 1244 and that the incident took place because of the troops failure to do so even though they knew them to be present on that site. The Saramati case was concerned with the arrest of the applicant and extra-judicial detention by KFOR that followed in the period between 13 July 2001 and 26 January 2002. This arrest was made on the order of a Norwegian commander of KFOR, replaced by a French commander before the end of the applicant's KFOR detention, in a sector where Germany was the lead nation. It was argued that the respondent states had failed in their "positive obligation to guarantee the Convention rights of those residing in Kosovo."[254]

Crucial for the ECtHR's assessment of admissibility was whether the detention in the *Saramati* case and failure to de-mine in the *Behrami* case was attributable to the UN or the respondent states. In its assessment the Court relied on the same understanding of attribution

[249] *Bringing a Case to the European Court of Human Rights*, p. 41.
[250] UNSC Res. 1244, 10 June 1999, para. 7.
[251] UNSC Res. 1244, 10 June 1999, para. 5.
[252] UNSC Res. 1244, 10 June 1999, Annex 2, Point 4.
[253] UNSC Res. 1244, 10 June 1999, para. 10.
[254] *Admissibility Decision ECtHR, Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway, 2 May 2007 (71412/01* and *78166/01)*, para. 62.

as formulated by the ILC in Article 3 Draft Articles on the Responsibility of International Organizations and "examined whether there was a Chapter VII framework for KFOR and UNMIK and, if so, whether their impugned action and omission could be attributed, in principle, to the UN." In its consideration of attribution the Court found that "UNSC retained ultimate authority and control and that effective command of the relevant operational matters was retained by [the North Atlantic Treaty Organization]."[255] With regard to KFOR the ECtHR found it "was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, "attributable" to the UN."[256] The Court came to the same conclusion with regard to UNMIK stating that it "was a subsidiary organ of the UN created under Chapter VII of the Charter so that the impugned inaction was, in principle, "attributable" to the UN in the same sense."[257]

In its final stage of analysis the Court "examined whether it is competent *ratione personae* to review any such action or omission found to be attributable to the UN."[258] The Court emphasized that "the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities."[259] These actions were rather directly attributable to the UN and the Court concluded "that the applicants' complaints must be declared incompatible *ratione personae* with the provisions of the Convention."[260]

This decision shows that attributing conduct to a certain actor is by no means straight-forward. The finding that the conduct in question was not attributable to the respondent states resulted in the inadmissibility of the application. The ECtHR can thus not be seen as an option for individuals adversely affected by the acts of international organizations to hold them responsible. The fact that the ECtHR deemed this particular application inadmissible does in no way result in "that organizations can violate human rights with impunity – it merely specified that such cases may remain outside the Court's reach."[261] The question of admissibility is of a procedural nature just as the question of jurisdictional immunity and the

[255] *Admissibility Decision ECtHR, Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway, 2 May 2007 (71412/01* and *78166/01)*, para. 140.
[256] *Admissibility Decision ECtHR, Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway, 2 May 2007 (71412/01* and *78166/01)*, para. 141.
[257] *Admissibility Decision ECtHR, Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway, 2 May 2007 (71412/01* and *78166/01)*, para. 143.
[258] *Admissibility Decision ECtHR, Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway, 2 May 2007 (71412/01* and *78166/01)*, para. 121.
[259] *Admissibility Decision ECtHR, Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway, 2 May 2007 (71412/01* and *78166/01)*, para. 151.
[260] *Admissibility Decision ECtHR, Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway, 2 May 2007 (71412/01* and *78166/01)*, para. 151.
[261] Jan Klabbers: *An Introduction to International Institutional Law,* p. 281.

gravity of underlying claims or the availability of alternative responsibility mechanisms have no role in such a decision.

In a more recent decision, *ECtHR, Al-Skeini and others v. the United Kingdom (55721/07)*, a case concerning a number of incidents occurring in Iraq in areas occupied by the United Kingdom and involving British armed forces. It was alleged that the UK violated Article 2 ECHR by failing to protect the applicants' relatives' right to life. The UK Government argued that:

> United Kingdom troops were not exercising the sovereign authority of the United Kingdom but the international authority of the Multi-National Force acting pursuant to the binding decision of the United Nations Security Council.[262]

Rather than considering the validity of this argument and assess to whom the conduct in question was attributable the Court found that the UK Government was "estopped from raising this objection in the present proceedings" since it "did not contend before the national courts that any of the killings of the applicants' relatives were not attributable to United Kingdom armed forces."[263] This approach seems to ignore the procedural nature of admissibility and is in contradiction with the Court's earlier statement that it will consider its jurisdiction *ratione personae* of its own motion even when no objections have been raised by the respondent state.[264] A requirement for raising jurisdictional objections before national courts does not hold up to scrutiny and the ECtHR cannot base jurisdiction on lack of such objections. The procedural nature of jurisdiction and the Court's earlier approach indicate that the Court should have conducted a careful analysis of attribution regardless of whether or when objections were raised by the UK Government.

It is apparent from *Admissibility Decision ECtHR, Behrami* and *Behrami v. France and Saramati v. France, Germany and Norway, 2 May 2007 (71412/01* and *78166/01)* that the ECtHR would have lacked jurisdiction if the conduct in question in *ECtHR, Al-Skeini and others v. the United Kingdom (55721/07)* had been attributed to the UN. By skipping the attribution analysis the issue of the Court's competence *ratione personae* did not arise. Another jurisdictional issue that the Court had to deal with was the fact that the alleged violating conduct took place outside the territory covered by the Council of Europe Member States. The Court found that the UK had "assumed authority and responsibility for the maintenance of security in South East Iraq." In these exceptional circumstances a

[262] *ECtHR, Al-Skeini and others v. the United Kingdom (55721/07)*, para. 97.
[263] *ECtHR, Al-Skeini and others v. the United Kingdom (55721/07)*, para. 100.
[264] *ECtHR, Sejdić and Finci v. Bosnia And Herzegovina (27996/06 and 34836/06)*, para. 27.

jurisdictional link existed because of the authority and control exercised over individuals killed in security operations by UK soldiers.[265]

It can be argued that in the *Al-Skeini* case the ECtHR adjudicated on matters involving an international institution. On 16 October 2003 UNSC Res. 1511 was adopted which specifically provided authorisation for "a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq."[266] In *Admissibility Decision ECtHR, Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway, 2 May 2007 (71412/01* and *78166/01)* a similar reference to "unified command and control" in UNSC Res. 1244 played a part in the Court's conclusion that the conduct under consideration in that case was attributable to the UN. It is possible that the conduct in question in the *Al-Skeini* case truly was attributable to the UK but no definite conclusion can be made in this regard since the ECtHR chose not assess this. Even if the conduct after the adoption of UNSC Res. 1511 was attributable to the UN it is difficult to accept that the Court's judgment can be seen as a way to hold international institutions responsible. All obligations were addressed to a specific state and it was truly the UK that was being held responsible. The possibility of holding individual member states of IOs responsible for action of the organization has received some attention. Whether this should be considered possible relates closely to how the relationship between such organizations and their member states is viewed.

5.8 Relationship between International Institutions and their Member States

From the discussion so far there seem to be a number of hindrances in holding international institutions accountable. IOs usually enjoy immunity from the jurisdiction of domestic courts, they lack standing at most international judicial tribunals and assessing what acts should be attributed to IOs is by no means a straight-forward task. One attempt to address these problems is to look beyond the IO itself and hold its member states accountable for acts made in the organization's name. Observations made by the ECtHR in the *Waite and Kennedy* case serve as an example of justifications offered for taking this approach:

> The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their

[265] *ECtHR, Al-Skeini and others v. the United Kingdom (55721/07)*, para. 149.
[266] UNSC Res. 1511 16 October 2003, para. 13.

> responsibility under the Convention in relation to the field of activity covered by such attribution.[267]

Here the ECtHR emphasizes the duty of the member states of the Council of Europe to respect the human rights obligations contained in the ECHR and that they cannot use IOs as a shield to pursue objectives that they could not do in their own rights.

It does not imply that attributing powers to an IO would allow the Court to have jurisdiction in a case brought against such an entity but rather that the member states can be responsible for the way powers are awarded to an IO. Thus it cannot be seen as a way to hold IOs directly responsible but rather indirectly, through the member states that created them. This in turn raises questions regarding the relationship between IOs and their member states. If IOs are separate entities with distinct will and legal personality then can their founding states be held responsible for their action? Such an approach might be justified when an IO is clearly being used as a tool that an individual member state is acting through. Still it seems unlikely that a single member state would be in such position even if it has considerable influence within the IO and it is a different situation that the ECtHR is referring to.

The Court implies that the way IOs are set up when created can have an effect on the responsibility of the member states of the Council of Europe. These states might then be held responsible for the action of IOs if such organizations are set up in a way that is inconsistent with the ECHR. This approach does not take into account the nature of powers enjoyed by IOs and that usually they expand from what their founders envisioned. The Court seems to view the powers of IOs as limited to those attributed to them but, as discussed before, the more accepted theory is that powers can also be implied. It is difficult to justify holding member states of the Council of Europe responsible for activities that IOs pursue through their implied powers.

Legal personality plays a crucial role in addressing whether member states can be held liable for the acts of an international institution. Such distinct legal personality is a prerequisite for holding the institution itself liable for its action and if it is not present then the liability is likely to be that of the member states. This stems from the fact that in international law the possession of international legal personality has been considered synonymous with whether an entity itself has rights and obligations. It seems to be widely accepted that liability remains with the members when international bodies “have no legal personality and are

[267] *ECtHR, Waite and Kennedy v. Germany, 18 February 1999 (26083/94)*, para. 67.

merely a vehicle for interstate cooperation."[268] A more controversial issue is how to establish the presence of legal personality, an issue that mostly remains outside the scope of this thesis. It suffices to say that when an international institution does possess distinct legal personality the question arises whether there exists a liability of a concurrent or secondary nature for member states. This is a question that was addressed by the Institut de droit international in a research on *The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations toward Third Parties*[269] where Rosalyn Higgins was the rapporteur.

Higgins observed that IOs are an integral whole composed of many different organs including, in nearly all IOs with separate legal personality, a secretariat or a similar organ where the member states are represented. If international institutions are to be regarded as tools in the hands of their member states then surely they cannot have a distinct will of their own. Where the institution has such a distinct will then the "role of states members qua organs should be regarded as neutral as regards the issue of members' liability for the acts of the international organization."[270] Having conducted a thorough review including an examination of treaty practice, international judicial decisions as well as domestic case law, the writings of various scholars and state practice Higgins ultimately concluded that:

> [B]y reference to the accepted sources of international law, there is no norm which stipulates that member states bear a legal liability to third parties for the non-fulfilment by international organizations of their obligations to third parties.[271]

That is not to say that the acts of international organizations have no consequence for member states. For instance when an IO concludes a treaty a member state is not a party to that treaty but it does have certain good faith obligations and it "may not engage in acts that run counter to the effective implementation of such treaties."[272] Similarly with regard to the funds of IOs Higgins argued that where a member state of an IO has a legal obligation to pay

[268] Rosalyn Higgins: "The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations toward Third Parties", p. 256.
[269] Rosalyn Higgins: "The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations toward Third Parties", pp. 253-258.
[270] Rosalyn Higgins: "The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations toward Third Parties", p. 261.
[271] Rosalyn Higgins: "The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations toward Third Parties", p. 286.
[272] Rosalyn Higgins: "The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations toward Third Parties", p. 275.

a share of the organization's expenses under its constitutive instruments a failure to do so "would entail a failure of an obligation to a third party."[273]

The central finding that there exists no norm in international law relating to state liability for the acts of IOs raises some questions. To address whether state liability should be presumed to exist if it has not been specifically excluded or limited by a state, Higgins emphasizes the well-established principle that "[t]he rules of law binding upon States […] emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law."[274] The result of this principle is that there can be no liability obligation for states unless it is shown by reference to the normal sources of international law that such an obligation exists. By reference to Higgins's findings that such a rule is absent from these sources it can be concluded that states cannot be held liable for the acts of international institutions that possess legal personality distinct from their member states.[275]

Higgins finds further arguments in support of this conclusion in the functional necessity approach towards IOs. She rejects the argument that allowing for secondary liability for member states of IOs in order to better protect those negatively affected by the action of such organizations would not hinder their efficient and independent functioning:

> [I]f members know that they are potentially liable for contractual damages or tortious harm caused by the acts of an international organization, they will necessarily intervene in virtually all decision-making by international organizations. It is hard to see how the degree of monitoring and intervention required would be compatible with the continuing status of the organization as truly independent, not only from the host state, but from its membership.[276]

These findings are not beyond reproach as is shown by the opinion of the minority of members of the Institut de droit international that stressed the lack of a rule of international law saying that there was no liability for member states of IOs.[277] Still the research conducted by Higgins is comprehensive and the arguments made convincing.

Although states do remain at the centre of international law the importance to look beyond their borders and cooperate at an international level is obvious in an increasingly more compact world. International institutions are a popular platform for such cooperation but often these institutions go beyond mere cooperation and become important actors in their own right.

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[273] Rosalyn Higgins: "The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations toward Third Parties", p. 276.
[274] *PCIJ, The Case of the S.S. "Lotus", 7 September 1927, 1927 PCIJ (Ser. A) No. 10*, p. 18.
[275] Rosalyn Higgins: "The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations toward Third Parties", pp. 286-287.
[276] Rosalyn Higgins: "The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations toward Third Parties", p. 289.
[277] Andrew Clapham: *Human Rights Obligations of Non-State Actors*, p. 134.

As a consequence of this these actors often have the power to adversely affect individuals and other third parties. An attempt to address the accountability issues that follow by holding the member states of such institutions liable for their action is likely to have a detrimental effect on the daily workings of international institutions. Their autonomy and independence would suffer with the inevitable interference by member states in the affairs of the organizations as Higgins has argued. Unanimous agreement or consensus would probably be required for all decision making and the position of IOs as collective entities separate from their member states would be damaged. This would relegate their status closer to that of international bodies lacking legal personality altogether and undermine the special status awarded to IOs in international law.

In a globalized world it is evident that international organizations do have an important role to play. The prime example of this is the UN that has the main purpose "[t]o maintain international peace and security."[278] While other factors have also played a role there is no denying that the organization has contributed to regulating the use of force and preventing conflict of a world wide scale. The special status of IOs as international legal persons separate from their member states that enjoy certain privileges and immunities necessary for their independent functioning has contributed to the increased role of these actors in governance activities. This has increasingly resulted in instances where individuals are adversely affected by such institutions' exercise of public power without the possibility to hold them to account. The potential benefits of IOs does not excuse this situation but rather than abandoning the special status awarded to such organizations it is suggested that there is need to find ways for holding them accountable rather than focusing on the accountability of states.

There is no single way to address these accountability issues and the choice made in this thesis is to focus on the multifaceted nature of accountability as the ILA Committee has done.[279] Given the potential difficulties in implementing a judicial system for holding international institutions accountable special focus will be on the role internal and external scrutiny and monitoring can play in enhancing the accountability of international actors. The possibility to set up accountability mechanisms as a part of the institutional structure of international institutions will now be addressed.

[278] Article 1 UN Charter.
[279] *Report of the Seventy-First Conference held in Berlin*, p. 168.

5.9 Institutional Structures

The various organs of IOs are set up to perform distinct functions and also to serve as checks and balances to each other. Three types of organs that are common to most IOs are a plenary body, an executive body and an administrative body.[280] Some organizations also have other types of organs one of which could be some sort of an accountability mechanism that has the potential of keeping the power exercised by IOs in check not only for the benefit of other organs but also individuals. Where such mechanisms are not in place they would have to be created. Just as member states have the power to create an IO they can create organs within the organization. The more controversial question is whether the organs of IOs can themselves create other organs. Here it is submitted that organs of IOs do have the power to do so and support for this is found in international judicial decisions.

In *ICJ, Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 13 July 1954, ICJ Reports 1954, p.47* the ICJ considered questions referred to it relating to the relationship between the UN General Assembly and an administrative tribunal created by it. One of the issues the Court touched upon was whether the General Assembly did have the power to establish such a tribunal. The ICJ found that it did and the power to do so could be implied from the UN Charter even though it was not specifically provided for.[281] The Court also found that this tribunal was capable of taking decisions binding for its creator, the General Assembly, regardless of its subordinate status, in the sense that the Assembly could decide to abolish or amend the tribunal. What mattered in this respect was whether the General Assembly intended to establish a judicial body capable of taking binding decisions. In this case it was shown that this was the intention of the General Assembly and it did have the legal competence to do so.[282] In *ICJ, Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, 12 July 1973, ICJ Reports 1973, p. 166* the ICJ confirmed this approach and that it is essentially up to the General Assembly to decide the need for a specific subsidiary organ. The Court emphasized that the sole limit to this power is that such organs need to be "necessary for the performance of its functions" as is stipulated in Article 22 UN Charter.[283]

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[280] Jan Klabbers: *An Introduction to International Institutional Law,* pp. 153-156.
[281] *ICJ, Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 13 July 1954, ICJ Reports 1954,* pp. 57-58.
[282] *ICJ, Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 13 July 1954, ICJ Reports 1954,* p. 61.
[283] See *ICJ, Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, 12 July 1973, ICJ Reports 1973,* pp. 172-173.

Further support is found in *Prosecutor v Tadic (Jurisdiction)*[284] where the power of the Security Council to create the International Criminal Tribunal for the former Yugoslavia was questioned by the defendant. The Appeals Chamber assessed the powers of the UNSC stating that "the Security Council has a very wide margin of discretion under Article 39 to choose the appropriate course of action and to evaluate the suitability of the measures chosen, as well as their potential contribution to the restoration or maintenance of peace."[285] With reference to Article 41 UN Charter the Appeals Chamber concluded that the UNSC had the discretion to establish the Tribunal as a way to secure such restoration or maintenance of peace.

These decisions relate to the establishment of judicial organs capable of taking binding decisions affecting both individuals and organs of the IO. The establishment of accountability mechanisms such as ombudsman procedures, discussed in Section 7, are less likely to cause controversy as a capability to take binding decisions is not a general feature of such procedures. The decisions do lend support for a finding that the organs of IOs have the power to create other organs unless expressly prohibited in the organization's constitutive instruments. Such establishment of new organs is also likely to remain unchallenged as it would simply not be established if a majority of the organization's members were against it.[286] Thus there is ample opportunity for IOs to establish mechanisms capable of enhancing their accountability.

5.10 Remedies against International Institutions

Remedy is a term "used as a form of shorthand for an acceptable outcome arrived at through a procedure instigated by an aggrieved party." It has received special attention by the ILA Committee on Accountability of IOs and plays a crucial role in the Committee's analysis that also includes "in addition to remedies of a formal kind, other means of redress which might be more appropriate to the circumstances of the case e.g. prospective changes of policy or practice by the IO."[287] The Committee has referred to that "[u]nder most human rights instruments the right to a remedy includes both the procedural right of access and the substantive right to a remedy" and that this right has been seen as a norm of customary international law.[288]

[284] *Prosecutor v Tadic (Jurisdiction) (1996) 3 Intl Human Rights Rep 578*
[285] *Prosecutor v Tadic (Jurisdiction) (1996) 3 Intl Human Rights Rep 578*, para. 32.
[286] Jan Klabbers: *An Introduction to International Institutional Law,* pp. 167-168.
[287] *Report of the Seventy-First Conference held in Berlin*, pp. 205-206.
[288] *Report of the Seventy-First Conference held in Berlin*, p. 208.

From the discussion above it is apparent that the functional necessities of IOs do put some limits on ways individuals can seek remedy. International institutions do, to a large extent, enjoy jurisdictional immunity before domestic courts and there is no general rule of international law that IO member states can be held to account for the acts of the organization. There may be possibilities for the member states to resort to some limited remedial actions against an IO that are not available to individuals.[289] Still, these limits should not result in the complete negating of individuals' right to remedy. The Committee finds broad relevance in the ICJ's ruling that not to afford judicial or arbitral remedy would "hardly be consistent with the expressed aim of the Charter to promote freedom for individuals and with the constant preoccupation of the UN to promote this."[290] While the Court specifically refers to the UN the Committee still finds that this indicates a more general principles that all IOs must provide for remedy for the second and third levels of accountability.[291]

To further support this finding the Committee identifies the right to remedy as a general principle of law where individuals adversely affected by their national authorities "can resort to a system of protection comprising a wide variety of political, administrative and legal remedies." At the international level similar mechanisms should exists for individuals in their dealings with IOs.[292] The Committee also refers to the basic international human rights standard of the right to adequate means of redress when rights are violated and that this standard "should always prevail over the functional needs of an IO."[293] In order to adhere to the principle of promoting justice IOs do need "to provide remedies and other means of redress to all interested parties who want to raise their accountability for not having complied with any of the applicable standards and principles."[294]

In line with the Committee's reasoning it is suggested here that "[a] comprehensive remedial regime should address both individual and societal concerns and interests and it should leave no loopholes at any level."[295] As was made clear in the discussion on the structures of international institutions they do have the power to establish mechanisms that can address accountability concerns appropriately. This can either be done on an ad hoc or structural basis.[296] The mechanisms needed to secure all three levels of accountability can

[289] *Report of the Seventy-First Conference held in Berlin*, p. 208.
[290] *ICJ, Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 13 July 1954, ICJ Reports 1954,* p. 57.
[291] *Report of the Seventy-First Conference held in Berlin*, p. 208.
[292] *Report of the Seventy-First Conference held in Berlin*, p. 208.
[293] *Report of the Seventy-First Conference held in Berlin*, p. 209.
[294] *Report of the Seventy-First Conference held in Berlin*, p. 209.
[295] *Report of the Seventy-First Conference held in Berlin*, p. 208.
[296] *Report of the Seventy-First Conference held in Berlin*, p. 209.

vary and it is both in an effort to "leave no loopholes" and to find a viable way to address accountability concerns raised in relation to IOs that ombudsman procedures will be specially addressed in this thesis.

Such procedures are not judicial in nature and are best suited for addressing the first level of accountability. They cannot replace mechanisms capable of addressing the second and third layer of accountability but where individuals are being denied justice as a result of a total lack of available remedies[297] there is need for swift amendments. The fact that ombudsman procedures do not take binding decisions does not necessarily result in less influential decisions and this nature of the procedure might make IOs more willing to implement it. There is still need to secure the effectiveness of such mechanisms and they need to be independent from the entity they are scrutinizing or monitoring. They also need to determine a number of issues "such as availability of, access to and successful use of mechanisms of redress."[298] Introducing mechanisms for protecting the first level of accountability might also facilitate the introduction of mechanisms better suited for securing the second and third levels of accountability and thus be the first step towards a more comprehensive accountability regime. Before discussing ombudsman procedures in more detail principles governing the exercise of public power will be introduced and their relevance for the international level assessed.

6 Principles Governing the Exercise of Public Power

6.1 Introduction

The legitimacy of governance activities has long been a central focus in political theory and this has influenced the structure of democratic national systems. Concerns over the limits of public authority have resulted in a lot of effort being put into establishing robust systems for controlling the exercise of public power by national authorities which often includes the possibility to hold the actors involved accountable for their exercise of power, a notion that is a central focus for this thesis. These controls exist to different degrees in different states and long and difficult processes have often been needed for achieving them.[299]

Now that these public powers that have traditionally been exercised by states are increasingly being exercised by international institutions concerns have been raised that "those powers may no longer be subject to controls associated with the rule of law,

[297] *Report of the Seventy-First Conference held in Berlin*, p. 209.
[298] *Report of the Seventy-First Conference held in Berlin*, p. 209.
[299] Ellen Hey: "International *Public* Law", p. 152.

constitutionalism and democracy."[300] There is danger that these traditional controls be lost following the transfer of public powers to international institutions and thus require reassertion.[301] It is for this reason that these theories concerning the exercise of public power and how they relate to the international level will be discussed. Focus will be on the rule of law, constitutionalism and administrative law principles. A concept of a 'common zone of impact' will be introduced to justify assessing international institutions in light of these concepts.

Granted, in domestic legal systems the exercise of public power is usually subject to elaborate systems of control that include judicial review which is essential in preventing the misuse of power and securing liability and responsibility in the sense of the second and third levels of accountability. Still, in order for the accountability regime to be comprehensive there is also need to secure the first level of accountability. It is suggested here that valuable lessons can be learnt from the ways in which national systems secure the internal and external scrutiny and monitoring of authorities capable of exercising public power. Different methods for doing this can be envisioned but for the purpose of this thesis focus will be on one in particular. After discussing how the exercise of public power is limited by the rule of law, constitutionalism and administrative law principles the concept of ombudsman procedures will be introduced and explained.

6.2 A Common Zone of Impact in the Exercise of Public Power

Public power is understood as legal power that is "designed to be exercised in the public interest; that is to say, exclusively to serve the common good and not to serve the self-interest of the power-holder."[302] The idea that public power and the authority to exercise it originates with the people is enshrined in the Universal Declaration of Human Rights which provides that "[t]he will of the people shall be the basis of the authority of government."[303] It is suggested that international institutions are increasingly exercising such power alongside states and thus jointly affecting individuals at the local level. This has been described as a 'common zone of impact'.[304] As a result of this state of affairs and also adding to its complexity is the fact that the lines between responsibilities of states and international institutions are increasingly blurred. It can be almost impossible for individuals to determine

[300] Ellen Hey: "International *Public* Law", p. 152.
[301] Ellen Hey: "International *Public* Law", p. 152.
[302] Philip Allott: "Five Steps to a New World Order", p. 107.
[303] Article 21(3).
[304] Aleksandar Momirov & Andria Naudé Fourie: "Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law", p. 298.

which entity should be held accountable as it is difficult to identify the actor causing the adverse effects being suffered.[305] This local impact that international institutions have alongside states has led to demands for enhanced accountability and legitimacy of the actors involved. Many national legal systems have addressed similar demands through specific constitutional and administrative law structures that have been inspired by centuries of political and legal thought.

Arguably there are benefits in seeking guidance from solutions implemented at the national level but the vertical legal comparison between the national and international level has traditionally been met with scepticism as it has been assumed that there is an inherent incompatibility between the two legal orders.[306] Jonathan Wiener has noted that "even a brief inquiry reveals that there are many examples of vertical legal borrowing between national and international law in practice."[307] The controversy surrounding such borrowing has resulted in it being "neglected or hushed, both in officialdom and in theory."[308] Wiener's calls for "a more rigorous analytic approach"[309] seem to have been met to an extent with the growing fields of global constitutionalism and global administrative law that will be discussed in the following sections. Although by no means undisputed concepts, it is submitted that the inspiration they seek from national systems can gradually change the sentiment towards the relationship between the national and international level.

It is suggested that a legal comparison involving the "vertical transplantation of the core notions behind these concepts in order to serve as analytical tools and frameworks for analysis at the international level" is increasingly justifiable by the emergence of a 'common zone of impact', that is the local impact international institutions have alongside states.[310] The conventional scepticism still serves a purpose namely in mitigating the risks involved in comparative law methods.[311]

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[305] Aleksandar Momirov & Andria Naudé Fourie: "Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law", p. 292.
[306] Aleksandar Momirov & Andria Naudé Fourie: "Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law", p. 296.
[307] Jonathan B. Wiener: "Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law", p. 1297.
[308] Jonathan B. Wiener: "Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law", p. 1301.
[309] Jonathan B. Wiener: "Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law", p. 1297.
[310] Andria Naudé Fourie: *The World Bank Inspection Panel and Quasi-Judicial Oversight*, p. 6. Italics in the original omitted.
[311] Aleksandar Momirov & Andria Naudé Fourie: "Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law", pp. 297-299.

6.3 The Rule of Law

The concept that societies should be governed by general rules applicable to both individuals and the government is an old idea that can at least be dated back to ancient Greece.[312] This idea of a rule of law is traditionally formulated within a domestic setting and reference is made to the relationship between the government and individuals. Still its relevance is not limited to such a setting and it does hold a central place in any discussion on the exercise of public power by an authority regardless of its domestic or international setting. From the perspective of individuals there are equal benefits from adherence to the rule of law regardless of whether they are being adversely affected by the exercise of public power by a domestic or an international actor. The rule of law should also benefit individuals in the latter situation and recently a lot of attention has been devoted to an international rule of law.

The UN member states have unanimously recognized that there is "need for universal adherence to and implementation of the rule of law at both the national and international levels" and that "an international order based on the rule of law and international law […] is essential for peaceful coexistence and cooperation among States."[313] It has been suggested that such wide "consensus on the virtues of the rule of law is possible only because of dissensus as to its meaning."[314] Kofi Annan, the former Secretary General of the UN, has identified certain components of the concept and referred to the rule of law as:

> [A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.[315]

Without suggesting that the rule of law does not have a connection with adherence to human rights it is worth emphasizing that care is needed when such adherence is formulated as a core of the concept itself. A variety of political ideals have sometimes been associated with the rule of law such as freedom, democracy and equality but there is danger that the concept becomes nothing more than an empty slogan, void of any real meaning if such a wide conception is applied.[316] Joseph Raz specifically warns against this as he states that "[i]f the rule of law is the rule of the good law then to explain its nature is to propound a complete

[312] Aristotle: *Politics. Book III*, Part X. See also Hafsteinn Þór Hauksson: "Beitti hnífurinn. Um réttarríkishugmynd Joseph Raz", pp. 303-304.
[313] *2005 World Summit Outcome*, para 134
[314] Simon Chesterman: "An International Rule of Law?", p. 332.
[315] *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, para. 6.
[316] Hafsteinn Þór Hauksson: "Beitti hnífurinn. Um réttarríkishugmynd Joseph Raz", p. 304.

social philosophy. But if so the term lacks any useful function."[317] Raz formulates a minimalistic view of the rule of law in that "the law should be such that people will be able to be guided by it," a formulation that "says nothing about fundamental rights, about equality, or justice."[318] In order for the law to have this effect on individuals "[i]t must be such that they can find out what it is and act on it" and for this purpose Raz has identified and listed certain principles.[319]

The list provided is an incomplete one and given the structural differences between the domestic and international legal order not all of the principles can be seen as appropriate for the international level. The central role of the government at the domestic level and the many ways it can affect individuals is not fully comparable to the usually less frequent incidents where international institutions adversely affect individuals. Still in such situations the public power exercised by international institutions to this effect should be governed by similar principles. These principles include that "[a]ll laws should be prospective, open and clear," they should be "relatively stable" and "[t]he making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules."[320]

This conception of the rule of law is, to a large extent, shared by John Finnis who identifies similar principles that indicate to what extent a legal system is based on the rule of law. As he points out, this extent depends on the degree of adherence to the principles rather than a simple question of either or.[321] In a way similar to Raz he highlights the importance of prospective and promulgated laws that "allow people to be guided by their knowledge of the content of the rules."[322] Finnis also adds principles that are of particular interest when considering the international legal system as they move focus away from an overarching central government towards the particular exercise of public power. Thus the principle that "the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general"[323] can reflect on the UNSC sanctions regime discussed in Section 3. The lack of such general rules and the secretive listing procedures undermines the rule of law and allows for unwarranted inclusion of individuals on the sanctions list. Another principle added by Finnis is also of relevance for this thesis. As Finnis points out a legal system is not merely composed of a set of rules and it

[317] Joseph Raz: *The Authority of Law*, p. 211.
[318] Joseph Raz: *The Authority of Law*, p. 214. Raz's work is inspired by Friedrich Hayek: *The Road to Serfdom* and his conception of the rule of law.
[319] Joseph Raz: *The Authority of Law*, pp. 214-218.
[320] Joseph Raz: *The Authority of Law*, pp. 214-216.
[321] John Finnis: *Natural Law & Natural Rights*, p. 270.
[322] John Finnis: *Natural Law & Natural Rights*, p. 270.
[323] John Finnis: *Natural Law & Natural Rights*, p. 270.

"subsists in time, ordering the affairs of subsisting persons."[324] It is for this reason that Finnis highlights the connection between the rule of law and holding those exercising public power bestowed upon them accountable for their action affecting "subsisting persons." He identifies the principle that:

> [T]hose people who have authority to make, administer, and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance and (b) do actually administer the law consistently and in accordance with its tenor.[325]

This emphasis on how authority is exercised rather than a government body exercising it makes the relevance of the rule of law for the international legal system even more apparent. If an international institution wants to abide by the rule of law it needs to put effort into complying with the principles associated with it, including putting in place a system of accountability for its exercise of public power. This is of particular importance when individuals are negatively affected.

Another aspect of the rule of law as emphasized by Joseph Raz is the importance of an independent judiciary that "should have review powers over the implementation of the other principles" and be "easily accessible." According to Raz only limited review is needed, "merely to ensure conformity to the rule of law."[326] As the previous discussion in this thesis has indicated there is rarely an independent judicial body capable of reviewing the action of international institutions, even in this limited sense. This can be an indicator that there is still a long way to go before the rule of law can be seen as having a central place in the international legal system as the extent of the concept's role depends on the degree the principles associated with it are relied upon.[327]

Still there is need to take into account the difference between the domestic and international legal systems. A world court with jurisdiction over every international institution is neither a realistic option nor is it necessarily a desirable one. IO's subjection to an independent judicial body of their own choice or own creation is another option but a large scale move in that direction also seems unlikely. That is not to say that the rule of law cannot govern international institutions and a greater degree of adherence to the other rule of law principles can, to some extent, mitigate the usual lack of judicial procedures. Another way to mitigate this problem is for IOs to implement independent and easily accessible mechanisms that can scrutinize and monitor the organizations' action. This option might be more

[324] John Finnis: *Natural Law & Natural Rights*, p. 271.
[325] John Finnis: *Natural Law & Natural Rights*, pp. 270-271.
[326] Joseph Raz: *The Authority of Law*, p. 217.
[327] As John Finnis has pointed out. Referred to above.

appealing to international institutions rather than judicial bodies since the decisions and findings of such procedures are not legally binding as will be further discussed below in relation to ombudsman procedures.

This would also allow for better observance of the rule of law principle identified by Raz that "[t]he principles of natural justice must be observed." This principle refers to certain due process rights such as "[o]pen and fair hearing, absence of bias" and the essential role they play "for the correct application of the law."[328] Allowing individuals adversely affected by international institutions' exercise of public power access to ombudsman procedures could be a step in the direction of better rule of law protection. It would secure a certain degree of adherence to this principle even though a judicial body might be better suited for the task and secure a larger degree of adherence.

The rule of law concept formulated here with reference to Raz and Finnis is a minimalistic one and emphasizes certain qualities of law without associating it with other political values such as freedom, democracy and fundamental rights. In Raz's view conformity with the rule of law can only have negative virtues since "it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself."[329] This view has been criticised as disguising "the fact that it is domination, coercion and violence rather than law as such that is the evil and that such evil is a feature of all societies so that any defence against them is of paramount importance."[330] It is precisely such "domination, coercion and violence" that individuals affected by international institutions need to be protected from. The principles of the rule of law influence the way laws are applied and interpreted and thus affect the legal system as a whole. They also allow individuals to oversee that the laws are being applied in a fair manner.[331] Finnis has highlighted the positive values associated with the rule of law:

> The idea of the Rule of Law is based on the notion that a certain quality of interaction between ruler and ruled, involving reciprocity and procedural fairness, is very valuable for its own sake; it is not merely a means to other social ends, and may not lightly be sacrificed for such other ends. It is not just a 'management technique' in a programme of 'social control' or 'social engineering'.[332]

[328] Joseph Raz: *The Authority of Law*, p. 217.
[329] Joseph Raz: *The Authority of Law*, p. 224.
[330] T. D. Campbell: "Liberty and the Rule of Law. Book Review", p. 446. See also Hafsteinn Þór Hauksson: "Beitti hnífurinn. Um réttarríkishugmynd Joseph Raz", p. 311.
[331] Hafsteinn Þór Hauksson: "Beitti hnífurinn. Um réttarríkishugmynd Joseph Raz", p. 310.
[332] John Finnis: *Natural Law & Natural Rights*, p. 274.

The rule of law requires "the discipline of operating consistently through the demanding processes of law"[333] which international institutions might view negatively as a potential for hindering the effectiveness of their operations. Still, such institutions should take seriously the potentially negative effects their exercise of public powers can have on individuals and if they truly value "reciprocity, fairness, and respect for persons"[334] they must respect the rule of law.[335]

It has been suggested that if the need for law is accepted then a legal system that complies with the principles of the rule of law must be seen as a better system than one that does not comply.[336] These observations hold equal value for the international legal order and underscores that international institutions should strive for compliance with its principles especially considering the noticeable shift of governance activities away from states and towards international actors. The rule of law and its core components, that political authorities should rule by law and that the law should be capable of actually guiding human conduct, are also closely related to the concept of constitutionalism and the law governing administration. These concepts and their application at the international level will now be discussed.

6.4 Global Constitutionalism & Global Administrative Law

6.4.1 Introduction

Global constitutionalism and global administrative law are concepts that have received attention in recent years in an effort to "reconceptualise international governance."[337] Analysing international law in constitutional terms and terms from domestic administrative law reflects on "a broader emphasis on the phenomenon of legalization in international relations - the idea that international relations are increasingly governed by rules rather than merely power and interests."[338] Both concepts address the legitimacy of legal structures beyond the state and ways to enhance it. They focus on the exercise of public power and attempt to structure ways for its analysis. It is suggested here that this focus can be of importance in addressing the accountability issues of international actors.

[333] John Finnis: *Natural Law & Natural Rights*, p. 273.
[334] John Finnis: *Natural Law & Natural Rights*, p. 273.
[335] See also Hafsteinn Þór Hauksson: "Beitti hnífurinn. Um réttarríkishugmynd Joseph Raz", p. 309 and his reference to Finnis's discussion on whether there is a reason for a tyrant to submit itself to the rule of law.
[336] Hafsteinn Þór Hauksson: "Beitti hnífurinn. Um réttarríkishugmynd Joseph Raz", p. 310.
[337] Daniel Bodansky: "Is There an International Environmental Constitution?", p. 566.
[338] Daniel Bodansky: "Is There an International Environmental Constitution?", p. 566.

6.4.2 Global Constitutionalism

The existence of public power exercised by an authority is a precondition for the idea of constitutionalism. The benefits of a society governed by public authority are generally accepted apart from those that advocate for anarchism.[339] Constitutionalism is the idea "that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations."[340] This is closely related to the rule of law idea that laws are binding on both individuals and those governing them. In this sense the rule of law forms a part of constitutionalism which provides that constitutional norms are binding on the authorities. Constitutionalism can also be of assistance in securing the rule of law principles associated with effectively influencing the behaviour of individuals by creating certainty and securing that they are not subjected to "lives of perpetual uncertainty."[341]

Constitutionalism has been associated with the political theories of John Locke that also influenced the founders of the United States of America and the influential constitutional system they established.[342] John Locke used a concept of a social contract to explain the existence of public authority. He found that individuals were willing to give up the freedom and rights they enjoyed in a state of nature and subject themselves "to the dominion and control of [another] power" because in the state of nature the enjoyment of these rights is very uncertain. According to Locke it is this "mutual preservation of their lives, liberties and estates" that explains why individuals are "willing to join in society with others."[343] In accordance with this a government that exercises public authority is justified by its role to secure the enjoyment of these rights and freedoms. This in turn puts limits on these public powers and an omnipotent authority is rejected. Conceiving public authority in this way highlights the value of constitutionalism but its relevance is not dependant on Locke's conception.

The core of constitutionalism, to find ways to put limit on authority, has influenced ways of thinking about the international legal system and a field of global constitutionalism has emerged. Constitutionalism relies on certain tools for securing the limits of public authority,

[339] Hafsteinn Þór Hauksson: "Stjórnarskrárhyggja og stjórnarskrárígildi alþjóðlegra mannréttindasáttmála", pp. 504-505.
[340] Wil Waluchow: "Constitutionalism", http://plato.stanford.edu.
[341] Richard S. Kay: "American Constitutionalism", pp. 22-23.
[342] Wil Waluchow: "Constitutionalism", http://plato.stanford.edu.
[343] John Locke: *Two Treatises of Government. Book II*, sect. 123.

"constitutional principles such as common values/hierarchy of norms, human rights and separation of powers" that are also at the core of the global constitutionalism movement.[344]

It has been argued that there is "an emerging international constitutional order."[345] In an effort to map to what extent constitutionalism exists at the international level Erika de Wet notes the development of an international community influenced by the UN Charter and the jurisprudence of the ICJ and an emerging "international value system characterized by hierarchical elements."[346] This emerging value system is closely linked to the UN Charter and the activities of the UN organs that have influenced the adoption of a number of human rights treaties and the creation of criminal tribunals. These values are also seen in peremptory norms or *jus cogens* from which no derogation is allowed as well as norms of *erga omnes* character that are obligations owed to the international community as a whole. The increasing rudimentary role of the UN and other international actors in enforcing this international value system has also been said to be evidence of this international constitutional order.[347]

To some this idea of an international constitution is a misnomer due the terms link with national legal systems. It is said that global constitutionalism simplifies the international legal order that is both complex and amorphous in reality. Anne Peters has rejected this and referred to that "the term 'constitution' has never been exclusively reserved for state constitutions." She further adds that focus on constitutionalism in legal discourse has loosened the connection between the term and the state and that it has become accepted that it is possible to conceptualize constitutional law beyond the state.[348]

Critics have also pointed out that there is no common political will for an international constitution and that power structures and sanctions at the international level are not capable of enforcing such a constitution.[349] In response to this criticism Peters convincingly points out that "law and legal constructs and arguments are supposed to have an impact on the exercise of power." It is implied that even if global constitutionalism is somewhat idealistic it does play a crucial role in highlighting "the current situation of global interdependence."[350] A situation that can benefit from the various features of constitutionalism. The language constitutionalism offers for assessing the validity of the exercise of public power at a

[344] Mónika Ambrus: "Through the Looking Glass of Global Constitutionalism and Global Administrative Law. Different Stories about the Crisis in Global Water Governance?", p. 32.
[345] Erika de Wet: "The International Constitutional Order", p. 51.
[346] Erika de Wet: "The International Constitutional Order", p. 56.
[347] Erika de Wet: "The International Constitutional Order", p. 54-78.
[348] Anne Peters: "Conclusions", pp. 342-344.
[349] See Anne Peters: "Conclusions", pp. 342-343 for an overview.
[350] Anne Peters: "Conclusions", p. 343.

domestic level is equally capable of assessing such exercise of public power at the international level.

Although the roots of constitutionalism can be traced back to ideas of limiting the "domination by humans over other humans" there does not exist "a single, uniform, generally accepted constitutionalist approach."[351] Features that have been associated with constitutionalism include "limited government, separation of powers, judicial review, transparency and human rights protection"[352] as well as "more inclusive and transparent decision-making."[353] Here it is normatively suggested that thinking in terms of these features has a potential for improving the accountability of international institutions in a similar way that the assumption has been made that it would be beneficial to further constitutionalize the international legal system

Daniel Bodansky argues that the different aspects of a constitution cannot be achieved overnight and that it might be beneficial to consider each feature of constitutionalism separately and their proper role in international governance rather than thinking of the concept in holistic terms.[354] Taking this approach would for example allow for assessing the potential of ombudsman procedures in securing some of the constitutional features. However, there is danger of overusing constitutionalist vocabulary in describing the international legal system as Anne Peters has warned against: "If all (international) law is somehow 'constitutionalized' and becomes more or less 'constitutional' or constitutionally infused, then nothing is constitutional." In combination, she suggests, the various features of constitutionalism "take on special normative significance" that goes beyond being merely additive.[355] Thus as a whole constitutionalism should encourage the adoption of its features within international legal structures. Still, Bodansky's argument, that this does not happen at once, remains. Perhaps efforts towards further constitutionalization are best served by thinking of each added feature as a step in that direction rather than individually bringing about constitutionalization.

As an alternative to thinking in terms of institutional architecture for bringing about constitutionalism the concept can be adopted as a mindset as has been suggested by Martti Koskenniemi.[356] This could better preserve the concept's idealistic nature and it has the potential of influencing the way validity of an exercise of authority is conceived. Global

[351] Anne Peters: "Conclusions", p. 346.
[352] Daniel Bodansky: "Is There an International Environmental Constitution?", p. 583.
[353] Anne Peters: "Conclusions", p. 345.
[354] Daniel Bodansky: "Is There an International Environmental Constitution?", p. 583.
[355] Anne Peters: "Conclusions", p. 345.
[356] Martti Koskenniemi: "Constitutionalism as a Mindset: Reflections on Kantian Themes about International Law and Globalization", pp. 9-36.

constitutionalism offers a vocabulary that politicizes what otherwise might appear as routine administration of international institutions and allows their acts to be challenged in a way similar to how the constitutionalism played a part in the French revolution as a challenge to the political stage where dynastic administration had been the norm.[357] The language of constitutionalism allows for a "fundamental critique of present politics" and such critique is just as relevant for challenging validity in the international system as it is in the domestic one. Constitutionalism's virtue is that it allows "extreme inequality in the world to be not only shown but also condemned."[358]

Thus, the language of constitutionalism allows for challenging the validity of the exercise of public powers by international institutions when they adversely affect individuals without accountability or other mechanisms in place that are capable of addressing constitutional issues. Without a possibility to hold these international actors to account there is danger that their public powers can be exercised absent limit. Accountability procedures can to some extent review the exercise of these powers and they do add transparency to the process. Attention will now turn to global administrative law, a concept closely related to global constitutionalism.

6.4.3 Global Administrative Law

In a way similar to global constitutionalism, the research project on global administrative law offers a way to conceptualize in legal terms the contemporary operations of international institutions.[359] This research project, originating at New York University School of Law, has been highly influential in reconstructing ways of thinking about global governance. It is suggested that there is a growing body of global administrative law shaping patterns of global governance. In the early stages of the research project it was said that this evolvement had received little attention and that in fact it was hardly unified or organized. The project sets out to systemize studies in a variety of settings that relate to this phenomenon.[360]

It is appealing to view the action of international institutions as a form of administration governed by administrative law principles as this body of law is primarily concerned with the control of public power and serves as a kind of check to the exercise of such powers. The

[357] Martti Koskenniemi: "Constitutionalism as a Mindset: Reflections on Kantian Themes about International Law and Globalization", pp. 34-35.
[358] Martti Koskenniemi: "Constitutionalism as a Mindset: Reflections on Kantian Themes about International Law and Globalization", pp. 34-35.
[359] Benedict Kingsbury & Lorenzo Casini: "Global Administrative Law Dimensions of International Organizations Law", p. 320.
[360] Benedict Kingsbury, Nico Krisch & Richard B. Stewart: "The Emergence of Global Administrative Law", p. 15.

underlying idea is that "[t]he powerful engines of authority must be prevented from running amok"[361] an idea that is equally applicable regardless of whether that authority is exercised through a government of a state or an international institution. Administrative law serves to protect individuals by keeping the authorities within their legal bounds and preventing their abuse of power.[362] The idea of global administrative law will now be explained as well as the concepts potential for increasing the accountability of international institutions and its possible shortcomings.

Observations made with regard to global administrative law are similar to those that are at the core of this thesis. It is noted that the strict division between the domestic and international has largely broken down and that a global administrative space is emerging. It is said "that much of global governance can be understood as regulation and administration" and that administrative functions are now being performed in this new global administrative space through complex interaction between representatives of the different levels. This increased exercise of public power at the international level or on a level that combines the international and domestic has in turn raised concerns about legitimacy and accountability.[363] Dispersed practices between a variety of actors are noted as a response to these issues where accountability problems are being "addressed through greater transparency, through notice-and-comment procedures in rule-making, and through new avenues of judicial and administrative review, in a vast array of disparate areas." Global administrative law aims to assess these practices as a whole "and understand them as part of a common, growing trend towards administrative-law type mechanisms for holding global regulatory governance accountable."[364]

John Locke's political theory and his conception of public authority as originating with the people was highly influential in the movement towards democracy in Europe. This movement has in turn secured such a conception and that those exercising public authority should be accountable to those that the power originates from. No longer is that origin of power considered to be with a God like entity and in liberal societies the government is not omnipotent. The will of the people as the basis of authority has become a recognised standard in modern human rights instruments.[365] This idea of limits to government and those exercising

[361] William Wade & Christopher Forsyth: *Administrative Law*, p. 4.
[362] William Wade & Christopher Forsyth: *Administrative Law*, pp. 4-5.
[363] Benedict Kingsbury & Nico Krisch: "Introduction: Global Governance and Global Administrative Law in the International Legal Order", p. 1.
[364] Benedict Kingsbury & Nico Krisch: "Introduction: Global Governance and Global Administrative Law in the International Legal Order", pp. 1-2.
[365] See Article 21(3) of the Universal Declaration of Human Rights.

public power is at the core of the concepts discussed so far and shows that there is a clear connection between the rule of law, constitutionalism and administrative law systems.

It has been suggested that "[e]very Western administrative law system is founded on the rule of law" and that this concept is both a governing principle and central to the operation of administrative law.[366] The fair hearing rights associated with the rule of law principle that "[t]he principles of natural justice must be observed"[367] are further expanded on in this body of law and developed into "a set of due process principles, including the right to be heard by or make representations to an adjudicator; the right to be heard by an impartial adjudicator; reasoned decisions, and so forth."[368] Administrative law systems seek to regulate the exercise of power delegated to those exercising public authority. It is mostly concerned with procedure and as a consequence its principles are largely procedural in nature. A common feature in administrative law systems is that the administration must act within the boundaries of legality and within its powers as is enshrined in the principle of legality central to all such systems.[369]

There are two distinct features of the principle of legality that have been identified.[370] Firstly, administrative decisions need to be in accordance with laws and regulations. If such a decision goes against the general rules applicable to the situation the decision concerns then it is deemed unlawful. It is generally accepted that an unlawful decision can be invalidated. Secondly, decisions of the administration need to be based on laws. At the core of this notion is the idea that the public authorities cannot adversely affect individuals through their action without sufficient legal basis.[371]

Legality thus understood can best be explained by reference to the theory of separation of powers that plays a large role in many domestic legal systems. The legislative branch of government serves as a check to the powers of the executive branch as the latter can generally only take action where it has been given the power to do so through legislation or if such powers are provided for in the constitution. At the international level there is no legislative branch that serves as a check to the powers of international institutions but their constitutive documents do provide a legal framework for their action. This framework does put some limits on the powers of international organizations but it does not share the domestic level's

[366] Carol Harlow: "Global Administrative Law: The Quest for Principles and Values", p. 190.
[367] Joseph Raz: *The Authority of Law*, p. 217.
[368] Carol Harlow: "Global Administrative Law: The Quest for Principles and Values", p. 190.
[369] Carol Harlow: "Global Administrative Law: The Quest for Principles and Values", p. 192.
[370] These features are not necessarily universal and the formulation referred to here is made in relation to the Icelandic administrative law system.
[371] *Starfsskilyrði stjórnvalda,* p. 18.

generally strict requirement of legal basis for administrative action. As is evident by the theory of implied powers that has allowed such organizations to take actions that were not clearly stipulated in their constitutive documents.

The stricter domestic level approach is not warranted at the international level given the differences between the two levels. In domestic legal systems it is relatively easy for the legislator to provide the administration with new powers if a situation calls for them. The political processes involved in law making procedures should take sufficient account of the will of the people from where the power originates. If the administration has not been granted powers for specific types of action through such procedures then it can usually be assumed that it does not have the power to act in these situations. This can be contrasted with the international level where amending the constitutive instruments of an international institution is usually a more difficult process and thus more akin to the entrenchment of a domestic level constitution. This makes it hardly viable to amend these instruments every time a situation arises that calls for action by the institution. Powers are thus implied in such instances.

Still there are limits to what powers can be implied and there must at least be some connection with the function and objectives of an IO as provided in its constitutive documents. The framework of these documents as well as general international law that is binding on these organizations can thus serve as a yardstick for assessing whether an IO has acted in accordance with the principle of legality. This is in line with the global administrative law approach that suggests that the exercise of public power by international institutions can be seen as a form of administration subject to certain administrative law standards[372] such as the principle of legality. In addition to legality other procedural principles at the classical core of administrative law include "fairness, […], consistency, rationality and impartiality."[373] Here it is suggested that this structure of analysis can be of benefit to individuals as it highlights the involvement of international actors in the exercise of public power and the need to put controls on this exercise. The principle of legality puts limits on how powers are exercised and it should prevent individuals from being adversely affected by arbitrary decisions of IOs.

The focus of global administrative law has been on legitimacy and how it can be achieved "through transparency, participation and accountability/judicial review."[374] Concepts that

[372] Benedict Kingsbury & Lorenzo Casini: "Global Administrative Law Dimensions of International Organizations Law", p. 319.
[373] Carol Harlow: "Global Administrative Law: The Quest for Principles and Values", p. 193.
[374] Mónika Ambrus: "Through the Looking Glass of Global Constitutionalism and Global Administrative Law. Different Stories about the Crisis in Global Water Governance?", p. 32.

have been associated with good governance rather than being at the procedural core of administrative law systems. Carol Harlow has pointed out that focus on these principles shows a bias towards common law systems and that principles from other administrative law systems are only recognized to a limited extent.[375] She has argued "that a universal set of administrative law principles, difficult in any event to identify, is neither welcome nor particularly desirable; diversity and pluralism are greatly to be preferred."[376] Harlow has said that the norms of administrative law systems are value-laden and criticised the suggestion that they can operate within different value systems. At the domestic level a political and constitutional system provides the framework within which administrative law functions, a framework that is not present at the international level. She has noted that it is difficult to identify a single set of principles that should be promoted as universal as there exists "much disparity of principle."[377]

Harlow has paid special attention to the focus of global administrative law on judicial review and participation. She has criticised the movement for putting too great emphasis on judicial processes and a supremacy of law thus disregarding the potential benefits of outcomes reached through political institutions.[378] With regard to participation she suggests that international judicial bodies are not in a position to decide on the import of such a principle. She highlights the different nature of the domestic level in this respect where powerful domestic courts that operate in a representative democracy interact with political institutions and interest groups that are "rooted in a politically active civil society." In contrast she finds that non-governmental organizations and other actors at the international level are claiming to represent civil society at the international level when in fact such society is "non-existent or marginal." Thus she does not find the protection global administrative law awards to these actors to be warranted.[379]

Harlow's criticism should not lightly be dismissed but here it is suggested that it is precisely for the sake of pluralism that the potential for global administrative law should be carefully assessed. The danger that the movement universalizes specific values for the benefit of particular actors by promoting certain principles rather than others can be mitigated by a broader focus. As the central goal of administrative law systems is to structure the ways in which the administration can operate a similar approach at the international level can greatly

[375] Carol Harlow: "Global Administrative Law: The Quest for Principles and Values", p. 195.
[376] Carol Harlow: "Global Administrative Law: The Quest for Principles and Values", p. 207.
[377] Carol Harlow: "Global Administrative Law: The Quest for Principles and Values", p. 208.
[378] Carol Harlow: "Global Administrative Law: The Quest for Principles and Values", p. 198.
[379] Carol Harlow: "Global Administrative Law: The Quest for Principles and Values", p. 203-204.

benefit individuals if international institutions adopt such structures where none were before. Inspiration can be sought from a variety of systems and principles with the one goal in mind to put controls on the exercise of public power by international institutions. Being common to most administrative law systems the principle of legality can play a crucial role in this respect. Formalizing the decisions of international institutions through administrative law type controls has a potential of greatly benefitting individuals and decreasing the likelihood that they be adversely affected by the acts of international institutions. This could be a step in the direction of guaranteeing that those exercising public authority, regardless of their domestic or international situation, cannot arbitrarily use this power to negatively affect individuals.

Not only does viewing the activities of international institutions as a form of administration lead to them being considered in terms of principles governing administrative law systems but also how compliance with these principles is secured in such systems. Judicial review plays a large part in this respect but it is by no means the only way employed for holding actors involved accountable. The multifaceted nature of accountability, as emphasized by the ILA Committee, calls for diverse options for holding those exercising public power to account. Exploring alternatives to judicial review is also in line with Harlow's emphasis on pluralism and the need to think outside the scope of proper judicial bodies even if it means lower due process standards. She suggests that:

> [I]t may be easier to 'transplant' rule of law principles into hostile terrain through an internal or inspectorial review system than through a court system external to the administration, which falls outside the dominant power structure.[380]

Ombudsman procedures are one such alternative that has taken on a significant role for resolving administrative disputes in many administrative law systems.[381] The potential for such procedures to take on an equally significant role at the international level will now be discussed.

7 Ombudsman Procedures

7.1 Introduction

A parallel can be drawn between the situation that sparked the growth in national ombudsman offices in the second part of the 20th century and the current status of IOs. That century saw a dramatic increase in the bulk of public administration in the Western world with public

[380] Carol Harlow: "Global Administrative Law: The Quest for Principles and Values", p. 209.
[381] Carol Harlow: "Global Administrative Law: The Quest for Principles and Values", pp. 208-209.

authorities taking active part in a variety of fields.[382] A fear of the growing administrative body and its impact on citizen's everyday lives resulted in the introduction of an ombudsman office in the Danish constitution of 1953. The possibility to address the courts was not considered sufficient since threshold for admissibility was high and the review was not always apt for the administration's increasingly discretionary decision making powers.[383]

In recent years, with increased globalization, a similar growth can be seen in the activities of IOs which are becoming increasingly more prominent players in the everyday lives of individuals. It is only logical that calls for accountability are becoming louder and IOs are under pressure to adopt systems that allow for complaints from those negatively affected by the operations of IOs. The incentive to adopt some kind of accountability mechanism should be even greater for IOs than within national systems where judicial bodies are present, which can address some of the issues otherwise referred to ombudsman procedures. This incentive is further enhanced when the exercise of public power by international institutions is viewed in light of the principles discussed in the previous Section and the need to put limits on this exercise. Ombudsman procedures have played a role in securing such limits in domestic administrative law systems and they do have a potential of doing so at the international level.

7.2 The Emergence of Ombudsman Procedures

It was in Sweden that the ombudsman mechanism first developed. With the adoption of a new constitution in 1809 the *Justitieombudsman* office was created. It was predated by a different ombudsman entity established in 1713 which was to act as a supreme representative of the king but unlike the latter it was completely independent of the government. The 1809 constitution was partly based on Montesquieu's theory of separation of powers and to balance the wide powers afforded to the king and council the parliament was given powers to appoint an ombudsman to act in its name. Even though the Swedish ombudsman acts on behalf of the parliament it is independent from it and is dependent only on the law.[384]

The Swedish ombudsman's role is to supervise the application in public service of laws and other statutes.[385] Judges, government officials and other civil servants are subjects to this supervision role and the ombudsman has powers to prosecute those that act illegally or neglect their duties.[386] In order to fulfil these functions the ombudsman is allowed great

[382] Ásmundur Helgason: "Aðdragandi að stofnun embættis umboðsmanns Alþingis", p. 172.
[383] Katja Heede: *European Ombudsman*, p. 25.
[384] Alfred Bexelius: "The Ombudsman of Civil Affairs", pp. 24-25.
[385] Article 6(1), Chapter 13, Svensk författningssamling 1974:15.
[386] Alfred Bexelius: "The Ombudsman of Civil Affairs", p. 24.

access to all information he requires.[387] However the Swedish ombudsman's authority does not extend to changing decisions of courts or administrative bodies.[388] This early development in Sweden can partly be explained by the Swedish administration system. In general ministers are not responsible for the application of laws which makes it more difficult for the parliament to monitor how the laws are being implemented since ministers cannot be held responsible for acts or omissions which are outside their powers. Thus the ombudsman office was created in order to exercise such monitoring powers.[389]

In the 20th century other Nordic countries started introduction ombudsman offices of their own. In 1919 Finland introduced an office very similar to the Swedish one but it was not until the Danish ombudsman office was introduced in 1954 that states in other parts of the world really started paying attention to the ideas behind this mechanism.[390] The Danish approach was different from the Swedish one as its main goal was not to hold certain public officials responsible but rather to examine certain decisions and acts of administrative bodies. The independence of the ombudsman office was still emphasized and it took on a neutral role similar to that of judges. The office is supposed to safeguard the citizens' rights in relation to the authorities and does not only investigate procedural aspects of decision making but also whether general rules of administrative law are adhered to. The Danish ombudsman operates in many respects in a similar way to constitutional courts which exist in many countries but not in Denmark.[391]

7.3 The Potential of Ombudsman Procedures for International Organizations

It can be argued that the Danish ombudsman model is better suited for increasing the accountability of international organizations than the Swedish one. It is difficult to imagine a mechanism within IOs that would allow for prosecuting individual employees of that very organization for their acts or omissions. A softer approach is more plausible, a mechanism that would not only allow individuals to complain when they are negatively affected by the actions of an IO but one that can also take initiative to investigate all aspects of an IO's practice and whether it is consistent with its constituent documents and other relevant rules of international law. Thus an ombudsman procedure can serve as an invaluable tool for incorporating the first level of accountability as identified by ILA Committee into the

[387] Article 6(2), Chapter 13, Svensk författningssamling 1974:15.
[388] Alfred Bexelius: "The Ombudsman of Civil Affairs", p. 25.
[389] Ásmundur Helgason: "Aðdragandi að stofnun embættis umboðsmanns Alþingis", p. 175.
[390] "Um umboðsmann", http://www.umbodsmadur.is.
[391] Ásmundur Helgason: "Aðdragandi að stofnun embættis umboðsmanns Alþingis", pp. 176-177.

operations of an IO, allowing the organization to exercise scrutiny and monitoring in a manner that has been quite successful at the domestic level.

Ombudsmen have great investigative powers but are generally excluded from taking binding decisions and cannot enforce their findings. Thus, their power lies in the strength of their arguments, power of persuasions as well as the possibility to assert political pressure.[392] Given these limitations IOs might be more willing to establish such procedures rather than judicial type of bodies capable of taking binding decisions, even with authority to sanction.

7.4 Features of Ombudsman Procedures

The general legitimacy of ombudsman offices cannot be taken for granted. This is true for both national ombudsmen and ombudsmen established within IOs but since other means of accountability are more readily available within states this is of even greater concern with regard to IOs. Arrangements have to be made to prevent arbitrary decision making as well as to secure confidence in the ombudsman's work and fairness of procedure.[393]

Certain features add to the legitimacy of ombudsman mechanisms. They need to have wide investigative powers and be fully independent in order to exercise their functions properly. They report their findings to the complainant and entities involved and can make recommendations for action to be taken. Making those reports available to the public can further enhance the accountability aspects of the procedure and give rise to public pressure. Individuals negatively affected by administrative or IO decisions should have easy access to the ombudsman procedure which is usually the case due to the lack of formalities involved in the process and the system's problem-solving approach.

Additionally there is need for some accountability arrangements with regard to the ombudsman entity itself, without sacrificing its independence. In national systems this is usually provided for through parliaments to which the ombudsman submits periodical reports of his or her work which the parliament has a chance to scrutinize.[394] This is also the case with the European Ombudsman, discussed in the next section, which reports to the European Parliament but there are few other IOs with established parliaments of that nature. In those instances reporting to the 'plenary body' common to many IOs will have to suffice. It should

[392] Duncan French & Richard Kirkham: "Complaint and Grievance Mechanisms in International Dispute Settlement", p. 65.
[393] Trevor Buck, Richard Kirkham & Brian Thompson: *The Ombudsman Enterprise and Administrative Justice*, p. 155.
[394] Trevor Buck, Richard Kirkham & Brian Thompson: *The Ombudsman Enterprise and Administrative Justice*, pp. 187-188.

also be kept in mind that ombudsman mechanisms do not take binding decisions which does reduce the risks involved but still, best practices should always be adhered to.

7.5 Ombudsman Procedures at the International Level

Different types of ombudsman models have been adopted at the international level and it can be argued that the term 'ombudsman' does not suit all of them. The national ombudsman offices handle external complaints, they have great investigating powers and are truly independent from the government branch they report to.[395] Ombudsman procedures that have been established at the international level are often tasked with handling internal disputes between IOs and their employees. In those instances the internal ombudsman or mediator established is tasked with trying to settle employment disputes when they first arise through informal techniques.[396] This ombudsman model is not very controversial and it allows both IOs and its staff to avoid more costly dispute settlement options.[397]

Ombudsman procedures have also been established to deal with very specific situations such as the Office of the Ombudsperson of the Security Council's 1267 Committee, discussed above in Section 3.4.5. It is tasked with reviewing requests from "[i]ndividuals, groups, undertakings or entities seeking to be removed from the Security Council's Al-Qaida Sanctions Committee List."[398] The inspection panels established by some international financial institutions have also many ombudsman-like features and focus on accountability to the public rather than legal liability.[399] However, according to Linda C. Reif's research, the only ombudsman office in the international field that can truly be compared with national ombudsman systems based on the Danish model is the European Ombudsman that operates within the EU.[400]

The European Ombudsman was established with the Treaty of Maastricht and the provisions concerning it can now be found in Article 20, 24 and 228 of the TFEU. Article 228 provides that the Ombudsman is elected by the European Parliament and is "empowered to receive complaints from any citizen of the Union […] concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with

[395] Linda C. Reif: *The Ombudsman, Good Governance and the International Human Rights System*, pp. 53.
[396] Linda C. Reif: *The Ombudsman, Good Governance and the International Human Rights System*, pp. 336-346.
[397] Linda C. Reif: *The Ombudsman, Good Governance and the International Human Rights System*, pp. 364-365.
[398] "Office of the Ombudsperson of the Security Council's 1267 Committee", http://www.un.org.
[399] Linda C. Reif: *The Ombudsman, Good Governance and the International Human Rights System*, p. 347.
[400] Linda C. Reif: *The Ombudsman, Good Governance and the International Human Rights System*, p. 367. See also Duncan French & Richard Kirkham: "Complaint and Grievance Mechanisms in International Dispute Settlement", p. 67.

the exception of the Court of Justice of the European Union acting in its judicial role."[401] The Ombudsman can either conduct inquiries on his own initiative or on the basis of complaints submitted to him.[402] When he finds instances of maladministration he allows the EU body concerned to make its views heard and then submits a report to the EU Parliament and the body concerned.[403] The Ombudsman shall also "be completely independent in the performance of his duties."[404]

As has already been discussed the European Union is a unique international organization with many state-like features such as a developed judicial system and other institutions similar to the typical branches of national governments as well as an extensive body of laws. Perhaps that makes for an easier implementation of a national-styled ombudsman system but there is nothing to suggest that such a developed institutional system within an IO should be a prerequisite for implementing ombudsman procedures. After all it is up to each IO and its members whether to implement an external accountability mechanism that allows for complaints from individuals negatively affected by the IO's actions. For IOs that want to implement such external accountability mechanisms the ombudsman procedure should not pose a threat since it is a soft, non-judicial mechanism, and its powers are limited to recommendations and public reporting.[405]

7.6 Concluding Thoughts

Ombudsman procedures are not a replacement for judicial bodies that are capable of taking binding decisions, administering sanctions and enforcing liability but such bodies are rarely present within international institutions. Such institutions also seem hesitant to adopt judicial bodies precisely because of the possibility of being bound by their decisions. Similar hesitation towards ombudsman procedures is uncalled for as the real powers of those procedures are confined to the solid logic and reasoning presented in their findings. The IO is not bound by the recommendations made but could feel public pressure to follow them.

Domestic administrative law systems are based on principles that revolve around a concept of limited government. In the field of global administrative law it has been suggested that these principles are also of relevance to the governance activities of international institutions. In line with this it is suggested that ombudsman procedures which have been

[401] Article 228(1) TFEU.
[402] Article 228(1) TFEU.
[403] Article 228(1) TFEU.
[404] Article 228(3) TFEU.
[405] Linda C. Reif: *The Ombudsman, Good Governance and the International Human Rights System*, p. 366.

adopted at national levels with a view to secure compliance with such principles can play a similar role at the international level. Ombudsman procedures with features similar to the Danish model can be a step towards greatly enhancing the accountability of IOs in the broadest sense of ILA's conceptual framework of accountability relating to internal and external scrutiny and monitoring but other steps are needed to enhance accountability and responsibility in the more narrow sense of that framework, relating to liability and responsibility. Ombudsman procedures are thus suggested as one alternative for enhancing the accountability of international institutions but pluralism of methods for the protection of individuals adversely affected by international institutions' exercise of public power should be emphasized.

8 Conclusions

Governance activities are increasingly moving beyond the state towards international institutions that are now taking part in the exercise of public power. There is a danger of individuals being adversely affected through this exercise of public power by these institutions. This increasing role of international institutions must be assessed in light of other developments in international law.

The human rights movement following the end of World War II has both secured a certain level of protection for the rights of individuals as well as changing the way individuals are viewed in the international legal system. Individuals are no longer regarded as mere objects of international law but rather as participants alongside states, although to a more limited extent. The increased participation of international institutions in the international legal system has also been noted and their role is emphasized in the field of global governance that represents a move away from a state centric approach to international law. Global governance reveals the on-going phenomena of governance activities beyond the state but there are legitimacy shortcomings involved in viewing governance as a continuous process rather than specific acts. A cosmopolitan outlook serves to remedy this by directing attention to the specific international actors involved in exercising public power beyond the state. It highlights that a certain framework is needed to secure controls for these actors.

In Section 3 specific instances of international institutions representative of the exercise of public power beyond the state were discussed. The World Heritage governance regime shows the potential influence the activities of the World Heritage Committee can have on domestic authorities and even potentially upset decisions reached by means of direct democracy. With

the vast scope of competences awarded to the EU there is a much greater potential of individuals being negatively affected by the action or inaction of the EU institutions. It is not only the scope of competences that are shown to be unique for an IO but also the mechanisms in place that allow affected individuals to hold relevant actors to account.

A more troublesome situation is seen in the practice of the Security Council when it targets individuals for sanctioning. It is argued that in its exercise of direct authority over individuals the Security Council must observe human rights including certain standards of due process. Since the sanctioning measures are implemented through UN member states there has been some success in securing protection for individuals through domestic and regional courts as the *Kadi* and *Nada* cases indicate. However such protection is likely to be coincidental and the international level is better suited for securing a right to remedy for affected individuals. The Office of the Ombudsperson has been introduced for this purpose and it has assisted individuals in being delisted from the sanctions list. Still its powers are limited and it cannot be seen as holding the Security Council accountable for its decisions.

Having exemplified how individuals can be adversely affected by the exercise of public power by international institutions and the accountability consequences that follow, Section 4 turned to examining the concept of *accountability*. With reference to the findings of the ILA Committee three levels of accountability have been identified. Special emphasis is placed on the first level of internal and external scrutiny and monitoring as it is suggested that international institutions might be more willing to adopt such mechanisms rather than those securing the second and third levels of liability and responsibility. Furthermore a connection between accountability and legitimacy is suggested and that enhancing the former can also increase the legitimacy of international institutions.

The law of international institutions plays a crucial part in understanding the accountability concerns raised in relation to these actors and was explored in some detail in Section 5. It can usually be presumed that an international institution capable of adversely affecting individuals does possess an international legal personality separate from its member states. It is appropriate for such personality to be in place if the institution is to be held to account for its actions. Another aspect of international institutional law relates to the foundations of powers of IOs. There are different theories concerning this but the theory of implied powers is the one that has prevailed and has been influential in justifying the expanding activities of international organization. This theory allows these organizations to exercise powers beyond what is clearly stipulated in their constitutive instruments. There are

limited ways for individuals to challenge the legal basis for the acts of IOs and focusing on how their powers are exercised is likely to be more productive.

International institutions enjoy certain privileges and immunities that are based on their functional necessity that should accordingly not extend beyond what is needed for an IO to function properly. It has been noted that in practice the "prevailing concept of functional immunity often leads *de facto* to absolute immunity."[406] Thus, the jurisdictional immunities enjoyed by international institutions make it difficult for affected individuals to hold such institutions accountable before domestic courts. Additionally immunity is of a procedural nature and needs to be assessed before any rules of substantive law. If this assessment reveals immunity to be in place then the national court cannot exercise jurisdiction.

Given the limited ways to hold international institutions responsible attempts have been made to hold their member states responsible instead. This relies on the conduct in question being attributable to the member states rather than the international organization. In such a situation it is not really the organization being held responsible. Closely related to this is the question whether it is possible to look beyond the organization itself and hold its member states accountable for acts done in the organization's name. This question is answered negatively and it is concluded that states cannot be held liable for acts of international institutions that possess legal personality distinct from their member states.

It is suggested that different organs of international organizations can serve as checks and balances to each other. Mechanisms for enhancing the accountability of these actors can thus be established by IOs themselves as they do have the power to do so. Such mechanisms can serve to secure individuals' right to remedy, identified as a general principle of law by the ILA Committee.

In Section 6 it was sought to establish limits to the exercise of public power. For this purpose focus is on the concepts of the rule of law, constitutionalism and administrative law principles. Concepts that relate to political theories of limited government and the legitimacy of governance activities that have traditionally been formulated in a domestic setting. A concept of a 'common zone of impact' is introduced as a justification for assessing the activities of international institutions in light of these principles. The rule of law is examined and the role it can play in protecting individuals from "domination, coercion and violence"[407] by international organizations exercising public power. Furthermore the concepts of global

[406] August Reinisch: "Privileges and Immunities", p. 138.
[407] T. D. Campbell: "Liberty and the Rule of Law. Book Review", p. 446. See also Hafsteinn Þór Hauksson: "Beitti hnífurinn. Um réttarríkishugmynd Joseph Raz", p. 311.

constitutionalism and global administrative law are introduced as ways for enhancing the legitimacy of legal structures beyond the state.

Constitutionalism is said to put limits on the exercise of public power and to reject omnipotent authority but it is particularly the language of cosmopolitanism that can contribute to assessing the exercise of public power by international institutions. It allows the validity of such exercise of power to be challenged through a fundamental critique based on constitutional values. Administrative law systems put specific limits on the exercise of public power, keeping the authorities within their legal bounds and preventing their abuse of power. Thus, it seems appealing to view the activities of international institutions as a form of administration. Still, global administrative law is not without shortcomings and it has been suggested that it employs a too narrow focus on specific principles and procedures.[408] Taking note of this criticism it is suggested that it is precisely for the sake of pluralism that the benefits of global administrative law should be assessed. Especially the potential of mechanisms used to secure accountability of the administration in national administrative law system to do the same at the international level.

Ombudsman procedures were discussed in Section 7 as one such alternative. Within national administrative law systems such procedures have been established to address concerns over the growing impact of the administration in the everyday lives of individuals and to allow those affected to seek redress more easily than is possible through judicial bodies. Such concerns are very similar to those raised at the international level where, additionally, access to judicial remedy is often non-existent. Ombudsman procedures are generally excluded from taking binding decisions, which should make IOs more willing to adopt such procedures in order to secure proper controls for their exercise of public power in line with the principles that govern this exercise. That is not to say that ombudsman procedures are the only mechanism that can achieve this. Still it is concluded that for international institutions to adopt ombudsman procedures with features similar to the Danish model could be a step towards greatly enhancing their accountability.

[408] Carol Harlow: "Global Administrative Law: The Quest for Principles and Values", pp. 195-208.

LIST OF ABBREVIATIONS

ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Union
ECtHR	European Court of Human Rights
EGC	General Court of the European Union
ESA	European Space Agency
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
IO	International organization
PCIJ	Permanent Court of International Justice
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNSC	United Nations Security Council
WTO	World Trade Organization

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