

THE OXFORD HANDBOOK OF

**INTERNATIONAL
ORGANIZATIONS**

Edited by

JACOB KATZ COGAN

IAN HURD

IAN JOHNSTONE

2016
OXFORD
UNIVERSITY PRESS

CHAPTER 2

INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL LAW

ANNE PETERS

THIS chapter seeks to give an overview of the state of the art of legal thought about international organizations¹ as legal entities in a legal environment. International organizations are legal communities in a threefold sense: they are created by law, they use law as a means of governance, and they should be governed by the rule of law. Accordingly, international law constitutes, enables, and constrains international organizations. I will show that (with some simplification) legal scholarship until the 1990s was primarily concerned with the constituting and enabling function of the law (thus securing the *effectiveness* of international organizations), while the more recent legal concern is the constraining function of the law (thus improving the *accountability* of international organizations). In the procedural law of organizations, a triad of accountability procedures has been built: transparency, participation, and access to information.

¹ From the perspective of international law, an “international organization” is best understood as “an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.” (Art. 2[1] Draft Articles on the Responsibility of International Organisations [“DARIO 2011”], Annex to GA Res. 66/100, December 9, 2011).

THE EFFECTIVENESS OF INTERNATIONAL ORGANIZATIONS

The effective and efficient operations of international organizations are secured by international law. The first wave of constitutionalism and legal functionalism underscored the role of law as a constitutor and enabler of international organizations.

Law as a Constitutor: Constitutionalism 1.0

The *doyen* of the discipline of the law of international organizations, Henry Schermers, recalls that he first considered, as a title for his seminal book, “International Constitutional Law,” but then chose, upon consultation with his colleagues, the title “International Institutional Law.”² Constitutionalism of the first generation understood the international organizations’ founding documents³ to be Janus-faced, i.e. “constitutional treaties” or “treaty-constitutions.”⁴ The International Court of Justice (ICJ) described these documents’ hybridity as follows: “From a formal standpoint, the constituent instruments of international organizations are multilateral treaties ... But the constituent instruments of international organizations are also treaties of a particular type.”⁵ The aborted “Treaty Establishing a Constitution for Europe” of 2004 had captured the hybridity in its official name.⁶

With regard to the EU, the constitutive role of the law was most effectively shaped and employed by the European Court of Justice (ECJ). This court was the first driver of the EU’s “constitutionalization.” The court reclaimed the authority to determine in a central fashion the direct effect of European Community (EC)—later European Union (EU)-law (*van Gend & Loos*)⁷ and, in *Costa v ENEL*,⁸ established the supremacy of European law

² Henry Schermers, “The Birth and Development of International Institutional Law,” *International Organizations Law Review* 1 (2004): 5–8, 6.

³ They are often officially called “constitution.” See “Constitution of the United Nations Educational, Scientific and Cultural Organization” of November 16, 1945 (UNTS 4, No. 52); “Constitution of the World Health Organization” of July 22, 1946 (UNTS 14, No. 221); “Constitution of the International Labour Organization” of October 9, 1946 (UNTS 38, No. 583); “Constitution of the Food and Agricultural Organization of the United Nations” of October 16, 1946 (UNYB 1946–47, 693); “Constitution of the International Telecommunication Union” of December 22, 1992 (UNTS 1825, No. I-31251).

⁴ Anne Peters, “Das Gründungsdokument internationaler Organisationen als Verfassungsvertrag,” *Zeitschrift für öffentliches Recht* 68 (2013): 1–57.

⁵ ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66, para. 19.

⁶ Treaty of October 29, 2004, OJ 2004 C 310/1. It was rejected by the populations of France and the Netherlands and never entered into force.

⁷ ECJ, case C-26/62, *Van Gend & Loos v Administratie der Belastingen*, February 5, 1963, ECR 1963, 1, 12.

⁸ ECJ, case C-6/64, *Costa v ENEL*, ECR 1964, 587, 593.

over the law of the member states (including over member states' constitutions).⁹ In the 1980s and 1990s, EU scholars began to acknowledge these seminal judgments as “constitutional moments,”¹⁰ and discussed the role of the ECJ as a constitution-maker. In the following, the ECJ frequently used the constitutional vocabulary to protect and expand its judicial powers.¹¹ The accompanying debate related to the qualification of the successively amended founding documents as a constitution. One concept to describe the whole was the “*Verbundverfassung*” or “multilevel constitution.”¹²

Law as an Enabler: Functionalism, and Constitutionalism Continued

The second overarching legal paradigm on international organizations, legal functionalism,¹³ also primarily sought to allow international organizations to work more effectively.¹⁴ The basic idea is that the *raison d'être* of international organizations is the fulfillment of specific tasks (functions), which have become necessary to tackle problems which concern more than one state. Typical statements by the

⁹ ECJ, case 11/70, *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECR XVI (1970–1), 1125, para. 3.

¹⁰ Eric Stein, “Lawyers, Judges and the Making of a Transnational Constitution,” *American Journal of International Law* 75 (1981): 1–27.

¹¹ ECJ, case 294/83, *Parti Ecologiste “Les Verts” v European Parliament*, ECR 1986, 1339, para. 23; ECJ, Opinion 1/91 of December 14, 1991 delivered pursuant to the second subparagraph of Article 228(1) of the Treaty—Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area [“EEA I”], ECR 1991, I-06079, para. 21; ECJ, Opinion 2/94 of March 28, 1996, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECR 1996, I-01759, paras. 34–5; ECJ, Opinion 2/13 of the Court (Full Court) December 18, 2014—*Accession to the ECHR*, para. 158.

¹² Ingolf Pernice, “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?,” *Common Market Law Review* 36 (1999): 703–50; Anne Peters, *Elemente einer Theorie der Verfassung Europas* (Berlin: Duncker & Humblot, 2001).

¹³ Michel Virally's seminal piece (Michel Virally, “La Notion de fonction dans la théorie de l'organisation internationale,” in *Mélanges offerts à Charles Rousseau: La communauté internationale*, ed. A. Pedone (Paris: Pedone, 1974), 277–300) comes closest to a “manifesto of [legal] functionalism” (Jan Klabbbers, “The EJIL Foreword: The Transformation of International Organizations Law,” *European Journal of International Law* 26 (2015): 22, n 66). The legal paradigm of functionalism cannot be neatly separated from the international relations theories of functionalism as launched by David Mitrany (David Mitrany, *A Working Peace System* (London: The Royal Institute of International Affairs, 1943) and developed further by Ernest B. Haas and others (Ernest B. Haas, *Beyond the Nation State: Functionalism and International Organization* (Stanford: Stanford University Press, 1964)).

¹⁴ Likewise, the seminal ICJ-case on international organizations used the law (with the implied powers doctrine) as an enabler. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, especially 182.

authors of the most important textbooks on international organizations may serve as an illustration: Blokker writes that “our book ... is inspired by the need for international cooperation and by the conviction that the sovereign State is no longer able to deal with a growing list of cross-border issues alone.”¹⁵ According to Klein and Sands, “the role and powers of international organizations are constantly expanding, and institutional transformation is underway. As globalization proceeds apace, the need for international organizations to encompass an even broad range of activities, and to expand their functions in order to do so, is increasing.”¹⁶ It is this (real or perceived) “necessity” which justifies and authorizes the activities of the organization. From this perspective, international organizations are justified because they pursue a *global public interest*. They are “public collectives” (“collectivités publiques”).¹⁷

Although the functionalist paradigm also viewed the functions as constituting a limit on the organizations’ activity, it seems fair to say that the enabling role of the law stood in the foreground. In the seminal piece by Michael Virally, this was accentuated by the idea that the international organizations were not only “enabled”, but also “*obliged*” to deliver their functions.¹⁸

The empowerment of organizations through legal functionalism was additionally sought by highlighting the “technical” and thus ostensibly “unpolitical” nature of the organizations’ activities. Purely “functional” cooperation has been seen as an alternative strategy to the politicized path which is often associated with an (unwanted) world government.¹⁹ The emphasis on functions shielded the organizations against reproaches of encroachment on state sovereignty²⁰ and thus strengthened them.

Another empowering element of the theory was the idea of a spillover, the belief that the functional cooperation and integration would ultimately further and guarantee peace. Inis Claude classically stated that “the mission of functionalism is to make peace possible by organizing particular layers of human social life in

¹⁵ Niels Blokker, “Comparing Apples and Oranges? Reinventing the Wheel? Schermers’ Book and Challenges for the Future of International Institutional Law,” *International Organizations Law Review* 5 (2008): 202.

¹⁶ Pierre Klein and Philippe Sands, “(Re)Writing a Handbook on the Law of International Organizations: Options and Challenges,” *International Organizations Law Review* 5 (2008): 221.

¹⁷ Evelyne Lagrange, “La Catégorie ‘organisation internationale,’” in *Droit des Organisations Internationales*, ed. Evelyne Lagrange and Marc Sorel (Paris: LGDJ, 2013), 64 and 67.

¹⁸ Virally, “Organisation internationale,” 291: The “finalité fonctionnelle” fulfills a “triple fonction”: “habilitation”, “obligation”, and “mesure.”

¹⁹ René-Jean Dupuy, “L’Organisation internationale et l’expression de la volonté générale,” *Revue Générale de Droit International Public* 61 (1957): 527–79, 563, 574: “démotechnocratie”; “les organes techniques ne se développent pas à côté du pouvoir mais à la place de celui.”

²⁰ See the references to the older literature in Anne Peters and Simone Peter, “International Organizations: Between Technocracy and Democracy,” in *The Oxford Handbook of the History of International Law*, ed. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 182–6 and 193–6.

accordance with their particular requirements, breaking down the artificialities of the zoning arrangements associated with the principle of sovereignty.”²¹

Finally, functionalist reasoning continues to imbue the law on organizational immunities by which organizations are shielded from domestic law suits. For example, the European Court of Human Rights (ECtHR) upheld the jurisdictional immunities of the United Nations (UN) in the Srebrenica case with the argument that

since operations established by United Nations Security Council resolutions under Chapter VII of the United Nations Charter are fundamental to the mission of the United Nations to secure international peace and security, the Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations. To bring such operations within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfillment of the key mission of the United Nations in this field, including with the *effective conduct* of its operations.²²

The enabling role of the international law of immunities comes out clearly in this reasoning.

Constitutionalism i.o. has sided with functionalism in this regard. Besides “constituting” organizations, constitutionalist reasoning has been employed to keep the organizations’ members in check. This has been most visible for the World Trade Organization (WTO). Although the Appellate Body once stressed the “contractual” (as opposed to any “constitutional”) character of the WTO Agreement,²³ WTO scholarship engaged with constitutionalism.²⁴ First, the judicialization of the dispute settlement mechanisms and the use of “constitutional” balancing techniques were regarded as the marker of a constitutionalization of the WTO.²⁵ Second, the WTO’s function as a constrainer of protectionist measures adopted by members whose parliaments and executives are excessively lobbied by rent-seeking societal groups was highlighted.²⁶ Recognition of both features tends to legitimize and strengthen the WTO as an organization vis-à-vis its members.

²¹ Inis Lothair Claude, *Swords into Plowshares: The Problems and Progress of International Organization* (New York: Random House, 1956), 378. Cf. also Mitrany, *A Working Peace System*, 6: The “working peace system” as opposed to a “protected peace” should “overlay political divisions with a spreading web of international activities and agencies, in which and through which the interests and life of all the nations would be gradually integrated.”

²² ECtHR, third section decision, No. 65542/12, *Stichting Mothers of Srebrenica and Others v the Netherlands*, June 11, 2013, para. 154 (emphasis added).

²³ AB, *Japan—Taxes on Alcoholic Beverages*, October 4, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 15.

²⁴ Jeffrey Dunoff, “Constitutional Conceits: The WTO’s ‘Constitution’ and the Discipline of International Law,” *European Journal of International Law* 17 (2006): 647–75.

²⁵ Deborah Z. Cass, “The Constitutionalization of International Trade Law: Judicial Norm-Generation as the Engine of Constitutionalization,” *European Journal of International Law* 13 (2001): 39–77.

²⁶ See Ernst-Ulrich Petersmann, “Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice,” *Journal of International Economic Law* 10 (2007): 529–51.

Effectiveness Problems and Reform Debates

In the post-1989 legal landscape, a need was felt to adapt international organizations to a new political, military, economic, and legal surrounding, and to respond to new demands on their effectiveness and legitimacy.²⁷ Effectiveness deficits stem not only from waste or mismanagement, but also from legal design. The best-known example is the *blocage* of the UN Security Council (UNSC) through use (and abuse) of the veto power by one of its five permanent members (P 5), thereby preventing the Council from exercising its “primary responsibility for the maintenance of international peace and security” (Art. 24 UN Charter).²⁸ Another recent and worrisome phenomenon is the sidestepping of an entire organization by other instruments. For example, the WTO is currently being overtaken by hundreds of bilateral and regional trade agreements. This is not only a potential source of ineffectiveness of the WTO but also engenders losses of the legitimacy that resides in multilateralism.

Substantive reports proposed reforms of the UN (notably of the UNSC and its responses to new threats²⁹ and on peacekeeping)³⁰ of the WTO,³¹ and of the Organization for Security and Co-operation in Europe (OSCE).³² These reports have engendered relatively meagre practical results. A major reason of stagnation is the difficulty in formally amending the founding documents of the organizations which would require unanimity.

For example, the Bretton Woods institutions have been confronted with the critique of inadequate representation of the global south, especially BRICS countries (i.e., Brazil, Russia, India, China and South Africa), and their failure to react to the financial crises since 2007. The crucial International Monetary Fund (IMF) quotas and governance reform (foreseeing the redistribution of voting shares in favor of rising economies and the transformation of the executive board into

²⁷ Effectiveness and legitimacy are linked, because the normative and social legitimacy of international organizations flows on the one hand from *input* (from the member states which are themselves—for the better or worse—conceived as the a priori receptacles of legitimacy), and from *output* (from the effective and efficient performance of the organization’s tasks).

²⁸ See for a critique UN GA Res. 66/253, “The Situation in the Syrian Arab Republic B,” of August 3, 2012, “deploring the failure of the Security Council” to take enforcement action in Syria (Preamble and para. 9).

²⁹ “A More Secure World: Our Shared Responsibility,” Report of the High-level Panel on Threats, Challenges and Change, December 2, 2004 (UN Doc. A/59/565); “In Larger Freedom: Towards Development, Security and Human Rights for All,” Report of the Secretary-General, March 21, 2005 (UN Doc. A/59/2005).

³⁰ UN, SG Letter, “Report of the Panel on United Nations Peace Operations,” August 21, 2000 (UN Doc. A/55/305-S/2000/809) (the “Brahimi Report”); Secretary-General Letter, “A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations,” March 25, 2005 (UN Doc. A/59/710) (the “Zeid Report”).

³¹ Peter Sutherland et al., *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (Geneva: World Trade Organization, 2004).

³² OSCE, “Common Purpose—Towards a More Effective OSCE,” Final Report and Recommendations of the Panel of Eminent Persons on Strengthening the Effectiveness of the OSCE, June 27, 2005.

an all-elected board)³³ was in 2015 approved by the United States,³⁴ which has a blocking vote.³⁵ A related reform is the IMF's 2015 decision to include renminbi in the basket of currencies that make up the Special Drawing Right.³⁶ It remains to be seen whether China and other emerging economies will be satisfied with these measures, or will choose to pursue their interest through new financial institutions.

Likewise, the initiative to improve the UNSC working methods by a group of small states³⁷ was blocked with the argument that this would have implications for Charter amendment.³⁸ Since 2013, a group of twenty-one states, the "Accountability, Coherence, and Transparency group," seeks to pursue the same objectives without formal amendments.

In practice, evolution and adaptation of organizations have occurred through the dynamic interpretation of the founding documents, through institutional practice (of the member states and/or of the organization's organs themselves), and through secondary law such as rules of procedure. Hence the only reforms realized within the UN, namely the abolishment of the Human Rights Commission, the establishment of the Human Rights Council in 2006, and the creation of the UN Appeals Tribunal for employment disputes were those that could be realized without a formal amendment of the UN Charter.

A prominent example of informal evolution of an organization is the North Atlantic Treaty Organization. Since at least 1999, the organization has regularly adopted new "strategic concepts" which have sometimes been criticized as veiled treaty amendments sidestepping the domestic (notably parliamentary) procedures for approving a formal amendment.³⁹ In legal terms, such changes may be qualified either as informal amendments, as overlaying customary law, or as acquiescence by the member states. But they may also be simply breaches of the founding document and thus unlawful. The fine line between legitimate and lawful evolution and unlawful mission creep may not be easy to draw.

³³ See IMF, Press Release No. 10/477, December 16, 2010.

³⁴ Sec. 9002 Public Law No. 114-113.

³⁵ For the quota reform to take effect, the amendment to the Articles providing for an all-elected Executive Board must be first approved. According to Art. XXVIII(a) of the Articles of Agreement, for the reform of the Executive Board to enter into force, acceptance by three-fifths of the Fund's 188 members having 85 percent of the Fund's total voting power is required. Because the US has (prior to the reform) 16.75 percent of total votes in the IMF, US approval of the amendment was required for both reforms to come into force.

³⁶ See IMF, Press Release No. 15/540, November 30, 2015.

³⁷ Draft Res. A/66 L.42/Rev.1 in the General Assembly "Enhancing the Accountability, Transparency and Effectiveness of the Security Council."

³⁸ The opinion given by the legal service is not public. The initiative was withdrawn from the General Assembly agenda on May 16, 2012.

³⁹ The German parliament therefore complained of a violation of its constitutional competences before the German Constitutional Court (BVerfGE 104, 151 (November 22, 2001))—without success.

New Public Management, Public–Private Partnerships, and Privatization

International organizations have further sought to improve internal and external effectiveness through new public management,⁴⁰ public–private partnerships,⁴¹ and outright privatization.

Regular reports of the UN Secretary-General give numerous examples for partnerships between business actors and UN sub-organizations or programs.⁴² Important policy areas for public–private partnerships are refugee management (involving the UN High Commissioner for Refugees)⁴³ and public health (involving the WHO).⁴⁴ Examples of “hybrid” public–private bodies are the World Anti-Doping Agency⁴⁵ and the Global Water Partnership.⁴⁶

Privatization⁴⁷ in a larger sense is the recourse to the forms of private law. For example, the Bank for International Settlements is a stock corporation under Swiss law; its members are not states but central banks. It has nevertheless been qualified as an international organization.⁴⁸ The European Financial Stability Facility is incorporated in Luxembourg as a public limited liability company (“société anonyme”) under the law of Luxembourg.⁴⁹ Privatization in the proper sense has so far only occurred with organizations of satellite telecommunication: The previously intergovernmental organizations INTELSAT, EUTELSAT, and INMARSAT were dissolved around the turn of the twentieth century, and their activities are since then run by private business enterprises.

⁴⁰ The main case is the World Health Organization (WHO), also the World Intellectual Property Organization and the International Trade Organization. See Laurance R. Geri, “New Public Management and the Reform of International Organizations,” *International Review of Administrative Sciences* 67 (2001): 445–60.

⁴¹ A “Global Compact LEAD Task Force on United Nations-Business Partnerships” was created in 2011.

⁴² Most recently GA, “Enhanced Cooperation between the UN and All Relevant Partners, in Particular the Private Sector”, Report of the Secretary-General (UN Doc. A/68/326), August 15, 2013.

⁴³ See High Commissioner for Refugees, “Partenariat: Un manuel pour la gestion des opérations pour les partenaires du HRC” (2004).

⁴⁴ See, for example, the Joint United Nations Program on HIV/AIDS and the “m-Health” partnership between the International Telecommunication Union, the WHO, and the private sector.

⁴⁵ Lorenzo Casini, “Global Hybrid Public–Private Bodies: The World Anti-Doping Agency (WADA),” *International Organizations Law Review* 6 (2009): 421–46.

⁴⁶ “Global Water Partnership,” <http://www.gwp.org/>.

⁴⁷ See Régis Bismuth, “La Privatization des organisations internationales,” in *Droit des Organisations Internationales*, ed. Evelyne Lagrange and Jean-Marc Sorel (Paris: LGDJ, 2013), 192–8.

⁴⁸ Partial Award on the lawfulness of the recall of the privately held shares on January 8, 2001 and the applicable standards for the valuation of the shares, of November 22, 2002, paras. 104–18, in *Bank for International Settlement Arbitration Awards*, ed. Permanent Court of Arbitration (The Hague, 2003), 19–126.

⁴⁹ Founded June 7, 2010.

The integration of the private (commercial) sector into policymaking by international organizations, notably the UN, and the “privatization of UN mechanisms” have been a “quiet revolution ... largely off the radar of legal scholarship”.⁵⁰ The price of more flexibility and more effectiveness-orientation of novel formats may well be losses in terms of accountability: the principle of legality risks being undermined, and the attribution of competences and responsibilities risks might become blurred. It has now been realized that the conflicting objectives of more effective action and impact-orientation must be balanced against securing a sufficient degree of accountability.

THE ACCOUNTABILITY OF INTERNATIONAL ORGANIZATIONS: LAW AS A CONSTRAINER

The focus of contemporary legal thought on international organizations has shifted from constituting and enabling organizations to constraining them. The reasons seem to be both the real increase of power and intrusiveness of the organizations and changes in perception.⁵¹

Legitimacy Crisis and Lack of Accountability

International organizations are no longer seen as the good guys of global governance which produce global public goods that states alone cannot furnish. Instead, there is a “growing awareness of the *internal pathologies and ideological biases* of the most dominant international institutions.”⁵²

⁵⁰ Barbara K. Woodward, *Global Civil Society in International Law-Making and Global Governance* (Leiden: Martinus Nijhoff, 2010), 401–2.

⁵¹ Jan Klabbers, “The Changing Image of International Organizations,” in *The Legitimacy of International Organizations*, ed. Jean-Marc Coicaud and Veijo Heiskanen (Tokyo: United Nations University Press, 2001), 221–55. Klein and Sands, “(Re)Writing a Handbook on the Law of International Organizations,” 221: “The tremendous increase of powers of international organizations, ... has not been matched by a parallel development of mechanisms of control and accountability, including in relation to individuals.” See for an overview over criticism and challenges José Alvarez, “International Organizations: Then and Now,” *American Journal of International Law* 100 (2006): 324–47.

⁵² Richard Collins and Nigel White, “Moving Beyond the Autonomy–Accountability Dichotomy: Reflections on Institutional Independence in the International Legal Order,” *International Organizations Law Review* 7 (2010): 1–8, 2.

For example, the International Criminal Court (ICC) has been reproached for being a neocolonial instrument. Rwanda said in the UNSC: “It is unfortunate that the ICC will continue to lose face and credibility in the world as long as it continues to be used as a tool for the big Powers against the developing nations.”⁵³ The refusal of various African states to surrender the Sudanese President Al Bashir to the ICC was justified by the African Union by denouncing “ill-considered, self-serving decisions of the ICC” and “double standards that become evident from the investigations, prosecutions and decisions by the ICC relating to situations in Africa.”⁵⁴

Against the background of the “crisis” of international organizations,⁵⁵ the new buzzword is “accountability.”⁵⁶ The functionalist paradigm has proven incapable of accommodating this concern, because it focuses exclusively on the relationship between the organization and its member states (the “shareholders”). Functionalism is thus inherently unsuited to take note of the interests of affected outsiders (“stakeholders”), notably of natural persons (citizens of member and of nonmember states).⁵⁷ Also, the focus on functions and therewith on the organizations’ goals and objectives tends to lend acceptance to the idea that the ends justify the means. There is little or no room for the rule of law, for checks and balances, and for legal constraints.⁵⁸ Taken together, both features of functionalism result in the theory’s neglect of accountability of the organization, especially as far as external stakeholders are concerned. This neglect has triggered the rise of a renewed constitutionalism and of global administrative law.

⁵³ UNSC, 7060th Meeting “Peace and Security in Africa,” November 15, 2013 (UN Doc. S/PV.7060), 11; see also the statement of Kenya, 14.

⁵⁴ African Union, Press Release No. 002/2012 “On the decision of the PTC I of the ICC pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to comply with the cooperation requests issued by the court with respect to the arrest and surrender of President Omar Hassan Al Bashir of the Republic of Sudan” of January 9, 2012, 3.

⁵⁵ See for a nuanced picture Gabrielle Marceau, “IGOs in Crisis? Or New Opportunities to Demonstrate Responsibility?,” *International Organizations Law Review* 8 (2011): 1–13.

⁵⁶ “Accountability” is best defined as “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.” (Mark Bovens, “Analysing and Assessing Accountability: A Conceptual Framework,” *European Law Journal* 13 (2007): 447–68, 450).

⁵⁷ Klabbers, “The EJIL Foreword,” 10, has aptly called this the “blind spot” of functionalism.

⁵⁸ Cf. Mitrany, *A Working Peace System*, 44: “Authority would derive from the performance of a common task and would be conditioned by it, and not from the possession of a separate ‘right.’” Ibid., 55: “Promissory Covenants and Charters may remain a headstone to unfulfilled good intentions, but the functional way is action in itself, and therefore an inescapable test of where we stand and how far we are willing to go in building up a new international society.”

Constitutionalism 2.0 and Global Administrative Law

Constitutionalism 2.0. is no longer focused on the constitutive and enabling function of constitutional law, but rather on its constraining and checking function. With regard to the WTO, for example, constitutionalism now focuses on the need for the WTO-regime to integrate nontrade concerns, including the protection of human rights, labor rights, environmental concerns, and animal welfare.⁵⁹

In the UN, the Security Council is in the center of attention.⁶⁰ The activation of the Council's legal authority to impose binding measures after 1991 triggered the demand for controlling the Council's powers. In this context, the topos of constitutional bounds emerged with the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) by the Security Council. In a section of the *Tadić* jurisdiction decision entitled "Question of constitutionality," the Appeals Chamber examined whether Chapter VII, notably Article 39 of the UN Charter, could form a legal basis of the tribunal. It emphasized that the UNSC is subject to the principle of legality, and is not a purely political organ. It is not *legibus solutus*.⁶¹ In contrast, the Special Tribunal for Lebanon insisted that UNSC decisions under Chapter VII are "the sole and exclusive prerogative" of the Council, and are "essentially political in nature, and as such not amenable to judicial review."⁶² Whichever view one follows, it remains true that constitutional limits of UNSC action are barely enforceable; in any case, no judicial action is available against the Council as such.

Furthermore, the Council's quasi lawmaking resolutions on financing terrorism (Res. 1373) and on weapons of mass destruction (Res. 1540) provoked the question whether that body possessed not only "police"-powers but also lawmaking competences. That issue triggered a debate on the separation of powers within the organization—a constitutionalist institution which ultimately seeks to contain power, too.

The most intense debate on constraining and checking the UNSC was triggered by the targeted sanctions imposed indirectly by the Council on terror suspects and politically exposed persons by ordering member states to freeze their assets and prohibit them from traveling. These sanctions risk infringing procedural fundamental rights of targeted persons, depriving them of judicial review. The policy, which was actually devised to avoid the large-scale human rights problems posed by sanctions

⁵⁹ Thomas Cottier, "Limits to International Trade: The Constitutional Challenge," in *International Law in Ferment: A New Vision for Theory and Practice, Proceedings of the 94th Annual Meeting*, ed. The American Society of International Law (Washington DC: ASIL, April 5–8, 2000), 220–2, 221.

⁶⁰ Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Leiden: Martinus Nijhoff, 2009).

⁶¹ ICTY, case No IT-94-1-AR72, *Prosecutor v Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Appeals Chamber of October 2, 1995, paras. 26–8.

⁶² Special Tribunal for Lebanon, *The Prosecutor v Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, Assad Hassan Sabra* (STL-11-01/PT/AC/AR90.1), Decision on the Defence Appeals against the Trial Chamber's Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal, October 24, 2012, para. 52.

against entire states, gave rise to a constitutional confrontation between the UN and European institutions. In *Kadi*, the ECJ insisted on upholding its regional constitutional human rights standard protecting targeted persons.⁶³ The ECtHR on two occasions found that Switzerland, in implementing targeted sanctions, violated its obligations arising from the European Convention on Human Rights (ECHR).⁶⁴ In result, UN member states remain caught between the obligation to carry out UNSC decisions under Article 25 of the UN Charter and the obligation to respect international or regional human rights guarantees.

The third paradigm besides functionalism and constitutionalism, which is global administrative law (GAL),⁶⁵ has likewise been triggered by the perception of an accountability deficit in the exercise of power by international organizations. These are only one type of “global administration.”⁶⁶ The scope of GAL is thus broader than the traditional law of international organizations to the extent that it covers both international and national, both public and private law, both hard (“formal”) and soft (“informal”) norms, and all bodies operating with reference to these norms.⁶⁷

Although proponents agree that “administrative law ... is everywhere concerned with the *double task of empowering public authorities and controlling the bureaucratic behavior*,”⁶⁸ the second aspect, the constraining function of the law, constitutes the core of GAL as a normative project, with help of the concept of accountability.⁶⁹

⁶³ ECJ, cases C-420/05P and C-415/05P, *Kadi and Al Barakaat*, judgment of the Court (Grand Chamber), ECR 2008 I-06351, especially paras. 281–2, 316, 326.

⁶⁴ ECtHR (Grand Chamber), *Nada v Switzerland*, No. 10593/08, September 12, 2012, especially paras. 169–7: violation of Art. 8 ECHR; ECtHR, *Al-Dulimi and Montana Management, Inc. v Switzerland*, No. 5809/08, Grand Chamber judgment of 21 June 2016: the Swiss Federal Tribunal’s refusal to scrutinize the merits of Al-Dulimi’s complaint (with a view to Art. 103 UN Charter) had undermined the very essence of Art. 6 ECHR.

⁶⁵ Benedict Kingsbury, Nico Krisch, and Richard Stewart, “The Emergence of Global Administrative Law,” *Law and Contemporary Problems* 68 (2005): 15–61; Sabino Cassese, “Administrative Law without the State? The Challenge of Global Regulation,” *New York University Journal of International Law and Politics* 37 (2005): 663–94. See also Clémentine Bories (ed.), *Un Droit administratif global?* (Paris: Pedone, 2012); “Symposium: Through the Lens of Time: Global Administrative Law after 10 Years,” *International Journal of Constitutional Law* 13 (2015): 463–506.

⁶⁶ From the perspective of GAL, the “global administrative” space is further populated by hybrid public–private organizations and private bodies exercising public functions, by transgovernmental and transnational networks, and by “hybrid, multi-level, or informal global regulatory regimes”, with all types possibly combined and overlapping (Lorenzo Casini, “Beyond Drip-Painting? Ten years of GAL and the Emergence of a Global Administration,” *International Journal of Constitutional Law* 13 (2015): 473–7, 475).

⁶⁷ The proponents of the related “international public law-approach” however concentrate on “public” law (Armin von Bogdandy, Matthias Goldmann, and Ingo Venzke, *From Public International to International Public Law* (forthcoming)).

⁶⁸ Giulio Napolitano, “Going Global, Turning Back National: Towards a Cosmopolitan Administrative Law?,” *International Journal of Constitutional Law* 13 (2015): 482–5, 485 (emphasis added). See also Eberhard Schmidt-Aßmann, “Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen,” *Der Staat* 45 (2006): 315–38, 342 (“dual task”).

⁶⁹ See Cassese, “Administrative Law without the State?,” 688; Ludovic Hennebel, “Penser le droit administratif global,” in *Un Droit administratif global*, ed. Clémentine Bories (Paris: Pedone, 2012),

A main research question concerns “institutional design issues as to how such mechanisms should be designed in order to ensure accountability without unduly compromising efficacy.”⁷⁰

The paradigm of GAL is sometimes seen as competing with global constitutionalism, especially when portrayed as being bottom-up, empirically grounded, more fine-tuned, and politically neutral—in contradistinction to global constitutional law.⁷¹ The better view is however that contemporary global administrative law and global constitutional law complement each other and share the same normative ambition and a similar liberal assumption of the priority of individual self-determination which has to be reconciled with the global public interest but not subdued by it.⁷² In particular, the allegation of a “technical” and “neutral” character of the administrative law approach seems to be as misleading as this allegation had been with regard to functionalism, by simply veiling the political aspects of global law and decision-making. Global constitutionalism may have the merit of making it more explicit that all governance arrangements carry with them political aspects, and also that political decisions are indeed necessary. This is especially salient in times of heightened political tension worldwide.

Accountability to Whom?

An important question is to whom the organizations are and should be accountable. A different way of posing the same question is to identify the “subjects” of a given organization’s legal order, the rightful “principals” of the organization, or to speak of its “stakeholders.”

The traditional position is that organizations are exclusively accountable to their member states which in turn represent their people. Put differently, the “subjects” of the organization’s legal order are the member states; they are—in a principal–agent paradigm—the “principals.” A WTO panel expressed the idea by saying that “the GATT/WTO did *not* create a new legal order the subjects of which comprise both contracting parties or members and their nationals.”⁷³

The traditional view does not negate the principle that—ultimately—the organizations should serve human needs and interests. However, individuals are

79; Richard B. Stewart, “The Normative Dimensions and Performance of Global Administrative Law,” *International Journal of Constitutional Law* 13 (2015): 500; Casini, “Beyond Drip-Painting?” 474.

⁷⁰ Kingsbury, Krisch, and Stewart, “The Emergence of Global Administrative Law,” 18.

⁷¹ See, e.g., Stewart, “The Normative Dimensions and Performance of Global Administrative Law,” 506.

⁷² Mario Savino, “What if Global Administrative Law Is a Normative Project?” *International Journal of Constitutional Law* 13 (2015): 492–8.

⁷³ WTO Panel, *US—Section 301–310 of the Trade Act of 1974*, WT/DS152/R (January 27, 2000), not appealed, para. 7.72.

assumed to be entirely and properly “mediated” by their states in international organizations. The problem is that this “mediation” does not convey accountability. As far as *democratic* accountability to natural persons is concerned, three deficits stand out: First, there is no chain of election and recall running from citizens through their governments to the state delegates which will take the political decisions in the various forums of the organizations. Second, many member states of international organizations do not allow for free elections of their governors, and cannot claim to act for their citizens in a democratic sense. Finally, the actions and omissions of many international organizations regularly produce externalities (military, economic, or financial consequences) for persons who are not citizens of member states and thus not represented by them. For these reasons, it is impossible to qualify the governance of international organizations—as exercised now—as democratically accountable to natural persons.

The *judicial* accountability of the organizations to natural persons is minimal as well. The openings for individuals to institute judicial or administrative-type complaints against organizations whose actions or omissions affects their lives are extremely scarce (see “Access to Justice,” later in this chapter). The necessity for natural persons to ask their nation state for action against the organization renders the individuals hostage to considerations of high politics and often leaves them without redress.

On the premise that the ultimate principals of international organizations are indeed human beings, the insight that the funneling of accountability through the member states does not function very well leads to the quest for additional accountability forums which can be accessed by aggrieved individuals independently from member states.⁷⁴ In the law as it stands, this quest for a direct accountability to individuals has been unequivocally accepted only by the EU. The ECJ in its seminal judgment *Van Gend & Loos* stated that the “subjects” of the Community legal order “comprise not only member states but also their nationals.”⁷⁵ This legal construct could and should be extended to other organizations. Along this line, scholarship has demanded that “the exclusive link with member states must be broken, in that international organizations have many constituencies, all of which can make justifiable demands concerning both the everyday guidance and its accountability.”⁷⁶ A host of questions remain about the design of accountability schemes, and about the delimitation of the circle of “stakeholders,” notably beyond the citizens or residents of a given organization’s member states.

⁷⁴ Anne Peters, “The Constitutionalisation of International Organisations,” in *Europe’s Constitutional Mosaic*, ed. Neil Walker, Jo Shaw, and Stephen Tierney (Oxford: Hart, 2011): 264–6.

⁷⁵ ECJ, case 26/62, *Van Gend & Loos*, ECR 1963, 3 under II.B. The Court recently repeated that statement with a view to fending off the protocol on accession of the EU to the ECHR (ECJ, Opinion 2/13 of the Court (Full Court) December 18, 2014—*Accession to the ECHR*, para. 157).

⁷⁶ Klabbers, “The EJIL Foreword,” 81.

Against which Standards?

Accountability means to hold an actor to account against a benchmark. From a legal perspective, this benchmark is the law. The recognition that international organizations are governed by the *rule of law* and therefore bound by law is thus an important step toward strengthening their accountability. In the 2012 Declaration of the high-level meeting of the UN General Assembly (GA) on the rule of law at the national and international levels, the Heads of State and Government solemnly recognized that “the rule of law applies ... to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions.”⁷⁷ The *Tadić* Tribunal highlighted this, too, with regard to the UNSC.⁷⁸

The next question is *which law* binds international organizations and poses material legal limits on their action. It is clear that international organizations are “bound by any obligations incumbent upon them under general rules of international law,” as the ICJ put it.⁷⁹ But it remains an open question which rules exactly and when they are “incumbent *upon them*.” Schermers and Blokker opine that international organizations are “in principle” bound by customary international law, unless the concrete rule is not “suitable” for application to international organizations.⁸⁰ It must therefore always be examined which norms are “suitable.”

This is particularly important with regard to human rights norms. Traditionally, human rights had been addressed only to states as obligors, while international organizations did not constitute a threat to human rights. This changed with the UNSC’s comprehensive economic sanctions against Iraq (1991–2003) which affected notably social rights of the Iraqi population.⁸¹ Once an empowered organization risks infringing human rights, and in line with the idea that international organizations should *also* be accountable to natural persons (see “Accountability to Whom?” earlier in this chapter), the question arises whether and how an organization or its organs should be made to respect human rights, too.

Because international organizations are not parties to the relevant treaties, they are not formally bound by them. As far as independent customary human rights law is concerned, it is not clear whether and which obligations (to respect, fulfill,

⁷⁷ Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, A/RES/67/1 of September 24, 2012, para. 2.

⁷⁸ ICTY, *Tadić*, paras. 26–8.

⁷⁹ ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, 73, para. 37.

⁸⁰ Henry G. Schermers and Niels M. Blokker, *International Institutional Law*, 5th ed. (Dordrecht: Martinus Nijhoff, 2011), § 1579.

⁸¹ Frédéric Mégret and Florian Hoffmann, “The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibility,” *Human Rights Quarterly* 23 (2003): 314–42.

or protect some or all human rights) have been extended to (which?) organizations as additional duty-holders through practice and legal opinion. Even if direct (customary) human rights obligations of international organizations are denied, it is meanwhile generally acknowledged that the organizations' founding documents must be interpreted so as to take into account human rights (Art. 31(3) lit. c) of the Vienna Convention on the Law of Treaties). An evolution of the law in the direction of human rights obligations of international organizations is most welcome as an appropriate response to their increased potential to curtail human dignity and liberty.⁸²

Through which Procedures?

The Procedural Triad

The law of international organizations has begun to shape out a *triad of international procedure*, consisting in access to information (transparency), participation, and access to justice. In international environmental law, these three procedural elements have been imposed not only on states (by the Aarhus Convention of 1998)⁸³ but—what matters for our context—also on international organizations by the Almaty Guidelines of 2005.⁸⁴ Starting from there, there is arguably a customary rule that “in environmental matters” all international organizations (including bodies, forums, and conferences) must be transparent, must allow for participation of members of the public, and grant access to justice.

I submit that this triad, having the merit of already being anchored in international law as it stands, can from this point of departure be realistically and appropriately further fleshed out as a more general procedural framework for implementing and improving the accountability of international organizations. This is in line with

⁸² Société française pour le droit international, *La Soumission des organisations internationales aux normes internationales relatives aux droits de l'homme* (Paris: Pedone, 2009); Jan Wouters et al. (eds.), *Accountability for Human Rights Violations by International Organisations* (Cambridge: Intersentia, 2010); Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Accountability of International Organisations for Human Rights Violations*, Report by José Maria Beneyto, Doc. 13370, December 17, 2013; for the UN, see Anne Peters, “Art. 25,” in *A Commentary to the Charter of the United Nations*, ed. Bruno Simma et al., 2nd ed. (Oxford: Oxford University Press, 2012), 787–854, paras 109–23.

⁸³ Aarhus Convention: Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted June 28, 1998, entered into force October 30, 2001) 2161 UNTS 447.

⁸⁴ UN Economic Commission for Europe, Report of the 2nd Meeting of the Parties to the Convention on Access to Decision-Making and Access to Justice in Environmental Matters held in Almaty, Kazakhstan, May 25–7, 2005, decision II/4 entitled Promoting the Application of the Principles of the Aarhus Convention in International Forums, ECE/MP.PP/200572/Add.5, June 20, 2005.

various scholarly approaches,⁸⁵ ranging from global administrative law⁸⁶ over the International Law Association's (ILA) report of 2004 on the accountability of international organizations,⁸⁷ to the nongovernmental organization (NGO) project "One World Trust" which examines the accountability not only of international organizations but also of NGOs and business actors against transversal "dimensions", including transparency, participation, and complaints handling.⁸⁸

Access to Information/Transparency

Access to information (the term used in the Aarhus Convention) is roughly synonymous with transparency. A scheme or culture of access to information/transparency means that relevant information (on law and politics) is available or accessible.⁸⁹

With regard to the governance activities of international organizations, the objects of transparency (i.e., what is and should be made transparent) are the institutions, the procedures, the meetings, and documents. Depending on the objects, we might speak of the documentary, decision-making, and operational transparency of a given organization.⁹⁰

Transparency is a *conditio sine qua non* both for *critique* of an organization and for an informed *consent* to its activities. Both member states and outsiders, including affected individuals, will only be able to assess the quality of the operations of an international organization and its impact on themselves if they possess sufficient information on those operations. Transparency thereby safeguards member state sovereignty and functions *as a surrogate* for the lack of democratic and judicial accountability in international organizations: "[T]he less directly accountable

⁸⁵ Thomas D. Zweifel, *International Organizations and Democracy: Accountability, Politics, and Power* (Boulder: Lynne Rienner, 2006) identifies seven "indicators of democracy": appointment, participation, transparency, reason-giving, overrule, monitoring, and independence (especially 25). Applying them, only two of the international organizations examined by the author have a positive "democracy score": the EU and the ICC (176–7).

⁸⁶ Kingsbury, Krisch, and Stewart, "The Emergence of Global Administrative Law," 37–9, identify as relevant principles transparency, participation, and review; similarly Cassese, "Administrative Law without the State?," 690–1.

⁸⁷ International Law Association, First Report on the Accountability of International Organizations, Report of the 71st Conference held in Berlin, August 16–21, 2004. The report recommended, inter alia, transparency and access to information, "participatory decision-making processes," and "supervision and control." It proposed additional principles such as constitutionality, institutional balance, stating reasons, procedural regularity, and impartiality.

⁸⁸ Robert Lloyd, Shana Warren, and Michael Hammer, *One World Trust, 2008 Global Accountability Report*, <http://www.oneworldtrust.org>.

⁸⁹ Cf. Art. 4(1) of the Aarhus Convention (see n. 83). The related concept of "publicity" denotes the fact that such information is actually accessed.

⁹⁰ Luis Hinojosa Martínez, "Transparency in International Financial Institutions," in *Transparency in International Law*, ed. Andrea Bianchi and Anne Peters (Cambridge: Cambridge University Press, 2013), 77–111, especially 80.

a governmental agency is to the public, the more important it is that its actions be open and transparent.”⁹¹ While transparency is to some extent only an *ersatz* tool, it is a necessary one, because it replaces, in a global and pluralistic political space, the unattainable certitude and conviction about the “right” international law and policy through a procedural device allowing everyone to form his own opinion on matters of governance by international organizations. Overall, while transparency policies may sometimes be useless or even counterproductive, they more often seem to be “a reasonable initial step”⁹² toward improving the accountability of international organizations. It is therefore laudable that more organizations grant access to their documents to outsiders under certain conditions.⁹³ Another type of transparency concerns personnel matters. For example, the UN General Assembly recently set in motion a novel process of selection of the Secretary-General which “shall be guided by the principles of transparency and inclusiveness.”⁹⁴ The various moves toward transparent procedures and access to information might give rise to an international legal principle of transparency in the law of international organizations, possibly in the sense that the refusal to release documents requires a justification.⁹⁵

Participation

As an element of accountability, the concept of “participation” relates to civil society organizations or NGOs⁹⁶ which formulate and defend specific public interests (albeit without being legitimized through formal elections and rarely controlled by formal accountability mechanisms). In a different line of thought (the New Haven school), the concept of “participant” denotes a status transcending the traditional dichotomy of subjects and objects of international law. Qualifying NGOs as “participants” in the international legal process points notably to their role in the elaboration of “secondary” hard and soft law in forms of decisions, rules, or programs.⁹⁷

⁹¹ Joseph Stiglitz, “On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life,” in *Globalizing Rights, The Oxford Amnesty Lectures 1999*, ed. Matthew J. Gibney (Oxford: Oxford University Press, 1999), 155.

⁹² Cf. Virginia Haufler, “Disclosure as Governance: The Extractive Industry Transparency Initiative and Resource Management in the Developing World,” *Global Environmental Politics* 10 (2010): 53–73, 70.

⁹³ See, e.g., the World Bank Policy on Access to Information, July 1, 2010; Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of May 30, 2001 Regarding Public Access to Documents, OJ 2001 No. L145/43, May 31, 2001.

⁹⁴ GA Res. 69/321 “Revitalization of the work of the General Assembly,” September 11, 2015, para. 34; Joint letter of the Presidents of the General Assembly and the Security Council to all Member States to invite candidates, 15 Dec 2015.

⁹⁵ Anne Peters, “Towards Transparency as a Global Norm,” in *Transparency in International Law*, ed. Andrea Bianchi and Anne Peters (Cambridge: Cambridge University Press, 2013), 583–6.

⁹⁶ NGOs lack a generally accepted definition in international law. See for a characterization Council of Europe 2002, “Fundamental Principles on the Status of Non-governmental Organisations in Europe and Explanatory Memorandum,” November 13, 2002.

⁹⁷ See Woodward, *Global Civil Society*, 253–334, diagnosing “declining opportunities for NGO influence within the UN system” (*ibid.*, 401). In contrast, the *enforcement* of international law, by means of

Increasing involvement of NGOs, and their accommodation and promotion by new accreditation schemes and new rules of procedure in organizations and conferences (mainly during the reform era of 1990–2005)⁹⁸ rendered the idea of NGO “observation” obsolete. It has now become usual to speak of a “participatory status,” such as in the new Council of Europe rules,⁹⁹ or of “cooperative” or “official working relations” with the civil society organizations, as foreseen in the Organization of American States (OAS).¹⁰⁰ This paradigm change did not in itself add new rights or privileges for NGOs, but (only) implied a shift in the working method toward an enhanced dialogue, and toward a certain reliance on self-policing of NGOs.¹⁰¹

Short of a customary right to or a general principle of participation,¹⁰² NGOs may today rely on a legitimate expectation of participation, which can, for practical reasons, materialize only through some form of prior screening and admission, often called “accreditation” by the organizations (and by bodies such as Conferences of the Parties (COPs) and committees).

Importantly, the WTO¹⁰³ and the UN as a whole do not even possess a general accreditation scheme, a lacuna which makes NGO participation in those organizations more ad hoc-ish and limited. Within the UN, NGOs can be accredited to the Economic and Social Council (ECOSOC),¹⁰⁴ whose accreditation procedure has been a model for numerous

international judicial or arbitral proceedings, by international compliance bodies (treaty monitoring and verification) normally serves to control states, not international organizations. The participation of NGOs in such proceedings (especially in the area of international human rights and environmental law) through the conferral of a *locus standi* (or the power to trigger noncompliance proceedings), the admission of an *actio popularis*, of NGO *amicus curiae* briefs, shadow reports by NGOs to treaty bodies, and other means for feeding information into compliance control mechanisms will therefore not be dealt with here.

⁹⁸ See, besides the mentioned organizations: World Bank, Consultation with civil society organizations, general guidelines for world bank staff (2000); WHO, Policy for relations with nongovernmental organizations, Report by the Director-General, April 14, 2003, A56/46; African Union (AU), Statute of the Economic, Social and Cultural Council of the African Union (ECOSOCC), approved by the Assembly, Decision on ECOSOCC of July 8–9, 2004, Assembly/AU/Dec.48(III) Rev.1.

⁹⁹ Council of Europe, Participatory Status for International Non-Governmental Organizations with the Council of Europe, Res. (2003) 8, November 19, 2003, adopted by the Committee of Ministers at the 861st Meeting of the Ministers’ Deputies.

¹⁰⁰ Permanent Council of the Organization of American States, Review of the Rules of Procedure for Civil Society Participation with the OAS, March 31, 2004, CP/CISC-106/04.

¹⁰¹ Emanuele Rebasti, “Beyond Consultative Status: Which Legal Framework for an Enhanced Interaction between NGOs and Intergovernmental Organizations?,” in *NGOs in International Law: Efficiency and Flexibility*, ed. Pierre-Marie Dupuy and Luisa Vierucci (Northampton: Edward Elgar, 2008), 21–70, 59.

¹⁰² Steve Charnovitz, “Nongovernmental Organizations and International Law,” *American Journal of International Law* 100 (2006): 348–72; Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007), 57; ILA, Second Report of the Committee, “Non-State Actors in International Law: Lawmaking and Participation Rights” (2012).

¹⁰³ See for the WTO the Guidelines for arrangements on relations with Nongovernmental Organizations, WT/L/162, Decision of July 18, 1996; Pieter van den Bossche, “NGO Involvement in the WTO: A Comparative Perspective,” *Journal of International Economic Law* 11 (2008): 717–49.

¹⁰⁴ See ECOSOC 1996, Res. 1996/31—Consultative Relationship between the United Nations and Non-Governmental Organizations (UN Doc. A/RES/1996/31), 49th Plenary Meeting of July 25, 1996.

other international bodies. NGO involvement with the Security Council¹⁰⁵ remains selective, but seems to have become prevalent with the General Assembly.¹⁰⁶

The current procedural provisions on NGO participation typically comprise the following elements: NGOs must receive prior notification of meetings and agenda items, they must be automatically and continuously admitted to meetings, they have the option to distribute documents, and they are allowed to speak upon explicit permission.¹⁰⁷ In any case, all procedural elements only give a *voice and no vote* to (accredited) NGOs in the lawmaking and law-applying proceedings of international organizations. By raising their voice, NGOs can contribute to holding international organizations to account.

Access to Justice

A core element of accountability is legal responsibility for internationally wrongful acts. The International Law Commission's 2011 Draft Articles on the Responsibility of International Organizations (DARIO)¹⁰⁸ provide a framework for this, although they are more a progressive development than codification of extant customary law, and are not binding as such. It is an open question to what extent the Articles will be relied on in practice.

In order to generate real accountability, the international responsibility of international organizations (which comprises, e.g., the obligation to cease and not to repeat an unlawful behavior, and the obligation to make reparation for the injury including material and moral damages) needs to be identified and implemented. This task normally falls on courts and tribunals. Access to justice is therefore an important building block for securing accountability.

Again, the question is *who* should get such access. As far as states are concerned, normally no international court is available to them for suing an organization of which they are a member (the EU is the exception).¹⁰⁹ This scheme manifests the

¹⁰⁵ Since 1992, the UNSC admits NGO input in informal meetings of Council members under the so-called Arria formula.

¹⁰⁶ The UN GA Res. 70/1: "Transforming Our World: The 2030 Agenda for Sustainable Development" of September 25, 2015 was elaborated with NGO and stakeholder input through all stages since 2012 (Rio+20), beginning with the "Open Working Group on Sustainable Development Goals." Civil society organizations could contribute to the sustainable development goals in "thematic clusters"; a "stakeholder preparatory forum for the post-2015 development agenda negotiations" was held on January 16, 2015. The summit itself (in September 2015) encompassed "interactive dialogues" (basically intergovernmental but with stakeholder participation), "informal interactive hearings" with stakeholders, and an NGO key-note speaker in the plenary (cf. UN GA Res. 69/44 of December 29, 2014, containing the blueprint for the summit of September 2015).

¹⁰⁷ Anne Peters, "Membership in the Global Constitutional Community," in *The Constitutionalization of International Law*, ed. Jan Klabbers, Anne Peters, and Geir Ulfstein (Oxford: Oxford University Press, 2009/2011), 154–262, 225–7 with further references.

¹⁰⁸ See n. 1.

¹⁰⁹ Art. 263 of the Treaty on the Functioning of the European Union (TFEU): an annulment action can be instituted by member states.

view that the members, the “masters” of the organization, can *ab initio* control “their” organization by other means and do not need judicial protection against it.

But access to justice is crucially important for outsiders, notably natural persons. Here we face a legal gap. Outside the EU, no international courts before which individuals, beyond staff for labor issues, could institute judicial proceedings against international organizations or their organs exist.¹¹⁰

In some other organizations, only much weaker complaint mechanisms, short of judicial remedies, have recently been offered to natural persons or groups. The World Bank established an inspection panel in 1993.¹¹¹ Groups of two or more complainants who believe their rights are violated by projects funded by the World Bank may request an inspection. The Inspection Panel then examines whether the Bank has failed to follow its operational policies and relevant agreements with respect to the design, appraisal, and/or implementation of a project financed by the Bank and thus has had a material adverse effect on the rights or interests of the complainants.

Furthermore, two different institutions exist to monitor compliance with human rights standards by the two principal international actors in Kosovo. First, the UN Mission in Kosovo (UNMIK) is monitored by the UNMIK Human Rights Advisory Panel¹¹² which began its work in 2007.¹¹³ Second, the European Union Rule of Law Mission in Kosovo (EULEX) is reviewed by the Human Rights Review Panel (HRRP) in Pristina (operational since 2010).¹¹⁴ The benchmark for review to be applied by HRRP (its “accountability concept”) is not fully clear. It forms part of EULEX’s Operational Plan.¹¹⁵ But the relevant EU Council Joint Action states that EULEX Kosovo shall “ensure that all its activities respect international standards concerning human rights and gender mainstreaming.”¹¹⁶

¹¹⁰ See, for a quite limited jurisdiction of the ECJ for complaints by other actors than member states, Art. 263(4) TFEU.

¹¹¹ International Bank for Reconstruction and Development and International Development Association: Res. No. IBRD 93-10; Res. No. IDA 93-6, “The World Bank Inspection Panel” of September 22, 1993; Updated Operating Procedures, April 2014, <http://ewebapps.worldbank.org/apps/ip/Pages/Panel-Operating-Procedures-Update.aspx>.

¹¹² <http://www.unmikonline.org/hrap>.

¹¹³ The legal basis for the Human Rights Advisory Panel is UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel of March 23, 2006, amended by UNMIK Regulation No. 2007/3 Amending UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Review Panel of January 12, 2007. Also relevant are the Administrative Direction No. 2009/1 Implementing UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel of October 17, 2009 (based on Art. 19 of Regulation No. 2006/12), and the Rules of Procedure of the Human Rights Advisory Panel (adopted by the Panel on February 5, 2008 and revised several times). See European Commission for Democracy through Law (Venice Commission) of the Council of Europe, Opinion on the Existing Mechanisms to Review the Compatibility with Human Rights Standards of Acts by UNMIK and EULEX in Kosovo, No. 545/2009, adopted at its 85th Plenary Session on December 17–18, 2010, CDL-AD(2010)051.

¹¹⁴ The Rules of Procedure were adopted on June 9, 2010.

¹¹⁵ See Annual Report Human Rights Review Panel 2014, 8, n. 1.

¹¹⁶ Art. 3(i) of the Council Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo of February 4, 2008.

Against the UNSC, individuals affected by targeted sanctions (but only in the 1267-regime, not for targeted sanctions under other resolutions of the UNSC) can turn to the Office of the Ombudsperson, which took up work in 2010.¹¹⁷ In 2011, the mandate of the Ombudsperson was expanded. In particular, the Ombudsperson may now make a recommendation on a delisting decision, from which the members of the Sanctions Committee may deviate only by consensus; otherwise, the recommendation becomes binding after sixty days or a shorter period.¹¹⁸ The Ombudsperson procedure for delisting is defined in Annex II of the Working Guidelines of the sanctions committee (latest version of 2013), including time periods.¹¹⁹ It is controversial whether this procedure is tantamount to a “*de facto* judicial review” and meets the demands of due process.¹²⁰

The situation is better for employees of the organizations.¹²¹ Internal complaint mechanisms in form of administrative tribunals have been improved in the past decade.¹²² But overall, accountability through access to justice against international organizations remains deficient. Notably the new rules on the international responsibility of organizations lack teeth in the absence of third-party dispute settlement and enforcement mechanisms against the organizations.

Restriction of Organizational Immunities

Given the scarcity of international forums to pass judgment on violations of international law by international organizations, should not national courts and tribunals step in? Traditional international law has basically prevented this through the institution of jurisdictional immunity, on the reasoning that domestic law suits risk disturbing the functioning of the organizations.¹²³ Meanwhile it is increasingly

¹¹⁷ UNSC Res. 1904 (2009), paras. 20–7. In 2010, the Secretary-General appointed the first Ombudsperson.

¹¹⁸ UNSC Res. 1989 (2011). The latest resolution is UNSC Res. 2253 (2015) which extended the Ombudsperson’s mandate until December 2019 (para. 54).

¹¹⁹ Security Council Committee pursuant to Resolutions 1267 (1999) and 1989 (2011) concerning al-Qaeda and associated individuals and entities, Guidelines of the Committee for the Conduct of its Work (adopted on November 7, 2002, as amended numerous times, last on April 15, 2013). Important points have been revised in 2011.

¹²⁰ See Watson Institute for International Studies and The Graduate Institute Geneva (ed.), *Due Process and Targeted Sanctions: An Update of the “Watson Report” by Sue Eckert and Thomas J. Biersteker* (Providence: Watson Institute, 2012) with a positive assessment (quote on 24).

¹²¹ See for an important case concerning the Director-General Bustani of the Organization for the Prohibition of Chemical Weapons, Administrative Tribunal of the International Labour Organization (ILOAT) judgment no. 2232 of July 16, 2003, 59th Session, especially consideration 16.

¹²² The IMF established an Administrative Tribunal in 1994; an EU Civil Service Tribunal was established in 2005; the UN Administrative Tribunal was transformed into a two-tiered system with a UN Appeals Tribunal in 2009.

¹²³ See text with n. 2.

acknowledged that too broad immunities might unduly shield the organizations (and member states hiding behind them) from being held properly to account for unlawful conduct.¹²⁴

Two strategies for improving accountability are especially relevant. First, the organizational immunity could be narrowed (e.g., to *acta imperii*, or by a functional necessity test or the like) and/or made subject to balancing against countervailing interests. The main objection against this strategy is that organizations are anyway only entitled to perform specific functions, so that their range of activities is already limited, and hence deserves and needs full protection. A related point is that, because the immunity of a concrete international organization flows not from customary law but (only) from international treaty law (normally from the founding document, headquarters agreement, or a convention on immunities), its extent varies according to the concrete instruments. Only some texts refer to “functions.” Where the relevant instruments grant “absolute” immunity, it seems difficult to discard or narrow this immunity with the help of restrictive interpretations alone without a formal amendment of the governing instrument.

The second strategy to improve the accountability of organizations would be to tie the conferral of jurisdictional immunity to the existence of an internal alternative means of dispute settlement within the organization itself. For the ECtHR, “a material factor in determining whether granting [an organization] immunity from [domestic] jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention,” notably the right of access to a tribunal, as guaranteed by Article 6 ECHR.¹²⁵ This requirement has been widely received in national courts’ decisions on immunity, has sparked the development of internal settlement mechanisms in organizations, and has thus improved the accountability of international organizations.¹²⁶ However, the requirement has in recent practice not been applied as a strict *quid pro quo* for immunity, or as a *conditio sine qua non* for qualifying the restriction of the human right of access to a tribunal as being proportionate. Quite to the contrary, the ECtHR granted immunity to the UN against complaints before Dutch courts which sought to hold the organization accountable for failure to protect Bosnian men and boys against Serb murderers in Srebrenica—despite

¹²⁴ See Anne Peters et al. (eds.), *Immunities in the Age of Global Constitutionalism* (Leiden: Brill Nijhoff, 2015), “Part Five: Immunities of International Organisations” (285–354); see also the special issue of *International Organizations Law Review* 10 (2013): 255–626; August Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford: Oxford University Press, 2013).

¹²⁵ ECtHR, *Beer and Regan v Germany*, App. No. 28934/95; and *Waite and Kennedy v Germany*, App. No. 26083/94, February 18, 1999, para. 68.

¹²⁶ Thore Neumann and Anne Peters, “Beer and Regan v Germany,” in *Judicial Decisions on the Law of International Organizations*, ed. Cedric Ryngaert et al. (Oxford: Oxford University Press, 2016), 392–405.

the fact that the UN had *not* made provision for “modes of settlement” as suggested by Article VIII sec. 29 of the Convention on the Privileges and Immunities of the UN.¹²⁷ Or, to give another example, the Swiss Federal Court granted immunity from execution to the Bank for International Settlements (BIS), although the BIS did not provide for any internal dispute settlement in that case.¹²⁸

Overall, the immunities of international organizations constitute a major obstacle for realizing legal accountability through judicial means. Because domestic judgments risk impeding the work of the organization and inevitably apply the relevant international law in an uneven and uncoordinated fashion, domestic institutions should serve as an accountability forum only as a last resort (*ultima ratio*), and only with the objective of inciting organizations to close the accountability gap themselves. In the end, organizations are well advised to waive their immunity or to offer internal settlement in order to garner the public support they need.

Democratic Lawmaking by International Organizations?

Accountability may be realized through law- and decision-making by majority vote, and through the appointment and recall of the holders of high governing positions by the governed themselves. In the national context, one would summarize the relevant procedures under the heading of democracy. On a more abstract level, the features of *alternativity* and *reversibility* have been highlighted as constituent features of a democratic law, and lawmaking by international organizations has been examined against this benchmark.¹²⁹

Obviously, neither the selection of governors nor the determination of the legal action taken by international organizations currently happens in a way which would satisfy high standards of democracy.¹³⁰ During the reform era of the 1990s and the first years of the new millennium, two strategies for the democratization of international organizations have been advocated: first, empowering parliamentary assemblies in international organizations and, second, liaising with national parliaments.

¹²⁷ ECtHR, *Stichting Mothers case*, paras. 139–65.

¹²⁸ Swiss Federal Tribunal, BGE 136 III 379 of July 12, 2010—*NML Capital Ltd v BIZ*, especially E. 4.3.–4.5. Article 23 of the Headquarters Agreement obliges the BIS to take the necessary steps to ensure the satisfactory settlement, but this clause does not apply to immunity from enforcement regarding assets confided to the Bank (Art. 4(4)).

¹²⁹ Isabelle Ley, “Opposition in International Law: Alternativity and Revisibility as Elements of a Legitimacy Concept for Public International Law,” *Leiden Journal of International Law* 28 (2015): 717–42; Antje von Ungern-Sternberg, *Demokratie und Völkerrecht* (Heidelberg: Springer, 2016), ch. 7 III.

¹³⁰ Anne Peters, “Dual Democracy,” in *The Constitutionalization of International Law*, ed. Jan Klabbers, Anne Peters, and Geir Ulfstein (Oxford: Oxford University Press, 2009), 263–341.

Parliamentary Assemblies in International Organizations

Parliaments are rare in international organizations.¹³¹ Notably important universal organizations such as the UN, the WTO, and the Bretton Woods institutions lack an institution which would represent the member states' parliaments or citizens. The two exceptions are the International Labour Organization, where employers' and workers' organizations participate, on an equal footing with governments and with a vote, in the elaboration of conventions and recommendations ("tripartism"), and the EU with its relatively strong European Parliament.

The assemblies of other international organizations, such as the Parliamentary Assembly of the Council of Europe (PACE) of the Council of Europe (CoE),¹³² are not comparable to state parliaments, because their members are not directly elected by citizens, they do not have lawmaking and budgetary powers, and they do not elect the organizations' quasi-"executive" branch.

The quest for establishing new parliamentary assemblies in international organizations such as the WTO¹³³ or the UN (a "world parliament" or "peoples' assembly")¹³⁴ in order to strengthen those organizations' democratic credentials currently has no political prospects of success; it remains a "pious wish."¹³⁵ Overall, the parliamentarization of international organizations does not seem to lead the way to democratic accountability.

Liaising with National Parliaments

A more moderate strategy which pays respect to the principle of subsidiarity is to involve national parliaments or their members with international organizations. One might question whether this "statist" track of democratization of international organizations is reconcilable with the organizations' aspiration for universality. After all, many of the member states do not have well-functioning parliaments. However, the democratization of states (on the national level) is an acknowledged objective of international law, and a settled UN policy. There is no contradiction

¹³¹ Stefan Marschall, *Transnationale Repräsentation in Parlamentarischen Versammlungen* (Baden-Baden: Nomos, 2005).

¹³² But see for the successful performance of the accountability functions of critique and control by the PACE which extends beyond the CoE: Isabelle Ley, "Opposition institutionalisieren: Alternativität und Reversibilität als Elemente eines völkerrechtlichen Legitimationskonzepts," *Der Staat* 53 (2014): 227–62, 247–53.

¹³³ See Gregory Shaffer, "Parliamentary Oversight of WTO-Rulemaking? The Political, Normative, and Practical Contexts," *Journal of International Economic Law* 7 (2004): 629–54.

¹³⁴ See the Campaign for the Establishment of a UN Parliamentary Assembly, <http://en.unpacampaign.org/index.php>. In scholarship, Richard Falk and Andrew Strauss, "Toward Global Parliament," *Foreign Affairs* 80 (2001): 212–20.

¹³⁵ Laurence Dubin and Marie-Clotilde Runavot, "Représentativité, efficacité, légitimité: des organisations internationales en crise?," in *Droit des Organisations Internationales*, ed. Evelyne Lagrange and Marc Sorel (Paris: LGDJ, 2013), 77–103, 90.

between bringing national parliaments into international organizations and serving an international membership.

With regard to the UN, notably the Cardoso Report of 2004¹³⁶ had—upon the invitation of the UN Secretary-General—recommended a four-pronged strategy which focused on national parliaments.¹³⁷ But its proposals were rejected by the General Assembly which instead emphasized the intergovernmental nature of the UN.¹³⁸

Since then, very modest progress has been made. The UN cooperates with national parliaments through the Inter-Parliamentary Union which is in turn an international organization of national parliaments.¹³⁹ A General Assembly resolution entitled “Interaction between the UN, National Parliaments and the Inter-Parliamentary Union”¹⁴⁰ *inter alia* “welcomes the practice of including legislators as members of national delegations to major United Nations meetings and events,”¹⁴¹ invites member states to take into consideration “facilitating a parliamentary component to major United Nations conferences,”¹⁴² and “encourages the United Nations (...) to develop closer cooperation with the United Nations and parliaments at the national level.”¹⁴³

CONCLUSIONS: EFFECTIVENESS AND ACCOUNTABILITY IN TUNE

It has been shown that legal thought on international organizations, notably constitutionalism, has shifted its focus from constituting and enabling organizations to constraining them. Remarkably, domestic constitutionalism (relating to states) has roughly taken the inverse trajectory. Nineteenth-century constitutionalism in Continental Europe mainly sought to constrain states, while contemporary constitutionalism often

¹³⁶ UN, “We the Peoples: Civil Society, the United Nations and Global Governance, Report of the Panel of Eminent Persons on United Nations–Civil Society Relations” (the Cardoso Report), UN Doc. A/58/817 (June 11, 2004), proposals 13–18 and Part VI, “Engaging with elected representatives” (paras. 101–52, also in summary 10 and 19–20).

¹³⁷ Part VI, “Engaging with elected representatives,” para. 102.

¹³⁸ General Assembly Plenary Debates of October 4–5, 2004 (Press Releases GA/10268 and GA/10270).

¹³⁹ See the Cooperation Agreement between the UN and the Inter-Parliamentary Union of 2016.

¹⁴⁰ UN GA Res. 70/298 of July 25, 2016. ¹⁴¹ *Ibid.*, para. 7. ¹⁴² *Ibid.*, para. 8.

¹⁴³ *Ibid.*, para. 14. The identical objectives had already been formulated in UN GA Res. 68/272 of May 19, 2014.

underscores the empowering function of (state) constitutions.¹⁴⁴ The follow-up question (briefly touched upon earlier under “Democratic Lawmaking by International Organizations?”) is whether democracy really requires to empower states and to constrain international organizations, or whether democracy could also be realized in and through the organizations.

The threefold role of the law as analyzed in this chapter (law as a constitutor of international organizations, law as an empowerer, and law as a constrainer) does not deny the limits of the law. For example, the legal means at the disposal of the ICC do not allow it to enforce the duties of cooperation incumbent on its member states. Or, the UN’s task of peacekeeping cannot be realized without member states sending troops, and currently suffers from a deployment gap. Obviously, the performance and success of international organizations depends on additional factors of governance (besides law), such as political will, funding, and integrity.

Against the background of global and regional financial crises, negative repercussions of globalization, the rise of non-Western states, and heightened nationalism, the current legal key challenge for international organizations is to operate effectively and legitimately in a complex and multilayered legal space. This requires them to address and reduce the current accountability gap. Domestic institutions, notably courts, should in principle step in here, but only if and as long as the proper international accountability measures are lacking.

Increased accountability (toward states *and* individuals both inside and outside the organization) at first glance seems to obstruct the work of the organizations. However, it will ultimately strengthen them by contributing to their social legitimacy (acceptance).¹⁴⁵ Because organizations lack a proper territorial or military power base, they are inherently dependent on cooperation with states (member states and third states). But states cannot be forced to cooperate with, finance, and staff the organizations. They will do so only to the extent that they perceive the given organization as satisfying their (national, shared, or “globalized”) interests and ideals. Well-functioning accountability mechanisms within an organization will feed this perception and thereby secure state support. This will allow the organization to function better. Thereby, accountability in the long run improves not only the organizations’ legitimacy but also their effectiveness.¹⁴⁶

¹⁴⁴ This view is prevalent in the English tradition and motivated by concerns for democracy (see, e.g., Jeremy Waldron, “Constitutionalism: A Sceptical View,” Hart Lecture 2010).

¹⁴⁵ Kristina Daugirdas, “Reputation and the Responsibility of International Organizations,” *European Journal of International Law* 25 (2014): 991–1018.

¹⁴⁶ Cf. Collins and White, “Moving beyond the Autonomy–Accountability Dichotomy,” 8, referring to the ILOAT *Bustani* case.