Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART I · GENERAL FEATURES OF REMEDIES AGAINST INTERNATIONAL ORGANISATIONS

1 The accountability regime for international organisations

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

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

[1] *ILA Report of the 68th Conference*, held at Taipei, Taiwan, Republic of China, 24–30 May 1998 (London, 1999), p. 597.
[2] ILA Committee on Accountability of International Organisations, *Second Report*, submitted to the 2000 ILA Conference (London; 2000), pp. 4–8.

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

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

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

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

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

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

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

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

2 Remedies against international organisations

Remedies in international law

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

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

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

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

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

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

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

[4] J. Lonbay and A. Briondi (eds.), *Remedies for Breach of EC Law* (Chichester: John Wiley and Sons, 1997).

[5] J. Charney, 'Is International Law Threatened by Multiple International Tribunals?', *RCADI* 271 (1998), 101–382, at 137.

[6] D. Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 1999).

[7] M. Evans (ed.), *Remedies in International Law: The Institutional Dilemma* (Oxford: Hart Publishing, 1998).