SPECIAL ISSUE:
PUBLIC AUTHORITY & INTERNATIONAL INSTITUTIONS

Cross-cutting Analyses

Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review

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A. Mapping the Territory

The current contribution focuses on the oversight over international institutions, which is used as a synonym for the accountability of such entities. It departs from the principle that all entities exercising public authority have to account for the exercise thereof.[1] The growing power of international institutions in areas that were formerly regulated domestically, along with the growing impact of their conduct on (the rights of) States and non-State actors alike, has thus far not been matched by a shift in accountability relationships beyond those applicable within the confines of the territorial State.[2] Understandably therefore the calls for the accountability of international institutions have increased in recent years, as it is seen as essential for ensuring their credibility and for securing control over public power.[3]

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[1] Report of the International Law Association, Berlin Conference (2004), Accountability of International Organisations, reprinted in: 1 INTERNATIONAL ORGANIZATIONS LAW REVIEW 225 (2004). Hereinafter referred to as ILA Report.

[2] Deirdre Curtin & André Nollkaemper, *Conceptualizing Accountability in International and European Law*, 36 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 6, 9 (2005).

[3] Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 277 (2006); Bimal N. Patel, *The Accountability of International Organisations: A Case Study of the Organisation for the Prohibition of Chemical Weapons*, 13 LEIDEN JOURNAL OF INTERNATIONAL LAW (LJIL) 572-573 (2000). *See also* von Bogdandy, Dann & Goldmann, in this issue.

For the purpose of the current contribution, accountability refers to the obligation of international institutions to give a reasoned account of the manner in which they exercise public authority. Of particular importance in this context are normative acts such as standard-setting or rule-making, or the determining of a particular course of conduct.[4] Decisive is not whether the normative act is legally binding in the formal sense, but rather whether it has a de facto impact on the rights and interests of States and/ or non-State actors.[5] The exercise of public authority in the form of a normative act further implies a relationship between an actor and a forum (constituency), a particular conduct which has to be accounted for, as well as forms of or mechanisms for accountability.[6] Whereas the relationship between the actor and the forum should contain an element of distance, (as opposed to self-control) the accountability mechanisms may be judicial as well as non-judicial, (i.e. political, administrative or financial) or any combination of these.[7] The accountability mechanisms further imply some standard for assessing the conduct of the actor, as well as the possibility of sanctions which can vary from legally enforceable measures to naming-and-shaming.[8]

The actors concern (a specific organ or sub-entity of) an international institution. The international institutions range from organizations created under international law by an international agreement among States, possessing a constitution and organs separate from its Member States,[9] to the more amorphous ones that have non-State actors as members and/or do not constitute subjects of international law. It is the de facto impact of an international institution on the rights of States and/ or non-State actors which triggers the accountability requirement, rather than the question whether the international institution constitutes a subject of international law in the formal sense.

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[4] *See* ILA Report (note 1), at 230.

[5] *See* von Bogdandy, Dann & Goldmann, in this issue, at part C.II.

[6] Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUROPEAN LAW JOURNAL 450 (2007); Curtin & Nollkaemper (note) 2, at 10.

[7] ILA Report (note 1), at 226.

[8] Philip Dann, *Accountability in Development Aid Law: The World Bank, UNDP and Emerging Structures of Transnational Oversight*, 44 ARCHIV DES VÖLKERRECHTS, 384-385 (2006). *See also* Curtin & Nollkaemper (note 2), at 4.

[9] *See* definition in ILA Report (note 1), at 222.

I. The Constituencies

Some authors argue that the forum (constituency) under which accountability arises is one of the most controversial issues pertaining to international accountability, as it touches on the issue of who should control public authority.[10] For example, if one views the matter from the perspective of the sovereign equality of States, the Member States of an international institution are the primary constituency with a vital interest in policing the public authority exercised within the international institution.[11] From the liberal democratic perspective, this position is open to criticism, given the great disparity in power and population between states.[12] This reality would not be reflected in a "one State one vote" model of accountability. In addition, such a formalistic notion of the sovereign equality of States would not necessarily be representative of the electorate in any particular state.[13] From the perspective of liberal democracy, the national constituency in the form of the national electorate is the primary one. The domestic electoral process thus has to ensure accountability for the exercise of public authority also on the international level.[14]

However, for internationalists the international community (of States) as a whole constitutes the main constituency. This relates to the fact that many international institutions produce effects which reach well beyond national boundaries and cannot be left exclusively to national constituencies. In addition, certain subject matters such as environmental protection or human rights protection by their very nature concern all States.[15] The cosmopolitan view, on the other hand, attributes less importance to the role of States as part of the constituency and emphasizes the role of civil society in the international legal order. According to the cosmopolitan view, the global community of citizens, as for example represented by NGOs, constitutes the primary constituency.[16]

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[10] Krisch (note 3), at 252.

[11] Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 LAW AND CONTEMPORARY PROBLEMS 45 (2005).

[12] Nigel D. White, *Accountability and Democracy within the United Nations: A Legal Perspective*, 13 INTERNATIONAL RELATIONS 6 (1997).

[13] *Id.* at 8.

[14] Krisch (note 3), at 254, 277.

[15] *Id.* at 254.

[16] *Id.* at 255; Bovens (note 6), at 457; Patel (note 3), at 575.

This contribution departs from the premise that there is not necessarily one primary constituency for the purposes of accountability or oversight within any particular international institution.[17] Instead, the constituency entitled to claim accountability from an international institution can consist of a variety of international actors (with or without international legal personality), provided their interests or rights are affected by the conduct of the international institution in question.[18] On the one hand, multiple constituencies can lead to a conflict between different constituencies within the same international institution, especially if the constitutive instrument does not provide for a clear hierarchy between them. However, it is also possible that the day-to-day relationship between the constituencies is characterized by mutual accommodation, as a result of which they fulfill a complementing role for the purpose of accountability of a specific act of public authority.[19]

II. Retrospective versus Prospective Accountability

Since the concept of accountability has not acquired a clearly defined legal meaning in international law,[20] there is a tendency to define it very broadly. For example, the International Law Association (ILA) endorsed a three-layered model. The first level of the ILA model concerns the extent to which an international institution, in the fulfillment of its functions as established in its constituent instruments, is subjected to forms of scrutiny and monitoring, irrespective of potential and subsequent liability in a legal sense.[21] The second level concerns tortuous liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international and/ or institutional law (e.g. environmental damage as a result of lawful nuclear or space activities). The third level of responsibility arises out of acts or omissions which constitute a breach of international (institutional) law (e.g. violations of human rights or humanitarian law, breach of contract, gross negligence, or as far as institutional laws concerned, acts of organs which are *ultra vires* or violate the law of employment relations).[22]

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[17] Krisch (note 3), at 260; Curtin & Nolkaemper (note 2), at 10.

[18] ILA Report (note 1), at 226.

[19] Krisch (note 3), at 266-267.

[20] Curtin & Nollkaemper (note 2), at 5. *See generally* Ruth Grant & Robert Keohane, *Accountability and Abuses of Power in World Politics*, 99 AMERICAN POLITICAL SCIENCE REVIEW 29 (2005).

[21] ILA Report (note 1), at 226.

[22] *Id.* at 226.

Whereas the second and third levels correspond to classic legal notions of State responsibility (*Staatshaftung*), as well as responsibility of international organizations,[23] the first level of accountability is broader. It encompasses a range of procedures for scrutinizing the behavior of international institutions which can be of a non-judicial nature. Moreover, it is sometimes interpreted as including retroactive as well as prospective elements of accountability. The retrospective elements mainly concern oversight through which international institutions give account of prior conduct, such as reporting requirements or non-judicial complaints procedures. The prospective elements entail notions of participation in and transparency of decision-making, as well as reasoned decision-making.[24] Participation as a tool for accountability implies the inclusion of the various constituencies whose interests are affected by the decision-making process.[25] Transparency for its part requires access of affected constituents to information regarding the manner in which normative decisions are taken.[26] Closely related to the principles of participation and transparency is reasoned decision-making, which adds visibility to the different interests at stake and the role of the various stake-holders in the decision-making process.[27]

Proponents of the inclusion of prospective elements in the first level of accountability argue that the distinction between prospective and retrospective elements is artificial, as these concepts are inter-dependent. For example, reasoned decision-making can provide benchmarks for oversight, while broad participation assists in informing constituents who may subsequently be involved in oversight functions. A purely retrospective definition of accountability would not sufficiently take account of this reality.[28] However, such a broad definition of "first level accountability" risks becoming too diffuse to have any added value. [29] If one is

[23] *See* Giorgio Gaja (Special Rapporteur of the International Law Commission), First Report on Responsibility of International Organisations, UN Doc. A/CN.4/532, 26 March 2003; *Id.*, Second Report on the Responsibility of International Organizations, UN Doc. A/CN.4/541, 2 April 2004; *Id.*, Third Report on Responsibility of International Organizations, UN Doc. A/CN.4/553, 13 May 2005; *Id.*, Fourth Report on Responsibility of International Organizations, UN Doc. A/CN.4/564, 28 February 2006; *Id.*, Fifth Report on Responsibility of International Organizations, UN Doc. A/CN.4/583, 2 May 2007, all available at: http://www.un.org/law/ilc/.

[24] Curtin & Nollkaemper (note 2), at 8.

[25] *See* ILA Report (note 1), at 230.

[26] *Id.* at 229.

[27] Kingsbury, Krisch & Stewart (note 11), at 39; ILA Report (note 1), at 238. *See* von Bernstorff, in this issue.

[28] ILA Report (note 1), at 238; Curtin & Nollkaemper (note 2), at 8.

[29] Dann (note 8), at 384.

striving for the development of a workable "first level accountability" concept, conceptual clarity is of the essence. For this reason the current contribution limits the notion of "first level accountability" to retroactive mechanisms of oversight.[30] It regards notions such as participation, transparency and reasoned decision-making as separate and distinct concepts which complement accountability in a complex process of responsible international governance.[31]

The subsequent passages first analyze the extent to which first level accountability mechanisms are present in the case studies covered by this project. More specifically, this part of the analysis focuses on the non-judicial procedures present for retroactive oversight within the respective international institutions themselves. Thereafter the analysis focuses on oversight procedures provided outside of the international institutions, notably judicial review by regional and domestic courts.

When dealing with judicial review during which the behavior of an international institution is measured against binding norms of international law, one is moving away from first level accountability to second and third level accountability. One is then dealing with a situation where the violation of a primary obligation under international law can trigger the responsibility of an international institution and/or that of its Member States. The subsequent analysis focuses on the procedural dimensions of judicial review, i.e. its utility as a procedural technique for ensuring oversight. The contribution does not examine in any depth the substantive standards for measuring the conduct of international organizations, such as proportionality or substantive human rights norms. [32]

By contrasting non-judicial oversight procedures with judicial review, the author attempts to illustrate the complementary function of the different levels of accountability (first versus second and third level of accountability). Since the non-judicial mechanisms are mostly centralized (existing within the respective international institution itself) while the judicial mechanisms are decentralized (existing within in the respective Member States), the author also attempts to illustrate the layered nature of the complementing oversight mechanisms.

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[30] *Id.* at 384-385. *Compare* Curtin & Nollkaemper (note 2), at 11.

[31] One could even argue that participation and transparency are prerequisites for efficient oversight mechanisms. For example, the quality of the oversight mechanisms themselves would be significantly enhanced if they were well-reasoned and transparent.

[32] *See generally* ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL (2004).

The non-judicial as well as judicial procedures under discussion reflect a formal, command and control approach to accountability. From the perspective of legal certainty, these procedures constitute an obvious starting point, as their formalized (institutionalized) nature makes it possible to define and analyze them in legal terms. This is not intended to deny that informal and less visible accountability mechanisms such as behind-the-scenes political pressure could also be very effective under certain circumstances. However, exactly because of their informal and invisible nature, such political mechanisms are difficult to define in legal terms and could only be of secondary importance in a legal order adhering to the principle of legal certainty.

B. Oversight

The sub-sections on oversight divide the different mechanisms into two loosely defined categories. The first concerns general oversight mechanisms, which include all procedures which are not characterized by an individual(ized) complaints procedure and are not of a judicial nature. In addition, these procedures all generate from within the international institution itself and are therefore of a centralized nature. Most of them amount to accountability towards Member States in accordance with the sovereign equality of States model outlined above. This is particular the case with the vertical and intermediate oversight mechanisms as defined below, as Member States feature prominently in these oversight mechanisms. Where the States constituting the oversight body are perceived as acting on behalf of the large majority of States as a whole, the oversight mechanism is also representative of the internationalist accountability model. Certain centralized non-judicial oversight procedures further resemble the cosmopolitan accountability model, which is directed to civil society (the global community of citizens). This applies notably to the horizontal oversight mechanisms and to some extent also to the intermediate mechanisms.

The second category focuses on individual(ized) complaints procedures, which can either be of a centralized or decentralized nature. Only the decentralized complaints procedures in the form of judicial review before regional or domestic courts amount to full-fledged judicial proceedings. The centralized complaints procedures resemble the cosmopolitan accountability model, to the extent that it guards over the interests of specific individuals or groups within the global community of citizens. However, these procedures also reveal a tension between the cosmopolitan accountability model on the one hand and the sovereign equality of States and internationalist models of accountability, on the other hand. The individual protection guaranteed by the complaints procedures are sometimes diluted by influence of member States or the interests of the international community (of States) as a whole on the complaints procedures.

Decentralized complaints procedures in the form of judicial review are also a manifestation of the cosmopolitan accountability model. In addition, judicial review can be representative of the liberal democratic accountability model, as it is sometimes directed at strengthening parliamentary control over the manner in which the Executive exercises public authority on the international level.

I. General Oversight

General oversight can take several potentially complementing forms, which can broadly be divided into vertical, horizontal and intermediary oversight. Where parent organs exercise formal supervision over a subsidiary organ, this would constitute vertical oversight as there is a relationship of hierarchy between the respective organs.[33] In such a relationship the supervisory and controlling power implies the right of the parent organ to question the way in which the subsidiary organ has exercised its competencies. It can also impose sanctions, which can vary from the right to overrule the decision of the lower body to milder sanctions such as public or confidential criticism.

For example, in the case of INTERPOL, the Executive Committee can overrule decisions of the Secretariat on the basis of information provided by the independent expert Commission for the Control of INTERPOL's Files.[34] However, in the case of the OECD Guidelines for Multinational Enterprises, OECD's Investment Committee can merely issue abstract clarifications on the Guidelines in instances where it is of the view that the National Contact Points did not interpret the Guidelines correctly. It cannot make determinations pertaining to specific enterprises, nor can it overrule a decision of the National Contacting Points.[35]

In the case of the UNESCO Regime for the Protection of World Heritage, the vertical oversight which the General Conference exercises over the World Heritage Committee is limited to its election of the Committee's members and the determination of its budget.[36] The General Conference is not entitled to give any binding orders to the World Heritage Committee which remains an autonomous body within the international institution.[37] Similarly, in the case of the FAO's Code

[33] Bovens (note 6), at 460; Dann (note 8), at 392.

[34] *See* Schöndorf-Haubold, in this issue.

[35] *See* Schuler, in this issue.

[36] *See* Zacharias, in this issue.

[37] *Id.*

of Conduct for Responsible Fisheries, budgeting and internal reporting seem to be the main mechanism of the FAO Council and FAO Conference over the Committee of Fisheries (COFI) and the secretariat.[38] Much of the norm-creating activity of these bodies takes place in a relative autonomy from political influence of higher bodies.[39] The same applies to the conduct of the High Commissioner on National Minorities of the OSCE, whose country missions are organized independently from other OSCE bodies. Disapproval within the OSCE of the manner in which the High Commissioner exercises his functions can nonetheless prevent his re-election, seen as he is appointed by the Permanent Council (a plenary body) by consensus for a period of three years.[40] The OSCE example reflects that superior organs can strengthen their control over subsidiary organs by attaching time-limits to the mandates of lower bodies. Discontent with the manner in which the lower body exercises its mandate can result in its non-extension by the higher body.

The level of independence exercised by the higher body during the oversight procedure is likely to be more profound in instances where the composition of the higher body significantly differs from that of the lower bodies. Stated differently, such independence is not likely to be present where the Member States composing the higher body corresponds to a large extent to that of the lower body. This is particularly noticeable in relation to reporting, which seems to have become a prominent procedure for vertical supervision within all the international institutions under discussion. For example, within the WTO regime, the Committee on Trade and Financial Services is subsidiary to the Council for Trade in Services of the WTO and reports to the WTO Council on an annual basis.[41] The fact that the Council for Trade in Services is also a plenary body means that the membership of the subsidiary organ and the reviewing organ overlaps. This overlap does not extend to the specific individuals representing the States on the different bodies, as different expertise is required within the different bodies. Notably in the case of the Committee on Trade and Financial Services, the work is of a highly technical nature. These factors (overlapping membership and technical nature of the work of the Committee) make it unlikely that the WTO Council will exercise review in any strict manner or reach a different conclusion than the Committee. In fact, the Council's reports to the WTO General Council merely refer to the report of the

[38] *See* Friedrich, in this issue.

[39] *Id.*

[40] *See* Farahat, in this issue.

[41] *See* Windsor, in this issue.

Committee, which constitutes an annex to its own report, without any further comment.[42]

Particularly problematic in terms of overlap of membership between the higher and the lower bodies is the Al-Qaeda/Taliban Sanctions Committee. The regular reporting to the Security Council as required by the Committee Guidelines amounts to nothing more than self-reporting, given that the composition of the Sanctions Committee is the mirror image of the composition of the Security Council.[43] Moreover, the veto right of the five permanent members implies that any attempt within the Security Council to overrule a decision pertaining to listing or de-listing by the Al-Qaeda/ Taliban Sanctions Committee, is highly unlikely.

In all of the case studies covered, the supervisory organ is compiled of Member States of the international institution, which reflects that vertical oversight is first and foremost directed towards States in accordance with the sovereign equality model. To the extent that one accepts these supervisory bodies as being representative of the international community (of States) as a whole, the vertical oversight would also be representative of the internationalist model. In contrast, the horizontal oversight exercised over some international institutions resembles the cosmopolitan accountability model, as it involves scrutiny of normative activity by NGOs or other members of civil society.[44] The horizontal oversight can have its root in the constitutive document of the international institution or another formal decision, but frequently also occurs on a voluntary basis. Typical for this type of oversight is the absence of the involvement or intervention of a hierarchically superior body (composed of Member States) in the oversight procedure itself. The sanction is typically limited to social (peer) pressure or public naming-and-shaming. For example, the publication by the OECD's Investment Committee of information compiled by the National Contact Points in relation to the OECD Guidelines for Multinational Enterprises generates the possibility for review by the general public.[45] Similarly, the disclosure policies of the World Bank that provide rules for access to World Bank documents have introduced a measure of public scrutiny.[46]

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[42] *Id*.

[43] *See* Feinäugle, in this issue.

[44] Bovens (note 6), at 460.

[45] Although the peer review first and foremost has a bearing on the behaviour of member States, it also reflects on the OECD's ability to regulate the behaviour of multinationals. *See* in this issue the contribution by Gefion Schuler.

[46] Dann (note 8), at 388.

In between horizontal and vertical oversight one encounters various forms of intermediate supervision. In such instances the oversight would have a formal basis in, for example, the constitutive document of the international institution or resolutions adopted in accordance with the constitutive document.[47] The supervision as such is exercised by an independent body which does not have a direct hierarchical relationship with the body that is being supervised. It nonetheless takes place in the shadow of hierarchy, as the supervising body acts on the authority of a higher body and also reports to it. Sanctions – which can either be imposed by the higher body itself or by the independent body on the authority of the higher body – vary in intensity. The accountability generated by intermediate oversight seems to be directed primarily at the Member States composing the hierarchically superior organ in whose shadow the oversight is executed. However, the case studies reveal that intermediate oversight is also linked to the cosmopolitan accountability model when accompanied by horizontal oversight.

In relation to the case studies covered, the World Bank in particular has introduced several mechanisms of intermediate oversight, some of which are also connected with horizontal oversight. One such mechanism is the Department of Institutional Integrity, which investigates allegations of fraud and corruption in the World Bank projects and of misconduct of the Bank's staff. This Department, which has unrestricted access to Bank records, documents and properties, is institutionally separate from the regular staff and reports directly to the President.[48] Sanctions in case of substantiated allegations can result in various disciplinary measures including the termination of a contract with the World Bank and a debarment from re-hiring.[49] One can draw a parallel between this procedure and that of the Inspector General of UNHCR, who investigates severe misconduct affecting UNCHR beneficiaries, including corrupt practices and other misconduct related to Refugee Status Determination.[50] The inspection reports are submitted to the Executive Committee of the High Commissioner's Program, which functions as a subsidiary organ of the General Assembly.[51]

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[47] Bovens (note 6), at 467.

[48] Dann (note 8), at 390.

[49] *Id.* at 391.

[50] *See* Smrkolj, in this issue.

[51] *Id.*

A second, intermediate mechanism of the World Banks is the fiscal control proscribed by its Articles of Agreement.[52] It consists of the auditing of the Bank's financial Statements by an external private company who is chosen by and reports back to the Audit Committee of the Board of Executive Directors. The sanctions attached to the auditing are mild, as they are limited to the publishing of the audit reports. This also adds an element of horizontal oversight, as the audit reports are accessible to a potentially vigilant public.[53]

The World Bank's third mechanism for intermediate reporting is constituted by the Independent Evaluation Group. This group is organized independently from the Bank's other departments, but reports directly to the Board of Executive Directors and in this manner functions in the shadow of a hierarchically superior organ. It rates the efficacy of the World Bank's operation programs in accordance with four standards which were derived from the Bank's own objectives, namely outcome sustainability, institutional impact, and Bank and Borrower performance.[54] As the Group's findings are made public to the Member States and the broader public, it simultaneously enhances horizontal accountability.[55] Also in this instance one can draw a parallel with UNHCR's oversight mechanisms. The Policy Development and Evaluation Service (previously known as the Evaluation and Policy Analysis Unit), conducts independent systematic assessments of a wide range of UNCHR projects, programs, practices and policies. The evaluations are presented to the Senior Management Committee of UNCHR and are also available to the general public. [56]

Finally, one can mention the State reporting procedure under the 1998 ILO Declaration. These reports are analyzed by five independent Experts Advisers with whom the States do not have a direct hierarchical relationship. However, since they are appointed by and responsible to the Governing Body, the Expert Advisers function in the shadow of the tripartite executive organ of the ILO. Although (mild) sanctions in the form of public criticism is a possibility, the process is more geared towards identifying problems in the implementation of ILO fundamental Conventions, than exposing bad behavior by States.

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[52] Dann (note 8), at 390.

[53] *Id.*

[54] *Id.* at 392.

[55] *Id.* at 393.

[56] *See* Smrkolj, in this issue.

This brief overview reveals that the measures for general oversight are mainly representative of the sovereign equality of State model of accountability. Member States play a central role in relation to both vertical and intermediate oversight mechanisms. This model sometimes overlaps with the internationalist accountability model, for example where the Member States participating in the supervisory organ is representative of the large majority of States in the world. The cosmopolitan accountability is present (although in nascent form) through horizontal oversight. The liberal democratic model was not visibly present in the case studies under discussion. In addition, the oversight mechanisms under discussion remain rather weak for the most part, regardless of whether one is dealing with vertical, horizontal or intermediate oversight or any combination thereof. Stated differently, although the sovereign equality of States model of accountability is the dominant one, this does not necessarily mean that this is a strong form of accountability or necessarily stronger than the other accountability models identified here.

II. Individual(ized) Oversight

1. Centralized (Non-Judicial) Complaints Procedures

In relation to the individualized complaints procedures present in the case studies, one can distinguish between centralized complaints procedures within the institution itself and decentralized complaints procedures taking place within the Member States of the international institution. The centralized individual complaints procedures provided for in the respective case studies do not amount to judicial proceedings in the sense of binding (enforceable) decisions characterized by impartiality, independence and even-handedness.[57]

The most extreme example is that of the Al-Qaeda/Taliban Sanctions Committee's proceedings. Although the affected individuals can submit a request for delisting through the United Nations Focal Point, they have no right to consideration of their request. In addition, they have no right to be heard before the Sanctions Committee and are not provided with reasons for the Sanctions Committee's decisions which are taken by political consensus.[58] This procedure reflects the tension between the cosmopolitan accountability model and the sovereign equality of States model, with the scale tipping clearly in the direction of the latter. Moreover, if one were prepared to accept that the Security Council and its Sanctions Committee

[57] *See* Erika de Wet & André Nollkaemper, *Review of the Security Council Decisions by National Courts*, 45 GERMAN YEARBOOK OF INTERNATIONAL LAW 171 (2002).

[58] *See* Feinäugle, in this issue.

represented the international community of States as a whole, the oversight procedure would also reflect a tension between the cosmopolitan accountability model and the internationalist accountability model.

In contrast, the individual complaints procedure before the Inspection Panel of the World Bank seems to be slightly more protective of the interests of (members of) civil society, as it is composed of external experts who function independently from the Bank's management. However, the procedure does not result in binding decision against the bank, neither does it provide for compensation for affected individuals.[59] Similarly, individuals who are affected by INTERPOL's inclusion of certain data in its files have the right to file a complaint with the independent Commission for the Control of INTERPOL's Files. However, they do not have a right to the removal of such data in case the Commission finds in their favor. Such removal remains within the discretion of the Secretary General.[60] Also in case of the UNHCR's Refugee Status Determination procedure one is not dealing with a judicial procedure in the true sense. Although the applicants have the right to be heard and the right to appeal, there is no obligation to provide them with reasons or to interview witnesses in their presence. In addition, a positive decision is not binding on the domestic authorities that have parallel proceedings for determining the residence status of refugees.[61] In essence, these individualized complaints procedures reveal that the impact of cosmopolitan accountability models within international institutions is still significantly diluted by accountability models directed at the Member States or in some instances the international community of States.

2. Decentralized Judicial Review by Regional and Domestic Courts

The question arises whether the cosmopolitan accountability model can be strengthened through decentralized oversight mechanisms that are available to individuals whose rights are affected by the decisions of international institutions. More specifically, the question arises whether decentralized judicial review before regional or domestic courts can fulfill this role.

In this context one should note that decentralized judicial review is sometimes explicitly provided for and regulated on the international level, as in the case of the WIPO's regime for the international registration of trademarks. Third parties who

[59] Dann (note 8), at 389.

[60] *See* Schöndorf-Haubold, in this issue.

[61] *See* Smrkolj, in this issue.

are affected by the decision of the International Bureau of the WIPO to register an international trademark can file a complaint against this decision with their respective domestic courts. These courts can overrule the International Bureau's decision by refusing to recognize a trademark in the respective Member State's territory. [62] The clear legal framework within which this review takes place, combined with the fact that one is dealing with a binding judgment in the legal sense, strengthens the quality of the oversight that is being exercised. In this instance judicial review thus constitutes a useful avenue for strengthening the cosmopolitan accountability model.

The matter is more complicated where the decentralized review procedures are not explicitly provided for. In these instances the review of a normative decision of an international institution takes place incidentally, in instances where individuals challenge measures that implement decisions of an international institution before their domestic or regional courts. In the process, the courts may also be confronted with reviewing indirectly the scope and/or legality of decisions of an international institution.[63] The first challenge facing the court during incidental review is determining whether it has the implicit competence to engage in incidental review, given that such competence was not explicitly provided for. If it answers this question in the affirmative, it will then be confronted with interpreting the substance of the respective international normative measure.

At this point it is worth distinguishing between three situations with which courts can be confronted, by referring to pertinent examples of the European Court of Justice (ECJ) and the Court of First Instance (CFI) - all of which concern binding decisions of the Security Council. In the first situation, the ECJ had to interpret the scope of the EU's implementing measures and incidentally that of the relevant Security Council resolutions. However, in this situation neither the legality of the implementing measures, nor that of the Security Council resolutions themselves were at issue. In the second scenario, the ECJ was confronted with challenges to the legality of the implementing measures, but could avoid an incidental review of the legality of the respective Security Council measures. In this instance the Security Council measures were formulated in broad terms, as a result of which those responsible for their implementation had discretion as to how to achieve the desired result. The third scenario concerned disputes about the legality of measures of implementation which incidentally also touched on the legality of the respective

[62] *See* Kaiser, in this issue.

[63] The possibility to take action against international institutions directly before domestic courts remains very limited, as those with separate international legal personality such as the United Nations and the World Bank enjoy immunity before domestic courts. *See* Dann (note 8), at 389.

Security Council resolution. In this instance the relevant Security Council resolutions were formulated in narrow terms which did not (seem to) allow the Member States (or the EU) any discretion in relation to their implementation.

As far as the first two scenarios are concerned, the ECJ has in the past not hesitated to exercise its competence of review. The first example (pertaining to the first scenario mentioned above) concerns the *Bosphorus* decision.[64] In that instance, the ECJ had to determine the scope of EC Regulation 1990/993[65] and in particular, whether it authorized the impoundment by the Irish authorities of two aircrafts leased to the applicant by the former Yugoslav airline JAT. As the respective EC Regulation implemented a Security Council sanctions regime against the former Federal Republic of Yugoslavia, the ECJ also had to determine the scope of Security Council Resolution 820 of 17 April 1993.[66] The ECJ took into account the purpose of the sanctions regime in concluding that the limitation of the international right to property of the applicant (who effectively lost three years of a four year lease) was proportionate under the circumstances.[67] However, neither the legality of EC Regulation 1990/1993 nor the sanctions regime from which it resulted was at issue.

The second example (concerning the second scenario) is that of the *Segi* case.[68] In this case, the ECJ reviewed the EU measures implementing Security Council Resolution 1373 of 28 September 2001, which inter alia requested United Nations Member States to freeze all funds and other financial assets or economic resources to those involved in terrorist activity.[69] In order to ensure consistent implementation of this resolution in its Member States, the EU implemented this resolution through a series of measures which inter alia resulted in the blacklisting of the Basque organization *Segi*.[70] The applicants filed an action for damages in

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[64] Case C-84/85, Bosphorus Hava Yollari Turzim ve Ticaret AS v. Minister of Trasport, Energy and Communications and Others, 1996 ECR I-3953.

[65] EC Regulation 1990/93 O.J. 1993 L 102, 14.

[66] Bosphorus decision (note 64), at para. 15.

[67] *Id.* at para. 26.

[68] Case C-355/04 P, Segi, Araitz Zubimendi Izaga, Aritza Galarraga v Council of the European Union 2007 ECR I-01657, para. 57.

[69] *See* Mielle Bulterman, *Fundamental Rights and the United Nations Financial Sanctions Regime: The Kadi and Yusuf Judgments of the Court of First Instance of the European Communities*, 19 LJIL 757 (2006).

[70] *See* Common Position 2001/931/CFSP on the application of specific measures to combat terrorism O.J. 2001 L 344, 90; Regulation (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism O.J. 2001 L 344, 70; *Decision* 2001/927/EC establishing the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001 on specific

relation to the relevant EU measures, on the basis that it violated their right to judicial protection in accordance with Article 6(2) of the EU Treaty. According to their line of argument, the violation resulted from the fact that they had no means of challenging Segi's inclusion in the blacklist, due to the nature of the Common Positions that were adopted under the so-called third Pillar of the EU Treaty. This claim effectively also constituted an indirect challenge to the validity of the relevant Common Position.[71]

In reviewing the matter and concluding that EU law indeed provided for an avenue of judicial protection in this case, the ECJ emphasized the applicants' right to a remedy and access to a court of law.[72] However, it is important to note that Security Council Resolution 1373 (2001) clearly left States the discretion to implement the obligations contained therein in accordance with (international) human rights obligations. For example, it did not identify the persons to be blacklisted in a manner that appeared to suspend any avenue of (domestic) judicial protection for such individuals.[73] As a result, the question whether the respective implementing measures were in accordance with the EU standards of judicial protection could be addressed without raising the question whether Security Council Resolution 1373 (2001) itself conflicted with these standards.

The *Yusuf*[74] and *Kadi*[75] cases represent the third scenario mentioned above. In these instances the CFI (and subsequently the ECJ) was confronted with a request for annulment of EC Regulations which implemented the blacklisting regime of the Al-

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restrictive measures directed against certain persons and entities with a view to combating terrorism O.J. 2001 L 344, 83; Common Position 2002/340/CFSP updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism O.J. 2002 L 116, 75 and Common Position 2002/462/CFSP updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2002/340/CFSP O.J. 2002 L 160, 32.

[71] *See* Segi decision (note 68), at paras. 52 *et seq*.

[72] Common Position 2001/931/CFSP, *supra,* note 51; *see also Segi* decision, *supra* note 68 at paras. 51-52, para. 54.

[73] *See* in particular the opinion of Advocate General Mengozzi, delivered on 26 October 2006, Case C-355/04 P, *Segi, Araitz Zubimendi Izaga, Aritza Galarraga v Council of the European Union* 2007 ECR I-01657, para. 57. He described the listing of inter alia *Segi* as a completely autonomously by the EU. *See also* Bulterman (note 69), at 757.

[74] Case T- 306/01, Yusuf and Al Barakaat International Foundation v. Council and Commission 2005 ECR II-3353.

[75] Case T-315/01, Kadi v. Council and Commission 2005 *ECR* II-3649; Hereinafter reference will only be made to the relevant paragraphs of the Kadi decision.

Qaeda/Taliban Sanctions Committee.[76] The legal question before the CFI was framed in a manner that also touched on the issue of the legality of the Security Council measures. As these regulations transposed almost word for word the relevant Security Council resolutions, any review of the substance of the challenged regulations necessarily amounts to indirect review of the legality of the relevant Security Council measures.[77] The CFI concluded that it would not have the right to engage in such a review, except where violations of peremptory norms (*jus cogens*) of international law are at stake.[78] It further concluded that obligations under Article 103 of the Charter - which include binding Security Council decisions - took precedence over all other international obligations, with the exception of *jus cogens* obligations.

Elsewhere this author has extensively criticized the CFI's reasoning.[79] Here it would suffice to say that in light of the very small number of *jus cogens* norms currently recognized in international law, the judicial oversight resulting from the CFI's reasoning is of very little meaning to the affected individuals and would thus not significantly contribute to strengthening the cosmopolitan accountability model.[80] This is reflected inter alia by the fact that in accordance with the CFI's reasoning, the Security Council had the competence to suspend the right to a fair trial (as guaranteed by EU and international law) of the blacklisted persons for an unlimited period of time. As this right does not (yet) belong to the corpus of peremptory norms recognized by in public international law, it could be overridden by a conflicting Security Council decision.

The CFI's decision has subsequently been overturned on appeal.[81] Even so, the CFI's reasoning in relation to the very limited boundaries to Security Council

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[76] *See* Feinäugle, in this issue.

[77] Christian Tomuschat, *Primacy of United Nations Law – Innovative Features in the Community Legal Order*, 43 COMMON MARKET LAW REVIEW 543 (2006).

[78] Kadi decision (note 75), at para. 221, paras. 225-226.

[79] *See* Erika de Wet, *Holding the United Nations Security Council Accountable for Human Rights Violations through Domestic and Regional Courts: A Case of Beware what you Ask For?, in* SANCTIONS ACCOUNTABILITY AND GOVERNANCE IN A GLOBALISED WORLD (Jeremy Farrall & Kim Rubenstein eds., forthcoming 2009).

[80] For the very restricted list of *jus cogens* norms generally recognized as such, *see* Report of the International Law Commission, 58th Session of the International Law Commission, UN Doc. A/61/10 (2006) 421. For a different opinion, *see* ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW (2006) (defining *jus cogens* in a much broader fashion).

[81] The decision turned on European law and the ECJ did not address the *jus cogens* arguments raised by the CFI. See Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission, 3 September 2008, available at http://curia.europa.eu.

powers and the equally restricted roles of regional and domestic courts in reviewing such boundaries has already had a significant influence on the practice of other courts. More specifically, it has been confirmed by the *Nada* case of the Swiss Federal Supreme Court.[82] In this case, which also concerned the blacklisting of an individual in accordance with Al-Qaeda/Taliban sanctions regime, the Swiss court effectively copied the reasoning of the CFI. The reasoning was further explicitly confirmed by the English Court of Appeal in the *Al-Jedda* decision.[83] This case concerned an entirely different issue, namely whether the detention without trial of a British/Iraqi national by British forces in Iraq in 2004, on the basis of Security Council Resolution 1546 of 8 June 2004, violated Article 5(1) of the European Convention of Human Rights. In addition, the conflict between the respective Security Council decision and the human rights in question was arguably not as extreme as in the *Yusuf* and *Kadi* cases. Even so, the Court of Appeal relied heavily on the reasoning of the *Yusuf* and *Kadi* decisions. As the House of Lords subsequently did not dwell on this part of the Court of Appeal's reasoning, apart from confirming that the Security Council is bound by *jus cogens*,[84] one could interpret its decision as an approval of the Court of Appeal's reasoning on this particular point.

In essence therefore, it seems that regional and/ or domestic courts may remain reluctant to provide meaningful judicial oversight to individuals whose international human rights are suspended by directly conflicting decisions of the Security Council.[85] A different conclusion would perhaps be possible if regional

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[82] Youssef Mustapha Nada v. Staatssekretariat für Wirtschaft, BGE, No. 1A.45/2007, 14 November 2007. The Nada decision was rendered by the Federal Supreme Court, available at: http://www.admin.ch/ch/d/sr/sr.html.

[83] The Queen (on the application of Hilal Abdul-Razzaq Ali- Al-Jedda) v. the Secretary of Defence, [2005] EWHC 1809 (Admin).

[84] R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent) [2007] UKHL 58, judgment of 12 December 2007. *See* in particular the opinion of Lord Bingham of Cornhill, para. 35. However, it is also worth noting that the House of Lords was not inclined to accept a complete displacement of Art. 5(1) of the European Convention of Human Rights by S.C. Res. 1546 of 8 June 2004. The qualification of this right was therefore not to be equated with a complete displacement. *See* in particular the opinion of Baroness Hale of Richmond, paras. 126 *et seq.*

[85] *See* Agim Behrami and Bekir Behrami v. France (Application No. 71412/01), Judgment, 31.05.2007; and Ruzhdi Saramati v. France, Norway and Germany (Application No. 78166/01), Judgment, 31.05.2007. Both judgments available at: http://echr.coe.int/echr/en/hudoc. The ECtHR did not accept effective (extra-territorial) control by the Member States in question in Kosovo at the time when the alleged violation of the right to life (Art. 2) and the right to deny the legality of one's detention (Art. 5) of the ECHR occurred in 2000 and therefore declared the case inadmissible. At the time the states in question formed part of the NATO forces in Kosovo, whose presence was authorized under SC. Res. 1244 of 10 June 1999. The ECtHR's rather distorted arguments in finding an absence of effective control on the part

and domestic courts were willing to interpret the notion of *jus cogens* in a manner that also includes fundamental (human rights) norms of domestic or EU law – as a limitation to Security Council powers.[86] Another possibility would be to give preference to fundamental (human rights) norms on the domestic or regional level, without entering the debate as to whether the concept of jus cogens should be expanded in order to include such a domesticized or regionalized interpretation. This was in fact the strategy followed by the ECJ in the Kadi decision on appeal, that granted comprehensive judicial review for those blacklisted by the Taliban/ Al-Qaeda sanctions committee at EU level on the basis of EU law. [87]

Another technique for strengthening the cosmopolitan accountability model would be to depart from the premise that a suspension of individual human rights by Security Council decisions such as the Al-Qaeda/Taliban sanctions regime cannot be assumed unless provided for explicitly.[88] This approach would imply that a resolution such as Resolution 1267 (1999) necessarily (implicitly) allows States the necessary discretion to enforce the respective sanctions regime in accordance with human rights standards, even though this may not be self-evident from the resolution at first sight.

In this context the recent *Möllendorf* decision of the ECJ constitutes an interesting example.[89] This reference request to the ECJ resulted from the fact that the Al-

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of the Member States arguably reflects the pressure exercised by the troop contributing countries not to review binding Security Council resolutions.

[86] In Switzerland there is an ongoing debate as to whether the concept of *jus cogens* - which is explicitly recognized as a limitation to the legislative (constitutional) process in the federal Constitution of 1999 - should be defined to include also domestic fundamental norms. *See e.g.* Daniel Thürer, *Verfassungsrecht und Völkerrecht, in* VERFASSUNGSRECHT DER SCHWEIZ 179-205 (Daniel Thürer *et al.* eds., 2001); Daniel Thürer, *Wer hat Angst vor dem Völkerrecht? Wer vor den Volksrechten? Keine unlösbaren Widersprüche, sondern gegenseitige Stärkung*, NEUE ZÜRCHER ZEITUNG 17.11.2007; Tristan Zimmermann, "*Quelles normes impératives du droit international comme limite à l'exercice du droit d'initiative par le peuple?,*" 16 AKTUELLE JURISTISCHE PRAXIS 748 *et seq.* (2007).

[87] Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission, 3 September 2008, available at http://curia.europa.eu. *See also* the well-known *Solange* decisions of the German Federal Constitutional Court. BVerfGE 89, 155 (12.10.1993); BVerfGE 73, 339 (22.10.1996). These decisions are also available at: www.bundesverfassungsgericht.de. Note that this "dualist" solution could trigger the international law of State responsibility. This would be the case where the domestic or regional obligations which are granted preference conflict with (other) international obligations, such as binding Security Council resolutions.

[88] *See also* José E Alvarez, *The Security Council's War on Terrorism: Problems and Policy Options, in* REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES, 134 (Erika de Wet & André Nollkaemper eds., 2003).

[89] Case C-177/06, Gerda Möllendorf & Christiane Möllendorf-Niehuus 2007 ECR 0000 Judgment of 11 October 2007.

Qaeda/Taliban sanctions regime had unforeseen consequences for the property rights of third parties. A contract of sale concerning immovable property was concluded between the *Möllendorfs* (the sellers) and buyers who were subsequently blacklisted under the Al-Qaeda sanctions regime. At the time of the blacklisting, the buyers were already in possession of the immovable property and the sellers had already received (and spent) the sales price. However, ownership had not yet transferred since the transaction was not yet, as required by German law, registered in the Land Register.[90]

Since registration was no longer possible once the buyers were blacklisted, the question arose whether the sales transaction had to be reversed. This would have been the normal procedure under German civil law when a legal impediment arose against the transfer of property.[91] The sellers objected to repaying the sales price that would result from such a reversal of the transaction, arguing that it would disproportionately limit their right to property.[92] The ECJ supported this position to the extent that it ordered the national authorities to apply the national law to the sellers in a manner that gave effect to EU fundamental rights protection as far as possible.[93] It is important to note that the legality of the sanctions regime itself was not at stake in this case. Instead, it concerned the scope of the EU implementing measures and in particular their impact ('collateral damage') on third parties. Even so, the case potentially provides an interesting example of how elements of proportionality and human rights protection can be interpreted into a sanctions regime. Neither Resolution 1267 (1999) and subsequent resolutions, nor the EU implementing measures explicitly provide for such protection in instances where the sanctions regime affected the rights of non-listed third parties. The ECJ was nonetheless prepared to read it into the sanctions regime.[94]

Whether regional or domestic courts may be willing to engage in more stringent judicial review of normative acts of international institutions other than the Security Council remains to be seen. The special role of the United Nations Security

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[90] *Id*. at para. 24.

[91] *Id.* at para. 52.

[92]This money would then have to remain in a frozen account for as long as the buyers remained blacklisted. *Id*. at para. 70.

[93] *Id.* at para. 76, para. 81.

[94] Some might question whether the situation of third parties who are indirectly affected by the sanctions regime would at all be comparable with that of persons forming the direct object of the sanctions regime. However, this author submits that the *Möllendorf*-case remains an interesting example of how a court can read some human rights protection into a sanctions regime.

Council in maintaining international peace and security combined with the primacy clause contained in Article 103 of the United Nations Charter, place the obligations flowing from Security Council decisions in a *sui generis* position compared to those stemming from other international institutions. On the one hand, this may imply that regional and domestic courts would be more willing to engage in rigorous judicial review of decisions of other international institutions, if and to the extent that they are incidentally confronted therewith. On the other hand, it is possible that courts may generally be reluctant to exercise extensive judicial review over international norm-setting activities pertaining to issues closely associated with foreign policy.

This is, for example, reflected by decisions of the German Federal Constitutional Court pertaining to the evolving scope of NATO's goals and competencies. In 2001, the Court reviewed the nature of NATO's New Strategic Concept adopted in 1999 in order to determine whether it amounted to an international treaty or an amendment of the North Atlantic Treaty of 1949.[95] Since Article 59(2) of the German Basic Law requires parliamentary consent for the ratification of certain international treaties, an affirmative answer would have implied that the Government violated the Basic Law when adopting the New Strategic Concept without the consent of Parliament.[96] The Court determined that the New Strategic Concept did not amount to an international treaty and there was thus no violation of Article 59(2) of the Constitution, as the further development of a system of mutual collective security that did not involve the amendment of the treaty and thus did not require the consent of the federal Parliament.[97]

However, the Court did warn that Parliament's right to participate in the exercise of foreign policy would be violated if the Government's involvement in the development of NATO's competencies resulted in a fundamental structural departure from NATO's constitution and its orientation towards the maintenance of peace. This followed from Article 59(2) in combination with Article 24(2) of the Basic Law, which authorizes the government to enter into collective security systems aimed at the maintenance of peace.[98] However, no such departure took place in this instance. One could not infer from the content of the New Strategic

[95] BVerfGE, 2BvE 6/99 of 22 November 2001, paras. 130-131; Birgit Schlütter in ILDC 134 (DE 2001) H1. *See also* the earlier AWACS case, i.e. BVerfGE 90, 286 *et seq*., decision of 12 July 1994, which concerned the NATO Strategic Concept of 1991.

[96] BVerfGE, 2BvE 6/99 of 22 November 2001, para. 150; Birgit Schlütter in ILDC 134 (DE 2001) C5.

[97] *Id*. at para. 130.

[98] *Id*. at paras. 154, 161; ILDC 124 (DE 2001) H10-H11.

Concept that NATO intended to abandon its commitment to the aims of the United Nations and the compliance with its Charter.[99] The Court subsequently reiterated this position in a decision in 2007.[100] In that instance the Court was not prepared to accept that NATO's involvement outside the Euro-Atlantic region (through its involvement in the International Security Assistances Force in Afghanistan (ISAF)), or its (limited) cooperation with Operation Enduring Freedom in Afghanistan (which is lead by the United States of America), constituted a fundamental departure from the NATO Constitution or goals.[101]

In these instances the review was not directed at determining the legality of the manner in which NATO exercised its competencies in accordance with international (human rights) law. It was thus not directed at strengthening the cosmopolitan accountability model. Instead, the constitutional complaints were exclusively based on potential violations of domestic constitutional law and aimed at strengthening democratic control over executive participation in international norm-setting in the area of collective security. The procedure was essentially directed at strengthening the liberal democratic accountability model. This attempt was unsuccessful. The Court interpreted Article 59(2) of the Basic Law narrowly and did not consider any other form of modern international law-making beyond that of the NATO Treaty of 1949 as relevant for its decision.[102] It also gave a broad interpretation to the meaning of collective security systems directed at the maintenance of peace in accordance with Article 24(2) of the Basic Law. From this one can conclude that the Court will remain reluctant in future to extend parliamentary oversight in relation to Executive participation in international norm-setting pertaining to collective security, despite the fact that such extension remains possible in theory.

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[99] BVerfGE, 2BvE 6/99 of 22 November 2001, para. 157, para. 161. The New Strategic Concept did not call into question the mandatory prohibition on the threat or use of force contained in Art. 2(4) of the Charter; the accepted Charter prerequisites for the use of military force (which include a Security Council mandate in accordance with Art. 42 and Art. 48 of the Charter or to regional organizations in accordance with Art. 53 of the Charter); collective defence also of third states; intervention by request; and the proportionality of such action.

[100] BVerfGE, 2 BvE 2/07, decision of 3 July 2007, para. 45, para. 87.

[101] BVerfGE, 2 BvE 2/07, decision of 3 July 2007, para. 45, para. 87. The violation of international law by an individual NATO operation could be an indication of such a fundamental structural departure, but does not need to be the case.

[102] Birgit Schlütter, in ILDC 134 (DE 2001) C5. *See also* Andreas L. Paulus, *Quo vadis Democratic Control? The Afghanistan Decision of the Bundestag and the Decision of the Federal Constitutional Court in the New Strategic Concept Case*, 3 GERMAN LAW JOURNAL (2002), available at: www.germanlawjournal.com; Heiko Sauer, *Die NATO und das Verfassungsrecht: neues Konzept – alte Fragen*, 62 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 317-346 (2002).

C. Conclusion

The foregoing analysis illustrates that accountability of international institutions in the form of retroactive oversight remains under-developed on various levels. First, the oversight mechanisms are still very much oriented towards Member States in accordance with the sovereign equality of States model. In instances where the oversight mechanisms are representative of the international community (of States) as a whole, they also resemble the internationalist accountability model. In contrast, the presence and impact of the cosmopolitan model and in particular the liberal democratic model of accountability remain limited. This is inter alia reflected by the fact that individualized oversight mechanisms within international institutions remain the exception to the rule and where they do exist, do not amount to binding judicial proceedings resulting in enforceable decisions.

Second, the oversight mechanisms directed towards Member States are not necessarily forceful either. This is reflected by the different manifestations of vertical and intermediate oversight identified in the case studies. For example, vertical or intermediate oversight by Member States does not always provide for the possibility of overruling a decision of a lower body or the replacement of the persons composing the lower entity that is responsible for the normative decisions. This aggravates the perception that international institutions function in an autonomous environment that insulates them from accountability towards Member States and other constituencies alike.

The analysis has further revealed that the weak general mechanisms of oversight and centralized individual complaints procedures can be complemented by incidental judicial review of international normative acts before regional and domestic courts. This type of oversight could strengthen accountability along the lines of the cosmopolitan model, notably in relation to individuals affected by the international exercise of public power. The (still rather limited) court practice reflects that such review is particularly meaningful where the international normative decision leaves room for interpretation. Such discretion enables regional and domestic courts to strike a balance between the rights and interests of different affected constituencies.

However, practice also reveals the hesitance of regional and domestic courts in exercising judicial review in instances where normative measures stemming from a powerful international institution directly conflict with human rights obligations. This is particularly the case where such a conflict concerns human rights versus collective security obligations. Similarly, regional and domestic courts are unlikely to strengthen the liberal democratic accountability model through judicial review of

the national executive, where the latter participates in international norm-setting activities that touch upon sensitive areas of foreign policy.

This reveals that decentralized judicial review cannot in and of itself ensure the sufficient protection of the rights and interests of private individuals and other constituencies affected by the norm-setting activities of international institutions. In other words, it cannot entirely compensate for deficient oversight mechanisms within the international institution itself, but remains a residual mechanism that has to be imbedded in a broader system of oversight consisting of centralized and decentralized components aimed at creating balanced and effective oversight.

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