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# Above the Law?

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## Legitimate Behaviour of International Organizations

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*“If the Nineteenth century was a century of parliaments,  
and the Twentieth was a century of governments,  
then the Twenty-first will be that of courts and judges.”<sup>1</sup>*

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<sup>1</sup> See: Abi-Saab, Georges: Whither the Judicial Function? Concluding Remarks. Cited in: Wellens, 2004, p.23.

## **Table of Contents**

Introduction.....	1
Methodology.....	3
Structure .....	4
1. The International System – Legitimate Behaviour?.....	6
1.1. Democratic Legitimacy and Stability of Orders .....	6
1.2. What is Legitimacy?.....	8
1.3. How to identify Legitimate Behaviour? .....	11
1.4. Legitimacy in the International System .....	13
1.5. Conclusion Chapter 1 .....	15
2. International Organisations in the International System - Legal Competences.....	16
2.1. Legal Personality of International Organisations.....	16
2.2. The Relationship between the Law of International Organisations and their Member States .....	18
2.3. Traditional Sources of Law under the Impact of International Organisations.....	20
2.3.1. First Source of Law - International Agreements .....	21
2.3.2. Second Source of Law - Customary International Law.....	22
2.3.3. Third Source of Law - General Principles of Law .....	24
2.3.4. General Observations.....	25
2.4. Conclusion Chapter 2 .....	27
3. Rule of Law and Accountability of International Organisations.....	29
3.1. Rule of Law in the International System.....	29
3.2. Responsibility and Accountability of International Organisations .....	32
3.2.1. Responsibility.....	32
3.2.2. Accountability .....	34
3.3. Conclusion Chapter 3 .....	43
4. Possible Improvements for the Legitimate Behaviour of International Organisations .....	45
4.1. Democratisation of International Organisations .....	46
4.2. The Role of the Judiciary .....	47
4.3. Conclusion Chapter 4 .....	52
5. Conclusion.....	55
Reference List.....	60

## Abbreviations

AI	Amnesty International
CAIO	Committee on Accountability of International Organisations
CRC	Convention on the Rights of the Child
EC	European Community
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
ECTHR	European Convention on Human Rights
ESA	European Space Agency
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IHL	International Humanitarian Law
IHLR	International Human Rights Law
ILA	International Law Association
ILC	International Law Commission
NATO	North Atlantic Treaty Organisation
NGO	Non Governmental Organisation
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States (of America)
WBIP	World Bank Inspection Panel
WHO	World Health Organisation
WTO	World Trade Organisation

## Introduction

The current international system is influenced by many powerful actors. Apart from the traditional nation states there are international organisations, non governmental organisations (NGOs), international companies and many other actors on the global playground – all influencing politics in their own way, for their own benefits. This global organisation and “management” of our world, with an enormous amount of different actors, is rather new and challenges the old order and idea of politics in many ways. All the actors involved release doubts and discussions concerning their legitimacy and their way of acting. Due to the high number of actors and the recency of the system, control mechanisms and the general order are much harder to obtain. Global governance concerning multi level governance is getting more difficult – lines between political and legal orders become bleary.<sup>2</sup>

Regarding the international system, with all its facets, there is a great demand of discussions. But one area of the international system is of special importance, the legal system. It is assertive for many outcomes in politics. With the shift of the legal system “away from its traditional status as the exclusive realm of states”<sup>3</sup> (imaginable as a horizontal level) also into the vertical level (the international legal system), it covers a wider range and becomes of greater complexity and of more importance.

Although a lot of politics are already made outside of nation states there is still not “the” International Law we could talk about. There is no unity. So far the missing unity of international law creates a “hide and seek” game, mainly involving questions of responsibility and accountability for all actors involved.<sup>4</sup>

International organisations as such enjoy a special role in the international system, since they are created by nation states (therefore implicitly different to other international groups as for example NGOs, which are more or less independent actors). They are acting for a pool of nation states and are equipped with partly similar means but not with the same restrictions. The umbrella term international organisation in this paper is defined for those organisations which were constructed by a number of different nation states and acting (therefore influencing) on the international level. They are not independent from nation states but may be seen as

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<sup>2</sup> Cfr.: Wessel, Ramses & Wouters, Jan (Forthcoming): The Phenomenon of Multilevel Regulation: Interactions between Global, European and National Regulatory Spheres. In: A. Føllesdal, R.A. Wessel and J. Wouters (Eds.): Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes (Forthcoming), p.2.

<sup>3</sup> Cfr.: Welken, Karen (2004): Fragmentation of international law and establishing an accountability regime for international organisations: The role of the judiciary in closing the gap, p.2.

<sup>4</sup> Cfr.: Ibid.

the extended arm of a pool of nation states. The difficulties for these kinds of organisations emerge from different backgrounds of the different nation states regarding their histories, legal systems and cultures. This might cause problems and detain the development and decision-making of the international organisations. Due to their special role on the international playground, this paper will concentrate and examine international organisations.

Observing daily happenings all over the world, it becomes pretty clear that international organisations are not exclusively able to make international politics. The competence of global governance still remains with the nation states.<sup>5</sup> But nevertheless, the international organisation's importance is growing constantly, and they gain more influence when it comes to political decision making. International organisations are everywhere and their voices and actions cannot be ignored. Political decisions made by nation states depend on international organisation's actions and do equally influence those – the interplay between the actors gets more important.<sup>6</sup>

But there is one serious difference between nation states and international organisations: nation states themselves have constitutions, laws and rules and other legal backgrounds to guarantee "legitimate behaviour". Although international organisations are in principle based on charters, in many areas they are not bound to fundamental ideas as nation states are; a democratic order in the international system is missing. Despite many different opinions towards that matter one example therefore may be the lack of human rights bonding international organisations enjoy.<sup>7</sup> As one can imagine, this creates problems when it comes to activities and decision-making. Nation states have to act in a much more "observed" and restricted way than international organisations. Many times it is called into question whether this missing legal background is creating a crisis in terms of the legitimate behaviour of international organisations.<sup>8</sup>

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<sup>5</sup> Cfr.: Alvarez, José E. (2005): *International Organisation as Law-makers*. OXFORD University Press: Oxford, p.34.

<sup>6</sup> Cfr.: Collingwood, Vivien (2006): Non-governmental organisations, power and legitimacy in international society. *Review of International Studies*, 32, pp. 439-457. British International Studies Association, p.441.

<sup>7</sup> Cfr.: Cameron, Lindsey (2006): *Accountability of International Organisations Engaged in the Administration of Territory*. University Centre for International Humanitarian Law, p.66/ 95.

<sup>8</sup> Cfr.: Clark, Ian (2003): Legitimacy in a global order. *Review of International Studies*, 29, British International Studies Association, pp.75- 95, p.77. And: Collingwood, 2006, 440/444/445.

It is a “hot topic” to find out about the mechanisms of power international organisations execute and the legal grounds on which they act.<sup>9</sup> But the importance lies in the development of alternatives to improve the current system, after lacks have been examined. The approach preferred in this paper is to find out about the possibilities to improve the legal behaviour of international organisations as global players. One aim of this paper is, to examine whether there are conditions, which allow the support of legitimate behaviour in the international system, or if they are fragmentary or even missing.

By virtue of the growing complexity and importance of international organisations and the not entirely implemented unity of law in the international system this paper examines the main research question: “With regard to established systems of accountability and the rule of law, to what extent can actions by international organisations considered to be legitimate, and what are solutions to overcome possible problems?”

The relevance of this topic can be summarised in four major points:

1. The general importance and influence of international organisations is growing enormously.
2. Unity of law is not entirely realised on the international level, resulting in too much latitude for international organisations.
3. International organisations can extricate themselves from accountability which might lead to a lack of legitimate behaviour on the international level.
4. As a consequence, we observe violations of rights in several areas (for example human rights).

## Methodology

The method adopted is a literature-based analysis of the main issues covered. These include: various numbers of texts about international law mechanisms in general, (critical) research about accountability and responsibility of international organisations, research papers on legitimacy, the relationship between legitimacy and power, recommendations and improvements to the current international system.

Besides I will use secondary literature published by the United Nations (UN), the European Union (EU) and the International Court of Justice (ICJ) to get further

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<sup>9</sup> Cf.: Wellens, 2004, p.2.

information about projects and their accomplishment. In cases where it is appropriate, case law will be quoted.

### Structure

In order to answer the research question the paper is divided into five main chapters. The first chapter deals with the question: "What is legitimate behaviour, and what lacks, regarding legitimate behaviour, can be examined in the current international system?"

To answer the question, several areas of importance will be discussed. Firstly the importance of legitimacy in systems will be examined. Regarding further examination of the topic, one should understand why it is needful to discuss this topic. If legitimacy is not a desirable condition, there is no need to follow up to that topic. Secondly, the term legitimacy will be examined. As it is a rather abstract term, its main definitions will be presented and combined. It will be examined among the traditional idea of (western) nation states. In the same part, this definition of legitimacy will lead to examine some indications for legitimate behaviour. This part is important to gain an extensive understanding of legitimacy and legitimate behaviour. Only with the help of this analysis, the following research can be made. In the last part, the analysis of legitimacy and legitimate behaviour will be transferred to the international system. In this part, the overall problem concerning legitimate behaviour will be demonstrated. In my opinion it is important to gain an outline of the general problem before going into detail, narrowing down the topic to the analysis of international organisations only. Even if this paper's main goal is to demonstrate an extract of the international system, one need to be able to integrate it into the overall picture.

After the illustration about legitimacy in chapter one, chapter two presents international organisations within the international system. The question of chapter two is: "What is the role of international organisations in the international system?" In this chapter, I will examine their role in general, but also the changes international organisations have brought to the international legal system. Additionally I will examine the relationship between international organisations, their member states and other parties. In this chapter I will create a wider understanding of international organisations, especially of their powers. The need of this chapter lies in the recognition of the role and the power of international organisations. Only if international organisations enjoy great powers, there is the need for restrictions.



In chapter three I will then present the main problems of the modified rule of law in the international system and problems concerning the legitimate behaviour of international organisations arising from this modification. The meaning of the rule of law and accountability will be examined and they will be linked to each other. The sub-question of this chapter is: "What legitimacy lacks derive from the modified rule of law connected to accountability mechanisms of international organisations?" This precise recognition of lacks towards legitimate behaviour by international organisations is important for later following improvements to reduce possible problems.

Chapter four aims to give recommendations to improve legitimate behaviour of international organisations. In this chapter it is important to show whether there are possibilities to improve the system or not. If the lacks we can examine in the current system are not possible to improve, we could stop arguing about them and just take them for granted. But if there are other solutions and possibilities we should consider those and work to improve the current system. The sub-research question of this part is: "Are there possibilities to improve the legitimate behaviours of international organisations?"

At last, the fifth chapter will consolidate the content as well as the conclusions of the previous four chapters and answer the overall research question: "With regard to established systems of accountability and the rule of law, to what extent can actions by international organisations considered to be legitimate, and what are solutions to overcome possible problems?"

## **1. The International System – Legitimate Behaviour?**

The first chapter explores the asset of legitimate behaviour in the current international system. To develop this, we primarily need to begin with basic understandings of democratic legitimacy and its importance in political life. It is the key element of the first chapter to examine the main features of legitimacy, its importance and its desirability for the international order. These indications, based on a theoretical framework (of nation states), will be translated to the international level. General problem areas developing from a possible lack of legitimacy on the global level will be examined. The sub-research question of this chapter is: "What is legitimate behaviour, and what lacks, regarding legitimate behaviour, can be examined in the current international system?"

This chapter will merely give an overview about the general problems in the international system, creating the basis of any further analysis. Only if the overall problem regarding legitimate behaviour, triggered by multilevel regulation, is understood, the specified problem analysis and its concerns will become clear. International organisations have to be seen as a fundamental part of the whole international system.<sup>13</sup> That is why this precedent analysis is of great importance to the following analysis in chapter II.

The following discussion concerning a definition of the term legitimacy is not exhaustive. Due to the practical bias of my work, I will not go into detail concerning different theoretical models of legitimacy. Neither does the required length of the paper allow for that, nor is it necessary to answer the research question. Although a reflexion about such models is an interesting academic topic, the importance of this chapter is to gain a general understanding of legitimacy and its relevance for political systems.

### **1.1. Democratic Legitimacy and Stability of Orders**

Before examining what legitimacy in particular means, this first part will briefly expose the importance of legitimacy in any system. The question is why any of the discussions about legitimacy matter and why legitimacy is desirable for an order/ system.

Following the argument of various social scientists, one of the most important means of legitimacy is the positive impact on the stability of the system. The theories underline that the degree of legitimacy and the stability of a political order

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<sup>13</sup> Cp.: Hasegawa, Andreas; Weiffen, Brigitte (2009): International Institutions are the Key: a new Perspective on the democratic Peace. *Review of International Studies*, 32, pp.563-585, p.585.

are related to each other.<sup>11</sup> Beetham states that the most important advantages brought to a system of power by legitimacy are “enhanced order, stability, [and] effectiveness [...]”.<sup>12</sup> Ian Clark describes this theory as insufficient and incorrect, but admits nevertheless the positive effects of legitimacy for a system (such as consent and fit membership). He argues that the causality works in the opposite direction than assumed and that a consensus about legitimacy might emerge under certain conditions.<sup>13</sup>

But the characteristics such as the ones supported by other scientists can be seen as the basic structures for stability. One of the reasons for more effectiveness and enhanced order is surely the acceptance of the main structure by many great powers in the system. For example, the chance of an overthrow of a system is just not as likely as in an illegitimate system with fewer acceptances of policies by powerful parties.<sup>14</sup>

I argue that the middle course of these two theories should be the one explaining the advantages of legitimacy in the most sufficient way. There is no legitimacy “creeping” its way into a system without the basis of consensus and support, but once legitimacy has been established actively, enhanced order and effectiveness should grow further due to less opposition and more support. These developed features, such as consent and support, are the first steps towards a democracy. Following this line of argument it means that legitimacy (and therefore the legitimate behaviour of powerful parties) is necessary to develop a democratic order.<sup>15</sup>

Stability of orders, effectiveness, enhanced order and democracy are, for many of us, desirable conditions. Western nation states and their orders are built among this concept and nowadays this idea gets especially interesting for the international system. This is why discussions about legitimacy (especially in the global order) are recurrent, and we can state at this point that a legitimate international order (with legitimate behaviour) should be aspired.<sup>16</sup>

In democratic nation states legitimate behaviour of individuals, institutions but also the government is guaranteed by the legal order and in detail by national courts.

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<sup>11</sup> Cpl: Clark, 2003, p.82.

<sup>12</sup> Cpl: Beetham, *Legitimation of Power*, p.33. Cited in: Clark, 2003, p.82.

<sup>13</sup> Cpl: Clark, 2003, p.95.

<sup>14</sup> Cpl: Kissinger, *A World Restored*, p.145. Cited in: Clark, 2003, p.83.

<sup>15</sup> Cpl: Clark, 2003, p.81-83.

<sup>16</sup> Cpl: *Ibid.*, p.82.

Courts are important to support democracy and also legitimate behaviour.<sup>17</sup> This is due to the fact that courts open the possibility of fundamental rights like for example the right to a remedy. Additionally are courts due to the division of powers independent from other governmental institutions and are therefore able to control the government's actions. This way, individuals as well as other institutions can seek redress and hold institutions and also the government responsible and accountable.<sup>18</sup>

This means that an establishment of an "effective and accessible justice system is the way to provide the elements of individual redress and reparation [...]"<sup>19</sup> and is therefore supportive towards legitimacy within a state.<sup>20</sup>

But what is legitimacy in detail? How can legitimacy be defined and what are indications for legitimate behaviour? In the next part I will define legitimacy theoretically based on the ideas of (western) nation states. Based on this explanation, I will draw up (logically) necessary (legitimate) behaviours or circumstances to guarantee legitimacy.

## 1.2. What is Legitimacy?

What is legitimate behaviour and what is it important for? This question has been discussed in literature over and over again. Scientists can still not agree to one common definition for the term legitimacy.<sup>21</sup> But how can we discuss legitimate behaviour and its importance if there is no clear definition for legitimacy leading the way?

There are some definitions in legal and social theory about how legitimacy can be described. Some of them will be discussed here so that in the end some common indication for legitimacy can be made.

The first recognition about legitimacy is that it is not just the simple idea of performing power – but that legitimacy and power are connected. Schmitter defines the connection between legitimacy and power as:

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<sup>17</sup> Cfr.: Wellens, 2004, p.18/ 22.

<sup>18</sup> Cfr.: Cameron, Iain (2006): The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions. Council of Europe, p.2/ 3. Available at: [http://www.coe.int/t/e/legal\\_affairs/legal\\_cooperation/public\\_international\\_law/Texts\\_& Documents/2006/L%20Cameron%20Report%2006.pdf](http://www.coe.int/t/e/legal_affairs/legal_cooperation/public_international_law/Texts_& Documents/2006/L%20Cameron%20Report%2006.pdf)

<sup>19</sup> See: Herlow, Carol (2002): Accountability in the European Union. Cited in: Wellens, 2004, p.22.

<sup>20</sup> Annotation: This topic is explained more detailed in the third and fourth chapter of this paper.

<sup>21</sup> Cfr.: Clark, 2003, 81.

*"legitimacy converts power into authority – Macht into Herrschaft – and, thereby, establishes simultaneously an obligation to obey and a right to rule."<sup>22</sup>*

Although the idea of a transformation of pure power to authority is attractive, does this connection likewise trigger a danger for legitimacy? Powerful people can (and try) to legitimise their actions based on normative decisions (such as rules and principles). This means that legitimacy is (or at least can be) created by powerful actors with the reference to national interests, values and so forth. This fact can create difficulties while talking about legitimacy – as its idea is always depending on the interpretation by the rulers as well as by the ruled.<sup>23</sup> Building legitimacy only on a set of rules, laws can therefore not be the whole idea. Michael Edwards states that:

*"Legitimate behaviour is rightful behaviour: undertaken by the appropriate authority, in line with an agreed set of rules, and with appropriate or intended effects."<sup>24</sup>*

This definition includes next to an agreement about certain rules also the "rightfulness" of performed behaviour (with the outcome of appropriate or intended effects). This idea is obviously difficult, as the estimation of the term "rightful" is varying from person to person. At first glance this whole concept may seem rather slippery. It is not so easy to decide who should or can judge about the legitimacy of an action, as there is no objective position.<sup>25</sup> But nevertheless, there are arguments amplifying the importance of this aspect of rightful behaviour in the discussion of legitimacy. Every state is based on principles, ideas, which are leading the people's behaviours and actions (one may call it education, socialisation) and which are creating the constitutional state and its values in the end. Original ideas, given from generation to generation (developing in time) form the political culture of nation states. I argue that this form of agreement is just as important as the normative basis itself. Not only because it forms the agreed set of rules within time, but also because the ruled have to be convinced that the rulers adhere to common

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<sup>22</sup> See: Schmitter, Philippe C. (2001): What is there to legitimise in the European Union ... And how might this be accomplished? Max Planck Projektgruppe Recht der Gemeinschaftsgüter, Bonn, 2001, p. 2.

<sup>23</sup> Cfr.: Collingwood, 2006, p.415.

<sup>24</sup> See: Edwards, Michael (2000): NGO Rights and Responsibilities: A New Deal for Global Governance. London: The Foreign Policy Centre, p.20. Cited in: Collingwood, Vivien (2006): Non-governmental organisations, power and legitimacy in international society. *Review of International Studies*, 32, pp. 439-454. British International Studies Association, p.447.

<sup>25</sup> Cfr.: Collingwood, 2006, p.444.

rules.<sup>25</sup> The interaction of the two, the agreed set of rules and the conception of acceptance by the people, are constructing the idea of legitimacy – while one is depending on the other. So is the idea of legitimacy

*“not some abstract conception of right but, rather, to the norms of a specific cultural system at a given time.”<sup>26</sup>*

This idea also unhinges the above mentioned criticism on the rightful behaviour. It is not

*“the truth of the philosopher, but the belief of the people [...]”<sup>27</sup>*

This recognition is important, as it provides the means to estimate performed actions. The relevant actors are hence the participants in the system of rule, the people of the community. But this also means that a community or a closed entity is needed to develop and maintain legitimacy. Clark even argues that if legitimacy cannot exist without a community, then there can equally be no community existing without (its own) legitimacy.<sup>28</sup> Also in favour for this assumption is Edwards’ above mentioned idea of an appropriate authority. We can assume that an authority always goes hand in hand with any kind of a community/ society.

To summarise the assumptions we can say that, to reach legitimacy we need:

- an authority (regime) sticking to their own laws,
- a community/ society and participants (justifying laws in forms of the beliefs of their subjects),
- a set of agreed rules (by participants as well as authorities),
- practical actions which express consent.

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<sup>25</sup> Cp.: Dorbeck-Jung, Bärbel R.: Challenges to the Legitimacy of International Regulation: The Case of Pharmaceuticals Standardisation. In: Follesdal, Andreas; Wessel, Ramses A.; Wouters, Jan (Eds.) (Forthcoming): Multilevel Regulation and the EU. The Interplay between Global, European and National Normative Processes. Martinus Nijhoff Publishers, Leiden/ Boston, p.54.

<sup>26</sup> See: Franck, T.T. (1990) The Power of Legitimacy Among Nations. Cited in: Clark, Ian (2003): Legitimacy in a global order. Review of International Studies, 29, pp.75- 95. British International Studies Association, p.80.

<sup>27</sup> See: Schabert, T.: Power, Legitimacy and Truth: Reflections on the Impossibility to Legitimise Legitimations of Political Order. In: Moulakis (Ed.), Legitimacy, p. 102. Cited in: Clark, Ian (2003): Legitimacy in a global order. Review of International Studies, 29, pp.75- 95. British International Studies Association, p.80.

<sup>28</sup> Cp.: Clark, 2003, p.80.

To transfer the above mentioned ideas to the tradition of democratic legal states, the principles are: constitutional rights, legality, democratic decision making and control, checks and balances of power and judicial review.<sup>33</sup>

### 1.3. How to identify Legitimate Behaviour?

In this part we will transfer the ideas of legitimacy to some “behaviours”, which can be constituted to be legitimate. With their help we can later investigate legitimate behaviour of international organisations more detailed.

To get the above mentioned points into a frame, building a basis to analyse legitimate behaviour, we can say that an important means to measure legitimate behaviour is accountability. Accountability is strongly connected to responsibility and transparency, meaning that especially responsibility is a precondition to reach accountability. Important to notice is that accountability is one of the key elements to create legitimate behaviour. As mentioned in the previous part, legitimacy is based on the ideas and norms of the people at a special time. But this provokes the danger that “the powerful will always (attempt to) legitimise their actions with reference to a whole range of rules and principles [...]”<sup>34</sup> To counteract a mechanism of misapplication, leaders/ governments need to justify their actions among agreed standards and rules; they need to act accountable. Only with the means of accountability connected to responsibility, the possibility for legitimacy in nation states arises. That is why accountability is directly connected to the idea of legitimate behaviour.<sup>35</sup>

Legitimate behaviour also includes the discussion about the “rule of law”; basically meaning that no one is above the law.<sup>36</sup> It is important for every system to work according to the rule of law (as will later be explained in detail), as it is more likely to guarantee and support accountability (see previous clause), responsibility and transparency through the “certainty of law”<sup>37</sup>.

The rule of law and legitimacy are connected to each other.<sup>38</sup> The connection of legitimacy and the rule of law can be defined as the following: “In most national concepts of the rule of law, citizens can only be bound by laws, and these laws

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<sup>33</sup> Cps: Dorbeck-Jung, In: Follesdal; Wessel; Winters (Eds.), 2007, p.55.

<sup>34</sup> Cps: Wendt, Alexander. Cited in: Colingwood, 2006, p.445.

<sup>35</sup> Cps: Ibid.

<sup>36</sup> Cps: Cameron, L., 2006, p.58.

<sup>37</sup> See: Moroni, Stefano (2007): *Planning, Liberty and the Rule of Law*. SAGE Publications, Vol. 6(2), pp. 146-163, p.146.

<sup>38</sup> Cps: Cameron, L., 2006, p.58. And: Cps: Fallon, Jr., Richard H. (1997): “The Rule of Law’ as a Concept in Constitutional Discourse. *Columbia Law Review*, Vol. 97, No. 1, pp.1-56, p.11.

derive their legitimacy from the representative character of the legislature, which is directly elected.”<sup>36</sup> There are different voices about the (non-) presence of the rule of law in the international system. Some scientists state that the rule of law is absent in the international system<sup>37</sup>, whereas others say that it is just reduced and some claim that the whole “domestic ideal of rule of law is inappropriate for the reality of international power politics”<sup>38</sup>. Whatever might be the correct answer to this discussion, important for this paper is the recognition that the rule of law in the international system is not identical with the one on the national level. In comparison with the rule of law in any national state, the international system is not under the umbrella of a constitution or a set of agreed rules.<sup>39</sup>

The discussion about an international rule of law is diverse. On the one hand we can say that a common rule of law in political systems creates unity and understanding. But we should not forget that when talking about the international system, we are talking about nearly two hundred different entities with different laws and different ideologies. Its general importance is nevertheless unquestioned. There is consensus that the rule of law is relevant for the domestic and international society. The UN has recognized this relevance in the World Summit Outcome 2005 and underlined the importance of this topic, when it adopted Resolution 61/39 (2006). The term “rule of law” is mentioned not less than twelve times in this document. In both resolutions the wording makes clear that the UN recognizes the rule of law as a desirable, but not yet completely achieved feature of the international system.<sup>40</sup>

Due to the rule of law’s desirability but also controversial existence in the international system, we might call it a “modified rule of law”. Although different scientists came up with different expressions, I will use the aforementioned term throughout this paper.

We can say that legitimate behaviour is connected to accountability and the rule of law. The rule of law creates a basic framework, and arises the possibility for

<sup>36</sup> See: Dorbeck-Jung, In: Follesdal; Wessel; Wouters (Eds.), 2007, p.55.

<sup>37</sup> Cfr.: Cameron, L., 2006, p.5.

<sup>38</sup> See: Petersmann, Ernst-Ulrich (2007): Multilevel Judicial Governance of International Trade Requires a common Conception of Rule of Law and Justice. *Journal of International Economic Law*, 10(3), pp.529–551, p.537.

<sup>39</sup> Cfr.: Felton, Joseph N. (2007): Toward a Global Rule of Law: A Practical Step toward World Peace. *The Futurist* (November/ December), World Future Society, pp.23– 28, p.25.

<sup>40</sup> Cfr.: UN General Assembly Resolution 60/1 (2005), “World Summit Outcome 2005”, adopted on October 24, 2005. Available at

<http://daaccess.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf>. And Cfr.: UN General Assembly Resolution 61/39 (2006), adopted on December 18, 2006. Available at

<http://daaccess.un.org/doc/UNDOC/GEN/N06/496/77/PDF/N0649677.pdf>



accountability to develop in a system. Accountability then is an important mean to guarantee legitimate behaviour.<sup>41</sup>

Due to this cognition, I will focus on analysing international organisations for these two broad main points – accountability and its connection to the rule of law – in my further analysis (especially chapter 2 and 3). Primarily we will need to have a look on what effects the (in the international system modified) rule of law has on their behaviour. Secondly, we will need to look at accountability and responsibility and also at their connection.

Notwithstanding, in the next part I will briefly take a look at the whole international system, and examine it for occurring problems of legitimacy.

#### 1.4. Legitimacy in the International System

It gets obviously difficult to transfer the previously detected ideas of legitimacy and legitimate behaviour to the international level. Scientists review legitimacy in the current system differently, but most scientists recognise legitimacy in the international system as a delicate topic. The following points will explain problems and possible obstacles.

Starting with Ian Clark's interpretation, that (a) legitimacy can only be found within a community, and that (b) there is no community without its own legitimacy, we get in trouble. We need to ask if we can name the international system a community, if there is one world society we can talk about. Answering this question is rather a hurdle race as the outlook on the existing system varies enormously. There are some areas pointing to a closer global order such as *ius cogens*<sup>42</sup>, international treaties or customs. Nevertheless are areas as culture, history etc. still not pointing towards a common global society.

Important is then the question to what extend the "degree" of a world wide community matters in our discussion. I argue that by virtue of the importance of a legitimate system the degree of the international coalescence is not the main issue. It is more important to recognise the fundamental will to find common basics and the perspective which is given. Nevertheless one very important rule is not entirely represented in the international system: the rule of law. This fact is an important indicator to state that there is no fully developed common global society yet.<sup>43</sup> As

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<sup>41</sup> Cf.: Cameron, L., 2006, p.58-61.

<sup>42</sup> Annotation: *Ius Cogens* is a peremptory norm and a fundamental principle of international law. Accepted by the International Community of states as a norm from where no derogation is ever permitted.

<sup>43</sup> Cf.: Cameron, L., 2006, p.6.

will be demonstrated in following chapters, this fact impedes the control of legitimate behaviour enormously and can, especially regarding the legitimate behaviour, create grave problems.

There are other areas in this discussion which are of special importance in the literature, as they are fundamental to the western idea of democracy. As pointed out by Ian Clark, key questions of this discussion are: “which actors” should exercise power and “which rules” should be leading their actions. These two questions will be important for further examinations.

The comparison of powerful actors on the national level (in democratic states) and on the international level identifies the question about sufficient responsibility and accountability on the international level. Political as well as economical power is given to institutions which are insufficiently supported by citizens (due to lack of direct elections) but nevertheless gain a lot of power. It is not always clear why especially these institutions and actors have that much power, why they have “a right to have rights”<sup>44</sup>. In the modern democratic tradition, the right to exercise power is given through the mechanism of elections. This way the majority will of the people can be identified. On the international level direct elections of international officials are not taking place.<sup>45</sup>

As stated before, it is not only the question which actors should exercise power, but also according to which rules they should perform their actions. In our current world order, organisations (not important whether they are private, non governmental or governmental) are not always acting towards obvious yardsticks.<sup>46</sup> Treaties and custom remain the primary sources of international law<sup>47</sup>, but even if these treaties and customs exist there is again the problem of accountability if institutions act wrongfully.<sup>48</sup>

We can finally say that multilevel regulation is more complicated and blurry then traditional regulation (on the national level).<sup>49</sup> A great number of social scientists assess these factors within the multilevel regulation as a “crisis of legitimacy” in the

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<sup>44</sup> Cfr.: Clark, 2003, p.80.

<sup>45</sup> Cfr.: Isry, Daniel C. (2007): Good Governance at the World Trade Organisation: Building Foundation of Administrative Law. *Journal of International Economic Law*, 10(3), pp.509- 527, p.510.

<sup>46</sup> Cfr.: Collingwood, 2006, p.440.

<sup>47</sup> Cfr.: Wessel; Wouters, 2007, p.2/ 3.

<sup>48</sup> Cfr.: Cameron, L., 2006, p.6.

<sup>49</sup> Cfr.: Follesdal, Wessel; Wouters, Forthcoming, p. 41.

international system.<sup>51</sup> An extract of this problem will be demonstrated among international organisations in the following chapters.

### 1.5. Conclusion Chapter 1

The sub-research question, "What is legitimate behaviour, and what lacks, regarding legitimate behaviour, can be examined in the current international system?" has been answered by exposing the international system and its problems connected to legitimacy. We can answer the question stating that multi-level governance, hence international governance, is much more complex and challenges several fundamental ideas of the traditional western nation state. Legitimate behaviour in the international system is not sufficiently provided. Important preconditions to provide legitimacy are missing. Missing control mechanisms, missing direct participation of the people and the modified rule of law do not provide the modern idea of democracy. But as briefly presented in part 1.1., the idea of legitimacy within a system is desirable as it is creating stability, order and effectiveness.

Important for the notion of this paper is the role, the obligations, and the guidelines of international organisations within the international system, where only a modified rule of law is leading the way. Related to the conclusion of this first chapter we can adhere that if international organisations are one of the main actors on the global level and if they are engaged into policy processes and decision-making processes (which affect states, citizens and businesses) they need to be subject of particular rules and standards supporting legitimate behaviour. These would mainly include standards as accountability, transparency and representation as important parts of legitimacy.<sup>52</sup> In the next chapter I will examine the legal role and the general importance of international organisations in the international system. This examination is of great importance to the following analysis to see to what extent international organisations are important in the international system. If they were unimportant and their actions did not affect nation states, citizens or world politics at all, this analysis would not be of importance. But if international organisations were actually powerful institutions, who are heavily involved into world politics and current changes, we then need to examine their faults and impairments towards legitimacy to find possible solutions in the end.

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<sup>51</sup> Cp.: Collingwood, 2006, p.415; Clark, 2003, p.95.

<sup>52</sup> Cp.: Ibid., p.446.

## 2. International Organisations in the International System - Legal Competences

The international system is still based on national legal orders which are legally autonomous. These autonomous legal orders are in principle the only ones which are “competent to create, implement and enforce legal norms.”<sup>57</sup> But with the growing international legal order and the therefore increasing multilevel governance, more and more legal norms are being developed outside the nation states. One of the most important participants in this new development are international organisations, gaining more and more importance in the international system and its governance. International organisations are even the first ever recognised “international legal persons”<sup>58</sup> next to nation states.<sup>59</sup>

As a result of the increasing role of international organisations, national governments depend cumulative on international organisations, as their decisions and actions increasingly influence national matters.<sup>60</sup> This is why “international organisations can be seen as contractual relationships between member states (legal persons) or as a legal entity with an autonomous status in the international system.”<sup>61</sup> This great influence of international organisations, with the consequences of their decisions and actions, constitute a great power within the global order and should therefore be observed carefully.

This chapter deals with the sub-question: “What is the role of international organisations in the international system?” Initially it is important to recognise legal competences of international organisations within the international system to examine towards whom international organisations are powerful and to what extend. Only if international organisations have similar extensive possibilities of power exercises as states, the previous analysis of legitimate behaviour is adaptive.

### 2.1. Legal Personality of International Organisations

As mentioned before, international organisations are next to nation states the only recognised international legal persons. The acceptance of international organisations being a legal person (therefore having a so called *legal personality*) is of great importance, because only with the precondition of enjoying the status of a legal

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<sup>57</sup> See: Wessel; Wouters, 2007, p.2.

<sup>58</sup> Annotation: International organisations may also be seen as a legal entity with an autonomous status in the international legal system (See: Dekker, Ige E.; Wessel, Ramses A. (2003): *Governance by International Organisations: Rethinking the Normative Force of International Decisions*. In: Dekker, Ige E.; Werner, W. (Eds.) (2003): *Governance and International Legal Theory*, The Hague: Kluwer Law International, p.ii.). In literature nevertheless is the opinion of international organisations as international legal person more common so that it will be the conception used in this paper.

<sup>59</sup> Cfr. Alvarez, 2005, p.608.

<sup>60</sup> Cfr. Wessel; Wouters, 2007, p.3.

<sup>61</sup> See: Dekker; Wessel, 2003, p.6.

personality an institution or person is entitled to bear certain rights and obligations. Scientists are still discussing whether a legal personality is an objective fact or whether the benefit of the legal personality only applies to those with a universal membership.<sup>57</sup> This matter shall not be discussed here, as it would go beyond the scope of this paper.

The idea of a legal person used in this paper is the one according to the institutional legal sense, stating that the main legal parts of legal systems are exhibited by legal institutions. These legal institutions are themselves constituted by institutional rules which “relate to the creation and termination of a specific legal institution as well as to the legal consequences the encompassing legal systems attach to such a legal institution.”<sup>58</sup>

Additional to these institutional rules, legal persons do have their own legal system, which constitutes the basis to own decisions within institutions. This legal personality of an international organisation arises out of the will of its member states.<sup>59</sup> Their legal framework is in most cases a highly complicated system with different rules, norms and principles. The legal regime of an institution (a legal person) can develop and include legal competences. This way the institution can assign legal powers to one or more organs of the institution, which itself can create legal rules. An institution can develop its own institutional legal system to regulate other practises. This gives the legal institution the possibility to design itself (according to own wishes/ images).<sup>60</sup>

As an international organisation is by definition a legal person, it can not only develop towards being an autonomous subject on international law, but also far enough that its competences are additionally based on its own legal system. Following this argumentative strand, international organisations are endowed with everything needed to fulfil their purposes (as long as it is concordant with international law and its own legal system), the so called *inherent powers*. The criterion, on which the validity of a competence of an international organisation is based, is, if it fits into its own legal system, its purpose and the institutional rules.<sup>61</sup>

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<sup>57</sup> Cq.: A'varez, 2005, p.129.

<sup>58</sup> See: Ibid, p.5.

<sup>59</sup> Cq.: d'Aspremont, Jern (2007): Abuse of the Legal Personality of International Organizations and the Responsibility of Member States. *International Organizations Law Review*, pp.91-119, p.104.

<sup>60</sup> Cq.: A'varez, 2005, p.123.

<sup>61</sup> Cq.: Wessels/Wouters, 2007, p.6/ 7.

## 2.2. The Relationship between the Law of International Organisations and their Member States

The relationship between the legal system of international organisations and the one of the member states is important to clarify power relations between the member states of international organisations, the international organisations and its member states and the international organisations themselves. There are various theories about the conceivable validity relations. The most common accepted theory is that the legal systems of member states, as well as of the international organisation itself, are equally important but also more or less independent from each other.<sup>62</sup>

The legal system of the international organisation is based on the international customary rule *pacta sunt servanda*. From this rule arises the recognition that "every treaty in force is binding upon the parties to it and must be performed by them in good faith".<sup>63</sup> This means, that on the one hand member states are not allowed to use their national law to justify the breach of an obligation towards the international organisation (or the treaty). On the other hand it also means that all parties have to act according to the treaty.<sup>64</sup> This function can be seen as the legislative function, the first one ever developed in the international system. It is established (institutionalised) in some permanent international organs, which can be seen as the forerunners in an international democratic order.<sup>65</sup>

But there is one important difference between the legal personality of nation states and the one of international organisations: "No global organisation, not even the UN, has the capacity to engage in the plenary international law-making that the smallest or least powerful state on the planet has. No international organisation can make global law."<sup>66</sup> This statement emerges mainly from some cognition concerning international organisations:

The first awareness is that there is to be made a difference between "internal" and "external" powers of international organisations. Internal powers are for example budgetary powers international organisations enjoy, or even their legal personality (which still are constructed on behalf of the member state's decisions). External powers are the ones affecting parties, which are not a part of this organisation.

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<sup>62</sup> Cfr. Alvarez, 2005, p.120.

<sup>63</sup> See: Vienna Convention on the Law of Treaties (1969). Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. Article 26.

<sup>64</sup> Cfr. Dekker/Wessel, 2003, p.12.

<sup>65</sup> Cfr. Detter, Ingrid. (1965): Law Making by International Organisations. Stockholm: P.A. Norstedt and Söner. International and Comparative Law Quarterly, Book Reviews, Vol. 15, pp. 304-305, p.305.

<sup>66</sup> See: Alvarez, 2005, p.121.

The assumption that nation states would voluntarily give up much more sovereignty is naive: international organisations do not have inherent legislative authority. This means that they are not able/ allowed to create international norms, which are directly binding on other states.<sup>67</sup> If an international organisation exhibits that power, it must already be allocated in an international organisation's constitutive instrument. These forms of decision-making still remain to a great extent within the nation states.<sup>68</sup>

We also need to recognise that all decisions made by international organisations, or one of its organs, are after all affiliated from a treaty, which is itself based on obligations resulting from state's consent. International organisations, or international organisation's law, are despite their autonomy subject to customary rules, mainly codified in the Vienna Convention on the Law of Treaties, which brings along a constraint related to external powers of international organisations. Article 34 (General rule regarding third States) of the Convention states: "A treaty does not create either obligations or rights for a third State without its consent."<sup>69</sup> This means that international organisation decision-making is in any case not transferable to states, which are not a member of that particular organisation. Furthermore, international organisation's powers are constricted to those which were explicitly allocated to it or one of its organs (by the charter).<sup>70</sup>

But there is also some bondage towards the member states of an international organisation. Member states are not allowed to defeat or to grant valid legal rules of an organisation, because international organisations law, as well as those of their member states are part of the same overarching legal system. This means that "valid legal rules of international organisations have to be accepted as legal facts by the member states."<sup>71</sup>

Whether the law of an international organisation is valid, or not, can be judged by the conditions of the same legal system and it does not depend on the (constitutional) law of the member states. It is important to realise that the legal order of an international organisation is concerning its validity equal (hierarchical) to the one of its member states. That does nevertheless not mean that rules and

<sup>67</sup> Cf.: Szasz, Paul (1997): General Law-Making Process. In: Joyner, Christopher C. (Ed.) (1997): The United Nations and International Law 27, at 58. Washington DC: ASIL, and Cambridge, U.K. Cambridge University Press. Cited in: Alvarez, 2005, p.121/ 122.

<sup>68</sup> Cf.: Ibid.

<sup>69</sup> See: Vienna Convention on the Law of Treaties, 1968, Article 34.

<sup>70</sup> Cf.: Alvarez, 2005, p.120/ 121.

<sup>71</sup> See: Dekker/Wessel, 2003, p.12.

decisions taken by international organisations have automatically direct effect or supremacy.<sup>72</sup>

The international legal system is often characterised as a system without institutional vertical unity, as states are liberated how to apply and give effect to international law. One way to regulate this phenomenon is for example the legal system in the European Community, with the help of the regulation of applicability, effect and supremacy regarding most issues. Other international organisations, which do not have this regulation, are dealt with under the traditional rules of international law.<sup>73</sup>

At this point we can embrace that international organisations are, due to their legal role, powerful players in the international system. Even if their powers are mainly restricted to internal powers of the organisation, these internal powers are very strong and efficient. To begin with, the composition of international organisations, based on institutional rules as well as on an own legal system, is allowing international organisations to develop autonomy. Additional legal competences and inherent powers are supporting this autonomy to a great extent. All this makes the international organisations and their legal system not only autonomous but also equally important, plus more or less independent from their member states and their legal systems.<sup>74</sup> The powers towards international organisation's member states are also relatively big. With the idea that international organisations are founded on behalf of its member states, and therefore based on their will, international organisations are nevertheless able to make binding decisions towards their member states. The member states are not allowed to decline these decisions or to act against them.<sup>75</sup> But what did law-making by international organisations and this legal rule provoke in the international system and what did explicitly change due to the influence of international organisations?

### **2.3. Traditional Sources of Law under the Impact of International Organisations**

International organisations as one of the most important global players have changed international sources of law, its substantive content and also the actors making these laws. There are different sources of law which have been changed

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<sup>72</sup> Cfr. Alvarez, 2005, p.588.

<sup>73</sup> Cfr. Dekker/Wassel, 2003, p.14.

<sup>74</sup> Cfr. Alvarez, 2005, p.589.

<sup>75</sup> Cfr. Ibid, p.587.



under the influence of international organisations. These sources will individually be discussed in the following parts.

The adjustment of the “hierarchy” of the law is Article 38 (1) of the Statute of the ICJ, which provides a list of sources of international law. To give a quick overlook, these sources are:

- I. International conventions (agreements), whether general or particular, establishing rules expressly recognized by the contesting states.
- II. International custom, as evidence of general practice accepted as law.
- III. General Principles of Law recognized by civilized nations.
- IV. [Judicial decision and the teaching of the most highly qualified publicists of the various nations, as subsidiary means of determination of law.]<sup>77</sup>

### 2.3.1. First Source of Law - International Agreements

The first source of law is, according to the ICJ, the international agreement. International agreements can be described as treaties, for example, if two or more states entered into. These agreements are binding to all parties. Once the treaty is signed, the parties agree to bind themselves to all it demands. Multilateral international agreements include also conventions, pacts, accords, protocols, final acts, general acts, and declarations; they can be either bi- or multilateral.<sup>78</sup>

Due to the fast globalisation process, international agreements are gaining importance. In the second half of the 20<sup>th</sup> century, with the massive emergence of international organisations, the bargain of those international agreements increased enormously.<sup>79</sup>

The possibility that there is a connection between the increasing amount of (primarily) international organisations and (secondly) international agreements is highly assumable. There is no direct proving for that theory though. What is known in any case is that the bargain for such agreements is facilitated by international organisations. This might be reason enough to assume that the number of such agreements would be reduced without the support of international organisations. Alvarez even states that “international organisations are *effective treaty-makers* for the same reason many of them are effective sites for other forms of standard-setting: because they encourage iterated cooperation; promote pooling of information, expertise, and resources; reduce transaction costs, uncertainty, and free riders; and

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<sup>76</sup> Annotation: Will not be discussed more detailed, as its importance to this topic is not profound.

<sup>77</sup> See: <http://www.internationaljusticeproject.org/juvjusCogens.cfm>

<sup>78</sup> Cf.: <http://www.stanford.edu/group/jonsson/treaty.html>

<sup>79</sup> Cf.: Alvarez, 2005, p.589.

facilitate path dependencies.”<sup>80</sup> One hint, supporting this theory, are the several treaties which were mainly introduced because of the interest of international organisations. To name some of them: Rome Statute for the International Criminal Court (established as a result of the intervention of the United Nations Security Council (UNSC), the UN and the International Law Commission (ILC)), the Landmines Convention (established as a result of the intervention of NGOs, the UN Secretary and its General and due to already established international organisation procedures for treaty making), World Health Organisation’s (WHO) Tobacco Control Convention. I say that these treaties (and there are much more of them) should be reason enough to make the theory credible that international organisations are increasing the amount of international agreements.

But there are other forms of relevant changes due to the involvement of international organisations in the international agreement-making. These innovations do basically transform all measures of treaty-making, from the initiation of negotiations between the nation states until the follow-up procedures. The initiation of how treaties are made today comes from the consensus reached by experts, mostly provided by international organisations.<sup>81</sup>

Nevertheless, the institutionalisation of treaty-making by international organisations has also some negative implications. One is caused by the high number of participants in most of the negotiations – not only the number of nation states involved, but also the number of international organisations and NGOs taking part. The involvement of such high numbers of different parties leads to some serious problems: First of all it is creating intransparency, especially towards the different members, as information may not always be distributed equally. Negotiations may also be more time-consuming and often less efficient than with a smaller number of participants. Another difficulty emerges from the different types of international organisations involved, as they are all deliberated to their own benefit.<sup>82</sup>

### **2.3.2. Second Source of Law - Customary International Law**

There is certainty that international organisations have also changed the second source of law; the customary international law.<sup>83</sup> “Customary international law is

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<sup>80</sup> See: *Ibid.*, p.589.

<sup>81</sup> *Cp.: Ibid.*, p.589- 591.

<sup>82</sup> *Cp.: Ibid.*, p.591.

<sup>83</sup> *Cp.: Ibid.*, p.591.

binding on a nation. It is evidenced by a *generally accepted state practice* and *opinio juris* (accepted as law)."<sup>86</sup>

The traceability of customary law is in a lot of cases rather difficult and requires a lot of research for judges or diplomats. But as reality shows, do neither judges nor diplomats always have the time or patience to do that kind of research. But customary law is important and provides especially on the international level a good basis to certain (as for example fundamental) rights.<sup>87</sup>

International organisations can provide shortcuts to these customs, as they have more efficient means (for example more staff) to do the research work for judges and diplomats. Despite criticism to this rather new form of providing customary law, international organisations are the ones assuring that this "modern form" can exist. Due to the intervention of international organisations into the research of customary law there is more of this type of law used in the judiciary. Some resolutions produced by the United Nations General Assembly (UNGA), which are based on customary law, are used as basic arguments in some cases of international disputes.<sup>88</sup> In detail, international organisations are doing the work which would otherwise not be possible: they find manifest (written, if possible) evidence that preferably many states accept as customary rule.<sup>89</sup>

One of the most popular examples for customary law is the Resolution 2000/17 on the Death Penalty on Relation to Juvenile Offenders. It confirms that the use of death penalty against child offenders is in contrary to customary international law. It also recommends to states, who continue using death penalty for child offenders, to change their laws. They state that these countries should "remind their judges that the imposition of the death penalty against such offenders is in violation of international law."<sup>90</sup> The Ratification of the Convention on the Rights of the Child (CRC), adopted by the UNGA in 1989, is with 192 participating member states nearly universal. Only the United States of America (US) and Somalia are missing. Due to this effort by the UN and other international organisations (for example AI) many nation states were encouraged to change their national laws (for example

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<sup>86</sup> See: <http://www.internationaljusticeproject.org/inv/usCogens.cfm>

<sup>87</sup> Cfr.: Ibid.

<sup>88</sup> Cfr.: Alvarez, 2005, p.592.

<sup>89</sup> Cfr.: Ibid., p.593.

<sup>90</sup> See: United Nations Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2000/17.

China, Zimbabwe and Yemen).<sup>39</sup> The fact that today the US executes more juveniles than the rest of the world combined indicates how powerful and also important customary law is. All other states which have adopted this international customary law have reduced or even banished the possibility of executing juveniles.<sup>40</sup>

International organisation's texts are in generally given more normative weight than texts which are reflecting the view of one state only. Simply the fact that a measure has been discussed in (for example) the UNGA, gives it more credibility. Such acts are universally more truthful than traditional customs are.<sup>41</sup>

As for agreements, the international organisation's impact has also negative aspects on customary law. Some voices say that due to the high number of participants (as in states) involved into the discussions, the possibility of abuse and miscommunication is rather high.<sup>42</sup>

### 2.3.3. Third Source of Law - General Principles of Law

Article 38 of the ICJ Statue lists general principles of law as the third source of international law. This source of law is equally difficult to research as customary law, because it is also documented in such a wide variety of materials (for example, state papers, diplomatic correspondence, executive decisions, judicial decisions, etc.).<sup>43</sup>

In addition, it is not always that clear to decide whether laws can be seen as general principles or not.<sup>44</sup> So it is for example hard to decide whether fundamental principles of justice should become international law or not. The ICJ determines that "an examination of the municipal laws of States in the family of nations will reveal the answer. If it is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of international law would seem to be fully justified."<sup>45</sup> The special reference made by the ICJ towards municipal law is made due to two main facts. Firstly, because it has a much longer history and is much more developed than other national sources of law. It is often much easier to deduce such principles. Secondly, municipal law is

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<sup>39</sup> Cfr.: <http://www.internationaljusticeproject.org/inv/usCogens.cfm>

<sup>40</sup> Cfr.: Ibid.

<sup>41</sup> Cfr.: Alvarez, 2005, p.391/ 595.

<sup>42</sup> Cfr.: Ibid.

<sup>43</sup> Cfr.: <http://www.law.duke.edu/hr/cust-law-1.htm>

<sup>44</sup> Cfr.: Alvarez, 2005, p.596.

<sup>45</sup> See: 15 Annual Digest (1918), p. 632/ 633. Cited in: Akehurst, Michael (1976): *Equity and General Principles of Law*. The International and Comparative Law Quarterly, Vol. 25, No. 4, pp.801-825, p.813.

chosen because the ICJ considered that international law and municipal law are in nature identical.<sup>36</sup> However, these applications of general principles of law assume a universal concept of law which can be adopted internationally. This is of course one of the main challenges towards general principles of law. As mentioned before, it is not always that easy to decide whether a law can become a general principle in the international law or not.<sup>37</sup>

General principles of law are important as they give the possibility to judges to fill in any gaps of *lacunae* in law. There are even civil codes, where the judge is explicitly directed to do so and use general principles of law. The fact that judicial gaps can be filled in gives great importance to general principles of law, especially in international law where law is not as developed as in nation states yet.

Due to international organisations, the significance of general principles of law has increased, as they are able to provide the needed materials to do research across the bulk of materials.<sup>38</sup>

#### 2.3.4. General Observations

As demonstrated in the last three parts of this chapter, international organisations have provoked basic changes in the three international sources of law. Their potential significance to judicial decisions has been increasing enormously - as the number of international dispute settlers proves. It should be kept in mind that the conclusion about law-making of international organisations is mainly positive at this stage.

Unfortunately there is another side of the coin. Many of the standard-settings in which international organisations interfere can not clearly be associated with one of these three sources of international law. Many standards or rules produced by international organisations are "not authorised by express charter provision."<sup>39</sup> International organisations are not without reason impeached of law-making by subterfuge. This is because of the missing link towards the charter provision, as mentioned before. Obviously is law-making without legal basis hard to justify, especially if subterfuge is possible. Emerging from this fact we can state that the

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<sup>36</sup> Cf.: Gutteridge, H. C. (1952): The Meaning and Scope of Article 38 (1) (c) of the Statute of the International Court of Justice. Transactions of the Grotius Society, Vol. 38, Problems of Public and Private International Law. Transactions for the Year 1952, pp. 125-134, p.128/129.

<sup>37</sup> Cf.: Alvarez, 2005, p.596.

<sup>38</sup> Cf.: Ibid, p.597. And: Cf.: Gutteridge, 1952, p.129.

<sup>39</sup> See: Alvarez, 2005, p.596.

ambiguous disunion of “internal” and “external” international institutional law-making by international organisations reduces the protectorate of the nation states in any case.<sup>130</sup>

International organisations produce plenty of norms which can be considered to be newcomers in international law. The only difficulty is the fact that these norms, as for example many of the UNGA’s laws, are more of a general will and a global law than to be classified in one of the three sources of law defined by the ICJ. Competences between nation states and non-state actors are often ignored or changed somehow.<sup>131</sup> They are imprecise and open a lot of ways to act wrongfully. This fact goes hand in hand with the softening of hard law. International organisations, such as the UN, often make use of soft law. This way they provide broader possibilities of interpreting laws, often for their own benefits.<sup>132</sup>

Additionally, international organisations are changing the content of international law as they are filling in gaps and permanently react on the actions of nation states all over the world. They have created rules and laws which would have been unimaginable without these institutions. One of them is the privileges and immunities towards nation states and international organisations themselves, which do create problems in the international system and especially towards the notion of fundamental rights (see Chapter 3).<sup>133</sup>

All these facts show us that international organisations have a great and important impact on politics and that they are able to influence incidents. In time they have created self-dynamics and authorities which were not always foreseen by member states and possibly not always wanted either.<sup>134</sup> Concerning this fact the debatable question is: If member states would have known about these great powers international organisations would develop with time (also directly affecting the member states and their policies), would they have agreed to establish international organisations with these enormous powers at all?

Some reasons for this development lay certainly in the lethargy of the member states: the lack of actionability, divided opinions between the member states which

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<sup>130</sup> Cp.: *Ibid.*, p.597.

<sup>131</sup> Cp.: Czernowitz, L., 2006, p.11.

<sup>132</sup> Cp.: Alvarez, 2005, p.597- 600.

<sup>133</sup> Cp.: *Ibid.*, p.601.

<sup>134</sup> Cp.: Detter, 1965, p.304.

allows the international organisation to act more on its own initiative, and additionally the slow and non-effective planning by the member states.<sup>135</sup>

## 2.4. Conclusion Chapter 2

This chapter's research question was: "What is the role of international organisations in the international system?" Its purpose was to examine whether international organisations are powerful players in the international system or not. The answer is, after the foregoing analysis: international organisations are very powerful players with, to look at it holistically, broad influences.

As demonstrated in this chapter international organisations did (and still do) enlarge their competences in the international system enormously. They are able to make binding decisions towards their member states and they may even exercise sovereign powers. The best examples for international organisations with such great powers are the European Community (EC), UN, North Atlantic Treaty Organisation (NATO), the World Health Assembly of the WHO and others. Alvarez states that more and more of these influential international organisations "appear to be engaging in legislative or regulatory activity in ways and for reasons that might be more readily explained by students of bureaucracy than by scholars of the traditional forms for making customary law or engaging in treaty-making."<sup>136</sup>

This exculpation for the transfer of powers gets especially important when international organisation's decisions become part of the domestic law of its member states, as for example in the EU. In this moment international organisation law affects directly or indirectly the life of citizens of the member states.<sup>137</sup> This was demonstrated in the second part of this chapter where the direct impact of international organisations decision-making or influences on different sources of law was presented. The influence international organisations have on traditional sources of law is enormous. The impact is not to be estimated as only black or white, positive or negative, but in any case as an important influence in the future - international organisations just *need to be handled well*. The lethargy of other involved parties (such as the member states of the international organisation) does not help out.

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<sup>135</sup> Cp.: Ibid, p.334.

<sup>136</sup> See: Alvarez, 2005, p.217.

<sup>137</sup> Cp.: Collingwood, 2006, 439.

I argue that, although many of these influences are actually positive, there is still a need to control international organisations and to guarantee their legitimate behaviour. It is important for this analysis to notice that all legal persons have clearly transcribed responsibilities under international law. International organisations are also not superior to nation states, which means that they should not have greater rights than states do and that, if they execute similar tasks as states, they should at least have the same limits.<sup>108</sup>

Combining the two conclusions of chapter 1 and 2 we can say that international organisations, as they are very strong players in the international system, need to be acting towards legitimacy, with legitimate behaviour. The following chapter 3 will be based on the results of chapter one and chapter two. International organisations will be audited for legitimate behaviour within the international system. As mentioned before, the modified rule of law is a great threat to legitimate behaviour. This fact will be examined initially as the following analysis is to a great extent based on this perception. After that, responsibility and accountability of international organisations will be explored.

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<sup>108</sup> Cp.: Ibid, p.267.



### **3. Rule of Law and Accountability of International Organisations**

After examining the power and role of international organisations in the international system, this chapter will firstly examine the impacts of the modified rule of law in the international system on international organisations. The “modification” of the rule of law is having great impacts on legitimacy regarding accountability, responsibility and transparency. In the first part, the term “rule of law” will be examined. Secondly, tying up the rule of law to this part, accountability of international organisations will be examined. Starting with an examination of responsibility, international organisation’s accountability and its main obstacles will be disclosed. The research question of this chapter is: “What legitimacy lacks derive from the modified rule of law connected to accountability mechanisms of international organisations?” Only by the precise recognition and definition of the lacks regarding legitimacy, subsequently possible solutions can be developed.

#### **3.1. Rule of Law in the International System**

In this first part of the chapter, the modified rule of law in the international system will be examined. Starting with an explanation what we can understand while talking about the rule of law, we will move on to examine why this rule is a gain to a system and what problems might occur when it is not entirely implemented.

The rule of law is a legally charged phrase. In short, one could say its definition is that “no one is above the law”.<sup>109</sup> But the concepts of the rule of law vary from article to article. Some authors do not even take the time to explain what the rule of law exactly means, probably because it is not entirely clear.<sup>110</sup>

In my opinion one of the most persuasive, and yet free explanation, is the one given by Stefano Moroni. He follows a liberal explanation of the term rule of law. According to Moroni, there are four main factors, which should be present in a state where the rule of law is applied: publicity, non-retroactivity, impartiality, and stability.<sup>111</sup>

Publicity is here to be understood as the possibility for citizens to have access to laws and to gain knowledge about those, which means that laws need to be published adequately. Non-retroactivity means that laws should always be made in

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<sup>109</sup> See: Cameron, L., 2006, p.56.

<sup>110</sup> Cp.: Moroni, 2007, pp.147. And: Jones, Harry W. (1958): The Rule of Law and the Welfare State. *Columbia Law Review*, Vol. 58, No. 2, pp. 143-156, p. 143.

<sup>111</sup> Cp.: *Ibid*, pp.147/148.

a way that they are prospective, or sustainable. These first two factors are partly included in the following two factors:

**Impartiality** describes the equal application of all laws to everybody. This can for example be achieved with the means of general rules and the support of negative kind of rules. Negative rules are for example those, which are prohibiting individuals to interfere with the private business of others. **Stability** should be provided for citizens, so that they are able to have expectations towards the system they live in. They need to be sure that they will not be disappointed by it. This can be provided by means of long-term prospective, simple and clear rules and norms. These factors provide certainty of law to the citizens and describe the idea of the rule of law.<sup>112</sup>

There are three more points, which should be attended to the description of the rule of law. The three points assumed by Harry Jones to describe the rule of law are important to gain deeper understanding of the term. His aim is more to describe the citizen's rights, whereas Moroni's description is more directed towards the system itself.

The first point suggested by Jones is that every person has the right to defend himself in court if his interests are affected by administrative or judicial decisions. Secondly, he states that people with deciding positions such as judges or the police should be in completely independent positions. The last point describes that day-to-day decisions should be rationally justified. This means that the demands of general principles shall be deciding, but also the demands of each particular situation should not be disregarded. Both factors together will be crucial, leading to the decision.<sup>113</sup> These points refer, again, to the certainty of law and can be comprised into the definition by Moroni.

There might be more points in addition to define the rule of law more extensively, but as already mentioned, it is hard to find an entire or universal definition. To make it shorter, we can say that the rule of law was in the first place created to protect citizens against the state's power-holders, the government.<sup>114</sup> As laws are (according to the rule of law) binding on everybody, so to the government, a citizen always has the chance to stand up for himself.

The importance of the rule of law becomes clear while having a look at current decisions of the UN. It has recognized this relevance in the World Summit Outcome

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<sup>112</sup> Cp.: *Ibid.*

<sup>113</sup> Cp.: *Ibid.*, p.115.

<sup>114</sup> Cp.: Jones, 1958, p. 145.

2005, that refers to “the need for universal adherence to and implementation of the rule of law at both the national and international levels”<sup>115</sup> Only a year later, the UN underlined the importance of this topic, when it adopted Resolution 61/39 (2006), which states that the UN is “convinced that the promotion of and respect for the rule of law at the national and international levels, as well as justice and good governance, should guide the activities of the United Nations and of its Member States”.<sup>116</sup> This view is acknowledged by a number of authors. Broomhall states that “an institutionalized rule of law, in the robust sense, remains fundamentally at odds with the world system as it now exists.”<sup>117</sup>

As already stated in previous chapters, one of the greatest troubles of the international system is that it is not structured according to the conditions of the rule of law. But how can we prove this finding?

Nearly all definitions of the rule of law on national level mention the presence of an independent judiciary system as being important. Kelly for instance claims that it is “the key link to fostering and establishing the rule of law”.<sup>118</sup> There is no reason why the same should not hold true for the international level. But when we analyse the international system, we will come to the conclusion that such an independent judiciary system rarely exists. The main reason for this may be seen in a faulty design of the Statute of the International Court of Justice, which states in Article 34(1): “Only states may be parties in cases before the Court.”<sup>119</sup> International Organizations as well as individuals do not possess the right to file an action. Thus, the construction of the judiciary does not meet the requirements of the definition of the rule of law.<sup>120</sup>

The problem is, as we could see in chapter one and continuously within this chapter, that the rule of law is essential or at least very important to assure legitimate behaviour. Additionally the rule of law is fundamental to guarantee peace and security for the people living in a state. If citizens are not able to defend themselves against possible breaches, especially those conducted by the

<sup>115</sup> Cp.: UN General Assembly Resolution 60/1 (2005), “World Summit Outcome 2005”, adopted on October 24, 2005. Available at:

<http://daaccess.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf>

<sup>116</sup> Cp.: UN General Assembly Resolution 61/39 (2006), adopted on December 18, 2006. Available at: <http://daaccess.un.org/doc/UNDOC/GEN/N06/496/77/PDF/N0649677.pdf>

<sup>117</sup> Broomhall, Bruce (2003): *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*. Oxford University Press, p. 3

<sup>118</sup> Kelly, Justice E. B. Williams: *An Independent Judiciary: The Core of the Rule of Law*, p. 20 [http://www.oach.law.ubc.ca/Publications/Reports/An\\_Independent\\_Judiciary.pdf](http://www.oach.law.ubc.ca/Publications/Reports/An_Independent_Judiciary.pdf)

<sup>119</sup> See: Article 38 (1e) of the Statute of the International Court of Justice.

<sup>120</sup> Cp.: Wellens, 2004, p.9/22.

government, or in our case international organisations, the trust towards the system is vanishing and the whole idea of democracy is distressed.<sup>121</sup>

This perception goes hand in hand with the fact that, if there is no rule of law, it is rather hard (perhaps even impossible) to establish an accountable, responsible and transparent system, to create legitimate behaviour. If overall laws, binding to everyone in the system, are absent, there is a clearance for the more powerful to play with their own rules, to elude from responsibility and thus from accountability.<sup>122</sup> Regarding to the topic of this paper this means that the question to follow up to will be: if there are no overall laws to guide within the international system, to whom are international organisations then responsible, and who could hold them accountable for their actions if necessary? This also means that either there is a way to introduce fully the rule of law in the international system, or we need to find alternatives to balance this problem.

In the following part the question of accountability of international organisations, under consideration of the modified rule of law and the lack of responsibility of international organisations will be discussed. Responsibility and accountability in international organisations will be examined closely. Examples related to some of the most important international organisations in the international system will be given to explain the situation more detailed.

### **3.2. Responsibility and Accountability of International Organisations**

After the comprehension of the rule of law and its importance in and for a legitimate system, this part will now dispute the importance of accountability. As stated in the first chapter, accountability is related or even partly composed by responsibility and transparency. The recognition of responsibility provides important points for the argument and realisation of accountability. This is why the first clause will briefly discuss responsibility, incipient to accountability in the second clause. As the term of responsibility contains the idea of transparency, this point will not be discussed separately.

#### **3.2.1. Responsibility**

The modified rule of law is one of the graver problems in the international system. To manage problems and the conduct of any party acting on the global level is much more difficult. Therefore, in 2001, the United Nations General Assembly

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<sup>121</sup> Cp.: Cameron, L., 2006, p.6.

<sup>122</sup> Cp.: Clark, 2003, p.82. And: Jones, 1958, p. 131.

(UNGA) adopted a document concerning the “responsibility of states for internationally wrongful acts”<sup>125</sup>. This document was adopted, because the dimension of international acts executed was increasing incredibly. In addition, since the end of World War II the role of international organisations has enlarged.<sup>126</sup> After the current and still growing powers of international organisations, we can admit that, due to the enormously expanding importance of international organisations in the international system, also international organisations need to be responsible for their actions. That is why the International Law Commission (ILC) recently adopted and included the “responsibility of international organisations” as a long term perspective.<sup>127</sup>

It is especially the fact that international organisations enjoy legal personality, which allows the international organisations to bear certain rights. But this means that they should fulfil some obligations at the same time.<sup>128</sup> The great importance of responsibility has been clarified by the statement of the International Law Association (I.L.A) in 2002, pointing out that there is an actual greater need to improve responsibility of international organisations.

An international organisation is obliged to be responsible for its actions when it committed an internationally wrongful act. According to the ILC an internationally wrongful act of an international organisation is defined as “conduct consisting of an action or omission” that “is attributable to the international organisation under international law” and that constitutes “a breach of an international obligation of that organisation.”<sup>129</sup> The term responsibility of international organisations does not only entail responsibility of the international organisation itself, but also responsibility of members of their staff.<sup>130</sup>

As pointed out in the foregoing chapters, citizens are more and more affected by the decisions taken by international organisations. In reverse this means (or better said *should mean*), that international organisations also do have responsibility towards these individuals. The status of individuals in the international system is anyhow

<sup>125</sup> Cp.: Responsibility of States for Internationally Wrongful Acts (2001): Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10).

<sup>126</sup> Cp.: Alvarez, 2005, p.587.

<sup>127</sup> Cp.: Report of the International Law Commission on the work of its fifty- sixth session (2001), 3 May- 4 June and 5 July- 6 August, UNGA.

<sup>128</sup> Cp.: Suzuki, Fisuke; Nanzari, Suresh (2005): Responsibility of International Organisations: The Accountability Mechanisms of Multilateral Development Banks, Michigan Journal of International Law, Vol. 27:177, pp.177- 225, p.179/180.

<sup>129</sup> See: Report of the International Law Commission on the work of its fifty- seventh session (2005), 2 May - 3 June and 11 July - 5 August, UNGA O.R. 60<sup>th</sup> Session, Cited in: Cameron, L., 2006, p.9.

<sup>130</sup> Cp.: Ibid.

rather difficult, as they are primarily not subjects of international law. They have only gained some obligations under international law.<sup>129</sup> One of the first and still most active answers to this problem of responsibility towards individuals is the World Bank Inspection Panel (WBIP) introduced in 1993. This Panel hears complaints of individuals and reports them with recommendations to reach an improvement.<sup>130</sup>

But as there are no conductive obligations to ensure their responsibility, international organisations are, although there are advised to do so, often not responsible towards their actions. But if international organisations are not responsible, who and how then can they be held accountable? Accountability of international organisations will be discussed in the next clause.

### 3.2.2. Accountability

The term accountability can be seen as a broader term as responsibility and it “contains” it at the same time. Without responsibility it is rather hard to reach the accountability of anybody. It is hard to hold somebody accountable for an action, when he is not, or claims not to be, responsible.

Let us in the first place have a look at what accountability means and how we can define its scope. The short definition, elaborated by the Committee on Accountability of International Organisations (CAIO) is that “Power entails accountability, that is the duty to account for its exercise.”<sup>131</sup> A little longer and therefore more detailed definition is the one elaborated by Caplan, stating that “accountability refers to the various norms, practices, and institutions whose purpose is to hold public officials (and other bodies) responsible for their actions and for the outcomes of those actions.”<sup>132</sup> This definition also demonstrates the close connection and interdependence between responsibility and accountability.

One of the reasons why accountability is desirable not only for the member states, but also for the international organisations themselves, is that states would probably be more willing to transfer powers to international organisations, if there are

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<sup>129</sup> Cp.: Cameron, L., 2006, p.70.

<sup>130</sup> Cp.: Ibid.

<sup>131</sup> See: New Delhi Conference (2002): Committee on Accountability of International Organisations. International Law Association, p.2.

<sup>132</sup> See: Caplan, Richard (2005): *International Governance of War-Torn Territories: Rule and Reconstruction*. Oxford: Oxford Univ. Press. Cited in: Cameron, L., 2006, p.10.

mechanisms which will ensure the right acquaintance with these powers. If member states transfer their powers, they should at least have the possibility to know these to be controlled by democratic mechanisms.<sup>133</sup>

There are three levels of accountability, recognised by the ILA in the New Delhi Conference. The recommendations of these levels are common to all international organisations. The first level contains the supervision and the monitoring of international organisations (containing transparency). This is meant to be for internal as well as for external issues, and for actions executed by international organisations. The second level is directed towards the liability connected to responsibility of international organisations and their actions. The last level of accountability is also directed towards the responsibility of international organisations.<sup>134</sup>

Showing these basic observations and recommendations of the New Delhi Conference, the first step towards more responsibility and therefore more accountability may be made.

The importance of accountability in the current system becomes clear. But there are still great obstacles towards responsibility and accountability of international organisations. The following two parts will deal with two main obstacles towards accountability, and give explanations why the compliance with it is not always present. The first point that is important in this discussion is “the right to a remedy” and the second one is “immunities” of international organisations.

### 3.2.2.1. The Right to a Remedy

One of the reasons why accountability is of such great importance is the *Right to a Remedy*, which is strongly connected to the rule of law. It is recognised as a general principle of law and contains “[...] both the procedural right of effective access to a fair hearing and the substantive right to a remedy.”<sup>135</sup> It is noted that this kind of protection to non-state third parties is essential in recognition of accountability. The absence of the right to a remedy would be especially dangerous in combination with the entitlement of jurisdictional immunity (see 3.2.2.2.).<sup>136</sup>

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<sup>133</sup> Cp.: New Delhi Conference (2002): Committee on Accountability of International Organizations. International Law Association, p.2.

<sup>134</sup> Cp.: Ibid., whole document.

<sup>135</sup> See Wellens, Karel (2004): Diversity or Cacophony, 25 Mich. J. Int'l Law 1159. Cited in: Cameron, 2006, p.67.

<sup>136</sup> Cp.: Ibid.

The right of the access to a remedy is a guarantee to the protection of human rights and is part of the customary international law<sup>177</sup>. It contains the means of redress in the case of gross violation of International Human Rights Law (IHRL) or International Humanitarian Law (IHL). The GAUN states in its resolution, concerning the right to a remedy that individuals, which have either been suffering gross violations of IHRL or violations of IHL, have rights to the following remedies (provided by international law):

- a) "Equal and effective access to justice;
- b) Adequate, effective and prompt reparation for harm suffered;
- c) Access to relevant information concerning violations and reparation mechanisms."<sup>178</sup>

I say that these rights should always be estimated higher than the functional needs of international organisations. Already in 1959, the ICJ made sure that certain aspects of law (in this case especially human rights) related to the right to a remedy are binding for the UN.<sup>179</sup> This recognition by the ICJ is connected to the fact that international organisations and states standing "in the same place", meaning both parties enjoy a legal personality. As international organisations are somehow (by their member states or by own law), as well as nation states, bound to human rights, they need to accept at the same time the duty to provide for a right to a remedy.<sup>180</sup>

The right to a remedy applies in all matters where an international organisation is involved, or it *should* apply. The application of the right to a remedy is not always as easy and uncomplicated as it might sound. This has to do with the fact that "[...] no international tribunal has compulsory jurisdiction over international organisations."<sup>181</sup> This makes the possibility to guarantee the right to a remedy considerably difficult.

<sup>177</sup> Cp.: Cameron, L., 2006, p. 67. See: Art. 13, European Convention on Human Rights; Art. 8, Universal Declaration of Human Rights.

<sup>178</sup> See: General Assembly of the United Nations (2006): Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Resolution adopted by the General Assembly [on the report of the Third Committee (A/60/509/Add.1)], Sixtieth session Agenda item 71 (a), UN Doc. 60/147, p.6.

<sup>179</sup> Cp.: Effects of Awards of Compensation Made by the United Nations Administrative Tribunal (1954) Advisory Opinion, I.C.J. Rep. 47 at 57. Cited in: Cameron, 2006, p.40.

<sup>180</sup> Cp.: Cameron, L., 2006, p.66.

<sup>181</sup> See: Singer, Michael (1955): Jurisdictional Immunity of International Organisations: Human Rights and Functional Necessity Concerns, 36 Va. J. Int'l L. 53, 64. Cited in: Wellens, 2004, p.5.



International organisations have in addition a limited or even complete lack of *locus standi* and tribunal's jurisdiction is partly restricted. According to Article 34 of the ICJ's statute, an international organisation is for example not allowed to be a party before the ICJ; they do not have a *locus standi*.<sup>142</sup> That means that member states have no possibility to bring up disputes against international organisations to the ICJ. Following from this, member states have no other means against the breach of international law by international organisations than to go into dispute with the member states of the very international organisation.<sup>143</sup> Anyhow, the reasons for the missing *locus standi* seem to be more political than judicial ones, which make its whole existence in this case rather dodgy.<sup>144</sup>

The European Commission on Human Rights has ruled that member states which transfer power to international organisations, bind this international organisation to fundamental rights.<sup>145</sup> This occurs for example in the EU, where the member states have bound the EU as an international organisation to the European Convention on Human Rights (ECHR). This means that the state responsibility even consists after the transfer of power. But nevertheless the mechanism in the case of the European Court of Human Rights (ECtHR) is not very different from the one of the ICJ. As international organisations as such cannot become parties of conventions (such as the ECHR or the International Covenant on Civil and Political Rights (ICCPR)) and as they have their own legal personality, applications against breaches of fundamental rights have to be made in the member states of the international organisation and can not be brought before the ECtHR.<sup>146</sup> Formally, the right to a remedy is guaranteed in the ECHR and the ICCPR.<sup>147</sup>

I say, that by looking at reality we can commit, that if member states or individuals are not able to defend their rights towards the main people in charge, for example a international organisation, the right to a remedy is not sufficiently implemental.

There are much more examples for areas where responsibility and/ or accountability of international organisations is not postulated. Another great problem is the *immunity* of international organisations. Closely connected to the right of a remedy,

<sup>142</sup> See: Statute of the International Court of Justice. Available at: <http://www.icj-dj.org/documents/index.php?p1=4&p2=2&p3=0>

<sup>143</sup> Cp.: Wellens, 2004, p.8/9.

<sup>144</sup> Cp.: *Ibid.*, p.8.

<sup>145</sup> Cp.: *Ibid.*, p.11.

<sup>146</sup> Cp.: *Ibid.*

<sup>147</sup> See: European Convention on Human Rights, Article 6 (1). Available at: [http://www.echr.coe.int/ECHR/EN/Header/Basic-Texts/Basic-Texts/The+European+Convention+on+Human+Rights+and+its+Protocols/International+Covenant+on+Civil+and+Political+Rights,+Part+II,+Article+2+\(3\)+I](http://www.echr.coe.int/ECHR/EN/Header/Basic-Texts/Basic-Texts/The+European+Convention+on+Human+Rights+and+its+Protocols/International+Covenant+on+Civil+and+Political+Rights,+Part+II,+Article+2+(3)+I). Available at: <http://www.hrweb.org/legal/epr.html>.

this privilege of international organisations will be discussed in the following clause.

### 3.2.2.2. Immunity of International Organisations

International organisations cannot be subject to suits, claims or accomplishments on the domestic level. They are exempted from the jurisdiction of national courts, they enjoy *immunity*.<sup>149</sup> The justification is that international organisations execute important tasks in the international system. The ECtHR ruled that the immunity of international organisations is “an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual government”<sup>150</sup>. To ensure this, international organisations as well as their international civil servants enjoy functional immunity. But immunity of international organisations has to bear up against great criticism from a lot of sides, as it is seen as a threat to the rule of law as well as to accountability in international administration.

Functional immunity of international organisations turns out to be a “fairly broad and almost unlimited immunity from the jurisdiction of national courts.”<sup>151</sup> There is no obvious justification for this broad and almost unlimited immunity of international organisations. If we make a comparison between the immunity of nation states and the one of international organisations, this becomes clear:

Nation states enjoy historical immunity from the jurisdiction of foreign courts. Today this immunity has vastly eroded, but the reasons and mechanisms why state's immunity was originated are still traceable and provide an argument for or against justification of international organisation's immunity. This mechanism of immunity of states is generally accepted, as it is one great part guaranteeing the state's sovereignty.<sup>152</sup> But despite all acceptances, discussions are getting louder which are clearly in favour of boundaries to the immunity of states, for example in the case of breaches of human rights. In any case, the argument of sovereignty, to

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<sup>149</sup> Cp.: Cameron, L., 2006, 78. And: Wellens, 2004, p.16.

<sup>150</sup> See: *Waite and Kennedy v. Germany*, App. No. 26083/94 European Court of Human Rights, 1999. Cited in: Reinisch, August (1999): *Waite and Kennedy v. Germany*, Application No. 26083/94; *Beer and Regan v. Germany*, Application No. 28934/95. The American Journal of International Law, Vol. 93, No.4, pp. 933-936, p.934.

<sup>151</sup> See: Reinisch, August; Weber, Ulf A. (2004): In the Shadow of White and Kennedy. The Jurisdictional Immunity of International Organisations, The Individual's Rights of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement. *International Organizations Law Review*, 1, pp.59-110, p.59.

<sup>152</sup> Cp.: Neumann, Peter (2006): *Immunity of International Organisations and Alternative Remedies against the United Nations*. Vienna University, p.4.

justify state's immunity, is not transferable to international organisations; neither are they sovereign entities, nor are they supposed to be sovereign.<sup>132</sup>

Another argument, which is not in favour for the immunity of international organisations, is the principle of extraterritoriality. In the matter of state's immunity, this principle presupposes the presence of a territory, including the people living in that territory, which are subject to legislation and executive authority. This argument supported state's immunity against suits of foreign countries. But international organisations do not have a territory, hence they do not have a population, nor do they have a comprehensive body of law.<sup>133</sup> These facts, supporting state's immunity, make the immunity of international organisations look rather baseless.<sup>134</sup>

The argument of the independent functioning of international organisations, which shall be guaranteed by this means, seems to be rather unimportant when tied to the importance of fundamental rights, for example "the right of access to a court". One of the leading decisions regarding this question was the case of *Waite and Kennedy v. Germany* (Application no. 26083/94) and the parallel case *Beer and Regun v. Germany* (Application no. 28934/95) in 1999. In this case, all four applicants were working at a disposal in the European Space Operations Centre for the European Space Agency (ESA) in Darmstadt in Germany. After some time of work in Germany, their contracts were not renewed. They inducted proceedings before the Darmstadt Labour Court (*Arbeitsgericht*) against the ESA, saying that according to the German Provision of Labour (Temporary Staff) Act (*Arbeitnehmerüberlassungsgesetz*), they had achieved the status of employees of the ESA. The ESA relied on its immunity from jurisdiction under Article XV (2) of the ESA Convention and its Annex I.<sup>135</sup>

The German *Arbeitsgericht* declared the actions inadmissible and ruled that the ESA's immunity was valid. The Court noted that the proceedings before the German *Arbeitsgericht* had concentrated on the question of whether or not ESA could validly rely on its immunity from jurisdiction.<sup>136</sup>

The final decisions concerning immunity of ESA, taken by the ECtHR<sup>137</sup>, were not satisfying as immunity was granted to the IO. This decision was taken although the ECtHR recognised that the immunity granted to international organisations may

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<sup>132</sup> Cp.: *Ibid.*

<sup>133</sup> Cp.: *Ibid.*, p.5.

<sup>134</sup> Cp.: *Ibid.* And: Wellens, 2004, p.22.

<sup>135</sup> Cp.: <http://www.echr.coe.int/eng/Press/1999/Feb/waite,kennedy%20epresse.html>

<sup>136</sup> Cp.: *Ibid.*

<sup>137</sup> Annotation: After the Federal Constitutional Court (*Bundesverfassungsgericht*) declined to accept the appeal for adjudication the case was directed to the ECtHR.

lead to a possible infringement of an individual's right of access to court. Nevertheless, a step was made towards "scrutinizing more closely the grants of immunity from the jurisdiction of national courts which deprive claimants of access to dispute settlement institutions" as "it embodies a clear departure from the Commission's earlier jurisprudence, which viewed immunity issues as being outside the jurisdiction of the Strasbourg organs."<sup>158</sup>

In these two cases, the consideration between the importance of the immunity of international organisations / nation states, and the protection of fundamental rights of individuals was made. Also the need for alternative remedies was recognised. So the ECtHR stated that a state is not discharged from its responsibility concerning the protection of human rights because it approved immunity to an international organisation.<sup>159</sup>

In fact, the need for dispute settlement mechanisms is even more relevant for international organisations (or those who are in dispute with them) than for nation states. Nation states can in most cases be sued before courts of their own country. This means, that individuals have the possibility to defend themselves against possible breaches of law by their state.<sup>160</sup> Following from that we can say that:

- a) The state has to take responsibility for its actions.
- b) The state can be held accountable for its actions.
- c) The rule of law applies, as the state has to act in line with its own laws.

But, as already demonstrated in the precedent part, there are no comparable international courts dealing with cases where international organisations are involved. We can see that as theoretically international organisations cannot be held accountable for their actions; they do not have to be responsible for their actions.<sup>161</sup> This makes the means of immunity of international organisations, especially in connection with the non feasible right to a remedy in the international system, so dangerous. Especially towards the protection of fundamental rights of citizens this system is extremely shady. A great lack of accountability by international organisations can be identified.

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<sup>158</sup> See: Reinisch, 1999, p.935.

<sup>159</sup> Cp.: Ibid.

<sup>160</sup> Cp.: Wellens, 2004, p.18.

<sup>161</sup> Cp.: Reinisch; Weber, 2004, p.69

Due to these enormous and reasonable criticisms, some international organisations already acted towards more responsibility and accountability. The UN did introduce some means to improve itself.<sup>162</sup>

In the case of the UN, its charter states that the UN enjoys immunity in all territory of its member states. This is a very broad interpretation of immunity for the UN, as it basically covers all forms of legal processes. The ICJ has ruled in favour of this enormous immunity, stating that national courts should not deal with damages which are arising from acts executed by agents or officials for whom immunity is not waived.<sup>163</sup> The organisation nevertheless is urged to balance this. The UN is bound to make preparation for adequate ways of settlement of disputes. This is adaptive if in cases which involve an official of the UN who enjoys immunity due to his position, and from whom the immunity has not been waived by the Secretary-General. In other words: the UN is obliged to promote alternatives to individuals, which are seeking redress in the case that the official enjoys immunity. One of the alternative means, introduced by the UN, is the so called claims commissions with each peace operation. To what extent these commissions are essentially promoting more responsibility or accountability is dodgy, as no "official" regulations or administrative directions exist.<sup>164</sup>

Again we can state that there are barriers towards these obligations, as there are no means to determine whether the UN has fulfilled those, or not.<sup>165</sup>

This means, that even if there are attempts towards the improvement of accountability and overcoming UN's immunity, these are neither indefinite nor are they revisable. And even if there were, who then would observe this means to be sufficient?

Not only do international organisations enjoy immunity, but also individuals which are in service of an international organisation. The immunity granted to individuals (international civil servants) is yet not as absolute as the one to international organisations as such. A person who would due to immunity be "above the law", would logically be irresistible towards any kind of law. This would be a great violation of the rule of law and is therefore not in consideration. That is why a

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<sup>162</sup> Cp.: Cameron, L., 2006, p.85.

<sup>163</sup> Cp.: Ibid.

<sup>164</sup> Cp.: Ibid, pp.85- 88.

<sup>165</sup> Cp.: Wellens, 2004, p.85

difference has been made between an international civil servant acting *intra virus* and the one acting *ultra virus*.<sup>166</sup>

*Intra virus* means, that a person is acting within the scope of his or her mandate. This person will, in the case of a suit by an individual, enjoy immunity. In the case that the person was acting *ultra virus*, beyond its mandate, it can be deprived of its immunity. In the case that the international civil servant was acting *ultra virus*, the international organisation is also not dismissed from its responsibility.<sup>167</sup>

This fact was stated by the ICJ in the case of *Cumaraswamy* 1998<sup>168</sup>, where the relationship between international civil servant's immunity and the responsibility of international organisations was defined very clearly. In this case, the United Nations Economic and Social Council (ECOSOC) asked for the advisory opinion of the ICJ on the applicability of Article VI, Section 22, of the 1946 Convention on the Privileges and Immunities of the United Nations General Convention<sup>169</sup> on the case of Cumaraswamy. Cumaraswamy was presently in the function of a special Rapporteur, speaking for the UN. He faced several lawsuits in Malaysia by claimants who argued that he used defamatory language in the interview and seek damages in a total amount of US\$ 112 million. The ICJ held Mr. Cumaraswamy free from any payment obligations and hold up his immunity. Nevertheless this case led to another judgement: The ICJ ruled that international civil servants need to make sure that they stay within their mandates and also here act carefully. This judgement by the ICJ was one of the first steps towards more responsibility of international organisations and their civil servants.<sup>170</sup>

In the case of the UN, the Secretary-General has the right to waive immunity of the UN's civil servants.<sup>171</sup> To assure the rightful exertion of this task, the ICJ is urged to inspect the decision. This can for example happen, if the appraisal of the UN and the member states diverge. The decision by the ICJ is the final decision that needs to be accepted by all parties.<sup>172</sup>

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<sup>166</sup> Cp.: Cameron, 2006, p.84.

<sup>167</sup> Cp.: *Ibid.*, p.85.

<sup>168</sup> See: "Advisory Opinion" by the International Court of Justice, 29<sup>th</sup> Apr. 1999. Cited in: Cameron, 2006, p.84.

<sup>169</sup> See: Resolutions Adopted by the General Assembly During the First Part of its First Session (1946): UN Doc. A/64.

<sup>170</sup> Cp.: <http://www.icj-ij.org/doctrinet/index.php?pr=154&p1=3&p2=1&case=100&p3=6&search=%22Cumaraswamy%22>

<sup>171</sup> Cp.: Cameron, *Id.*, p.80.

<sup>172</sup> Cp.: *Ibid.*

I say that despite these attempts to higher responsibility and accountability in the UN, they still not seem to be exhaustive enough. Overall guiding rules and laws, which would guarantee completely independent observations, are still missing.

Concluding to the immunity of international organisations we can adhere, that the immunity international organisations and their international civil servants enjoy, is enormous and not justifiable to that extend. The argument of the ECtHR, that immunity ensures proper functioning of international organisations seems unimportant and undersized when compared to the right of access to a court, which is not without reason a fundamental right. Also, if some progress has been made, this is still not enough to say that the situation can be improved sufficiently.<sup>171</sup>

As this fundamental right, the right to a remedy, is connected to the rule of law, I say, that this extensive immunity international organisations enjoy is a breach to the rule of law in states. The problem is, again, that the rule of law does not fully exist in the international system; so there are no imperative reasons to change this fact - other than that it creates a breach of human rights.<sup>172</sup> I say, that the protection of fundamental rights of the individual should in any case be the most important overall rule, immunity (to that extend) is not justifiable under this condition.

### 3.3. Conclusion Chapter 3

It was the aim of this chapter to examine the main obstacles towards legitimate behaviour of international organisations. The research question of this chapter was: "What legitimacy lacks derive from the modified rule of law connected to accountability mechanisms of international organisations?"

As we have seen in the first part of the chapter, the rule of law is one precondition to ensure legitimate behaviour in a system. As it is not entirely implemented in the international system, it cannot guarantee the compliance of certain rights to the people. Due to the modified rule of law, mechanisms as responsibility and accountability are harder to obtain.

Although the importance and powers of international organisations are increasing enormously, international organisations are yet not always responsible for their actions. The reasons for this situation are missing mechanisms to ensure responsibility of international organisations in the international system. Despite some beginnings of attempts to improve responsibility of international

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<sup>171</sup> Cp.: Wellens, 2004, p.21/22.

<sup>172</sup> Cp.: Colingwood, L., 2006, p.95.

organisations, either by non-binding decisions of committees, or the international organisation itself, responsibility seems not to be compulsive.

But as responsibility is an important precondition to be able to hold organisations actually accountable for their actions, accountability of international organisations is not mature either.

The fundamental right of the right to a remedy is highly challenged due to the modified rule of law in the international system. International organisations lack, or do not even have a *locus standi* in front of some courts and tribunals jurisdiction is partly restricted. The direct accuse of international organisations is nearly not possible. Individuals as well as member states have to make a detour towards member states of the international organisation, accuse those of breaches performed by the international organisation the state is a member of, and hope for compensation. The right to a remedy is in many cases not directly applicable to international organisations, and is therefore insufficient when international organisations are involved. This perspective worsens when this fact is combined with the immunity of international organisations.

Immunity of international organisations, developed to that extent, derives from a baseless justification and is constructing a rather dangerous means; it makes international organisations "untouchable" by national courts. The decision for the promotion of alternative means is a start to improve responsibility and accountability, but is yet not developed far enough. Control mechanisms to ensure the sufficient and correct implementation are missing. In other words we can say that the immunity of international organisations impedes the possibility of judicial clearance, the rule of law protects in nation states.<sup>173</sup>

But the protection of fundamental rights of humans should always come first, and be one of the most important goals within a system. What can be done? Simply establish a rule of law in the international system? This idea seems to be rather utopian at the very moment. We need to find an alternative means, ensuring the judicial clearance, guaranteeing certain rights to individuals, but also to states.

The next chapter will deal with this matter of alternatives to improve responsibility and accountability for international organisations in a system without a fully established rule of law. Possible solutions will be demonstrated and discussed.

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<sup>173</sup> Cp.: Wellens, 2004, p.22.



#### **4. Possible Improvements for the Legitimate Behaviour of International Organisations**

In the previous two chapters I examined the role of international organisations, their powers and rights. Occurring lacks in the legitimate behaviour of international organisations were discussed. Concluding in chapter two, we were able to say that international organisations enjoy similar rights as nation states. One of the most important facts is the legal personality international organisations and nation states enjoy. Only because of the precondition of a legal personality an institution/ person is entitled to bear certain rights. But this should also entail a correct conduct within the international system, a legitimate behaviour of those who enjoy legal personality. Examining this question of legitimate behaviour of international organisations, I concluded in chapter three that international organisations feature great lacks of legitimate behaviour; especially responsibility and accountability.

One main trigger for this lack is the modified rule of law in the international system. Lacks of responsibility and accountability occur and are, despite some attempts, obviously not easy to erase. In this paper two main problems creating the lack of accountability were examined. The first one is the right to a remedy, which is not sufficiently implemented in the international system. The second one is the immunity of international organisations and their international civil servants, which is broad and nearly unlimited from the jurisdiction of national courts.

I say that to improve these lacks of responsibility and accountability there are basically two possible solutions. The first would be to "introduce" the rule of law (following the idea of the rule of law in national systems) in the international system. I say that this idea is utopian in the present situation: This kind of a rule of law in the international system would imply a unity of law which is still non-existent. To create unity of law, the unity of nation states is required first. This idea seems currently not to be realisable, as nation states, cultures, and people but also politics and the history of nation states are too diverse.

This means that we need to find alternative mechanisms, which can balance the not entirely introduced rule of law in the international system. Mechanisms, which probably are still not comprehensive, but can dissolve the problems where they emerge and therefore improve legitimate behaviour of international organisations. I say, that some solutions could constitute the first steps into the right direction.

International organisations are, despite occurring lacks in their construction, such as the lack of legitimate behaviour, a gain in times of globalisation. As examined in chapter two, there are many advantages international organisations administer to global development. That is why the improvement of the legitimate behaviour of international organisations is of such great importance.<sup>176</sup>

In this chapter, ideas for improvements of the legitimate behaviour of international organisations will be discussed. The sub-question which will be answered is: "Are there possibilities to improve the legitimate behaviours of international organisations?" The main areas which will be discussed are the improvements of responsibility, the right to a remedy and immunity of international organisations.

#### 4.1. Democratisation of International Organisations

There were already different proposals made to improve legitimacy of international organisations. One of the more often discussed ideas is the one of a democratisation of international organisations, which is sometimes combined with the idea of global governance.

One interesting proposal concerning democratisation was made by Alois Stutzer and Bruno S. Frey in 2004. Their idea is, to improve legitimate behaviour of international organisations by "an approach to world governance based on the democratic idea of *citizen participation*."<sup>177</sup> It means that randomly selected citizens have the right to participate in the decision-making processes of international organisations. This would be implemented by the means of initiatives, referendums and recalls. The involvement of citizens would on the one hand give international organisations the possibility to substantiate their actions and on the other hand a closer connection to the people would be possible. International organisations would then accomplish their actions according to the will of the people. Finally this idea would lead to a higher legitimacy of international organisations.<sup>178</sup>

Stutzer and Frey admit that there are many aspects in their proposal, which still need to be considered and revised. It will not only be difficult to get current decision-makers to agree to this proposal as they admit, but also diversities are relevant to succeed.<sup>179</sup> In my opinion, the proposal by Stutzer/ Frey is a little

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<sup>176</sup> Cp.: Alvarez, 2005, p.217.

<sup>177</sup> See: Stutzer, Alois; Frey, Bruno S. (First Draft 2004): Making International Organisations More Democratic. University of Zurich and CREMA - Center for Research in Economics, Management and the Arts, p.21.

<sup>178</sup> Cp.: Ibid.

<sup>179</sup> Cp.: Ibid, p.21/ 22.

overcast and utopian, but the general idea is not too far from what we should strive for. However, we should also take into account that the current world is in many aspects very diverse and that there are still areas which are irreconcilable.<sup>153</sup> Therefore the general idea of the democratisation of international organisations might be the best point to get started with. A higher involvement of people into decisions-making processes as well as the actions of international organisations and a higher accountability (and responsibility) of international organisations may be the first step.<sup>154</sup>

Some scientists state that in a long time perspective, global governance seems to be possible; the approach is excessively obvious in today's happenings.<sup>155</sup> But that would also require that international organisations strengthen the weak sense of international community. Only if there is less diversity and more global identification, participation, responsibility and also solidarity, the idea of global governance is able to work. This would also mean that international organisations need to change/ improve their relationships with other global and national actors, such as NGOs, governments and individuals. This is not as simple as it may sound, due to the different and partly even conflictive agendas all these parties are following. Nevertheless is the whole idea of global governance in my opinion not completely utopian, but it will need some time to put it into practice.<sup>156</sup>

Also with a perspective towards global governance there is still no solution found for the current situation. The subsequent question then is how we might be able to improve accountability to higher democratic standards and to finally improve the legitimate behaviour of international organisations. One very well discussed purchase is the role of the judiciary. In the next part this will be presented and discussed.

#### 4.2. The Role of the Judiciary

In this part the role of the judiciary, as a main trigger to improve international organisation's legitimacy, will explicitly be discussed.

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<sup>153</sup> Cp.: *Ibid.*, p.21.

<sup>154</sup> Cp.: Holmes, Kim R. (2003): Remarks to the World Federalist Association and Oxfam, Washington, DC. Available at: <http://www.state.gov/p/for/rls/rm/2003/26949.htm>

<sup>155</sup> Cp.: Colzaud, Jean-Marc (2001): Reflections on international organisations and international legitimacy: constraints, pathologies, and possibilities. *UNESCO*, p.534. Available at: <http://www.blackwell-synergy.com/doi/abs/10.1111/1468-2451.00342>. And: Cp.: Stutzer, Frey, 2004.

<sup>156</sup> Cp.: Stutzer, Frey, First Draft 2004, p.10.

Let us start to discuss one of the main obstacles towards international organisation's legitimate behaviour. As demonstrate in chapter 3.2.2.1., the right to a remedy is not sufficiently implemented when talking about the involvement of international organisations. Access to courts belongs to *jus cogens*, and should therefore be respected in any case. Also case law of the ECtHR underlines the importance of the right to a remedy by stating that "the guarantee of an effective remedy requires as a minimum that a competent, independent appeals authority must exist which is to be informed of the reasons behind the decision."<sup>154</sup> No matter whether connected to the not implemented right to a remedy or the immunity of international organisations towards national courts, the right to the access to court is not sufficiently elaborated and realised and creates therefore a great lack of accountability of international organisations.

One possibility to improve this problem is to extend the role of the judiciary. So is an "effective and accessible justice system [...] the way to provide the elements of individual redress and reparation and, where appropriate sanction, which form essential components of accountability systems."<sup>155</sup> This idea of the role of the judiciary will be guiding the ideas about possible improvements of the legitimate behaviour of international organisations.<sup>156</sup>

The basic idea underlying all attempts to improve the situation is that all executive organs, so the United Nations Security Council (UNSC), rely to a great extent on the administration of the nation states and their courts for their implementation of decisions and policies. In continuation with this idea, a possibility would open up in holding executive organs, as the UNSC, accountable over national courts. This could be manageable "through a system of enforceable judicial remedies"<sup>157</sup>. By the means of observation of international organisations, and especially those ones constituting the main actors on the planet, international organisations could become more accountable.<sup>158</sup>

So can and should member states provide for the protection of fundamental rights, such as a right to a remedy. This way the possibility to strengthen a unity of international law would be given. Once this basic would be strengthened, the

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<sup>154</sup> See: Cameron, I., 2006, p.2.

<sup>155</sup> See: Harlow, C/et al (2002): *Accountability in the European Union*. Cited in: Wellens, 2004, p.22.

<sup>156</sup> Cp.: Wellens, 2004, p.18.

<sup>157</sup> See: Harlow, C/et al (2002): *Accountability in the European Union*. Cited in: Wellens, 2004, p.21.

<sup>158</sup> Cp.: Wellens, 2004, p.21.

competences would be transferred to the international level as the review by national courts would fall away.<sup>129</sup>

An important beginning would be to improve the implementation of the right to a remedy in opening the access of international organisations to international courts. A locus standi for international organisations is needed to guarantee the attendance of international organisations in any case.<sup>130</sup>

Not only should international organisations be able to be invited as respondents, but also as applicants themselves. In the case of the ICJ, Article 34 of the ICJ's statute needs to be changed and respectively amended. Instead of clause 1, stating that "only states may be parties in cases before the Court"<sup>131</sup>, international organisations should be included as parties before court. Especially if the reasons for the missing locus standi before the ICJ are more political than juridical ones, Article 34 needs to be revised. This way, member states would have the possibility to hold international organisations directly responsible and accountable for their actions.<sup>132</sup>

In the case of the ECtHR the basic idea is similar. There is great need of an international justice system, providing the possibility to individuals to protect themselves directly from international organisations. The ECtHR has been too careful in its decision-making in many cases. Decisions, made by this internationally important court, need to be more progressive and step up as a forerunner regarding the questions of international law. The ECtHR needs to see that a denial of justice, leading towards more immunity, is not in line with basic principles.<sup>133</sup> Even if the *Waite and Kennedy v. Germany* and *Beer and Regan v. Germany* cases in 1999 were somehow progressive, the ECtHR nevertheless did not decide towards the protection of the individuals, but to immunity. "The Court has unfortunately missed a very good opportunity to deliver a courageous judgement."<sup>134</sup> The ECtHR took a number of other decisions in which the right to a remedy of an individual or another third party was violated due to the immunity of an international organisation. The ECtHR should here improve its decisions and step up towards the protection of human rights.<sup>135</sup>

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<sup>129</sup> Cp.: *Ibid.*, p.18.

<sup>130</sup> Cp.: *Ibid.*, p.22.

<sup>131</sup> See: Statute of the International Court of Justice, Article 34, 1. Available at: <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

<sup>132</sup> Cp.: Wellens, 2004, pp.22/23.

<sup>133</sup> Cp.: *Ibid.*, p.15.

<sup>134</sup> See: Al-Adsani: 34 Eur.I.R. Cited in: Wellens, 2004, p.15.

<sup>135</sup> Cp.: Wellens, 2004, p.21/22. And: Cameron, *et al.*, 2006, p.47.

This basic idea of the opening of the access for international organisations to international courts is transferable to many others. "Direct remedial action against international organisations should be become available [...]"<sup>196</sup> Only this way, with the possibility to a right to a remedy for other parties, international organisations and their actions can become more responsible and accountable. For the ECtHR the time has come to realise that "le déni de justice auquel aboutit l'immunité ne peut plus être toléré."<sup>197</sup>

This would not only improve accountability of international organisations, but another important question in correlation with this "system" would be clarified. It is for example very questionable if "we can really hold member states responsible for the actions of organs, such as the Commission and Court, over which they have no day-to-day control?"<sup>198</sup> This question can and will not be answered in this paper. But questionable is in that matter if the shifting of responsibility to the nation states, is not another (welcome) opening for international organisations not to be accountable for their actions.

Concerning immunity of international organisations before domestic courts a solution is not as easy, as we can state that "an international organisation needs and desires to protect its staff from personal suit is understandable and perhaps even justifiable for acts that are not criminal in nature."<sup>199</sup> But we should keep in mind that immunity of international organisations is only justifiable, if it does not "release" the international organisation from its human rights obligations. As we have seen in chapter three this is not always guaranteed. We can say that this absolute immunity of international organisations is neither compatible with the idea of the rule of law, nor with jus cogens. In many cases, human rights violations are provoked.<sup>200</sup>

Regarding the discussion of immunity the solution might lie in the recognition of the right to an access to court and therefore the above explained right to a remedy. Access to a court is a fundamental right which is violated by the immunity of international organisations. One possibility would be that international organisations find alternative remedies, which are actually a) sufficiently

<sup>196</sup> See: Wellens, 2004, pp.5.

<sup>197</sup> See: Pingel, Isabelle (2002): *Droit d' Accès aux Tribunaux et Exception d' Immunité : la Cour de Strasbourg Persiste*. Cited in: Wellens, 2007, p.16.

<sup>198</sup> See: Clapham, Andrew : 'The European Union before the European Court of Human Rights', in *International Organizations and International Dispute Settlement: Trends and Prospects*, L. Boisson de Chazournes, C. Romano and R. MacKenzie (eds). Transnational Publishers, New York, 2002, pp.73-88.

<sup>199</sup> See: Cameron, I., 2006, p.95.

<sup>200</sup> Cp.: *Ibid*, p.4.

implemented and b) supervised by outside institutions. This way international organisations would be able to hold on to immunity but would be monitored by institutions which could guarantee their rightful behaviour. But even in this case the need to reduce international organisation's immunity is given. In the case of breaches and violations there must in any case be possibilities for redress.<sup>701</sup>

If there are no alternative remedies created, international organisations need to partly resign from immunity, and respectively their immunity needs to be waived. It is the emphasis that needs to be changed between the protection of human rights and the immunity and functioning of international organisations. This means that, in the case of a possible violation of human rights, an international organisation's immunity should be waived. Individuals and other third parties should get the possibility for redress. The right to access to a court should be fulfilled in any case.<sup>702</sup> To a certain extent, immunity should still be present to ensure the functioning of international organisations, but the protection of human rights should nevertheless be more important. In my opinion should international organisations therefore guarantee the protection of human rights in the case of a human right's violation but remain with the means of a reduced immunity.

I state that the improvement of the role of the judiciary is the most important means to create better legitimate behaviours of international organisations. In the current system there is a dislocation of law-making power from the legislative to the executive. This needs to be cancelled and brought into an order following democratic standards. The role of the judiciary, both on the national or international level, is important as a critical reflection of the executive behaviour. If the behaviour of executive bodies is not reflected or supervised, responsibility and accountability are hardly realisable. The whole idea of checks and balances is out of order.<sup>703</sup>

In 2004, the II.A decided that "In cases before domestic courts it will be for the Executive Head of the international organisation to decide, in the interest of the organisation, upon the waiver of immunity from jurisdiction."<sup>704</sup> But an executive head of the international organisation is probably not very objective when it comes to the decision, whether immunity should be waived or not. The "executive cannot

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<sup>701</sup> Cp.: Bianchi, Andrés (1999): Immunity versus Human Rights: The Pinochet Case. EJIL, Vol. 10, No.2, pp.237-277, p.265.

<sup>702</sup> Cp.: Cameron, L., 2006, pp.93/96.

<sup>703</sup> Cp.: Brown, Rory S.: How do Judges Cope with Multilevel Regulation? In: Follesdal; Wessels; Wauters (Eds.), Forthcoming, p.229.

<sup>704</sup> See: International Law Association (2004): Accountability of International Organisations. Berlin Conference. International Organizations Law Review 1, pp. 221-293, p.237.

be expected to exercise self-control.”<sup>205</sup> I say, that as long as there are no external supervisors deciding about immunity and the sufficient implementation of alternative means, the gap of accountability of international organisations is hard to close. External supervision, preferable by an independent and actually operating institution, working closely with the international and national judiciary, is necessary to improve legitimate behaviour of international organisations.<sup>206</sup>

One general reason for this problematic might be the fact that “still many principles, rules and doctrines of both international and domestic law are reminiscent of an old fashioned and no longer viable approach to international law [...]”<sup>207</sup> Due to the on the one hand old fashioned rules and ways of global organisation, and the on the other hand new appearances in the international system, inconsistencies are created. These inconsistencies can then, for example lead into the lack of legitimate behaviour of international organisations. One general starting point to improve legitimate behaviour of international organisations is to reduce these inconsistencies and to assimilate the two systems to each other and to reduce the gap between them.<sup>208</sup>

In my opinion, the judiciary is able to diminish this gap. By taking the new appearances, laws and rules into account and change established rules, such as the immunity of international organisations, a better protection of fundamental rights can be created. This would mean that the judiciary is one important element to plane these inconsistencies in the international system.

I think that until now, we have not been getting too far in improving responsibility or accountability. But the attempts which are for example visible in the results of the New Delhi Conference show the recognition, the relevance and the general will for improvements of this matter.<sup>209</sup>

#### 4.3. Conclusion Chapter 4

After discussing importance and lacks of legitimate behaviour in the previous chapters, this chapter’s aim was to examine possible improvements. The fact that international organisations show a great lack of legitimate behaviour may on a first glance seem severe. But as long as there are possibilities to recognise possible

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<sup>205</sup> See: Brown, In: Follesdal; Wessel; Wouters (Eds.), Forthcoming, p.236.

<sup>206</sup> Cp.: Ibid.

<sup>207</sup> See: Bianchi, 1999, p.272.

<sup>208</sup> Cp.: Ibid, p.275.

<sup>209</sup> Cp.: New Delhi Conference, 2002, Whole Document (especially pp. 18/19).



starting points to improve the situation it is not viewless. The chapter's research question therefore was: "Are there possibilities to improve the legitimate behaviours of international organisations?" The brief answer to this question is: yes, there are ways to improve international organisation's legitimate behaviour.

The way towards improvements at present is perhaps not the creation of an overarching system as a unity of law with a following establishment of the rule of law in the international system in the current situation. A democratisation and to aim at the goal of global governance are possible if changes are made. International organisations would have to support a stronger sense of international community by creating higher global identification, participation, responsibility and also solidarity. At the same time international organisations need to improve their relationships with other global and national actors. In the current situation this might seem difficult – I state that it is manageable in the future. But we do have to admit that even if this is without doubt a desirable goal in a long term perspective, smaller steps have to be made at first.

In my opinion, the role of the judiciary is in the current situation an important feature to improve legitimate behaviour of international organisations in the international system.

If international organisations would be an accepted party in front of international courts, as for example the ICJ or the ECtHR, the possibility for individuals and others to demand their rights would be given. This would then constrain international organisations to be more responsible and at least accountable for their actions.

The role of the judiciary is also important on the national level. At present, international organisations enjoy a nearly unlimited immunity towards national courts. But, as the derivation of this immunity (state's immunity) is not transferable to international organisations, and this huge immunity is in any case a threat to the protection of human rights, it is not justifiable. The solution for this is that international organisations either find other, alternative remedies to make sure that claimed redress receives sufficient attention, or their immunity needs to be constricted immensely. Possible alternative means needs then to be controlled by an independent institution as the executive cannot control itself sufficiently.

The dislocation of law-making power, from the legislative to the executive, needs to be cancelled. The critical reflection of actions of international organisations by independent institutions is needed. The improvement of the relationship of

international organisations and the judiciary on national and international level is the key for the first steps towards more legitimate behaviour of international organisations.

## 5. Conclusion

The invention and creation of international organisations is relatively new. Within a short period of time, the importance of international organisation grew immensely. Their impact on global politics, decision-making and the life of citizens all over the world increased. These circumstances make a general examination of international organisations so important. With the help of the explanation of the status quo of international organisation's legitimate behaviour and the identification of ways out of current problems, the main-research question of this paper will be answered at last. The question of this paper was: "With regard to established systems of accountability and the rule of law, to what extent can actions by international organisations considered to be legitimate, and what are solutions to overcome possible problems?"

In chapter one, the aspect of legitimate behaviour in the international system was explored. The sub-research question: "What is legitimate behaviour, and what lacks, regarding legitimate behaviour, can be examined in the current international system?" was answered. The aim of this chapter was to build up a basic understanding of current problems in the international system, especially problems regarding legitimate behaviour.

As one of the first conclusions in this part we can adhere that legitimate behaviour can be seen as a desirable condition within a political system as it particularly provides stability, enhanced order and effectiveness. That is the reason why democratic western nation states are, among other things, constituted on the principle of legitimacy with the demand of legitimate behaviour of their institutions. During the analysis it became clear, that multi-level governance, hence international governance, is much more complex and challenges several fundamental ideas of the traditional western nation states. The legitimate behaviour of many institutions in the international system is, for example, not adequate, as important preconditions for legitimacy are missing. These are in particular mechanisms of supervision, direct participation, and eminently the rule of law.

The intrinsic conclusion of chapter one was not only the recognition of the importance of legitimate behaviour and its problematical position in the international system. It was in particular the recognition of the fact that: if international organisations are one of the main actors on the global level, they need to be subject of particular rules and standards supporting legitimate behaviour.

Chapter two examined the question: "What is the role of international organisations in the international system?" Following the conclusion of chapter one, the goal was

to define the role and powers of international organisations in the international system and to compare them with the "natural powers" of nation states.

Already by recognising international organisations as "international legal persons" they gain rights and powers. There are no other entities in the international system, which are recognised as legal persons next to nation states and international organisations.

Within time, international organisations have gained a lot of additional power, transferred from the member states to the international organisations. They are partly able to make binding decisions towards their member states and they may even exercise sovereign powers. The influence international organisations have on traditional sources of law is also formidable. They have, often to the positive, changed and improved sources of international law, and today citizens are directly affected by their decisions and strong powers.

The influences of international organisations in different areas are partly positive, but also partly questionable, as problems and lacks derive from these powers. Member states are apparently overstrained, as they seem to fall into a lethargic attitude. This is of course not the way to overcome and lastly improve existing problems. Finally we can state that international organisations enlarged their competences over the past decades, that they can be identified as very powerful players and that they still gain more power with time.

The findings of chapter two can be summarized in this short statement: international organisations have enormous influences, their rights and powers are similar to those of nation states. Therefore, adjacent to chapter one, we were able to say that international organisations with similar rights as nation states and especially with the advantages of a legal personality should follow similar restrictions and obligations as nation states.

Chapter three aims to examine the substantiality of restrictions and obligations of international organisations. The impact of the modified rule of law as a precondition in the international system was examined briefly. The sub-research question of this chapter was: "What legitimacy lacks derive from the modified rule of law connected to accountability mechanisms of international organisations?"

As demonstrated, the not entirely implemented rule of law is having great impacts on established systems like accountability and responsibility. As the rule of law can be seen as a precondition to ensure legitimate behaviour, its modification in the international system produces the non-compliance of certain rights. Mechanisms as responsibility and accountability are harder to obtain.

Responsibility of international organisations and constraining accountability are an important means of legitimate behaviour, which international organisations do not always adhere to. One of the most important rights in international law which is not sufficiently implemented is the right to a remedy. International organisations are only partly, or even completely, lacking locus standi before international courts. In the case of the ICJ, for instance, international organisations are excluded as a party due to the wording of Article 34 of the Courts Statute. Member states cannot claim redress against international organisations directly, which constitutes a violation of the right to a remedy. Individuals as well as member states have to make a detour towards the member states of an international organisation to achieve compensation. The right to a remedy in the international system is in many cases not directly applicable to international organisations.

On national level international organisations are additionally “protected” by their immunity. International organisation’s immunity is broad and universal: international organisations are nearly “untouchable” by national courts. It is supposed to guarantee an independent functioning of international organisations, but the dilemma is that this immense immunity of international organisations also creates violations of human rights. While international organisations are protected by immunity, it removes the right of citizens to defend themselves directly to international organisations at the same time. Although the decision for, and implementation of a promotion of alternative means has already started to improve responsibility and accountability, it is not developed far enough to state that it balances the general problem. Control mechanisms to ensure the sufficient and correct implementation are missing. Immunity of international organisations impedes the possibility of judicial clearance, in nation states usually protected by the rule of law.

After these extensive considerations, chapter four aimed to seek possible alternatives to overcome the problems of legitimate behaviour of international organisations. One possible outlook to overcome this problem might be the democratisation of international organisations and global governance. Global governance might – with a few efforts and changes in the international society – be possible, but it does not constitute an immediate solution. Although democratisation is a good starting point, the solution is not immediately practicable. Decision-makers are possibly not certain to share or even to transfer their powers to other actors.

After reckoning that a final solution will supposable take time to be developed and integrated into the international system, the role of the judiciary was identified as the key solution to the problematic at present.

Primarily, international organisations need to be accepted as parties in front of international courts, such as the ICJ and the ECtHR. The means to guarantee the widening of the access to these courts is not as difficult as we might assume in the first moment, as it is sometimes just the change of an article. This way, the possibility for individuals and others to demand their rights would be given. International courts generally need to step up and support the rights of citizens to seek redress against international organisations, if there was a violation demonstrable. An effective and accessible justice system on the international level is the key to higher legitimate behaviour of international organisations. If citizens and other third parties are able to defend themselves, international organisations are in the position to act legitimate and to be accountable for their actions.

Another problem is the immunity of international organisations, which is a great threat to the protection of human rights. In my opinion there are just two alternatives to annul this problem: international organisations either find other, alternative remedies to make sure that claimed redress receives sufficient attention, or their immunity needs to be constricted immensely. If alternative means are the way to improve responsibility and accountability of international organisations, independent institutions for the supervision of actions and the sufficient implementation of those means are needed to control the executive. Individuals and other third parties should get the possibility for redress.

The right to a remedy and the right to access to a court should be fulfilled in any case. They are in my opinion the key to legitimate behaviour of international organisations. If other parties are able to defend themselves, to seek redress, international organisations will be forced to act more thoughtful and in line with laws and rules, especially human rights.

Additionally we can reckon that the international system is "divided" into on the one hand old fashioned rules and the on the other hand new appearances. The, due to this fact emerging inconsistencies, create problems in the international system. The gap between the old fashioned rules and the new appearances needs to be reduced. With the help of the judiciary this gap can be diminished as international organisations would start to take the new appearances, laws and rules into account and act accordingly.

By the help of these different means the dislocation of law-making power in the international system can be changed and brought into a frame of democratic ideas. The improvement of the role of the judiciary on national and international level is the key for the first steps towards more legitimate behaviour of international organisations.

With the help of these different and necessarily broad considerations, we can say that there is a strong imperative to improve the recognised problems. Legitimate behaviour of international organisations – as influencing and powerful players in the international system – should in any case be guaranteed. At the moment they are not practicing what they preach, and they are not acting towards the ideas of the nation states by which they were established once.

We should treasure in mind that international organisations are enrichments in times of globalisation and the construction of new orders. Despite deficits concerning their legitimate behaviour, they for example still account for the prevention of war due to early recognition and blocking of escalation pathways and the general support of democratic order. "International organisations provide greater opportunities for all states, regardless of wealth or power, to participate in the formation of law."<sup>13</sup> Some other advantages international organisations add to the current world were already mentioned in this paper. The importance and enrichment of international organisations to the present world should inspire people even more to improve the current lacks of international organisation's legitimate behaviour!

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<sup>13</sup> See: Alvarez, 2005, p.217.

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