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PRACTICAL LEGAL PROBLEMS OF INTERNATIONAL ORGANIZATIONS  
A Global Administrative Law Perspective on  
Public/Private Partnerships, Accountability, and Human Rights

GENEVA, March 20-21, 2009

CONFERENCE REPORT

prepared by

Makane Moïse Mbengue, Davinia Abdul Aziz and Katherine Del Mar

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## **Introduction**

### *Background*

This conference was jointly organized and sponsored by the Department of Public International Law and International Organization at the University of Geneva Law School (Professor Laurence Boisson de Chazournes) and the New York University (NYU) Institute for International Law and Justice (Professor Benedict Kingsbury and Research Fellow Lorenzo Casini). The event was also sponsored by the Swiss Federal Department of Foreign Affairs, the Carnegie Corporation of New York, and the Institute for Research on Public Administration of Rome.

The purpose of the meeting was to raise, analyze, and discuss important operational issues that confront major international organizations (IOs) that may not as yet have been sufficiently addressed in a systematic fashion. The conference organizers categorized these issues as follows:

- (a) public-private partnerships (PPPs) involving IOs;
- (b) “soft law” produced by IOs;
- (c) emergency action by IOs;
- (d) IO field operations; and
- (e) human rights in the work of IOs.

The conference was attended by 76 participants, including leading experts in the field from practice and academia.

### *Conference Format*

Discussions were structured in the following way. There were four thematic panels and a round table discussion involving IO lawyers and academics. For each thematic panel, papers were distributed in advance. Commentators highlighted themes and issues raised by the papers. Authors’ responses were followed by a general discussion open to all participants.

The conference was held under the Chatham House Rule, which provides that “[conference] participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.”

### *Overview*

Both Geneva and New York house the headquarters of various United Nations (UN) bodies and other IOs. For many years, the law of IOs has been a key focus of

the work of the Department of Public International Law and International Organization at the University of Geneva, which has profited from its location.

The same has been true of NYU Law School over many decades. Professors Benedict Kingsbury and Richard Stewart at NYU, in close collaboration with Professor Sabino Cassese at the University of Rome La Sapienza and other colleagues around the world, have developed the concept of "Global Administrative Law" (GAL) to help channel, assess and control uses of power in all forms of international governance. This includes principles and mechanisms for transparency, participation, reasoned decisions, accountability, review, and protection of rights, as well as for effectiveness. This conference focused on the applicability of GAL approaches and techniques to current issues in the practical operations of IOs.

Current issues of importance in contemporary international law include how questions of accountability and immunity come up against mutual interests, the role played by PPPs in the daily workings of IOs, and IOs' compliance levels with human rights norms. There is now a clear need for new ways of thinking on these issues. There are many ways in which the disciplines of domestic public law, the law of IOs and international law increasingly overlap, so that these norms play some role in the day-to-day interaction of IOs. The idea developed within NYU's GAL Project (<http://www.iilj.org/GAL>) may help to address all these questions.

The main difference between the current GAL enterprise and the 19th century "international administrative law" approaches is that GAL is a truly global effort, involving scholars in Heidelberg, New York, Paris, Rome and many other cities in Africa, Asia, Europe and North and South Americas. The GAL endeavour deals with a new subject matter that precludes reliance on the usual paradigms of public law. These paradigms were developed in national contexts, and so they cannot be mechanically transposed to an entirely new environment beyond the State. The GAL approach to IOs could be summarized in the following way:

1. Notwithstanding some areas of overlap, GAL should be distinguished from traditional international law. GAL includes national and supranational rules, as well as rules produced by IOs. Here, "global" is not to be equated with "international."
2. International law is based mainly on transactions. Global law has developed a more robust hierarchy of norms.
3. There are now around 2,000 IOs. They act as standard-setters, service-providers or rule-makers.
4. The most important global bodies are those that carry out standard-setting functions. These standards are addressed to national governments, but also affect private parties.

5. Such global bodies lie at the top of self-contained regulatory regimes. However, these regimes do not exist entirely independently. They are linked in many different ways.
6. The global and national orders interact in a number of different ways.
7. In this context, a “global administrative law” has developed to ensure and promote the rule of law, procedural fairness, the duty to give reasons and accountability.
8. Traditional diplomatic relations and negotiations survive and operate alongside adjudication in global courts and compliance committees.
9. Procedural rules play an important role at the global level in the absence of periodic elections.

## **I. Public-Private Partnerships Involving IOs**

This Panel discussion covered the following issues:

1. definitional issues, including variations on institutional models and governance structures;
2. the use of various types of legal instruments to promote accountability and oversight;
3. managing impartiality of IOs dealing with private actors, including conflict of interest issues;
4. whether PPPs really do fulfill some “value-added” function at the global level.

At the global level, the notion of PPP covers a large array of situations as it has developed in different ways in different areas of cooperation. The functions of PPPs include the regulation of conduct, service delivery, the transmission of information and standard-setting. However, not all PPPs embody such functions. For example, most PPPs in the field of health do not have a standard-setting function.

Global PPPs are not defined by any specific institutional model, which presents particular legal challenges. Various institutional models have been used: networks, alliances (UNITAID, GAVI), semi-autonomous entities (e.g., the Global Fund which was hosted by the WHO until 2008 under an administrative services agreement). The institutional framework of PPPs may evolve in light of the challenges faced by each of them and in order to achieve their object and purpose. For example, GAVI is now as a non-profit foundation under Art. 80 *et seq* of the Swiss Civil Code and is asking to be granted privileges and immunities equivalent to those of a public

international organization under the new Swiss Host State Act.

Despite being characterized by flexible and “informal” institutional frameworks, PPPs can in some cases be the receptacle for traditional IOs. For instance, UNICEF and WHO are full voting members of GAVI and may be beneficiaries of funding that supports GAVI programmes. PPPs sometimes strive for legal autonomy both at the institutional and functional levels *vis-à-vis* traditional IOs. In the field of health, some PPPs have even established their own strong identity/mind-set, and the WHO is regarded as merely as administrative support that should not get entangled with the PPP activities. There is thus a constant demand to adapt rules of international organizations to PPPs, and PPPs represent themselves to third parties as being something quite independent of their partner IOs.

PPPs are also not always constituted by treaty. Most PPPs are based on informal arrangements and/or are established through various other types of legal instruments: public law, private law, agreements, and memoranda of understanding (both binding and non-binding). One reason for this flexibility concerning the form of the constituent norm is the desire to be not legally bound by strict commitments.

While the ultimate “value-add” of PPPs is the resources that private partners often have at their disposal, so that the impact of the PPPs’ work is immediately felt on the ground, the conference acknowledged the trade-off between “hard” institutional frameworks and flexibility. This trade-off is exemplified by the United Nations Environment Programme (UNEP) mercury programme. Initially, the programme used the PPP structure because States could not agree on a convention. The programme was then criticized for lack of clear accountability and oversight mechanisms. However, improved accountability and oversight mechanisms made the programme structure more complicated. The UNEP Governing Council ultimately decided to launch negotiations for a legally-binding framework.

To determine the opportunity cost of establishing a PPP, a balance has to be made between purely legalistic considerations and more “materialistic” concerns. In other words, a weighing and balancing process must be found between promoting normative work (conventions but no money) and developing projects on the ground such as PPPs (that do bring in money).

PPPs are facing numerous challenges: hosting arrangements, independence of international organizations, conflict of interest, public goals. There is pressure from in-house policy-makers on lawyers to “bend the rules”. Sometimes lawyers are set aside and policies ignore legal advice. Some PPPs, like the ones established in the environmental field, raise more specific questions: To what extent can we “formalize” them? Can we “overlegalize” these partnerships? Are PPPs a way for governments to avoid public responsibilities and push things onto the private sector?

In spite of uncertainties, it is clear from practice that PPPs can in fact promote accountability. For instance, PPPs such the ones set at the level of the International Atomic Energy Agency (IAEA) are mechanisms built to promote accountability, to monitor progress and achievement (e.g. in the field of cancer prevention). But the question of the impact of such PPPs remains: Do they provide a basis for third parties, i.e. people outside the partnerships? In this context, PPPs in the field of sports law appear to be the most developed regime. It can be explained by the existence of a sort of unity of aim in the sports field allowing the various stakeholders (including third parties) to be fully integrated in the partnerships. Can this inclusiveness element be applied beyond the sports law regime? There is no answer for the time being. Nevertheless, some new trends are being identified. For instance, the Basel Convention Mobile Phones Partnership Initiative involves all the actors in the field, including mobile phone manufacturers and telecommunications operators.

Further, the proliferation of PPPs raises problem of accountability regarding relations with the host State, the partners *inter se*, and with beneficiaries (sometimes represented in governance, sometimes not). There is a risk of losing a critical voice because civil society is taking part in the system of partnerships. Moreover, there is a need to ensure the public character of the IOs involved in PPPs, and to ensure the respect of their mandate in order to avoid that the international organizations concerned become “commercial entities” which will not be protected by privileges and immunities. Privileges and immunities have been framed for traditional IOs, and not really for IOs.

This being said, the dosage of privileges and immunities has to be pondered in order to protect partners to the extent that they are serving a public good. Such a challenge occurs in the context of procurements that have many features of what can be described as PPPs (sort of *sui generis* PPPs). Without granting privileges and immunities to such PPPs, there is a problem of subjecting the companies involved in procurement to domestic courts (arbitration should not be conducted in the forum of a domestic court). IOs should not be subject to domestic jurisdictions, but there is a need to find something better than arbitration. If arbitration is used, there needs to be more transparency. One solution would be to submit the issues related to a given procurement to the ILO Administrative Tribunal. For that, there should be an extension of the ILO Administrative Tribunal to deal with such contractual relationships.

Indeed, mandate issues in IOs’ activities (and activities of their organs) are very sensitive and complex issues. The waiver of privileges and immunities in the context of PPPs (be they traditional PPPs or *sui generis* PPPs) has to be done in accordance with the mandate of each IO.

## II. Legal Process, Participation and Mandate Issues in IO Activities

This Panel discussion raised the following issues:

1. Who can take part in norm-creating processes within IOs? How are experts appointed? How are they regulated?
2. Is there transparency in the decision-making process?
3. When can IOs act beyond their mandate? What kinds of oversight mechanisms are in place for when IOs take emergency measures?

The practice of the World Trade Organization (WTO) in the realm of the financial crisis is rather illustrative of the relevance of such questions relating to legal processes, participation and mandate issues in IOs. Some actions taken by the Secretariat of the WTO show that international organizations emancipate themselves from “prior constitutional-based action” when dealing with some specific issues. For instance, the so-called “power to report” of the WTO Director-General came without treaty provision in the multilateral trading system. Furthermore, the WTO Director-General called two meetings with private banks without any treaty basis. Some consider that those actions are the result of implied powers and raise issues of “mission creep”.

Secretariats of IOs have a high degree of autonomy *vis-à-vis* the legal basis of their actions, pushing new initiatives supported by experts and strong member States. This is the case of IFAD with the supervision of development projects and provision of funds to NGOs, as well as the provision of financial assistance to Palestine, notwithstanding that Article 7(1)(b) of the Agreement Establishing IFAD clearly limits funds to developing member-States by members or international organizations. Moreover, IFAD turned into a fully-fledged international organization without the mandate of its constituent instrument.

Whether they are the result of implied powers, or of mission creep, those out-of-treaty actions have nevertheless raised concerns about the criteria for determining and identifying which private actors should participate in the formal or informal decision-making process of an international organization. Some organs of IOs have covered their beyond-treaty actions or implied-treaty actions with the veil of legitimacy. Legitimacy takes the form of different faces. One of these faces is “due process”. Due process was, for instance, invoked by the WTO Appellate Body to legitimate its acceptance of *amicus curiae* submissions and in the creation of its own rules with regard to those submissions.

Another face of legitimacy is “pragmatism” in the interpretation of the mandate of IOs in light of needs. Indeed, mandate issues really matter when an IO “pays a price” for it, i.e. when it becomes clear that IOs have lost a lot of money by the investments they have been engaged in. The rule of law does not IOs from acting beyond their mandate. Lawyers in IOs do not engage in the enforcement of the



law; they only try to impose their views. Even when the lawyer is in a privileged position, he will try not to stop the process of acting out of a treaty provision. Some consider that if there is consensus, the out-of-treaty action could be considered as an informal revision of the text, or interpretation through subsequent practice. Continental lawyers usually draft mandates in broad terms, whereas common law lawyers try to include everything in fine detail. Thus, when something is not specifically mentioned, it may be considered not to be included, but that is not necessarily the case. It is not always so obvious that one has gone beyond the mandate. The problem is when it is obvious to the lawyer. The issue is not so much the mandate but the reaction that each IO gives to a problem. The doctrine of implied powers is a reality. Interpretation has to be dynamic.

Mission creep by way of “soft law” occurs often in the practice of IOs like the IAEA. IAEA has adopted a large number of technical standards (more than 200). Political commitments are made by States in the form of codes of conduct that are adopted. States that adopt codes are greater in number than those that adhere to legally-binding treaties. These technical standards have a far-reaching effect because they are incorporated into international conventions and developed by experts. Nevertheless, one has to consider that standard-setting in international organizations is being counter-driven by the rise of private standards. For instance, who has to decide on the issue of the standardization of biofuels? Norms in this field are principally developed by private institutions. More and more developing States are opposed to the private standards and they want the governments to be responsible for those standards.

By contrast to “due process” and “pragmatism” which seem to allow action regardless of the existence of a treaty provision, soft law operates within a hard law context. That is the case of WTO soft law. Both soft law and hard law should be seen as compliments and each fulfill different tasks within the WTO. Soft law that is created at the WTO may be regarded by member States as having no legal consequences, but these norms will nevertheless have an impact in a hard law context (i.e. interpretation).

In conclusion, some levels of control are to be put in place to ensure more transparency in the decision-making process and to give more legitimacy to the activities of international organizations particularly when they act beyond treaty provision. Those levels of control are ‘self-control’, ‘clientele-control’, ‘democratic-control’ and most of all ‘accountability’ (constitutional response, international law response and global administrative response).

### III. Accountability and Immunity in IOs

This Panel discussion dealt with the relationship between accountability and immunity of IOs. For an IO to be efficient, immunity is crucial. Privileges and immunities are important to preserve the functions and objectives of IOs. IOs have more recently been pushed outside of the headquarters with their work. Thus, they have greater importance (constructing buildings, opening bank accounts). It is still important to protect the activities of IOs. For instance, the World Intellectual Property Organization (WIPO) has privileges and immunities, but considering that WIPO makes money from its activities (arbitration and mediation services; internet-domain names), should these activities be exempted from WIPO privileges and immunities?

It is not a good idea to make the distinction between *iure imperii* and *iure gestionis* when determining the scope of privileges and immunities of IOs. In the past, the whole idea was to strengthen IOs, but now the opposite is true – there is a need to ensure they do not become too strong. Certain States where WIPO is active are not parties to the 1947 Convention on Privileges and Immunities of Specialized Agencies, and thus they argue that it is domestic law that governs WIPO privileges and immunities in those jurisdictions. For example, this has been the position taken by Singapore and Brazil.

Some also now hold the view that privileges and immunities should not be limited to traditional IOs. For example, the Global Fund appears to be a quintessential PPP with privileges and immunities in Switzerland and the United States. On what grounds is this expansion justified? Are there public policy imperatives in favor of such a move? Here, there are two discrete inquiries. The first inquiry attempts to identify which PPPs should benefit from privileges and immunities, using a GAL analysis of institutional design as a normative reference, and the second attempts to scope the extent of privileges and immunities with reference to what is necessary in particular jurisdictions.

However, immunity does not imply exemption from accountability. What is the source of accountability? Where does it come from? Accountability has become politicized. What lies behind it? Some insist on financial accountability, in the sense that those who control the purse control the programmes. One can note a corporate mentality creeping in (the “PricewaterhouseCoopers yardstick”) and one needs to point out the dangers of analogy with a multinational corporation approach. Can we consider that an IO that does not deal with philanthropic issues is not bound by the same level of scrutiny? Some advocate that the most effective way to promote accountability is not through disciplinary means, but by clarifying the standards to which staff must adhere (standard operating procedures). Thus, there is a need for a management accountability framework within IOs. Such a framework consisting of operating procedures and codes of conduct has been developed in the context of the Office of the UN High Commissioner for Refugees

(UNHCR).

Field accountability must be distinguished from headquarters accountability. The need for an accountability framework is even more important in situations in which there are no field offices. This is the case of the WTO. At the level of this organization, the only way for the WTO to have field activity is through “technical assistance”. When technical assistance is being conducted, the targets must be defined. To be precise, you have to be intrusive in the States concerned (the beneficiaries). These States must generally follow certain procedures for domestic selection. It is not enough to say there should be a selection committee. What are the objectives of the technical assistance (objectives also of the donors who often exert great pressure)? Technical assistance exerts a huge draw on finances of the IO, but also on human resources (even though external staff are used). Thus, there is a necessity for planning and framing the accountability. However, there is a fundamental ambiguity of technical assistance. Remedies are not sufficient. But here, there are limits because to have assistance audited, one hits the limits of the purpose, and scope of limitations.

In conclusion, it appears that accountability is now more multi-layered and horizontal rather than vertical. Accountability mechanisms are directed towards to many different donors and to NGOs. A vision of absolute immunities is being eroded. Time has come to think critically of what privileges and immunities are needed, and with respect to remedies.

#### **IV. International Organizations Lawyers Round Table**

The discussion opened with brief comments on GAL analyses of the problems considered thus far.

GAL attempts to move beyond formal distinctions between “public” and “private”. A GAL analysis is not entirely concerned with whether a particular IO is treaty-based, or clear delegations of authority, although these issues still matter. In the real world, various bases for organization exist: some entities are private and voluntary; yet others have a normative basis. Ideas of transparency, participation and reason-giving apply where the decision of an organization has a specific effect. However, some of these ideas may evolve into pathology. For example, it is possible to have too much accountability, in the sense that there is accountability to donors, but not to those affected by the decisions of the organization, or accountability to the organization’s founders and members, but not to others. Serious good governance is the capacity to balance these competing interests. Quite apart from the concern with quotidian exercises of power, the intent here is to infuse some broader ideas of how to think about law, governance and process into

the enterprise.

Broadly, the topics covered during the round table discussion included:

1. How do the notions of “public mission” and “private sector mentality” interact in a PPP?
2. How do IOs and PPPs manage liability risk? Are liability issues being addressed in a systematic, conceptual manner? Is there an identifiable liability risk management policy? Are privileges and immunities an important aspect of liability risk management?
3. How do IO legal advisers manage mandate and mission creep issues? How are cooperation, coordination and institutional fragmentation issues managed in practice? Do aspects of legal practice within IOs (short of judicial decisions) have jurisgenerative effect?

#### *1. PPPs, privileges and immunities, and the private sector*

At the outset, there was a consensus among many of the participants that from the perspective of a “risk management strategy”, privileges and immunities would be useful for some PPPs. In particular, such a need is pressing when considering the particular structural links between some PPPs and some IOs, but also when taking into account the legal risk to the assets of the PPPs in some States.

Besides the issue of privileges and immunities, private participation sector in PPPs is another feature which is currently on the agenda of many PPPs. More specifically, there is a private sector delegation that constitutes corporations and other private entities that generally have an interest in global health. It would not be interesting for a health PPP not to include relevant private actors in its governance. Prevention of abuses (e.g. the issue of influence from private entities to try to make more money) would consist in the elaboration of an ethics policy (constantly reviewed) and/or in the establishment of ethics committees.

The criteria for more participation in PPPs are diverse. For instance, GAVI was originally a voluntary alliance, with five founding members who decided not to create a legal entity. The question of how to manage donor money became a difficult question in early days, and one of the decisions taken by the group was to establish a charity to help manage donor funds. The number of seats on the Board was decided on an *ad hoc* basis. The decision was made to establish a Swiss foundation reorganizing the Alliance Board and 9 members of the Charity Board, and to adopt statutes for the GAVI alliance (27 seats, 18 are representative seats, seats for Research Institutes, NGOs, UN agencies, and nine seats for un-affiliated members who brings finance for expertise). Thus, one-third of the participants are from the private sector.

## *2. Liability issues*

As with IOs, PPPs may face issues of liability in their activities. To what extent are these liabilities being addressed in conceptual and policy ways? Are there measures outside of contractual arbitration? For instance, liability is not really foreseen in the framework of a PPP. With respect to GAVI, only recipients are responsible for buying medically prescribed drugs. Nonetheless, GAVI takes out insurance in the event of lawsuits. The Global Fund is guided by the same rationale in looking to insurance to protect its assets.

With respect to IOs, there are different liability scenarios. For example, WIPO has faced liability risk issues of two different kinds. The first relates to the WIPO Arbitration and Mediation Center, and the second relates to the Patent Cooperation Treaty, which is administered by WIPO.

The WIPO Arbitration and Mediation Center is responsible for the resolution of domain name disputes. The role of WIPO is as one of the institutional providers. In some cases, the losing party has commenced proceedings against WIPO in national courts. In those circumstances, WIPO's practice has simply been to refrain from appearing, invoking its privileges and immunities, because WIPO does not profit from dispute settlement mechanisms.

The practice is different with regard to the Patent Cooperation Treaty. WIPO derives 70 per cent of its income from this Treaty. Here, WIPO tries to avoid invoking privileges and immunities, so as to avoid giving a bad impression of hiding behind immunities, and so that potential applicants are not turned away by this prospect. Thus far, WIPO's practice has been to settle disputes out of court. This has been successful. However, if pressed to litigation, WIPO would probably not invoke its immunities.

Other IOs draw the line between "preventive liability" and "reactive liability". For example, WHO incorporates an indemnification clause in its favor in agreements with pharmaceutical companies testing and delivering new drugs. In the past, there had been some opposition against putting travel advice on the web (health warnings) because there was no legal basis for doing so. The WHO Director-General thought that the health imperative was too strong not to issue health warnings. Under residual constitutional mandate, in situations of emergency, it would have been unconscionable not to recommend travelers to go to places where SARS was epidemic. There was a rush to allow such recommendations to be made. States did not challenge the legitimacy of such an action.

The reverse side of liability would be the possibility for IOs to sue public or private actors. The UN has considered this. The decision to sue, by waiving immunity, may have a backlash. There is a need to proactively define a policy. Arbitration is really ill suited for these types of cases. The importance of an internal

investigation mechanism should be recalled. The UN needs professional investigators bound by rules (due process requirements) in order to force respect from some State members of the will of the Organization. In some cases, it may be a good thing to waive immunities in a State that has a good judicial system and legal predictability. In other cases, immunities are essential – they must be asserted and protected.

### *3. Prevention of overlapping mandates between IOs*

Issues of privileges and immunities, liability and participation are common to all international organizations in a global administrative perspective. The issue of the mandates is also another feature of the activities of IOs. At that level, there is a lot of overlap between the UN and other international organizations and also within the UN itself. How can such overlapping be rationalized? There is a need for legal advisors to cooperate and coordinate work.

The Office of Legal Affairs (OLA) in New York functions as the central legal service of the UN. Although it is one of the main components of the Secretariat, it is not called a department, because it has cross-cutting responsibilities. The Head of the OLA is the Secretary-General's legal adviser as well as the legal counsel of the UN. This brings with it broader responsibilities. Unlike legal advisers in foreign ministries, for example, the OLA is tasked with advising on public international law, the internal rules of the UN, as well as aspects of administrative law and private law.

While the OLA now convenes meetings of legal advisers in the UN system, the OLA has no particular superior hierarchical role over legal advisers of specialized and related agencies. Previously, there was little integration of legal advisers under the broader framework of cooperation under the Chief Executives Board for Coordination ("the CEB") or the High Level Committee on Management ("the HLCM").

Four actions were taken to improve the coherence of the provision of legal advice within the UN system, and to ameliorate the effects of an institutionally fragmented system.

First, regular meetings were convened. The network of the legal advisers of the UN system (consisting of legal advisers from the UN as well as the specialized and related agencies) meets annually. A network of legal liaison officers for UN funds and programmes has been strengthened, and meets twice a year. A network of legal advisers of UN field operations meets regularly. These meetings discuss any issues of interest, but also consider selected broader topics in depth: for example, human rights in the UN system, and cooperation with the International Criminal Court.

Second, legal advisers exchanged emails. This created opportunities for colleagues to comment on various legal issues. This worked extremely well because officers did not feel constrained by the risk of publication. The UN Secretariat collated these exchanges, which were then disseminated to legal advisers across the UN system.

Third, the three networks referred to above have been included together as the legal network within the HLCCM, in the broader framework of the CEB.

Fourth, a support unit within OLA was created. Two staff members were reserved for coordinating the work of legal advisers across the UN system.

The way in which international institutional law is taught in law schools promotes the idea that a relevant judicial decision is crucial to demonstrate the existence of a legal rule. One might question whether these judicial decisions are overvalued. Emphasis might be more usefully placed on the legal practice of IOs, particularly in instances where decisions are *not* taken on legal advice. Would it be easier to make a case in favor of a particular legal position if one could show a demonstrable relevant norm across IOs, and more specifically, among IO legal advisers? Might the sharing of opinions in a network of legal advisers in fact be jurisgenerative, or does it lead to rigidification?

Networks like those led by the UN OLA are good, but this is contingent on how they are managed. Positive outcomes are likely where “best practices” are established by networks, and later evolve into something akin to law. There are also various configurations of sub-networks (for example, the Geneva network), and legal advisers might consult different networks depending on what the problem at hand is. Ultimately, these networks do promote levels of consensus on certain views, and some level of agreed practice. There was some suggestion that the effect of these networks might indeed be a general movement toward the same legal position. However, one should avoid relying too much on precedent, as opposed to rethinking the *problematique*. In this way, networks could promote legal creativity, thereby moderating the perception of legal advisers as “decision-blockers”.

## **V. Human Rights and Global Administrative Law in the Headquarters and Field Operations of International Organizations**

This Panel discussion covered the following issues:

1. the effectiveness of IO field operations outside “hard” legal frameworks; and
2. accountability, independence and neutrality.

Lack of respect of human rights has been more and more denounced recently. This can seriously undermine the legitimacy of IOs. Even if decisions and

operations have a legal basis (this is difficult to determine sometimes), these operations need some confidence from the wider public (credibility). It is important that not only the legal rules are observed but that some sort of confidence is maintained. Sometimes the mandate is too narrow and should be enlarged to integrate or incorporate the rules considered as essential by the people concerned and that respect local traditions.

Given the increasing involvement of non-governmental organizations (NGOs) in the field, NGOs should also be accountable for their actions—in particular, in some areas such as disarmament where the role of civil society is crucial. It is an NGO that has taken up the role of monitoring land mines. A small arms survey is put out by NGOs that has facts and figures relating to arms. For de-mining, there are NGOs working with private de-mining companies, the public and victims. This raises concerns. One concern is accountability of NGOs, and another is individual responsibility. Legitimacy is also an issue for NGOs even if they thrive on the perception that they represent civil society.

It was noted that the accountability issues considered at this conference can be dealt with under the rubric of two sets of questions: the preliminary “why” and “when” questions, and the “who”, “to whom” and “for what” questions.

*“Why”*. The GAL project focuses on the legitimacy and accountability of new exercises of power or authority that are removed from traditional democratic structures that regulate public authority. Preceding Panels had discussed the role of PPPs. Although GAL does focus on these new entities, the idea here is not really to make their exercises of power more democratic, but to make them more reasoned.

*“When”*. In an earlier panel, one participant had said that the expression “It is better to ask for forgiveness than for permission” often describes the work of many IOs. However, if one is asking for accountability following a crisis, it may very well be too late.

*“Who”*. This asks who we are holding accountable. In Panel I, various definitions of the term “public-private partnership” were posited. Notably, one expansive definition of the term included procurement by IOs. With regard to entities like UNHCR, which was discussed in Panel III, the question is whether we want to hold UNHCR or various States accountable.

*“To whom”*. This question is particularly acute in the context of field operations, or when “double governance”-type issues arise. The question of “to whom” may sometimes be addressed directly by the formation of PPPs, which are sometimes designed to avoid accountability. In Panel III, there was also some discussion of whether privileges and immunities should be extended to global PPPs, and the difficulties which the practical application of IO privileges and immunities can create.



*“For what”*. Here, discussions distinguished between internal (issue of going beyond the mandate) and external accountability (rule of law and GAL; different forms for standards in the context of the UN; the problem when an international organization is ready to impose standards on others but not on itself) within the context of GAL and the principle of the rule of law.

*1. Effectiveness of IO field operations outside “hard” legal frameworks: internal and external accountability*

Two main legal aspects must be taken into account when dealing in particular with the issue of external accountability: “law-making” and “law adjudication”. With regard to “law-making”, UN field operations are confronted with the problem of having to determine whether the law of human rights applies to non-State actors such as rebel groups. There is a need to clarify the law, in particular after the armed conflict. “Gaps” in the law can be filled to hold those individuals accountable.

“Law adjudication” recalls the fragmentation debate in international law more generally. Here, it was felt that the question of what obligations applied were connected to international humanitarian law, and lay somewhat beyond the competence of UN field operations. One way of getting around this was to say that in order to hold non-state armed groups to relevant standards, part of the solution might come from combining liability and participation. In other words, if these groups are brought into discussion about “for what” they are accountable, we might find a set of commitments that the non-State armed groups themselves had made, rather than rely on international humanitarian law or human rights treaties as such. To be sure, this is a departure from conservative formalism. In order to be effective, however, there is a need to involve these groups in the question of what they will or will not respect whether or not they are formally bound under international law.

With respect to internal accountability, there is one major legal aspect: “law enforcement”. Here, the UN has been accused of being complicit in terrorism and interfering in domestic jurisdiction when seeking to engage such groups in participatory processes. This, in turn, affects the UN’s ability to be effective because it undermines the UN’s ability to fulfill its mandate in the field. If UN reports are silent on non-state armed groups’ behavior, the State government might conclude that the UN is not credible. The field operation has a duty not to see this as a problem of the limited scope of international law, but to increase its law-making function and consider that there is such a thing as GAL, which might justify a “soft law” reading of human rights law.

However, there was also some doubt that GAL might have such a reach. There is a necessity for lawyering with precision. This precision could be achieved by referring to rights that have been affirmed in international instruments, such as the ILO Declaration on Fundamental Rights at Work, or the prescriptions in the UN

Global Compact. These might be considered to bind all IOs and NGOs, and to reflect customary international law on human rights issues. Another important question is whether all the rules that could possibly be relevant should apply. It is at least possible to say that Common Article 3 of the Geneva Conventions should apply. The case of Kosovo showed the importance of establishing a legal basis for interventions in the field.

## *2. Accountability, independence and neutrality*

The movement towards law-making, law adjudication and law enforcement, as well as the concomitant use of GAL in the activities of IOs, set some new trends. The time when international organizations were asserting their independence is over. Accountability is now the answer. The question is how to balance these two concepts (i.e., independence and accountability). The UN cannot shield itself from accountability. And the question of “to whom” is very important. Most international organizations feel that they are accountable to those who gave them the mandate. But the issue must be deeper – it is important to develop “accountability to the population”, and the question is how. In post-conflict situations, the major threat to human rights is from non-State actors with no clear link to the State.

Of course, accountability to the population may be limited or hampered by constitutional mandates given to IOs. For some organizations, their mandate suggests that unless they can identify liability under a legal regime, they should step back. The UN for instance has taken a conservative approach. Moreover, it is almost useless or rather irrational to call upon the State to provide security and accountability for non-State actors, when the State is unwilling to do so and armed groups have become a more significant part of the equation. The UN and other organizations are even reluctant to use non-binding standards and voluntary commitment as the main vehicle of their work. Nevertheless, a move towards a greater engagement with non-State actors with soft law mechanisms is inevitable and needs to be articulated in a more formal way. The GAL paradigm is a useful way to talk about this when traditional arguments about trying to find that hook in human rights or international humanitarian law – or saying that armed group members are bound as citizens of the State – seem a real stretch.

In this context, it is interesting to note that accountability has witnessed some positive developments within the UN system. The first development is “*accountability to judicial processes*”. For instance, when operating in a country like Sudan, there is no doubt that judicial bodies and other actors look at the work of UN staff. In the *Lubanga* case, the UN was supposed to waive the confidentiality of a number of documents. Despite its immunity, the UN is implicated in this kind of judicial accountability process. This is the only way for fighting impunity. However, in some examples like the one of elections monitoring conducted by actors working for the Organization for Security and Cooperation in Europe (OSCE), it has been

proven hard or rather impossible to resort to judicial revision. There is a need to find different forms or variables to enable them to remain independent, but also accountable. There must be some kind of assessment. They must be accountable to the State.

The second development is “*accountability for those who report*”. Special Rapporteurs are subject to a code of conduct that has been developed in the Human Rights Council. This code of conduct deals with and governs the kind of information they gather, their reports, their access, and reliability of their reporting. Inter-governmental bodies are thus holding UN actors accountable. Nevertheless, and beyond any pessimistic point of view, one has to recognize that there is no highly legalized system. Actions are governed by and based on soft law (e.g. codes of conduct). There are no clear guidelines to assess if a particular code of conduct is followed. If there is poor performance, then the organization might not hire the person again. Given the fact that this kind of mechanisms for accountability is deficient, the question is how these mechanisms work. It seems that they work through “reputation”: basically, through “credibility” on the field. That leads to a more general point, the question of how far soft law can work as an accountability mechanism for international organizations given its increasing use. There are some prerequisites: transparency, dispersion of information to affected groups; and there may be some competition so that the IO can choose the most “credible” entity to which it will outsource.

The third development is “*accountability of UN staff*”. UN Security Council mandates give dual messages: they say there must be demobilization, but that there must also be cooperation, etc. Who is responsible? The UN staff who did this, or the UN Security Council? There is a public accountability, irrespective of immunities and privileges. However, public accountability may not be achieved because of two sorts of screens: the “State screen” and the “independence and neutrality screen”.

With regard to the “State screen”, the two decisions in 2008 from Dutch courts in respect of the responsibility of Netherlands and the UN about the behavior of the Dutch military forces present in Srebrenica should be recalled as an example. In that case, the Dutch State supported the immunity of the UN saying that as a member of the UN, the Netherlands had to respect the Charter which provides for immunities. This immunity was upheld, but on the merits, the Netherlands claimed they were not responsible as the action of the Dutch personnel was attributable to the UN.

As regards the “independence and neutrality screen”, independence and perception of neutrality lead to tension with accountability. For instance, aid work is a notoriously unaccountable business, because it functions under the notion of “charity work”. The retort to any demand for accountability for aid work is “you should be grateful we are doing anything at all”. Independence is not a bad thing,

nor is perceived neutrality (access to victims), but it also brings many problems because of the philosophy of independence (“we are independent – no one can tell us what we can do”). In this specific context, what emerges is the idea of “NAOs” (“non-accountable organizations”).

We now speak of accountability where we used to speak of responsibility as an external standard. So far, the conference had identified four different forms of accountability: to mandate, to people affected, to human rights law in the abstract and to the public at large, or civil society. Was there a prospect of these various accountability systems conflicting with each other? How might such conflict be dealt with? And a broader question for the GAL project at large might be: to what extent is the notion of accountability useful at all?

However, there was also some caution expressed against an outright jettison of the concept of accountability and soft law in favor of the doctrine of responsibility and hard law. It might be useful to consider how soft law works, and how it might help in holding the necessary actors to account. Soft law may sometimes be more effective than hard law, and in many circumstances, the distinction between soft and hard law is not clearly drawn. Finally, it was noted that if the rules governing responsibility are more comprehensive and more precise, there would be a more minimal role for the concept of accountability. Over time, the development of legal responsibility will come to contain the field of accountability.