An Inclusionary Governance Model for International Institutions

Ensuring Accountability towards Individuals

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AN INCLUSIONARY GOVERNANCE MODEL FOR INTERNATIONAL INSTITUTIONS

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by Marjolein Schaap

ISBN 978-90-830552-9-9
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Layout and printing: Print Service Ede, The Netherlands

An Inclusionary Governance Model for International Institutions

Ensuring Accountability towards Individuals

Het waarborgen van de verantwoordingsplicht van internationale instellingen ten opzichte van individuen

Een inclusief governance model

Thesis

to obtain the degree of Doctor from the
Erasmus University Rotterdam
by command of the
rector magnificus

Prof.dr. R.C.M.E. Engels

and in accordance with the decision of the Doctorate Board.
The public defence shall be held on

November 13, at 13:30 hrs

by
Marjolein Schaap
born in Vlaardingen, the Netherlands

ERASMUS UNIVERSITY ROTTERDAM

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Acknowledgements

Writing a PhD is a daunting task, it is a journey, not only intellectually but perhaps even more personally and mentally. Besides the numerous conferences visited, papers written, presentations given, the stays abroad, the PhD training schools, and the in-house training of the ESL, this period was similarly marked by national moves (oh my beloved the Hague), two international moves (Miami, USA 2017-2019; San José, Costa Rica 2019-onwards), my marriage, and the birth of my son. While we choose how we live our life and to start a family, academia and the professional world is not always fully in sync with our life plans, not fully able to offer the support one needs. A PhD is not only an academic endeavor, it simultaneously resembles a part of your personal life, where you try to find a proper balance in life between your personal and career ambitions. Thus, even more, in this journey you need your people who support you, who push you to do even better, who help you getting out this dark place of self-doubt and those who make you laugh and make you enjoy the process. I would like to take this opportunity to thank those people who helped me in these years, both academically and personally.

First, I would like to thank my two promotors, Ellen and Jeroen. Ellen, thank you for guiding me in my academic years, by becoming a mentor and a dear friend, a person who motivated me to strive for more, who was always empathic but who similarly would tell me whenever I need to step it up. I truly appreciate your support, your dedication to research, teaching and to my personal development. Jeroen, when you became my second promotor, I did not only get a passionate ambitious human rights researcher on board, but also someone who I call my friend, with whom I would discuss the successes and particular fails of our two beloved soccer teams, and who brings a healthy dose of Rotterdam humor to any discussion to lighten the mood whenever necessary. The both of you allowed me to strife, to aim higher with my PhD, and helped me find my confidence in my research and trust my research voice. Thank you, I could not have done it without you.

My colleagues at the department of international and European law, I sincerely would like to thank you. Thank you to those that were there between 2010-2013, when I was working fulltime as a lecturer at the department and when the PhD was something to pursue in the weekends. Monika Ambrus, Alessandra Arcuri, Aleksandar Momirov, Andria Naude Fourie, thank you for all brainstorm sessions, and for showing me how important it is to find your village of people. To all my colleagues at the department, thank you for showing your level of dedication to research and teaching, for our endless substantive discussions and teaching philosophy discussions. Thank you for the lovely coffee breaks and lunches, for offering a listening ear, for being there whenever you are stuck on an idea and just need to talk it through with someone.

A special mention is necessary for my fellow PhD buddies. I owe a big thanks to all of you. It means a lot to find your people to whom you can openly show your struggles: that doing a PhD coincides with constant self-doubt, and that there is a thin line between that inner voice that enables you to aim higher and persevere, and that voice which makes you think that whatever you do is not good enough. Thank you for all laughs, for being each others' support group and ad hoc thinktank, for all coffees, lunches and dinners, and for just needing a few words to completely understand each other. Thank you in particular, Nathanael Ali, Ryan Gauthier, Anna Sting, Thomas Riesthuis, Petra Gyöngyi, and Margaux Raynaud.

After being determined to the PhD, but with a full-time lecturer position, a defining moment for me was the 2012 Prins Bernhard Cultural Foundation grant, which enabled me to go for 6 months to Heidelberg in 2013, Max Planck Institute for Comparative Public Law. The grant showed me that I was on the right track, and that I just have to persevere and keep working on it. I particularly would like to thank Armin von Bogdandy for welcoming me in the research group on international public authority, for all discussions, and for granting me the Max Planck Gesellschaft scholarship which enabled me to return to MPIL in 2014. To all my MPIL friends, to Federica Favuzza and Federica Violi, who kept me sane in the process and were always ready to debate whatever topic, similarly thank you Pedro Villareal, Kushtrim Istrefi, Inge Leijten, Andre Chaib, Dana Schmalz, Michaelis Ioannidis, Paola Andrea, Yira Segrera, Federica Cristani, and all others with whom I spend time with in the MPIL Lesesaal and in the lovely Heidelberg.

Similarly, I would like to thank all those researchers with whom I had the pleasure to discuss ideas with in various stages of my research. It is my vast belief that only through cooperation and discussion one can excel in research. Thank you, Wibren van den Burg, Veronika Bilkova, Kathleen Claussen, Adnan Kadribasic, Jan Klabbers, Kim Lane Scheppele, Elaine Mak, Anne Peters, Nikolas Rajkovic, Sanne Taekema, Wouter Werner, Thomas Streinz and so many more.

Thank you to all organizations who have accorded me grants to further my research, to enable me to go on research stays, present at conferences abroad and participate in PhD trainingschools: Prins Bernhard Cultural Foundation, the Erasmus Trustfond, the ESL Research program 'Rethinking the Rule of Law in an Era of Globalisation, Privatization and Multiculturalisation', COST Action IS1003 'between fragmentation and constitutionalization of international law,' and the Max Planck Gesellschaft.

Thank you to my friends, who had to endure my PhD stress, and listened too often to talks about my research. A particular thanks goes out to Brittany, who helped me get fast adjusted in Miami, who reminded me to keep believing in myself and kept me focused on my end goal

to successfully submit the PhD. Perhaps even more important, thank you for our dancing nights out, to just relax and have fun. You made me realize once more the importance of a sisterhood of women helping each other out. Speaking about a sisterhood, Caroline and Federica, my paranymphs, your friendship means the world for me. The way you both support me, how you are always available for a peptalk, to offer a shoulder, to distract me, or to just laugh and enjoy the time together regardless of the hour, is truly amazing. Thank you for being there for me in all the important moments of my life, for helping out with Fernando, being there for us through all relocations, and to be there to brainstorm about something related with the PhD from wherever we are. Honestly, words fall short of describing my gratitude, thank you.

Thanks to my family, in particular my parents Albert and Saskia, for your love and your patience. For trusting me on the road that led to the PhD and that led me abroad. Thank you for your belief in me and my capabilities. Lastly, thanks to my husband, Juan, for enduring all talks about international law, for enduring all long nights working, and above all for supporting me from day one and believing in me and my research. Thank you, Fernando, my son, for giving me the welcome perspective that work is not all there is, for being the lovely, caring little human that you are.

Anyone can achieve anything, as long as we are passionate, curious, and we persevere with the help and love of our family and friends.

San José, Costa Rica, February 25, 2020

Content

List of Acronyms and Abbreviations

ACCC	Aarhus Convention Compliance Committee
ACHR	American Convention on Human Rights
AfCHPR	African Court on Human and Peoples' Rights
AfCommHPR	African Commission on Human and Peoples' Rights
AU	African Union
Banjul Charter	The African Charter on Human and Peoples' Rights
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CERD Committee	International Convention on the Elimination of All forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
COE	Council of Europe
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CRPD	Committee on the Rights of Persons with Disabilities
DARIO	ILC draft Articles on the Responsibility of International Organizations
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
GAL	Global administrative law
GC	Global Constitutionalism
HRCee	United Nations Human Rights Committee
IACommHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant for Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGM	Inclusionary Governance Model
ILA	International Law Association
ILC	International Law Commission
WB INT	Department of Institutional Integrity of the World Bank Group
ITA	International territorial administration
OAS	Organization of American States
OHR	Office of the High Representative of Bosnia and Herzegovina

RSD	Refugee Status Determination procedures
WB SB	Sanctions Board of the World Bank
UN	United Nations
UN SC	United Nations Security Council
UNHCR	UN High Commissioner for Refugees
WB	World Bank
WB IP	World Bank Inspection Panel

Overview of Tables and Figures

1 Introduction, Methodology and Definitional Considerations

> But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.
>
> *James Madison, 1788*[1]

1. The Exclusion of Individuals by International Institutions: A General Problem

The most notorious example of decision-making by international institutions directly affecting individuals is the UN Security Council Sanctions Committees' listing in the context of countering terrorism. The vast majority of these individuals is listed by the 'UN Security Council Sanctions Committee of the 1267 ISIL ('Da-esh') and Al-Qaida and associated individuals, groups, undertakings and entities' ('Sanctions Committee' or 'ISIL (Da'esh) and Al-Qaida Sanctions Committee'). The Sanctions Committee's list contains the names of more than 80 entities and 245 individuals.[2] Designated[3] individuals are often unable to access their property or receive social security benefits. In addition, they may face work-related problems and are restricted in their ability to travel, either domestically or internationally. Being designated not only affects those who are actually listed, who have aptly been referred to as "prisoners of the state"[4] but also their spouses and families. Designated individuals face serious difficulties in challenging these decisions: they are often not informed of the reasons for listing, have no access to any underlying evidence, nor do they know which state proposed the listing, all of which have detrimental consequences on the effectiveness of their scarce legal remedies.[5]

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1 J. Madison, 'The Federalist No. 51- The Structure of Government Must Furnish the Proper Checks and Balances Between Different Departments' (1788) *Independent Journal,* available at <http://www.constitution.org/fed/federa51.htm> (last accessed: December 18, 2019) All websites in this manuscript have been last accessed on December 18, 2019.

2 https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list these statistics are from December 2019.

3 The term *designation* is used in UN Sanctions Committee documents and in the literature to refer to the listing of individuals and/or entities in the context of counter-terrorism sanctions. In official UN Security Council documents and in literature the term listed and designated is used interchangeably.

4 Sedley LJ (Court of Appeal Judge), in *A and others v. HM Treasury* [2008] EWCA Civ. 1187 [2009] 3 WLR 25, §125. See also *Her Majesty's Treasury v. Mohammed Jabar Ahmed and others; Her Majesty's Treasury v. Mohammed Al-Ghabra; R v. Her Majesty's Treasury* [2010] UKSC 2, Judgment, (January 7, 2010) §38-39, see further, e.g., *R(M) v. HM Treasury* (note) [2008] UKHL 26 [2008] 2 ALL ER 1097.

5 E.g., A. Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion' (2007) 17 *EJIL* 881–919; A. von Bogdandy, P. Dann and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for

Other international institutions[6] have similarly adopted decisions affecting individuals and have faced comparable criticism as to the extent to which those affected are included in the decision-making procedure and/or have access to legal avenues to challenge the decision(s) in question. Illustrative examples are the UNHCR Mandate Refugee Status Determination procedures ('Mandate RSD procedures', 'Mandate RSD' or 'RSD procedures'),[7] the World Bank decisions on the financing of development projects[8] and the administration of territories by international institutions.[9] For instance, the UNHCR determines the status of refugees when states are unable or unwilling to do so. In 2016 alone, more than 200,000 applications for Mandate RSD[10] were

Global Governance activities' in: A. von Bogdandy, R. Wölfrum, J. von Bernstorff, P. Dann, and M. Goldmann (eds.) *The Exercise of Public Authority by International Institutions: Advancing International Institutional law* (Heidelberg, Springer 2010) 3-32; C.A. Feinaugle, 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protecting of Individuals' (2008) 9 *German Law Journal* 1513-1538; L. van den Herik, 'The Security Council's Targeted Sanctions Regimes' (2007) 20 *Leiden Journal of International Law* 797-807; Watson Institute for International Studies 'Addressing Challenges of Targeted Sanctions' (2009) available at http://watsoninstitute.org/project_detail.cfm?id=4 and its update: Watson Institute for International Studies, Brown University, *Addressing Challenges to Targeted Sanctions: An Update of the "Watson Report"*, (October 2009), available at http://hdl.handle.net/1887/43690.

6 The term *international institutions* is used instead of international organizations to include a broader definitional scope, including not only formal international organizations but also subsidiary bodies of formal international organizations exercising public power. See further section 6.1 of this chapter.

7 See, e.g., M. Alexander, 'Refugee Status Determination Conducted by UNHCR' (1999) 11 *International Journal of Refugee Law* 251-289; Amnesty International, Selective Protection: Discriminatory Treatment of Non-European Refugees and Asylum Seekers, EUR 44/16/94 (1994); Human Rights Watch, *50 Years on: What Future for Refugee Protection?* (2001); M. Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination' (2006) 18 *International Journal on Refugee Law* 1-29; J.C. Simeon, 'The Response to Rapidly Fluctuating Refugee Status and Asylum Applications' (2010) 22 *International Journal of Refugee Law* 72-103; M. Kagan, 'Assessment of Refugee Status Determination Procedure at UNHCR's Cairo Office 2001-2002' *American University in Cairo Forced Migration and Refugee Studies Working Paper No. 1* (2002) available at www.auceypt.edu/academic/fmrs; M. Pallis, 'The Operation of UNHCR's Accountability Mechanisms' (2005) *NYU Journal of International Law and Politics* 869-918; M. Smrkolj, 'International Institutions and Individualized Decision-Making: an Example of UNHCR's Refugee Status Determination' (2008) *German Law Journal* 1779; RSDWatch.org, *No Margin for Error: Implementation of UNHCR's Procedural Standards for refugee status determination* at selected UNHCR Field Offices in 2006 (September 2006), available at: https://rsdwatch.com/no-margin-for-error/.

8 See, e.g., A. Naudé Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight* (Utrecht, Eleven International Publishing 2009); E. Hey, 'Global Environmental Law and Global Institutions: a System Lacking "Good Process"' in: R. Pierik and W. Werner, *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (Cambridge, Cambridge University Press 2010), 45-72.

9 See, e.g., A. Momirov, *Accountability of International Territorial Administrations – a Public Law Approach* (Utrecht, Eleven Publishing 2011); C. Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge, Cambridge University Press 2008); European Commission for Democracy through Law of the Council of Europe (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative* (Venice, March 11, 2005) CDL-AD (2005)004; Parliamentary Assembly of the Council of Europe, Resolution 1384 (2004), available at http://assembly.coe.int.

10 The term *Mandate RSD procedures* is used in the literature in order to distinguish between the RSD procedures conducted by states and those conducted by the UNHCR.

submitted to UNHCR field offices.[11] The Mandate RSD procedures have been criticized for failing to implement necessary procedural safeguards to protect against flawed or arbitrary decision-making.[12] Although the UNHCR has significantly improved its procedural safeguards,[13] the main criticism still holds: asylum seekers have no access to the evidence used in their procedure, they may not access their personal file, and the decision to reject refugee status is not reviewed by an independent review body. The World Bank decisions on the financing of development projects[14] and the administration of territories by international institutions[15] face similar criticism of the lack of accountability vis-à-vis those affected.

The exclusion – or inadequate inclusion – of individuals from decision-making procedures poses a prevalent problem in international law. While other international institutions carry out their decision-making in ways not identical to that of the ISIL (Da'esh) and Al-Qaida

11 UNHCR Global Trends, Forced Displacement in 2016, (report) http://www.unhcr.org/5943e8a34.pdf. 26,300 asylum applications were filed in countries were the UNHCR determines the refugee status jointly with the host-government.

12 See, e.g., M. Alexander, 'Refugee Status Determination Conducted by UNHCR' (1999) 11 *IJRL* 251; Amnesty International, 'Selective protection: Discriminatory Treatment of Non-European Refugees and Asylum Seekers' EUR 44/16/94 (1994); *Human Rights Watch, 50 years on: What future for Refugee Protection?* (2001).

13 These measures include the publication of the Procedural Standards for RSD under UNHCR's Mandate (UNHCR, Geneva, 2005, available at: http://www.unhcr.org/4316f0c02.html); a progressive increase of RSD staff at field offices; and expansion of the role of the Refugee Status Determination Unit in Geneva, which supports RSD operations in the field through various activities. It does so, for instance, by providing advice to field offices on procedural as well as substantial issues pertaining to RSD, including facilitating the development of appropriate standard operating procedures in RSD operations, and evaluating UNHCR RSD operations. The procedural safeguards are currently under review, with several chapters of the 2003 Procedural Safeguards Handbook having been updated, including the chapter on Legal Representation (UN High Commissioner for Refugees (UNHCR), *UNHCR RSD Procedural Standards - Legal Representation in UNHCR RSD Procedures*, 2016, available at: http://www.refworld.org/docid/56baf2c84.html) and on Appeal (UN High Commissioner for Refugees (UNHCR), *UNHCR RSD Procedural Standards - Appeal of Negative RSD Decisions*, 2017, available at: http://www.refworld.org/docid/5915c1b14.html. See chapter 8 for a brief discussion of the extent to which the UNHCR provides inclusionary governance to those affected.

14 See, e.g., A. Naudé Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight* (Utrecht, Eleven International Publishing 2009); E. Hey, 'Global environmental law and global institutions: a system lacking 'good process' in: R. Pierik and W. Werner, *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (Cambridge, Cambridge University Press 2010) 45-72.

15 See Schaap (2011) for a detailed assessment of a claim/demand for inclusionary processes in ITAs, M. Schaap, 'Contextualizing a Claim for Inclusionary Governance by International Territorial Administrations' (2011) (2) *International Journal of the Rule of Law, Transitional Justice and Human Rights* 107-120. See further, for instance, A. Momirov, *Accountability of International Territorial Administrations – a Public Law Approach* (Utrecht, Eleven Publishing 2011); C. Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge, Cambridge University Press 2008); European Commission for Democracy through Law of the Council of Europe (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative* (Venice, March 11, 2005) CDL-AD (2005)004; European Stability Initiative, *Legal Dynamite: how a Bosnian Court may bring closer the end of the Bosnian protectorate* (March 12, 2007) available at <www.esiweb.org>. Parliamentary Assembly of the Council of Europe, Resolution 1384 (2004), available at <http://assembly.coe.int>.

Sanctions Committee, their outcome is largely comparable in the way individuals are impacted by decisions of international institutions. Moreover, individuals affected by their decisions face similar difficulties in holding any such international institution to account. They are, for example, barred from directly challenging such decision at a domestic level due to the immunity of international institutions.[16] Some regional courts have adopted ad hoc solutions in order to marginally review the effects of a decision and to address the lack of procedural guarantees as well, in particular, the lack of effective legal remedies for those affected.[17] However, these courts are not in a position to directly review a decision adopted by an international institution, let alone, offer a viable solution remedying the wrong done to

16 The immunity of international institutions is generally based on the principle of *functional necessity*, meaning that international institutions need immunity to be able to function. N. Blokker, 'International Organizations: The Untouchables?' (2013) 10 *International Organizations Law Review* 259 at 260. For an introduction to the immunities of, for example, the UN, see the Convention on Privileges and Immunities of the UN in which the immunities and privileges of the United Nations have been stipulated (February 13, 1946) 1 U.N.T.S. 15, Article II section 2. See further, e.g., ECtHR, *Waite and Kennedy v. Germany,* application no. 26083/94, judgment (February 18, 1999), §63. For a recent successful challenge of the immunity of an international institution, see US Supreme Court, *Jam v. International Finance Corp.* 586 US _ (2019), in which it was held that international financial institutions can be subject to lawsuits when their investing in international development projects is allegedly causing harm to local communities. For an analysis as well as a background of the case, see, e.g., E. Kim, 'The Supreme Court Rules in Jam v. International Finance Corporation' Lawfare blog entry, https://www.lawfareblog.com/supreme-court-rules-jam-v-international-finance-corporation (March 1, 2019). With regard to UN Security Council sanctions, the majority of the challenges focuses on the domestic administrative act implementing the UN SC listing. In the context of the UN peacekeeping missions, there are several examples of court cases confirming the immunity enjoyed by UN peacekeepers from national jurisdiction. See, e.g., the Dutch Supreme Court, *Mothers of Srebrenica association et al. v. the State of the Netherlands and the United Nations* (April 13, 2012), case no. 10/04437; ECtHR, Stichting Mothers of Srebrenica and Others v. The Netherlands, Application no. 65542/12 (June 11, 2013). Both the Dutch Supreme Court and the European Court of Human Rights concluded that the UN enjoyed absolute immunity in this case.

17 Some successful claims for judicial review have been made. Most of them relate to the UN Security Council Counter-terrorism listings. The best-known regional court judgments are the joined cases C-402/05 and C-415/05 P, *Yassin Abdullah Kadi and Al Bakaraat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] ECR I-6356; ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerlan*d, 5809/08, ECHR 2013; ECtHR, *Nada v. Switzerland*, no. 10593/08 (2012). Domestic courts have also adopted creative approaches to assess – to a certain extent – international institutions' decisions. See, e.g., *Her Majesty's Treasury v. Mohammed Jabar Ahmed and others; Her Majesty's Treasury v. Mohammed Al-Ghabra; R v. Her Majesty's Treasury* [2010] UKSC 2, Judgment (January 27, 2010). For a further discussion of the different ways in which national courts have approached legal challenges of UN Security Council sanctions in their judgments, see Tzanakopoulos (A. Tzanakopoulos, 'Domestic Court Reactions to UN Security Council Sanctions in: A. Reinisch (ed.) *Challenging Acts of International Organisations before National Courts* (Oxford University Press 2010) 54-76. He recognized four different outcomes when domestic courts assessed UN SC resolutions: (1) abstention, (2) low-intensity review (i.e., compatibility with *ius cogens* norms), (3) interpretations meant to avoid conflict between international and national spheres, and lastly, (4) the quashing of domestic measures, which gave a prevalent effect to the international decision concerned. The ECtHR's presumption of the equivalent-protection methodology and the approach taken by the CJEU can also be categorized along these lines. On the regional and national responses to the Sanctions Committee procedure evaluated in this research, see further K.E. Boon, A. Haq, D.C. Lovelace Jr. (eds.) *Terrorism Commentary on Security documents (vol. 122) UN Response to Al Qaeda – Developments through 2011* (Oxford University Press 2012).

the individual concerned. Instead, the only institution that would be in a position to remedy a wrongdoing is the international institution in question. However, as the examples show, international institutions are often insufficiently prepared for such remedying.

This exclusion from decision-making procedures is symptomatic of a lack of accountability of international institutions vis-à-vis those affected by their decisions. Accountability in its most basic form refers to a duty to account for the exercise of public power.[18] This research focuses on said lack of accountability of international institutions that adopt decisions directly affecting individuals[19] and examines the way in which the accountability problem can be properly analyzed and may be addressed.

2. Explaining the Public Law Approach

As illustrated, international institutions increasingly exercise a form of public power[20] that directly affects individuals. Even though it is widely acknowledged that international institutions ought to be accountable to some extent towards third parties,[21] there is no proper legal framework for analyzing and addressing the accountability deficit of international institutions.

The law of international institutions[22] does not provide any benchmarks for assessing the exercise of public power by international institutions vis-à-vis third parties. Instead, it

18 International Law Association, Committee on Accountability of International Organisations, Final Report (Berlin Conference 2004) at 5 (hereinafter ILA Final Report) at 5.

19 This term will be further explained in section 6 below.

20 The concept of public power as used by Allot refers to the exercise of authority or power that "constructs the public plane or space," P. Allot, *Eunomia: New Order for a New World* (Oxford: Oxford University Press 1990) at 336-337. See also the definition used in the IPA project of the MPI (Heidelberg) in which the exercise of international public authority is defined as "any kind of governance activity by international institutions, be it administrative or intergovernmental" when "it determines individuals, private associations, enterprises, States or other public institutions" (A. von Bogdandy, P. Dann and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' at 5, infra). In this research, however, the focus is on the administrative governance activity that determines individuals.

21 See, e.g., G. Verdirame, *The UN and Human Rights: Who Guards the Guardians* (Cambridge University Press 2011); with regards to the UNHCR, see above n. 6, with regard to the ITAs n. 14, and the World Bank n. 13. In general see, e.g., ILA Final Report at 5; A. von Bogdandy, R. Wölfrum, J. von Bernstorff, P. Dann, and M. Goldmann (eds.) *The Exercise of Public Authority by International Institutions: Advancing International Institutional law* (Heidelberg, Springer 2010); B. Kingsbury, N. Krisch, R.B. Stewart, 'The Emergence of Global Administrative Law', *IILJ Working Paper 2004/1* (Global Administrative Law Series), available at www.iilj.org.

22 See, for instance, J. Klabbers, *An Introduction to International Institutional Law* (Cambridge: Cambridge University Press 2006); H.G. Schermers and N.M. Blokker, *International Institutional Law* (Brill, 2005 5th ed.); C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge Studies in International and Comparative Law) (Cambridge: Cambridge University Press 2005); P. Klein, *Bowett's: Law of International Institutions* (Sweet & Maxwell 2009); J. Klabbers and A. Wallendahl, *Research Handbook on the Law of International Organisations* (Research Handbooks in International Law Series) (Cheltenham Edward Elgar Publisher Limited 2011).

provides a more functionalist approach.[23] The law has not been developed to such extent that it contains a set of external standards (meaning standards unrelated to any particular international institution) to be used to evaluate an institution's exercise of public power.[24] Although some attempts have been made to identify general international rules on the accountability of international institutions, they do not provide a clear benchmark: both the Report of the International Law Association (ILA) on the Accountability of International Organizations[25] and the Draft Articles on the Responsibility of International Organizations (DARIO) of the International Law Commission (ILC)[26] fall short of offering a yardstick to analyze or address the accountability problem in a systematic manner.[27]

The ILC Draft Articles on the Responsibility of International Organizations[28] set out the conditions under which international institutions may be held responsible for international wrongful acts.[29] There are two conditions that have to be met: (1) the occurrence of an

23 J. Klabbers, 'EJIL Foreword: the Transformation of International Organizations Law' (2015) 26 *European Journal of International Law* 9-82.

24 J. Klabbers, 'Paradox of International Institutional Law (2008) 5 *International Organizations Law Review* 1 at 15. See chapter 2, section 1.1, below for a discussion of the extent to which the law of international institutions addresses the accountability of international institutions; B. Kingsbury and L. Casini, 'Global Administrative Law Dimensions of International Organizations Law' (2010) *Global Administrative Law Series, IILJ Working Paper 2009*/9, available at http://iilj.org/wp-content/uploads/2016/08/Kingsbury-GAL-Dimensions-of-International-Organizations-Law.pdf at 7.

25 The ILA, a non-governmental organization, has as its main goal "the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law." The ILA is open to all members (non-state) that are interested in its objectives and includes members from academia and practice. The Committee on the Accountability of International Organizations (1996-2004) produced its final report in 2004, which lists recommended practices and rules on the accountability of international organizations. The reports will be addressed in greater detail in chapter 2. See further http://www.ila-hq.org/en/committees/index.cfm/cid/9 .

26 The ILC was established by the UN General Assembly and has as its mandate to promote "the progressive development of international law and its codification," article 1(1) ILC Statute. The members of the Commission have "recognized competence in international law" and are elected by the General Assembly after being nominated by a United Nations' member state. From 2002-2011, the ILC considered the topic of the responsibility of international organizations, which resulted in draft Articles on the responsibility of international organizations. See further http://legal.un.org/ilc/texts/9_11.shtml.

27 The ILA Final Report (2004) will be further discussed in chapter 2. In short, the ILA Report cannot serve as a stand-alone yardstick for analyzing the accountability of international institutions as it is not sufficiently precise nor is it clear whether the principles formulated are more descriptive or normative in nature. The ILA Report serves, however, as a good point of departure in the search for generally recognized standards of inclusionary governance.

28 Report of the International Law Commission, Responsibility of International Organizations, *Text and Titles of Draft Articles 1 to 67 Adopted by the Drafting Committee on Second Reading in 2011,* 63rd session (May 30, 2011) UN Doc. A/CN.4/L.778; see in general C. Alhborn, 'The Roles of International Organizations and the Law of International Responsibility (2011*) International Organizations Law Review* 397-482; C.F. Amerasinghe, 'Comments on the ILC's Draft Articles on the Responsibility of International Organizations' (2012) 9 *International Organizations Law Review* 29-31; J. d'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility' (2012) 9 *International Organizations Law Review* 15-28.

29 Article 1 DARIO.

international wrongful act that (2) is attributable to the international institution. An international wrongful act is defined as a breach of an international obligation of the international institution that may be either an act or omission.[30] Such an obligation may derive from a treaty provision, a rule of customary international law or a general principle of law applicable to the international institution in question. However, DARIO does not "attempt to identify the obligations binding an international institution,"[31] and instead focuses only on the consequences of a breach of an international obligation. As a result, the question which international rules are applicable to international institutions is left open. In general, the normative relevance of DARIO is quite limited for this research. First of all, DARIO addresses solely the rules for international wrongful acts attributable to international institutions, thus excluding any liability for damage caused by the lawful exercise of public power.[32] More importantly, DARIO focuses only on ex-post situations, which are those where a rule of international law has been breached. The concept of accountability as defined in this research includes both prospective (before the decision has been made) and retrospective (after the decision has been made) elements; section 6 will discuss this definition of the concept of accountability in greater detail. More generally, DARIO does not accord those individuals who are affected by an international institution's decision-making any procedural rights in the decision-making procedure, nor does DARIO provide a benchmark against which the conduct of international institutions can be assessed. An additional limitation of DARIO is that only injured states or international institutions may invoke the responsibility of an international institution, thus excluding individuals from invoking it as a third party.[33] Klabbers, for instance, argues therefore that the ILC Articles have a rather civil-law paradigm, addressing the responsibility between, and among, actors of equal standing, and they do not contain a public-law paradigm, which he referred to as a missed opportunity.[34]

The ILA Report on the Accountability of International Organizations (ILA Report) does provide more guidance than the ILC Articles; the ILA Report identifies *Recommended Rules and Practices* (RRPs) to enhance the accountability of international organizations vis-à-vis

30 Article 10 DARIO.

31 Introductory Note to the DARIO by Special Rapporteur Gaja at 5.

32 See also I.F. Dekker 'Making Sense of Accountability in International Institutional Law (2007) 36(1) *Netherlands Yearbook of International Law* 83 at 93-94, which discusses the limited scope of the Articles.

33 Article 43 Dario, see also articles 49 and 50; a state may however invoke the responsibility of an international institution by bringing a claim for the diplomatic protection of its nationals. In practice, it would require an individual to ask the state of nationality to invoke the responsibility of the international organization in question after the individual exhausted all local remedies (if they exist at the level of that particular international institution). See also A. von Bogdandy and M.S. Platise, 'DARIO and Human Rights Protection: Leaving the Individual in the Cold' (2012) 9 *International Organizations Law Review* 67 at 73.

34 Klabbers referred to P. Cane (Responsibility in Law and Morality (2002)), who drew the distinction of a civil law and a public law paradigm; J. Klabbers, 'EJIL Foreword: the Transformation of International Organizations Law' (2015) 26 *European Journal of International Law* 9 at 73.

a variety of stakeholders, including third parties. The Recommended Rules and Practices derive from two different types of sources: (1) primary rules of international and domestic law, and (2) rules of international institutions (i.e., constituent instruments, decisions made and resolutions adopted by the institution in question, and said institution's established practice).[35] Although discussed in greater detail in chapter 2, it is important to note that the ILA Report in itself cannot serve as a normative yardstick for analyzing the accountability of international institutions. The RRPs are not sufficiently precise. It is furthermore unclear whether the formulated RRPs find their origin in existing standards, or whether they concern preferred standards; that is, whether they concern rules *de lege lata* or *de lege ferenda*.[36] In other words, it is not clear to what extent they reflect the practice of international institutions. Thus, current international law does not provide an adequate legal framework that imposes constraints on the public power exercised by international institutions.

This research adopts *a public law approach* to address the accountability deficit of international institutions vis-à-vis those affected by their decision. The relevance of a public law approach to address and analyze an international institution's exercise of public power is increasingly recognized.[37] Public law has both a constituting and constraining function in any national legal order, the latter being the most relevant for this research. The main justification for the public law approach is the functional similarity[38] that exists between the way in which an international institution exercises its public power and the way in which domestic public authorities exercise theirs. Individuals are affected by these decisions made in a similar manner, whether it is by a state's or international institution's conduct, hence creating a *common zone of impact.*[39] As a result, the addressees of national and international legal orders are increasingly merged which necessitates a different approach in terms of the law; it is consequently unwarranted to uphold a strict separation between the two legal orders.[40] It is not desirable in such situations to focus on the characterization of the actor exercising the public power – in other words, an international institution or state – in order

35 ILA Final Report (2004) at 7.
36 ILA Final Report (2004) at 6; the ILA accountability principles will be further discussed in chapter 2.
37 See, e.g., E. Hey, 'Global Environmental Law: Common Interests and the (Re)Constitution of Public Space' (2009) 39(3) *Environmental Policy Law* at 152, 156; L. Casini, 'Beyond the State: the Emergence of Global Administration' in S. Cassese and others, *Global Administrative Law Case Book* (2008) available at http://www.iilj.org/gal/GALCasebook.asp, 18, at 24; A. von Bogdandy, P. Dann and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' in: A. von Bogdandy, R. Wölfrum, J. von Bernstorff, P. Dann, and M. Goldmann (eds.) *The Exercise of Public Authority by International Institutions: Advancing International Institutional law* (Heidelberg, Springer 2010) 3; A. Momirov, *Accountability of International Territorial Administrations – a Public Law Approach* (Utrecht, Eleven Publishing 2011).
38 A. Momirov. and A. Naudé Fourie, 'Vertical Comparative Law Methods: Tools for Conceptualizing the International Rule of Law' (2009) 2(3) *Erasmus Law Review* 291.
39 Idem, 291.
40 Momirov and Naudé Fourie at 292.

to answer the question what an accountability framework should look like.[41] Conversely, this research asserts that what should be decisive is *how* public power is exercised and *the impact* a decision has on an affected individual. As argued by Von Bogdandy:

> … the more an international authority impacts an individual, the stronger the assumption is that international principles require legal arrangements which are functionally equivalent to what is to be expected in the domestic realm.[42]

The public law approach[43] adopted in this book is used to examine the extent to which public *international* norms and principles mould, constrain and/or guide the exercise of public power by domestic public authorities. The aim of using said approach is to identify general standards, common denominators and deviating practices across international instruments constraining the exercise of public power at a national level. Accordingly, the consensus reached between member states of the respective instruments on the formulation of certain international norms combined with an authoritative interpretation of said norms by treaty monitoring bodies and the international compliance mechanism in place for their enforcement contributes to a further substantiation of the normative relevance of these norms.

Moreover, the aforementioned approach is supported by the interaction between the two types of legal order and between their norms. The standards applicable in a national or international context increasingly "interact with and influence each other, resulting in some degree of normative integration between the international and national contexts."[44]

41 See also Klabbers, who argues that a focus on international institutional law would enable concentrating not so much on the actor but on *how* public authority is exercised; J. Klabbers, 'Paradox of International Institutional Law (2008) 5 *International organizations Law Review* 1, 22-23. As demonstrated, a focus on the actor's identity will moreover bring no answers as to the accountability framework for international institutions, as international (institutional) law has not been developed in such a way as to provide external benchmarks.

42 A. von Bogdandy, 'General Principles of International Public Authority' in: A. von Bogdandy, R. Wölfrum, J. von Bernstorff, P. Dann, and M. Goldmann (eds.) *The Exercise of Public Authority by International Institutions: Advancing International Institutional law* (2010) at 727. See also above Klabbers (2008), note 40.

43 See, for example, also Naudé Fourie, who conducted a comparative study of (quasi-)judicial review mechanisms in national and the EU legal order, to develop an analytical lens to assess the World Bank Inspection Panel; A. Naudé Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight* (Utrecht, Eleven International Publishing 2009); Momirov adopted a public law approach to assess the exercise of public power by international territorial administrations, A. Momirov, *Accountability of International - Public Law Approach* (2011). Other research similarly adopts a public law approach even though they take a more theoretical approach. For instance, Global Administrative Law and the International Public Authority project both rely on domestic public law concepts. It is however less explicit where the precise notions are derived from; it often concerns rather internal normative notions. See further chapter 2.

44 J. Ebbesson, 'Public Participation' in D. Bodansky, J. Brunneé and E. Hey (eds.) *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press 2007).

Similarly, some national-level international standards have been deemed relevant for international institutions.[45] Furthermore, various international institutions themselves refer to international standards applicable at a domestic level in order to justify their exercise of public power or to explain the procedural safeguards that they have in place. For instance, several international institutions, quasi-judicial review mechanisms in particular, refer to concepts developed at a national level or to relevant domestic court cases for determining the interpretation of a rule of international law.[46] However, the general argument is that although those norms are relevant to an international institution, the context in which it operates should also be taken into account in the interpretation and application of the norm.

3. Research Question

No normative yardstick currently exists with which one can analyze and address in a systematic manner the accountability of international institutions in regards to those affected by their decisions. It is therefore this research's main objective to develop such a yardstick. The overarching research question is:

Based on a public law approach, what are the elements of a normative yardstick to analyze the accountability of international institutions that adopt decisions directly affecting individuals?

The research adopts the following two underlying criteria for the development of such a yardstick:

1. The yardstick identifies the procedural arrangements necessary to decrease the accountability deficit;
2. In the identification of the elements of the yardstick, a proper balance is to be struck between the general nature of the accountability problem and each institution's specific circumstances.

Ad 1: Procedural arrangements necessary to decrease the accountability deficit
Literature review shows that an accountability framework for international institutions adopting decisions that directly affect individuals generally contains three (main) elements: a right to information, a right to participate in decision-making procedures and access

45 See, for example, Decision IV/3 (2011) ECE/MP/pp/2011.CRP.5 in which Parties to the UNECE Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (the Aarhus Convention, which is in principle applicable at a national level) deemed the Convention to be relevant within the framework of international organizations.

46 See, for example, A. Naudé Fourie, 'The World Bank Inspection Panel's Normative Potential: A Critical Assessment, and a Restatement' (2012) 59 *Netherlands International Law Review* 199-234. Similarly, see the discussing of the standard of review adopted by the Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee and how said standard takes into account the different national standards of review in chapter 7, section 6.2.5.

to an effective remedy.[47] Said three dimensions can also be discerned from the practice of international institutions.[48] Access to information in this context refers to the right to seek and receive information from public authorities. Participation in decision-making procedures means the right to be heard before a decision is made.[49] Access to an effective remedy refers firstly to the right to a reconsideration by a review body, and secondly, to the right to reparation to remedy the harm done. This research suggests that a combination of these three dimensions may serve to address the accountability deficit of international institutions vis-à-vis individuals, which would further justify the use of the overarching term *inclusionary governance* for the accountability framework. This project asserts that the aforementioned procedural arrangements – either in combination with substantive rules or by themselves – can decrease said accountability deficit of international institutions.[50]

The term *inclusionary governance* is used to refer to the way in which individuals are (to be) *included* in an international institution's decision-making procedure. So far, *inclusionary governance* has been used mainly in the context of migration research to describe a type of governance that ensures the proper inclusion of migrants in society as well as to refer to policies aiming to empower migrants to reach a position similar to that of other individuals in that same society.[51] This research, to the best of its author's knowledge, is the first to use the

47 Global Administrative Law has identified these three principles as the core elements of administrative decision-making, B. Kingsbury, N. Krisch, R.B. Stewart, 'The Emergence of Global Administrative Law', *IILJ Working Paper 2004/1* (Global Administrative Law Series), available at www.iilj.org; see also the Swedish government's official assessment of procedural principles recognized within all EU countries, which includes: access to information, the right to a fair hearing, the obligation to provide written reasons for decisions reached and the obligation to inform one about the right to appeal, quoted in E. Schmidt-Aßmann, 'Verwaltungsverfahren und Verwaltungskultur' (2007) *Neue Zeitschrift für Verwaltungsrecht* 40 at 43. J. Ebbesson, 'Public Participation' in D. Bodansky, J. Brunneé and E. Hey (eds.) *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press 2007).

48 See, for example, the ILA Final Report on the Accountability of International Organizations (2004), which formulates recommended practices for international organizations vis-à-vis third parties, which will be extensively discussed in chapter 2.

49 It should be noted that the term *participation* has a different meaning depending on its context. It may sometimes be referred to as *a thick concept*, such as democratic participation, or as *a thin concept* when it only refers to the possibility of having one's view expressed before a decision is made. In the context of this research, the thin concept of participation is used, and it focuses only on administrative decision-making.

50 See, similarly, the Global Administrative Law Project of the Institute for International Law and Justice, New York University School of Law, which stipulates that procedural arrangements are required in order to address the legitimacy deficit. For an overview on the Global Administrative Law project, see: B. Kingsbury, N. Krisch, R.B. Stewart, 'The Emergence of Global Administrative Law' (2005) 15.

51 Inclusive policies focus on ensuring inclusive social development of migrants, which often has both a financial and social component. See, for example, Global Migration Group, 'Brief no. 3: Migration as an Enabler for Inclusive Social Development'; see also Migration Policy Initiative, Building inclusive Cities Challenges in the Multidimensional Governance of Immigrant Integration in Europe, by D. Gebhardt, (September 2014), available at http://www.migrationpolicy.org/research/building-inclusive-cities-challenges-multilevel-governance-immigrant-integration-europe; similarly see for the usage of the term *inclusionary governance*, albeit with a focus on general development studies, the book A*chieving*

term *inclusionary governance* in relation to international institutions exercising public power that affects individuals directly.

Governance in this context refers to the broader notion of exercise of public power, and it is therefore not limited to one government structure in particular or only to formally binding decisions.[52] Although the term "means different things in different contexts,"[53] the concept in general "relates to group decision-making to address shared problems."[54] When applied to international institutions, however, it concerns "less than global government, a task for which no international organization is equipped, but [it concerns] more than the power to determine policy or initiate the process of international law-making."[55] The term governance is also justified when one considers recent developments in international law: a variety of actors are exercising public power more and more, and such power is increasingly exercised in an informal manner.[56] Most decisions that directly affect individuals are not made by central organs of international institutions but by expert bodies, agencies, or subsidiary organs instead.[57] Accordingly, a more all-inclusive working concept of the exercise of public power is required, hence the term *governance*. Even though the necessity of the three elements of inclusionary governance for international institutions is increasingly recognized, their exact scope is not well-defined in the literature. A further characterization of each element of inclusionary governance is therefore required, particularly because developing a standard for inclusionary governance for international institutions is the main object of this research. Sections 4 and 5 will explain how this yardstick will be developed.

Inclusionary Governance: Advancing Peace and Development in First and Third World Nations (Brill 2000) by T.E. Paupp, who uses the concept to describe an inclusive way of governing, focusing on fostering social, economic, political rights for all individuals governed.

52 See for an overview of the term *governance*: M.P. Ferreira-Snyman and G.M. Ferreira, 'Global Good Governance and Good Global Governance' (2006) 31 *South African Yearbook of International Law* 52-94; see also D.C. Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115 *Yale Law Journal* 1490; Common on Global Governance, Our Global Neighborhood: the Report of the Commission on Global Governance 2 (1995) ("governance is the sum of the many ways individuals and institutions ... manage their common affairs").

53 Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) at 1497.

54 Idem.

55 P. Birnie and A. Boyle, 'International Governance and the Formation of Environmental Law and Policy' in P. Birnie and A. Boyle, (eds.) *International Law and the Environment* (OUP 2002) at 34-3.

56 See, e.g., A. von Bogdandy, P. Dann, and M. Goldmann 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance activities' (2010), at 7.

57 For instance, the subsidiary organs of the UN Security Council, the UN Sanctions Committees, decide on the designation of individuals and not the UN General Assembly. The UNHCR field offices (often comprised of max. four UNHCR staff members) also determine the refugee status.

Ad 2: Striking a balance: assessing the relevance of an international institution's specific circumstances

First, it is important to differentiate this research's approach to the accountability problem of international institutions from other existing approaches. The normative yardstick is not intended to serve as a blueprint for an accountability framework or to merely list best practice for all international institutions.[58] A blueprint approach would not do justice to the diversity among the various international institutions. Moreover, attaining accountability is a continuous process; it is not a final end result.[59] A best-practice approach would not manage to set common minimum standards applicable to all international institutions. The yardstick should embrace a certain level of flexibility to strike this balance. The standards underlying such a yardstick should therefore be of a sufficiently general nature to address the accountability problem of all international institutions that adopt decisions directly affecting individuals. At the same time, the standards ought to allow institutions a certain discretion and to take into account the context in which each international institution operates.

Said context is assumed to be relevant in identifying not only potential differences and similarities between international institutions but also possible differences between international institutions and domestic public authorities that exercise similar powers. This book draws inspiration from research engaging in legal transplanting where important notions from one legal order are transplanted into a different legal order.[60] However, as pointed out by Della Cananea:

> A generalized, indiscriminate 'transplant' of legal principles and tools would entail the risk of jeopardizing the contribution which international institutions are expected to provide precisely because they differ from states.[61]

58 See, for example, Peerenboom, who criticized these approaches in relation to rule of law reforms, R. Peerenboom, 'Towards a Methodology for Successful Legal Transplants' (2013) 1 *Chinese Journal of Comparative Law* 4 at 5.

59 In other words, it is a process instead of a checklist. Regarding the international rule of law, see similarly Chesterman, 'An International Rule of Law' (2008) 56 *American Journal of Comparative Law* 3331.

60 When engaging in these methods, one needs to have a thorough understanding of the object of study. As described by McDougal:

> The demand for inquiring into function is, however, but the beginning of insight. Further questions are 'functional' for whom, against whom, with respect to what values, determined by what decision-makers under what conditions, how, with what effect.

M.S. McDougal, 'The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order' (1952) *Faculty Scholarship Series* Paper 2475, http://digitalcommons.law.yale.edu/fss_papers/2475 at 31.

61 G. della Cananea, 'Procedural Due Process of Law Beyond the State in: Exercise of Public Authority' in: A. von Bogdandy and others (eds.) *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010) 965 at 969.

Solutions offered at a national level or particular international standards developed for use at a national level may therefore not be fully appropriate or adequate at an international level.[62] Accordingly, the question how the context of international institutions exercising public power should be taken into account will be assessed throughout the research and while developing the yardstick.[63] This is further reflected in the way in which said yardstick will be developed, as will be discussed in the next two sections.

4. Approach: Developing the Yardstick in Four Steps

This research develops the yardstick ('Inclusionary Governance Model for International Institutions' or 'Model') in four steps.

4.1. Step 1: A Conceptual Model for Inclusionary Governance

In step 1, a conceptual model for inclusionary governance (Conceptual Model) will be developed based on an assessment of the existing approaches to the accountability problem of international institutions. This step's underlying analysis involves an assessment of current international norms and of existing theoretical scholarly approaches to the problem.

The analysis' point of departure is a basic understanding of the three-dimensional concept of inclusionary governance. The Conceptual Model is drafted in two separate steps. Firstly, it is examined whether and to what extent existing international law imposes constraints on an international institution's exercise of public power that directly affects individuals; the 2004 ILA Recommended Rules and Practices for the accountability of international organizations are of particular importance to this assessment. The second step comprises an evaluation of existing approaches to the accountability problem of international institutions and the extent to which these theories address the relation between international institutions and individuals. The focus of the analysis is on global administrative law[64] and

62 See, e.g., Hey in relation to international environmental law:
> National public law offers a language in which we can conceptualize the problems at stake. However, the solutions adopted at the national level probably cannot and should not be replicated at the international level. Instead, I suggest we need to be more creative and develop solutions that enable integrated approaches to the decision-making patterns involved in global environmental law.

E. Hey, 'Global Environmental Law: Common Interests and the (Re)Constitution of Public Space' (2009) 39(3) *Environmental Policy Law*; See also E. Hey, 'Global Environmental Law and Global Institutions: a System Lacking "Good Process" ' in: *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (2010) 45 at 46-48.

63 See particularly steps 3 and 4 of the model-building, sections 4.3 and 4.4.

64 Even though the global administrative law project originates from NYU, other research projects similarly study the existence, or development, of global or transnational administrative law. These other research projects were also considered relevant in the context of this research such as the IRPA (Rome) and IPA (Heidelberg) project. See, e.g., B. Kingsbury, N. Krisch, R.B. Stewart, 'The Emergence of Global Administrative Law' (2005), 15. A. von Bogdandy, M. Goldmann and I. Venzke 'From Public International to International Public Law – Translating World Public Opinion into International Public

the constitutionalization of international law.[65] The Conceptual Model serves as a lens for the legal survey conducted in step 2.

4.2. Step 2: Developing the Yardstick's Building Blocks

In step 2, the yardstick's building blocks will be identified and developed through an extensive legal survey of relevant international instruments that addresses the exercise of public power by public authorities at a national level. Relevant instruments include international and regional human rights instruments,[66] environmental law instruments addressing domestic decision-making procedures,[67] and OECD instruments. The following questions have been asked in the legal survey:

- What is the legal basis for the right in question?
- Who is (are) the holder(s) of the right?
- How is the right defined?
- What is the scope of the authorities' obligations?
- What procedure should be followed?
- Are there any recognized limitations to the right, if so which ones?

This research aims to identify patterns, similarities and differences between the various international standards and the way they have been interpreted by, for instance, treaty monitoring bodies. Moreover, international standards developed in the context of a treaty regime do not operate in a vacuum, and instead such standards are often influenced and strengthened by norms of other treaty regimes. Certain legal norms show similarities in their scope and significance regardless of the treaty regime in which they operate. Moreover, the norms further interact through cross-references by treaty monitoring bodies, through the overlapping of the norms' scope of applicability in a specific region, and as a result of treaty monitoring bodies' overlapping mandates. Throughout the survey, the relative normative relevance of a given standard and of the respective instrument was evaluated to examine whether it constitutes a generally recognized standard for inclusionary governance. In other words, it matters whether a standard can only be found in a regional instrument with a specific scope of application, or whether it can be found in an instrument of universal and general character. The outcome of this step is a Draft Inclusionary Governance Model ('Draft

Authority' (September 18, 2015) working paper, available at SSRN: http://ssrn.com/abstract=2662391.

65 See, e.g., S. Besson, 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy' in: J. L. Dunoff and J.P. Trachtmann, *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009), 381; A. Wiener, A.F. Lang jr., J. Tully, M. Poiares Maduro and M. Kumm, 'Global Constitutionalism: Human Rights, Democracy, and the Rule of Law' (editorial) (2010) *Global Constitutionalism* 1(1) 1.

66 This includes, amongst others, all specialized UN human rights treaties, and the ECtHR, IACtHR, ICCPR and ICESCR.

67 For instance, the survey took into account the provisions of the Aarhus Convention on Access to Information, Participation and Access to Justice.

IGM' or 'Draft Model'), which will serve as a draft yardstick to assess the accountability of public authorities vis-à-vis those affected by their decisions.

4.3. Step 3: Testing the Functionality of the Draft Inclusionary Governance Model

In step 3, the Draft IGM will be tested by applying it to the designation procedure of the UN Security Council ISIL (Da'esh) and Al-Qaida Sanctions Committee. The purpose of its testing is two-fold. Firstly, the application of the Draft IGM to the Sanctions Committee's designation procedure aims to demonstrate the functioning of the Draft IGM as a draft yardstick to analyze the extent to which the Sanctions Committee is accountable to those affected by its designations. The analysis gives insight into existing inclusionary processes within the Sanctions Committee. It also enables the identification of patterns and practices that may contribute to further accountability and those that may have a negative impact on the accountability process.

Secondly, the Draft Model will be tested to assess whether certain adjustments may be necessary to better take into account the context in which international institutions operate. The building blocks developed in step 2 define the three dimensions of inclusionary governance – in terms of its standards, constraints and parameters – based on the aforementioned survey. Through the testing of the Draft Model, it is examined whether a translation or adjustment of the building blocks developed in step 2 may be necessary in light of the circumstances in which each international institution operates. Taking these considerations into account, the following questions guide will be asked in this testing phase:

1. Is the formulation of the different benchmarks of the building blocks of the Draft Model sufficiently clear to be applied as a yardstick to international institutions?
2. Do the dynamics and contextual factors identified by the Draft Model sufficiently capture the context in which each international institution operates?
3. Is the Draft Model complete as well as sufficiently sophisticated to deal with the everyday reality of international institutions, or are there any other issues that the Draft IGM does not yet sufficiently capture?

The rationale for choosing the Sanctions Committee's designation procedure to test the functionality of the Draft IGM is two-fold. First, the Sanctions Committee has been strongly criticized for the lack of properly including the individual in its decision-making procedures; particularly considering the enormous impact of its decisions on the lives of those designated.[68] There is a strong demand for further accountability of the Sanctions Committee vis-à-vis those affected. Second, the Sanctions Committee improved its decision-making procedure to become more accountable, largely in reaction to the judicial contestations at a national and regional level. The Sanctions Committee has adopted a narrative, which is based on the

68 See, e.g., the text in and around this chapter's footnotes 4 and 16.

context in which the Sanctions Committee operates, in which it justifies the deviation from the accountability standards that apply domestically.[69]

At the end of the testing phase, potential shortcomings in the Draft Model will be identified and it will be analyzed whether and to what extent certain adjustments are necessary to better take into account the context in which international institutions operate.

4.4. Step 4: Evaluation – an Inclusionary Governance Model for International Institutions

In step 4, the Draft Inclusionary Governance Model will be fine-tuned based on the outcome of step 3. In other words, any potential shortcoming(s) identified in the Draft IGM will be evaluated, and the yardstick will then be adjusted where necessary to address these shortcomings. The outcome will be a fine-tuned Inclusionary Governance Model for international institutions (Model). The following section will discuss the methodology employed to develop this Model.

5. Methodology

The main methodology used throughout the research is doctrinal legal research by way of reviewing primary sources and literature review. Said methodology was supplemented by other research methodologies to meet this research's objective. To answer the research question posed and the research objectives formulated, this project also engaged in model-building and used comparative methods to identify the elements of the normative yardstick.

The term *model* is used in this book to distinguish the normative yardstick from those developed from blue-print approaches and lists of general practice. The former (blue print approaches) are too static in that they serve as a checklist that needs to be completed without offering the possibility to take into account the context in which international institutions operate.[70] Blue-print approaches have been criticized for this rigidness and lack of flexibility, particularly in the context of rule of law approaches.[71] The latter (the lists of

69 See, e.g., UN SC Res. (2368) (2017), which makes several references to the need to uphold human rights and respect international law while emphasizing the need to take all necessary means to address any threats to international peace and security:

> *Reaffirming* the need to combat by all means, in accordance with the Charter of the United Nations and international law, including applicable international human rights law, international refugee law, and international humanitarian law, threats to international peace and security caused by terrorist acts, *stressing* in this regard the important role the United Nations plays in leading and coordinating this effort, (Preamble, 11th paragraph).

70 Similarly see A. Momirov and A. Naudé Fourie, 'Vertical Comparative Law Methods: Tools for Conceptualizing the International Rule of Law' (2009) at 302.

71 See, e.g., R. Peerenboom, 'Towards a Methodology for Successful Legal Transplants' (2013), at 5.

general or recommended practice) do not provide sufficiently normative guidance as to what elements are required to ensure the accountability of international institutions vis-à-vis those affected.[72] The Model developed in this research defines the elements of the normative evaluative yardstick that are necessary to be able to analyze and address in a systematic manner the aforementioned accountability. The yardstick is expected to incorporate a norm-flexibility that has regard to the context in which international institutions exercise public power. Thus, the term *model* is used to highlight the richness of the yardstick's elements and the incorporated flexibility of the norms.

The approach adopted (model-building)[73] was developed for this particular research to answer its research question. Model-building is used in various disciplines; its aim however is often different from the one employed in this research. It is most commonly used in the discipline of Economics, where both theoretical models and empirical models are developed with a specific aim.[74] In simple terms, models are used to understand what is happening and to predict what may happen.[75] For instance, Trachtmann explains in his work on the economic structure of international law that modelling

> …is a source of predictions and hypotheses. Once a Model has been validated by empirical testing, it might be appropriate to engage in normative public policy on the basis of the Model itself.[76]

72 See, e.g., the discussion of the ILA Final Report in chapter 2, section 1, which provides the recommended rules and practices for the accountability of international organizations.

73 The model-building approach is guided by public law considerations as explained in section 2 of this chapter. In short, the public law approach adopted in this book is deployed to examine how the exercise of public power by domestic authorities directly affecting individuals is constrained by public international law.

74 Theoretical models are generally developed "for consideration of data for the purpose of specification or calibration." (Boland at 10) When empirical models are used as instruments, one examines the available data and looks for patterns and then form a conjecture as to the course of the pattern. L.A. Boland, *Model-Building in Economics, its purposes and limitations* (Cambridge University Press 2014) at 10.

75 For instance, in systems dynamics, *modeling* is used as a term to describe:

> a process by which formal models are built. A formal model is an explicit representation or a construction of a reality... [a model] is normally a conceptual construction of an issue under study. Modeling, according to the constructivist position, is the construction of a subjective reality. The modeler is an observer who, by the act of observing or modeling, creates "a new world" (cf. von Foerster, 1984).

M. Schwaninger and S. Groesser, 'Modeling as Theory-Building', working paper 26th International System Dynamics Conference, Athens (June 2008) at 4.

76 J. Trachtman, *The Economic Structure of International Law* (Harvard University press, 2008) at 4. His book adapts tools used for the economic analysis of the law for the study of international law (at 8). It "is based on the idea that international law is produced in order to allow states to achieve their preferences with greater effectiveness through the exchange of authority" (at 11). Generally speaking, the core of the analysis conducted in this book addresses the allocation of authority in international law (at 22).

In contrast, the Inclusionary Governance Model is a normative evaluative model: it does not derive its elements from (economic or statistical) data but rather from an evaluation of positive law.

A combination of comparative methodologies is used to identify the elements of the normative yardstick.[77] They can be divided into two categories: those addressing the level at which a comparison is performed and those explaining how a comparison is conducted. Regarding the former, this research engages in a horizontal and a vertical legal comparison. Horizontal comparative methods involve a comparison of legal structures of systems at the *same level*: it compares various national legal systems or international bodies of law.[78] Vertical methods encompass a comparison of legal structures of systems at *different levels*: from national law to structures in international law, for example.[79]

77 The different comparative methods are not mutually exclusive, and a combination is often warranted in order to meet the research objective. M. van Hoecke, 'Methodology of Comparative Legal Research' (2015) *Law and Method* at 9.

78 See, e.g., Momirov and Naudé Fourie, 'Vertical Comparative Law Methods: Tools for Conceptualizing the International Rule of Law', 291-309.

79 The usage of vertical comparative law methods is justified by the emergence of a *common zone of impact*. The addressees of both legal orders are increasingly merged, which requests a different approach in terms of the law and makes it therefore unwarranted to uphold a strict separation between the two legal orders. See, e.g., Momirov and Naudé Fourie, at 292. Section 2, which introduced and justified the public law approach, explained further why a public law framework applicable to public authorities at a domestic level is of relevance for the exercise of public power by public authorities at an international level.

The ways in which both methods are used in this research are summarized in the table below.

HORIZONTAL AND VERTICAL COMPARATIVE METHODS IN THE MODEL-BUILDING PROCESS

The steps in the model-building process		Type of comparison	Result
STEP 1	Existing international rules applicable to international institutions and existing theoretical approaches to international institutions are compared with each other.	Horizontal comparison at an international level	Conceptual Model
STEP 2	The Conceptual Model is used as a lens for a comparative analysis of international instruments constraining the exercise of public power at a national level.	Horizontal comparison of international norms applicable at a national level; vertical comparison of international norms applicable at a national level with international norms applicable to international institutions	Draft Model
STEP 3	The functionality of the Draft IGM is demonstrated and tested by way of applying it to the decision-making procedure of the Sanctions Committee.	Vertical comparison (bottom-up) where the elements identified in the Draft IGM are tested for their suitability to analyze and address the accountability of international institutions in systematic manner.	Evaluation of the functioning of Draft Model
STEP 4	In this step, the Draft IGM is fine-tuned by addressing the findings of Step 3. In addition, the functioning and general relevance of the Inclusionary Governance Model is illustrated by making reference to non-exhaustive functional studies into the practice of other international institutions that make decisions directly affecting individuals	Less extensive horizontal comparison (non-exhaustive functional studies) of the practice of other international institutions.	Fine-tuned Inclusionary Governance Model for international institutions

Table 1: Horizontal and vertical comparative methods used

Concerning the latter, with regard to how a comparison is conducted, several comparative methods have influenced to a greater or lesser extent the process of model-building and the identification of the yardstick's elements. To sum up, the following methods are considered useful for the analysis conducted:

- The functional method that looks "at the actual societal problem … and the way this

> is [addressed] in different jurisdictions … along similar or different roads … and with similar or different results … The focus is on the societal problem and the actual result of the legal approach to that problem."[80]

- The analytical method that encompasses the analysis of "(complex) legal concepts and rules … in different legal systems in such a way that common parts and differences are detected."[81]
- The structural method that focuses "on the framework of the law or of the elements reconstructed through an analytical approach."[82]
- The common-core method that searches "for commonalities and differences between legal systems in view of the question to what extent harmonization on certain points would be possible among the compared legal systems,"[83] or the question "how a regional/international rule could be best interpreted to encompass the different legal traditions."[84]
- The law-in-context method that studies the broader social context in which the law operates and considers a "much broader context when compared to the functional or analytical method [which] implies the use of (results from) other disciplines."[85]

These comparative methods are used to develop the yardstick. The first step of this research's model-building, the development of the Conceptual Model, will be based on an evaluation of existing approaches to the accountability problem of international institutions.[86] A conceptual model is something that:

> is *constructed*, not found. It incorporates pieces that are borrowed from elsewhere, but the structure, the overall coherence, is something that [the researcher builds], not something that exists ready-made.[87]

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80 Van Hoecke at 28; R. Michaels, 'The Functional Method of Comparative Law' in: R. Reimanns and R. Zimmerman (eds.) *Oxford Handbook of Comparative Law* (Oxford, Oxford University Press 2008) 339 at 344-345. K. Zweigert and H. Kotz, *An introduction to Comparative law – the Framework* (Tony Weir, translated, 3rd edition 1998) at 34; A. Peters and H. Schwenke, (2000) 49(4) *The International and Comparative Law Quarterly* 800 at 809-81.

81 Van Hoecke at 28.

82 Idem at 29; it should be noted that this does not constitute "*the* structure of each of the compared legal systems, but just one way of looking at them, which proves to be revealing for answering the research question"(idem at 29).

83 Van Hoecke at 29.

84 Idem.

85 Van Hoecke at 29.

86 The model's four steps were discussed in the preceding section (section 4.1 discussed the development of the Conceptual Model).

87 J. A. Maxwell, 'Designing a qualitative study' in: L. Bickman, and D.J. Rog, *The SAGE handbook of applied social research methods* (Thousand Oaks, CA, Sage Publications 2009) 214-253 at 223. Maxwell explained that a conceptual framework discusses "the system[s] of concepts, assumptions, expectations, beliefs, and theories that suppor[t] and inform… your research" (Maxwell (2009) at 222); see also A. Naudé Fourie, who explains how she uses conceptual models in her research that are developed through a combination of legal and non-legal methods, at 109; see further the text in and around n. 73

In the second step of this research, the Conceptual Model will serve as the framework or lens to conduct the extensive legal survey of the relevant international instruments that address the exercise of public power by public authorities and that directly affects individuals. This step will involve a horizontal comparison of the relevant standards in international instruments. The various sources of international law will therefore be compared to each other with the aim to identify normative patterns across these instruments in the way in which the exercise of public power is constrained by international law and in which the inclusion of individuals is realized. By doing so, the conducted research resembles comparative work focusing on the identification of common denominators and/or a common core across different legal systems.[88] Although the exercise is similar, the purpose of this work is however slightly different: the comparison is not made to improve the international law applicable to public authorities, but instead it contributes to the identification of the elements for the normative yardstick.[89] The aim of the research bears resemblance to those research studies that focus on *legal transplants*[90](that is, research that transplants important notions from one legal order to a different legal order).[91]

of the article, 'Expounding the Place of Legal Doctrinal Methods in Legal-Interdisciplinary Research: Experiences with Studying the Practice of Independent Accountability Mechanisms at Multilateral Development Banks' (2015) 8(3) *Erasmus Law Review* 95-110; O. Brand, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' (2007) 32 *Brooklyn Journal of International Law* 405 at 436.

88 For example, van Hoecke identified this type of comparative method to focus on identifying a "common core in view of the (possible) harmonization of a certain part of the law" (Van Hoecke, 20).

89 In this research, the common core comparison constitutes one of the factors that contribute to the identification of the normative yardstick's elements. The yardstick is developed in 4 steps that involve a variety of comparative methods and other research methods.

90 Van Hoecke, who explains that "[l]egal transplants are rather an aim or a result, not a comparative method in its own right," at 30. Della Cananea warns that, when engaging in this type of research, it is essential to take into account the context in which international institutions operate to acknowledge whether and to what extent the exercise of public power by international institutions differs from that exercised by states. Della Cananea, 'Procedural Due Process of Law Beyond the State in: Exercise of Public Authority' (2010) 965 at 969.

91 The public law approach adopted in this book is deployed to find an answer to the accountability problem of international institutions vis-à-vis those affected by their decisions. The argument is that an international institution's exercise of public power is quite similar to that of public authorities and that individuals are affected in a rather similar way. As the exercise of public power by international institutions is not sufficiently constrained by international law, it is beneficial to assess how the exercise of public power by (domestic) public authorities that adopt decisions affecting individuals is restricted. This research examines the extent to which public *international* norms and principles mould, constrain and/or guide the exercise of public power by domestic authorities. Its outcome will form the basis for the yardstick used to analyze the accountability of international institutions vis-à-vis those affected. See above in section 2, in which the public law approach was further explained and justified.

In general, the legal survey's lens, or the frame for the comparison,[92] does not include a fixed and exhaustive set of standards. Its point of reference is the public law approach adopted to analyze the accountability deficit of international institutions vis-à-vis those affected. Accordingly, the aim is to (1) identify – and thus compare – international standards that aim to constrain the exercise of public power by public authorities that affects individuals, and/or (2) address the necessary procedural arrangements to realize the accountability of public authorities vis-à-vis those affected by their decisions. It is therefore anticipated that the interpretation of the standards may vary depending on the context in which they are used, and/or that different types of standards may be identified than those defined in the Conceptual Model.[93] Accordingly, one needs to maintain an open mind when conducting the legal survey. After all, one should keep reassessing what is considered relevant and what is not, and whether the evolving analytical framework is sufficiently clear.[94]

Treaty interpretation concerns an important component of the work since a large part of the research concerns a survey of the relevant international legal instruments addressing the exercise of public power by international and/or national public authorities. General legal interpretative methods are used to interpret the scope and applicability of the various standards and to examine possible similarities and differences between them. These include, for instance, the rules regarding the interpretation of treaty instruments as laid down in the Vienna Convention on the Law of Treaties.

92 In the context of comparative law, the term used is *tertium comparationis*, or second-order language. In the context of functional comparative methods, the yardstick for comparison is referred to as the *tertium comparationis* (R. Michaels, 'The Functional Method of Comparative Law' in: R. Reimanns and R. Zimmerman (eds.) *Oxford Handbook of Comparative Law* (Oxford, Oxford University Press 2008) 339 at 367-369). Before the *tertium comparationis* can be developed, a hypothesis needs to be formulated first on the basis of an observation of similarities between problems and solutions (*praesumptio similitudinis)*. See further Michaels, 'The Functional Method of Comparative Law,' at 371, and Zweigert and Kotz, *An Introduction to Comparative law – the Framework* (1998) at 40. Van Hoecke explains however that it is better for legal comparatists to develop, "through their research … [,] a comparative second-order language" instead of "looking for *tertia comparationis*," Hoecke at 28. The comparative second-order language refers to "a, relatively neutral, second-order language describing the concepts that constitute the different legal systems," instead of using and relying on first-order languages (in other words, concepts derived from the respective legal system, culture). Hoecke, idem; see also N. Jansen, 'Comparative Law and Comparative Knowledge' in: M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press 2006), 305 at 330.

93 In comparative work and in legal research in general, there is a need to take the context into account. See, for instance, A. Peters and H. Schwenke, (2000) 49(4) *The International and Comparative Law Quarterly* 800 at 832.

94 See also Maxwell, who explains that in a qualitative study "research design should be a reflexive process operating through every stage of a project" (quoting Hammersley and Atkinson, 1995, p. 24), Maxwell, 'Designing a Qualitative Study' (2009), at 214. Nevertheless, one cannot expect a complete absorption of the legal systems that one compares. There is a trade-off to be made between being thorough enough and keeping an eye on any constraints based on time, costs, and language. Momirov and Naudé Fourie, 'Vertical Comparative Law Methods: Tools for Conceptualizing the International Rule of Law' (2009), at 297-298; see similarly van Hoecke at 18.

Article 31 stipulates that:

> [a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. [95]

Treaty provisions are evaluated and compared to determine their normative relevance in the context of the legal survey's purpose. For instance, as treaties only bind those states that are party to the agreement (*pacta sunt servanda*), for the purpose of this research treaties with (near) universal ratification are considered to have a higher relative normative value than those with only a small number of member states. However, the extent to which a treaty has nearly been universally ratified is only one of the factors influencing a treaty's relative normative value. Judicial decisions (and other treaty interpreting documents of treaty monitoring bodies) and writings further aid in understanding the relative normative value of the various norms identified.

In general, there is no hierarchy between the primary sources of international law: treaties, customary law and general principles of law.[96] However, a limited category of substantive rules is considered to have a higher status than other sources of international law: the *ius*

95 Article 31 of the Vienna Convention on the Law of Treaties (VCLT), United Nations, *Vienna Convention on the Law of Treaties*, May 23, 1969, United Nations, Treaty Series, vol. 1155, p. 331, see also articles 32 and 33 in this regard. These rules on the interpretation of treaty law are considered to constitute customary law as the International Court of Justice consistently held in its case law, see, e.g., ICJ, *LaGrand (Germany v. United States)* [2001] ICJ Rep. 466, §99; ICJ, *Avena and Other Mexican Nationals (Mexico v. United States)* [2004] ICJ Rep 12, §83; similarly see ECtHR, *Golder v. United Kingdom* (February 21, 1975), Series A no. 18, §29. See also the Vienna Convention on the Law between International Organizations, which addresses treaties concluded between states and international organizations or between international organizations themselves. However, the Convention has not yet entered into force. See articles 31-33, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted: March 20, 1986, not yet entered into force) (1986) 25 ILM 543.

96 See in this regard article 38 ICJ Statute, which is "widely recognized as the most authoritative and complete statement as the sources of international law" (Shaw at 70). Paragraph 1 of article 38 reads:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   (b) international custom, as evidence of a general practice accepted as law;
   (c) the general principles of law recognized by civilized nations;
   (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The Court thus differentiates between the former three (treaties, customary law and general principles of law) and sources of subsidiary meaning (judicial decisions and writings). For the purpose of this research, judicial decisions and writings are taken into account in the interpretation of identified standards. See further, e.g., Shaw, *International Law* (Cambridge, 6th edition 2008), at 123 and ff.

cogens norms.[97] These are peremptory norms of international law from which no derogations are permitted.[98] Besides the higher status of *ius cogens* norms, there are certain general hierarchy rules that give guidance on the evaluation of the various sources of international law: newer rules precede older rules (*lex posterior derogate priori),* and special or specific rules prevail over a rule with a general character (*lex specialis derogate generali).* Even in cases when there is a newer rule and/or a specialized rule in international law, the *ius cogens* norm will nevertheless precede. In general, the legal survey defines normative patterns and cross-references between the various instruments and the respective treaty monitoring bodies, which aids in identifying generally recognized standards.

Any research that determines patterns, standards, and/or develops a normative framework makes choices as to what constitutes a general standard and what not, what is normatively relevant and what is not. Particularly in the field of comparative law, there is a danger of "systematic 'cherry picking' of friendly examples."[99] One should therefore be "mindful of key methodological considerations."[100] In other words, one should be explicit and clear about these choices and what led to them. In this light, it needs no explanation that more than half of this book is spent on demonstrating, explaining and justifying the yardstick's elements, being the building blocks of the Model, and which derive from the extensive legal survey conducted.

6. Defining Accountability

This research adopts a broad definition of the concept of accountability. Accountability encompasses more than the formal and limited models of controlling international institutions like liability[101] and responsibility.[102] Accountability refers to "the obligation of

97 See, e.g., articles 53 and 64 of the VCLT that addresses *ius cogens* norms (peremptory norms). See further Shaw*, International Law*, at 125-127.

98 See section 1 of chapter 2, in which it is argued that international institutions should be considered to be bound by *ius cogens* norms.

99 R. Hirsch, Editorial, (2013) *I•CON*, 1 at 10.

100 Idem; similarly see Mak, who explains that "the construction of a legal analysis based on comparative knowledge requires an explicit justification of methodological choices," E. Mak, 'Watch out for the Under Toad: Role and Method of Interdisciplinary Contextualisation in Comparative Legal Research' (2015) (2) *Erasmus Law Review* 65, 67.

101 Liability refers to the extent to which international institutions are liable for damage caused in the lawful exercise of authority; liability concerns the second level of accountability in the ILA report, see ILA Report (2004) at 226.

102 Responsibility concerns the third level of accountability as defined in the ILA Report (2004) at 226. The ILC Articles on the Responsibility of International Organizations address the circumstances under which international institutions may be held responsible for international wrongful acts. There are two conditions that have to be met: (1) the occurrence of an international wrongful act that (2) is attributable to the international institution. There is however quite some criticism on the limited scope of these Articles and the extent to which they rely too heavily on the Articles on state responsibility. J. Brunnee, 'International Legal Accountability Through the Lens of the Law of State Responsibility'

international institutions to give a reasoned account of the manner in which they exercise public authority."[103] This research includes both prospective and retrospective elements in the definition.[104] The ILA concluded along similar lines by saying that the first level of accountability[105] involves:

> the extent to which International Organisations, in the fulfilment of their functions as established in their constituent instruments, are and should be subject to, or should exercise, forms of internal and external scrutiny and monitoring, irrespective of potential and subsequent liability and/or responsibility.[106]

However, the concept of accountability as it is used in this research, needs to be further defined. As argued by De Wet, when developing a workable accountability notion or framework, "conceptual clarity is of the essence."[107] This section will therefore further outline how the concept of accountability is understood in this research, and to that end, it describes in greater detail three elements of the notion of accountability:[108] (1) who should be held accountable, (2) for what may they be held accountable, and (3) to whom they may be accountable. These elements will be discussed below.

(2006) *Netherlands Yearbook of International Law* 3 at 22.

103 E. de Wet, 'Holding international institutions accountable', in: *The Exercise of Public Authority by International Institutions: Advancing International Institutional law* (2010), 855 at 856; see for a narrower definition, for example, Bovens, who focuses solely on ex post accountability processes and excludes ex ante inputs in governance:

> accountability is a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment and the actor may face consequences.

M. Bovens, 'Analysing and Assessing Accountability: a Conceptual Framework' (2007) *European Law Journal* 447 at 450 and 467.

104 An example of a prospective element is, for instance, the duty to inform affected individuals about the decision-making procedure and the possibility to participate before a decision is made. An example of a retrospective element is the possibility to request a review of a decision made. Krisch argued that "focusing on those ex post checks may miss a significant part of the picture and may lead to distorted normative assessment" in N. Krisch, 'Global Administrative Law and the Constitutional Ambition' (2009) under 17. However, Kirsch also notes that one needs to be careful as broadening the understanding of a concept may make it more difficult to delineate the boundaries. See further, e.g., De Wet, 859-860, who discusses the concept of accountability as used by the ILA. It should be noted that unlike this research, De Wet (p. 860) limited her research to address only retrospective elements of accountability, acknowledging that the prospective elements are indeed complementary to accountability but should instead be seen as a separate concept. See also D. Curtis and A. Nollkaemper, 'Conceptualizing Accountability in International and European Law' (2005) 36 *Netherlands Yearbook of International Law* 6 at 8.

105 Liability constitutes the second level of accountability and responsibility the third level in the ILA Report.

106 ILA Report 2004 at 5. See further chapter 2, section 1, in which the ILA Report and the approach adopted to accountability will be discussed in greater detail.

107 E. de Wet, 'Holding International Institutions Accountable', at 860.

108 See, e.g., M. Bovens, 'Analysing and Assessing Accountability: a Conceptual Framework' (2007) *European Law Journal* 447 at 454.

6.1. Who Should be Held Accountable: The International Institution Exercising Public Power

This research adopts a broad working definition[109] of what constitutes an international institution[110] and focuses on those institutions that exercise public power that affects individuals. The definition includes formal international organizations[111] and other international institutions (that is: institutions created by treaty; those created by any other instrument governed by international law,[112] including (subsidiary) organs of international institutions, such as the UN Security Council; and agencies that work autonomously[113]). Regarding the latter, for instance, the UNHCR[114] administers refugee camps and conducts Mandate Refugee Status Determination if states are not willing or able to do so. In such situations, agencies (such as the UNHCR) often have "control over technical expertise and information";[115] they

109 It is therefore also a way of including in the definition those *variations* of institutions one sees in practice. For academic attempts to provide a legal definition, see, for instance, H.G. Schermers and N.M. Blokker, *International Institutional Law* (4th edition, 2003, Martinus Nijhoff) 30; see also J. Klabbers, *an Introduction to International Institutional Law* (Cambridge University Press 2002) 6 ff. They sketch the academic debate on the search for a legal definition.

110 The definition of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations themselves in article 2 (1)(i) is too limited for this research as it focuses on *international governmental organizations*, thus excluding organizations containing members other than states or those created by states through organs of international organizations; ILC Commission Report on the Work of the 55th Session (2003) UN Doc. A/58/10 Commentary to Draft Article 2 at 39-39; see also G. Verdirame, *The UN and Human Rights: Who Guards the Guardians* (Cambridge University Press 2011) 14.

111 For instance, the ILA Report on the Accountability of International Organizations adopts a more stringent definition, and it addresses only formal intergovernmental organizations and defines its object of study to be the "intergovernmental Organisations in the traditional sense, i.e. created under international law by an international agreement amongst States, possessing a constitution and organs separate from its Member State," Report of the 68th ILA Conference held at Taipei, p. 587; ILA Final Report under 4. Chapter 2 will extensively discuss the content of the ILA Report, including the narrow definition of international organizations.

112 See the ILC definition, which adopts such a broad (working) definition. Article 2, Draft Articles on the Responsibility of International Organizations (ILC report on the work of the 61th session (2009) UN Doc. A/64/10 at 20. See also G. Gaja, Seventh Report on the Responsibility of International Organizations by the Special Rapporteur, 61st session of the ILC (2007) UN Doc. A/CN.4/610 at 4.

113 The term *autonomy* refers to the extent to which the agency can operate independently from the parent organ that created it. G. Verdirame, *The UN and Human Rights: Who Guards the Guardians* (2011) at 16-19.

114 The UNHCR Mandate note explains that the UNHCR forms a "multilateral, intergovernmental institution," established by the UN General Assembly (UN GA) as its subsidiary organ (UN GA resolution 319 A (IV) of December 3, 1949). As explained further in the UNHCR Mandate note:

> It was the intention of the GA to ensure that the High Commissioner, supported by his Office, "would enjoy a special status within the UN ... possess[ing] the degree of independence and the prestige which would seem to be required for the effective performance of his functions."

UNHCR, Division of International Protection Note on the Mandate of the High Commissioner for Refugees and his Office (October 2013), under 1, available at https://www.unhcr.org/protection/basic/526a22cb6/mandate-high-commissioner-refugees-office.html. The note further explains how the mandate derived both from the UN GA resolutions and international treaty law (i.e., the 1951 Refugee Convention and its 1967 Protocol), which gives "the High Commissioner as well as his office its unique identity, specific legal authority and independence," UNHCR Mandate note under 2.

115 M. Barnett and M. Finemore, 'The Politics, Power and Pathologies of International Organizations'

work autonomously and can be qualified as autonomous agencies meeting the definition of international institutions. Although there are some structural differences between the various international institutions, similarity exists in how they exercise public power and the way in which their decisions impact individuals.[116] The Inclusionary Governance Model focuses on this similarity and thus applies to all international institutions – whether an agency, subsidiary body or intergovernmental organization – that meet the definitional scope of accountability as addressed in this section.[117]

6.2. For What May They Be Held Accountable: The Decision-Making Procedures that (May) Directly Affect Individuals

This research focuses on the exercise of public power by international institutions that directly affects individuals. It concerns decisions of an administrative nature – including infrastructure projects, administrative sanctions, and refugee status determination procedures – and not procedures that are norm-developing, such as the development of legislation.[118] The actual nature of the decision-making procedure is leading in a procedure's qualification; the label given to a decision-making procedure by public authorities is merely indicative.[119] The nature of various international institutions' decision-making procedures suggests that they are administrative procedures; amongst others, the UNHCR refugee status

(1999) 53 *International Organizations* 699 at 704 and further.

116 See, e.g., Klabbers, who argues:

> [international institutional law], being a broader, more comprehensive concept, would seem the more natural term to use if the ambition is to control public authority. Speaking of the "law of international organizations" focuses too strongly on "who" exercises power, and might allow some to slip through the net; this is less obviously a risk with "international institutional law," which allows for a concentration not on actors, but on *how* public authority is exercised.

J. Klabbers, 'Paradox of International Institutional Law' (2008) 5 *International Organizations Law Review* 1 under 22.

117 Even though the model has a general nature and can be applied to all the international institutions adopting decisions directly affecting individuals, the research acknowledges the relevance of the context in which each institution operates. As chapters 6 and 8 will further illustrate, the Draft Model has a dynamic nature.

118 E. Hey, 'International Institutions' in: D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press 2007), 749 at 760, see also 764, 768.

119 See for similar reasoning, for instance, the work of the various international human rights bodies, HRCee, *General Comment 32* (2007), §15; see also HRCee, *Perterer v. Austria,* Communication No. 1015/2001, §9.2.; in relation to the ECtHR, see, e.g., ECtHR, *Engel and others v. the Netherlands*, (June 8, 1976) app. no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/73, §82-83; ECtHR, *Adolf v. Austria* (March 26, 1982) app. no. 8269/78 §30; the reasoning that a label should not be leading and that one needs to look at other factors too has similarly been used by different bodies in different contexts. See, e.g., the Aarhus Convention where the Compliance Committee argued that, in order to determine whether an activity falls under the scope of article 6 or 7, one should make such determination on a "contextual basis, taking into account the legal effects of each decision" (*communication concerning Austria, ACCC/C/2008/26* (February 8, 2011) §50). By doing so, one should therefore look at the legal functions and effects of a decision instead of the label given to it in domestic law; ACCC, *Communication concerning Belgium,* ECE/MP.PP/C.1/2006/4/Add. 2, §29.

determination procedure and the Sanctions Committee's listing of individuals suspected of terrorism have been qualified as such. Similarly, these international institutions have themselves qualified these decision-making procedure as being administrative in nature. [120]

Only those administrative decision-making procedures that directly affect the lives of individuals fall within the ambit of this research. In determining the potential impact of a decision-making procedure, it is decisive whether a decision has a de facto impact on an individual's rights and interests and therefore not whether the individual or group concerned is the de jure decision's addressee.[121] For instance, large-scale development projects affect not only the addressees of a decision concerning the financing or permitting of such a project but also those who will be affected by the project. For example, the building of a dam affects both the addressees of the decision whether or not to build the dam and those that live in the area where the dam will be build. Said decision has a de facto impact on the latter.

Similarly, decision-making procedures of international institutions may not result in formal binding decisions on individuals, but they do have a de facto impact on the daily lives of individuals or groups of individuals. The UNHCR refugee status determination procedure, for instance, does not result in a formal binding decision in which refugee status is given to an asylum seeker; but in practice, the UNHCR refugee status certificate does have a similar impact on an asylum seeker.[122] Said certificate is determinative for those who depend on UNHCR officers for protection from a forcible return to their country of origin.[123]

In conclusion, those decision-making procedures of international institutions that have an administrative nature and have– at a minimum – a de facto impact on the lives of individuals or groups of individuals fall within the ambit of this research.

120 See, e.g., the website of the UNHRCR at http://www.unhcr.org/pages/4a16b1d06.html; UN SC targeted Sanctions regime, see, e.g., Ombudsperson Kimberly Prost's explanation on the administrative nature of the sanctions regime, see https://www.un.org/securitycouncil/ombudsperson/approach-and-standard; the UN SC emphasizes in its resolutions that its sanctions are not criminal in nature, thus justifying the conclusion that they are administrative in nature, see, e.g., UN SC Res 2253 (December 17, 2015), §44.

121 See, e.g., E. de Wet 'Holding International Institutions Accountable' (2010), 855 at 856; see, e.g., the research conducted by Naudé Fourie on the accountability of the World Bank and by Momirov on that of the administration of territories by the UN. Both focus particularly on affected individuals and less on the addressees of any decisions rendered. A. Momirov, *Accountability of International Territorial Administrations – a Public Law Approach* (2011) and A. Naudé Fourie, *The World Bank Inspection Panel and Quasi-Judicial Review Oversight, in Search for the 'Judicial Spirit in Public International law'*. (2009).

122 See, for example, under 8.1 of the UNHCR procedural safeguards for UNHCR-led RSD procedures. See further, e.g., M. Smrkolj, 'International Institutions and Individualized Decision-Making: an Example of the UNHCR's Refugee Status Determination', at 1782.

123 See also M. Kagan, the Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination (2006) 18 *International Journal on Refugee Law* 1. It should be noted though that the effects of the UNHCR-issued RSD decisions vary per country, in regard to both the host country and possible resettlement countries. See for a brief overview Smrkolj, at 1787-1789.

6.3. To Whom May They Be Accountable: Defining Who May Be Affected by Decisions of International Institutions

This research addresses the accountability of international institutions vis-à-vis those affected by their decisions. The question who may be affected is answered in the broadest sense and includes all kinds of third parties – for instance, individuals, groups of individuals, entities or NGOs. For the sake of clarity, whenever this research refers to *affected individuals*, it also includes groups of individuals and other non-state actors unless stated otherwise.

Often, international institutions formulate a basic principle of who is considered to be affected by their decision-making procedure and should therefore be included in their procedure. For instance, the UNHCR recognizes asylum seekers who apply for refugee status through the UNHCR offices as affected individuals,[124] the UN Security Council Sanctions Committees recognizes individuals and entities designated,[125] and the World Bank developed the term *project affected people* to refer to those affected by development projects it financed or co-financed.[126] It should be noted though that the research conducts an independent assessment as to who should be considered an affected individual. Accordingly, both the policy adopted by international institutions in which they define who is affected by their decisions and its application in practice will be scrutinized.

124 Affected individuals are those who have applied for refugee status; they are the addressees of any decisions made. See, e.g., the introduction (at 1-2) and paragraphs 3.1.2., 3.1.3 of the Procedural Safeguards Handbook of the UNHCR Mandate Refugee Status Determination Procedures, (2005) available at http://www.unhcr.org/4317223c9.pdf.

125 *Affected individuals* are those who have been designated as such (as well as their direct family members) by the Sanctions Committee. The UN SC adopts the resolution, and Sanctions Committees subsequently add names to the consolidated list. UN member states are then obliged to implement the sanction and to impose (implement at a national level) a travel ban and freeze any assets. The resolutions are thus directed at the UN member states. Although resolutions to designate individuals are addressed to the UN member states, those who are affected are the de facto addressees of the adopted resolution. See, e.g., UN SC Res. 2253 (December 17, 2015) UN Doc. S/RES/2253, §54, in which it was stipulated that the Ombudsperson review procedure is open for any "individuals, groups, undertakings or entities seeking to be removed from the ISIL (Da'esh) & Al-Qaida Sanctions List."

126 The World Bank policies and procedures address the its management and the borrower's obligations to those affected. See, e.g., Operational Policy 4.12 (December 2001) (involuntary resettlement) where paragraph 3 explains who is considered to be an affected party and should thus be offered further guarantees. The World Bank Inspection Panel exercises quasi-judicial oversight of the conduct of the World Bank management, for instance, in the application of procedural safeguards in practice. See, for example, 1999, *China Western Poverty Reduction,* IR in §79 and 278. See further Naudé Fourie, *The World Bank Inspection Panel and Quasi-Judicial Review Oversight, in Search for the 'Judicial Spirit in Public International Law'* (2009) at 238-240. She discusses the World Bank Inspection Panel's case law on the definition and quantification of *project affected people*.

7. Delimitation of the Research

This research addresses the question how public power is, and should be, exercised by international institutions. It does not address the issue whether they *should* exercise such public power at all, nor does it deal with the question whether an international institution is permitted to exercise public power in a given case. Even though both questions are worth researching, it falls outside the scope of this research.[127] In other words, the origin of an international institution's powers and the legitimacy of the exercise of said powers will not be addressed.[128] This research takes it as a given that international institutions have such powers but assesses the legal framework that needs to be applied to constrain them in order to hold an institution accountable to those affected.

127 For a critical account of the exercise of authority by international institutions with a specific focus on the UNHCR, see, for example, Smrkolj, 'International institutions and individualized decision-making: an example of the UNHCR's refugee status determination', 1779-1804; in relation to the legality of the UN Sanctions regime, see Verdirame, for example, above n. 49, under 304-306; in relation to international institutions in general, see J. Klabbers, for example, 'The changing image of international organizations' in: J-C. Coicaud and V.A. Heiskanen (eds.) T*he Legitimacy of International Organizations* (UN University Press 2001) 221 at 222; J.E. Alvarez, 'International Organizations: Then and Now' (2006) 100 *American Journal of International Law* 324; B.S. Chimni, 'International Institutions Today an Imperial Global State in the Making' (2004) 15 *European Journal of International Law* 1.

128 *Legitimacy* is a term that is often used in scholarly work, but it can have various meanings. It encompasses more than the legality of the exercise of authority: it concerns the justification of the exercised authority. Legality is hence only one of the dimensions of legitimacy. For example, see D. Beetham, The Legitimation of Power (Atlantic Highlands: Humanities Press International Inc. 1991) at 3-9, 57. See also Boission de Chazournes, who discusses the role of legal legitimacy versus legality. She argues, for instance in relation to transparency, that a norm produced by an organization through a transparent procedure will in this way not be more legal, but it may have a higher legitimacy. L. Boisson de Chazournes, 'Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies' (2009) 6 *International Organizations Law Review* 655 at 664. R. Wölfrum, 'Legitimacy of International Law and the Exercise of Administrative Functions: the Example of the International Seabed Authority, the International Maritime Organization (IMO) and International Fisheries Organizations' in: *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Heidelberg: Springer, 2010), 917 at 919. See also Bodanksy, who mentioned, for example, tradition, rationality, legality and democracy as a possible basis for legitimacy, D. Bodanksy 'The Legitimacy of International Governance: a Coming Challenge for International Environmental Law? (1999) 93(3) *American Journal of International Law* 596 at 601; see further Esty, who discusses six forms of legitimacy: democratic legitimacy, results-based legitimacy, order-based legitimacy, systemic legitimacy, deliberative legitimacy and procedural legitimacy. He argues that the various forms of legitimacy may in some cases reinforce each other while in other ones they may be in tension, D.C. Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115 *Yale Law Journal* 1490 at 1515-1523; D'Aspremont and De Brabandere categorize the different approaches to legitimacy into two categories: the legitimacy of exercise and the legitimacy of origin, J. d'Aspremont and E. De Brabandere, 'The Complementary Faces of Legitimacy in International Law: the Legitimacy of Origin and the Legitimacy of Exercise' (2010-2011) 34 *Fordham International Law Journal* 190 at 190; the basis for this distinction can be found in J. d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (2006) 38 *NYU Journal of International Law and Politics* 887 at 894.

8. Outline of the Book

Increasingly, international institutions exercise a form of public power that directly affects individuals without providing a legal framework commensurate with said power. This book examines this accountability deficit of international institutions vis-à-vis those affected by their decisions. Although the literature has recognized this problem, there is no yardstick to address and analyze the accountability of international institutions to those affected in *a systematic manner*. Therefore, the main aim of this book to develop such yardstick.

This book's structure follows the model-building process: its four parts represent the four steps in which the normative evaluative yardstick will be developed. The yardstick should include the elements of the procedural arrangements that are necessary to address the accountability deficit, and it should also strike a proper balance between the general nature of the accountability problem and the specific context in which international institutions operate. As a point of departure, this research suggests that a combination of the various procedural arrangements (such as access to information, participation in the decision-making procedure and access to an effective remedy (*inclusionary governance*)) may serve to address the accountability deficit. In Part I (step 1), the Conceptual Model will be developed through an analysis of the existing approaches to the accountability problem. Both the extent to which international law currently constrains international institutions in their exercise of public power and theoretical approaches to the accountability problem will be charted to identify the common elements that address the aforementioned accountability. The Conceptual Model will then serve as a lens for an extensive legal survey conducted in Part II of the research.

Part II (step 2) will identify the elements of the Draft IGM. Chapters 3-5 will describe the building blocks of the three dimensions of the Draft Model: access to information, a right to meaningful participation in the decision-making procedure concerned, and access to an effective remedy. The analysis differentiates between general and deviating standards across the instruments and accords proper weight to the normative relevance of each respective instrument (for instance, a human rights instrument of universal or regional character). As a result, these chapters, with their in-depth discussion of the generally recognized standards, provide the elements of the Draft IGM: its benchmarks and building blocks. Chapter 6 will reveal that the Draft Model is dynamic in nature. As one may witness throughout the book, it is only through a contextual analysis taking into account the whole picture that a proper analysis of the level of inclusionary governance offered may be realized. In general, the identified benchmarks serve as minimum standards, and public authorities enjoy discretion in the fulfilment of their obligations under the Draft Model. The dynamic aspect implies that – depending on the context – further protection of those affected may be warranted, and

public authorities may consequently enjoy less discretion in how to achieve the envisaged result. Moreover, the legal survey revealed that the inclusionary governance norms interact with each other and do not operate in a vacuum. Lastly, a schematic overview of the Draft IGM will be given, and the steps how to apply it will be identified and discussed.

In Part III (step 3), the functionality of the Draft IGM will be tested by applying the Draft Model to the designation procedure of the aforementioned ISIL (Da'esh) and Al-Qaida Sanctions Committee. The analysis in chapter 7 will demonstrate how the Draft IGM serves as a yardstick to analyze the accountability of an international institution vis-à-vis those affected by its decisions. Secondly, the Draft IGM as developed in Part II will be tested to examine whether, and to what extent, its elements are sufficiently clear for the intended analysis of the accountability or whether any elements require fine-tuning to better accommodate the context in which international institutions operate. Chapter 7 will conclude that, overall, the Draft IGM functions well as a yardstick to analyze the accountability; however, its elements require fine-tuning to sufficiently grasp the complexity and context of multi-layered governance by international institutions.

The Draft Inclusionary Governance Model will therefore be fine-tuned in part IV (step 4) considering the shortcomings identified in the previous chapter. Chapter 8 will present the dynamic fine-tuned Inclusionary Governance Model for International Institutions. Some final remarks will be presented in chapter 9.

PART

I A Conceptual Model for Inclusionary Governance

Part I constitutes the first step of the model-building process: the development of a conceptual model for inclusionary governance (Conceptual Model). By evaluating and comparing the various existing approaches to the accountability problem of international institutions vis-à-vis those affected by their decisions, several common elements are identified across the various approaches. The developed Conceptual Model serves as a lens for the legal survey conducted in step 2 of the model-building process, the results thereof will be discussed in Part II of this book.

2 Accountability of International Institutions: A Conceptual Model for Inclusionary Governance

This chapter develops the Conceptual Model which serves as a point of reference for the legal survey to be conducted in Part II of this research. It will deal with an evaluation of the *state of play* of the rules on the accountability of international institutions. Firstly, it will evaluate existing rules on the accountability of international institutions in order to assess whether, and to what extent, these rules give guidance on possible standards for inclusionary governance. Secondly, various theoretical approaches to the accountability problem of international institutions will be assessed to examine whether, and to what extent, they address inclusionary governance processes. The chapter will conclude with a schematic overview of the Conceptual Model.

1. The Accountability of International Institutions towards Third Parties: in Search of Legal Standards

In the advisory opinion *Interpretation of the Agreement of 25 March 1991 between the WHO and Egypt* (Advisory Opinion) of the International Court of Justice (ICJ), the Court stated that:

> … there is nothing in the character of international organizations to justify their being considered as some form of "super-State" (*Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 179). International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.[1]

International institutions[2] are thus bound by the obligations laid down in their statutes or constituent documents as well as by those laid down in the international agreements to which they are party. Treaty obligations only bind the institutions that are party to the treaty, and these obligations are therefore not of a general character. The International Court of Justice's statement "bound by any obligations incumbent upon them under general rules of international law" has led to vigorous debate in academia.[3] May one infer from this

1 ICJ, *Interpretation of the Agreement of 25 March 1991 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, §37.

2 As defined in chapter 1 this research uses the term international institutions and not the term international organizations to include not only formal intergovernmental organizations also other international institutions (that is: institutions created by treaty; those created by any other instrument governed by international law, including (subsidiary) organs of international institutions, such as the UN Security Council; and agencies who work autonomously. In literature, the term international organizations is used to refer to only formal intergovernmental organizations and/or to the broader term of international institutions. For sake of clarity, this research will use the term international institutions throughout the analysis. Where necessary, a distinction will be made between international institutions and international organizations when it implies a difference in scope of the concept.

3 Klabbers stated for instance:

Advisory Opinion that general rules of international law, such as general principles of law and/or customary international law, bind international institutions? And if not, what rules do constitute general rules of international law that bind international institutions? For example, Klabbers reasons that the Advisory Opinion should be interpreted as to imply that only a subset of such general rules binds international institutions.[4] However, some scholars argue that a broader set of said general rules bind international institutions,[5] including for example, customary international law[6] and the Universal Declaration on Human Rights.[7] In other words, there is no normative agreement as to how to interpret the Advisory Opinion

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> [T]he discipline may claim, following the ICJ in 1980, that international organizations are subjects of international law, and thus also subject to international law, but it remains unclear which international law and why: there is no plausible theory of obligation.

J. Klabbers, 'The Paradox of International Institutional Law' (2008) 5 *International Organizations Law Review* 151 at 165; Similarly, Cannizzaro and Palchetti argue that 'one can hardly draw from this dictum much indication that is useful for clarifying the issue'; E. Cannizzaro's and P. Palchetti's in J. Klabbers and A Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (London, Edward Elgar publishing 2011), 365-397, at 370; Similarly, Daugirdas argued that the WHO-Egypt Opinion cannot settle the question of the obligations of international institutions or even shed much light on it, K. Daugirdas, 'How and Why International Law Binds International Organizations (2016) 57 *Harvard International Law Journal* 325 at 332; for a general discussion of the normative value of this Advisory Opinion by the ICJ, see C.M. Brölmann, 'The Significance of the 1980 ICJ Advisory Opinion Interpretation of the Agreement of 25 March 1951 between the Who and Egypt' (May 29, 2015) *Amsterdam Law School Research Paper No. 2015-17*; Amsterdam Center for International Law No. 2015-08. Available at SSRN: https://ssrn.com/abstract=2611976 and J. Klabbers, 'EJIL Foreword: the Transformation of International Organizations Law (2015) 26 *European Journal of International Law* 9 at 59-63.

4 J. Klabbers, 'Book Review: Guglielmo Verdirame, The UN and Human Rights: Who Guards the Guardians?' 11 *International Organizations Law Review* (2014) 235 at 237 (2014) See further, J. Klabbers, The Sources of International Organizations Law, in J. d'Aspremont and S. Besson (eds.), *The Oxford Handbook on Sources of International Law* (Oxford University Press 2018).

5 Daugirdas maps the debate on the interpretation of the ICJ statement in academia, K. Daugirdas, 'How and Why International Law Binds International Organizations' (2016) 57 *Harvard International Law Journal* 325 at 331-335; A. Reinisch, 'Adapting to Change: The Role of International Organizations' 2015 ASIL Annual Meeting (Apr. 20, 2015), https://www.youtube.com/watch?v=4fW-YR6HqW0, quoted in K. Daugirdas at 331.

6 Benvenisti, quoted in Daugirdas:

> [A]s an international person, an [international institution] is subject to general international law. Therefore [international institutions] are subject to customary international law and general principles of law.

E. Benvenisti, *The Law of Global Governance* (The Hague: Hague Academy of International *Law*, 2014) at 99; A. Reinisch, 'Securing the Accountability of International Organizations' (2001) 7 *Global Governance* 131 at 136. August Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95 *American Journal of International Law* 851 at 858.

7 De Schutter states:

> We may conclude that international organizations, as subjects of international law, must comply with general public international law in the exercise of their activities, and that this includes a requirement to comply with the Universal Declaration on Human Rights as general principles of law.

O. De Schutter, 'Human Rights and the Rise of International Organisations', in: J. Wouters, et al (eds.) *Accountability for Human Rights Violations by International Organisations* (Intersentia, 2010), 51, at 72–73.

and which general rules of international law bind international institutions. However, the debate on the rules of international law that bind international institutions is broader than the discussion of the interpretation of the International Court of Justice's statement. There are numerous discussions within academia as to whether and to what extent international institutions are bound by human rights; human rights constitute a particular subset of general international norms which constrain the exercise of public power of public authorities. The ILA Committee noted, for instance, that:

> Human rights obligations, which are increasingly becoming an expression of the common constitutional traditions of States, can become binding upon IO-s in different ways: through the terms of their constituent instruments; as customary international law; or as general principles of law or if an IO is [authorized] to become a party to a human rights treaty.[8]

However, although one might be able to convincingly argue that international institutions generally ought to comply with (some) human rights standards, the challenging part is to identify what obligations bind international institutions and to what extent.[9] This research holds that, at a minimum, all subjects of international law, including international institutions, are bound by peremptory norms of international law – that is, *ius cogens* norms.[10] Said norms include the most fundamental human rights norms,[11] which must be respected by all subjects

8 ILA Final Report (2004), 22; It should be noted that the ILA upholds a narrower definition than international institutions, and instead, it focuses only on international intergovernmental organizations, this point is further addressed further below in chapter 2.

9 Idem, ILA Report 23-25; Several authors therefore argued in general or in regards to certain organizations or certain exercises of public powers that the international institution in question is bound by human rights. For example, see R. Wilde, 'Quis custodiet ipsos custodes? Why and how UNHCR governance of "Development" Refugee Camps Should Be Subject to International Human Rights Law' (1998) *Yale Human Rights and Development Law Journal,* at 5; '1995 Supplement to An Agenda for Peace', A/50/60, §75; Millennium Report of the Secretary-General of the United Nations: "We the Peoples": The Role of the United Nations in the 21st Century, (UN Department of Public Information, 2000), at 49.

10 *Ius cogens* norms are defined as "rules from which no derogation is permitted and which can be amended only by a new general norm of international law of the same value", D. Shelton 'International Law and "Relative Normativity"' in M.D. Evans, *International Law* (OUP, 4th edition, 2014) at 142. Article 50 of the Vienna Convention on the Law of Treaties (1966); See also International Court of Justice, *Barcelona Traction Case (second phase),* ICJ Reports (1970) 3, at 32. See also ILA Final Report (2004), 18; Report of Mr Jose Maria Beneyto, 'Accountability of International Organizations for Human Rights Violations,' Parliamentary Assembly of the Council of Europe, Doc. 13370 (December 17, 2013); C; Tomuschat, 'Ensuring the Survival of Mankind on the Eve of a New Century' 62 *Recueil des Cours* (1999) 23 at 135.

11 It should be noted that *ius cogens* norms cannot only be human rights norms. For example, the prohibition to use force by states against other states constitutes similarly a peremptory norm. For the purpose of this research, however, human rights norms provide a more interesting starting point. See on *ius cogens* norms in general, for example, I. Brownlie*, Principles of Public International Law* (OUP, 7th ed. 2008), 510-513; D. Shelton 'International law and "Relative Normativity" in M.D. Evans, *International Law* (OUP, 4th edition, 2014) 142-152.

under international law under all circumstances; these norms include the prohibition of torture and the prohibition of slavery, for instance.[12]

In the constituent documents of several international institutions, references can be found to human rights obligations.[13] It depends from international institution to international institution what human rights (or other international) norms are considered to be binding, legally and/or morally. An institution may have incorporated human rights language and/or commitments in its constituent documents,[14] it may have joined treaties that contain human rights obligations[15] and/or its various organs or agents may make reference to human rights norms in non-binding documents.[16] However, one cannot deduce a general

12 Report of Mr Jose Maria Beneyto, 'Accountability of International Organizations for Human Rights Violations' , Council of Europe, (2013), see its attachment 'Background Study which Lead to Council of Europe Parliamentary Assembly Resolution 1979 (Jan 2014) on the Accountability of International Organizations'.

13 In general, see the ILA Report (2004), at 22; See also F. Mégret and F. Hoffmann 'Fostering Human Rights Accountability: An Ombudsman for the United Nations (2005) *Global Governance* 317-318; See further Momirov, (2009) at 115-128.

14 See, for example, UN Charter, art. 24(2). This is however of a rather general nature. In UN SC Res. 1244 (1999), it was held that protecting and promoting human rights was one of the main tasks of the international territorial administration in Kosovo, §11 (j); similarly, see the Report of the Secretary-General on the Situation in East-Timor in Relation to the Administration to UNTAET, UN Doc S/1999/1029 (October 4, 1999), Section IV, and §29(h). It should be noted that in these instances the human rights language would rather focus on general obligations promoting and protecting human rights. It is not directly aimed at limiting the exercise of public powers to certain human rights obligations.

15 In general, multilateral rights-based treaties are only open for states to accede to. One of the exceptions is the Aarhus Convention, which states in art. 17 that regional economic integration organizations may accede to the Convention:

> This Convention shall be open for signature (…) by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters.

The (then) European Commission adopted the decision to accede to the Aarhus Convention on February 17, 2005, [Decision 2005/370/EC] and is party to the Convention since May 2005. For the EU legislation implementing the Aarhus Convention principles, see http://ec.europa.eu/environment/aarhus/legislation.htm. The European Union is similarly party to the UN Convention on the Rights of Persons with Disabilities, United Nations, Treaty Series, vol. 2515, p. 3 (December 13, 2006); the EU adopted its formal confirmation on December 23, 2010. See further https://fra.europa.eu/en/theme/people-disabilities/eu-crpd-framework in which the EU framework implementing the Convention is explained. Similarly, the Council of Europe adopted protocol 14, which started the process of allowing the EU to join the European Convention on Human Rights. See for the latest status https://www.echr.coe.int/Pages/home.aspx?p=basictexts/accessionEU&c

16 Broader human rights norms are often mention, such as *due process* and *fair trial*, without specific reference to a particular treaty provision or regime. For example, see one of the latest UN SC resolutions reaffirming the need of and framework for the ISIL (Da'esh) and Al-Qaida Sanctions Committee and its Ombudsperson review procedure:

> *Reaffirming* the need to combat by all means, in accordance with the Charter of the United Nations and international law, including applicable international human rights law, international refugee law, and international humanitarian law, threats to international peace and security caused by terrorist acts, *stressing* in this regard the important role the United Nations plays in leading and coordinating

standard of being bound by human rights or by another accountability standard from these references alone.

The Committee on the Accountability of International Organizations (1996-2004) of the International Law Association (ILA)[17] conducted an extensive study of what measures should be adopted to ensure the accountability of international organizations (IOs), which study aids in understanding whether general norms can be deduced from current international law practice.[18] It should be noted that the 2004 ILA Final Report (ILA Report) addresses the accountability of *international intergovernmental organizations* and therefore upholds a narrower definition than the definition of international institutions used in this research.[19] Said ILA Report identified recommended rules and practices (RRPs) that contribute to ensuring the accountability of international organizations. These recommendations are based on two different types of sources: (1) primary rules of international and domestic law, and (2) rules of international institutions (that is, constituent instruments, decisions and resolutions adopted by the institution in question, and an institution's established practice).[20] However, the ILA Report does not specify from what sources it deduces its recommended rules and practices. Further, the RRPs constitute a mixture of existent and preferred, yet currently non-existent rules and practices (that is, *de lege lata* and *de lege ferenda*) without specifying whether the rule and/or practice referred to derives from an international

this effort, (…) "*Recognizing* that development, security, and human rights are mutually reinforcing and are vital to an effective and comprehensive approach to countering terrorism, and *underlining* that a particular goal of counter-terrorism strategies should be to ensure sustainable peace and security. Preamble, UN SC Res 2368 (2017).

17 According to the ILA constitution, its objective is: "the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law", article 3 of the Constitution of the Association (adopted at the 77th Conference, 2016), available at http://www.ila-hq.org/images/ILA/docs/constitution_english_adopted_johannesburg_2016.pdf. As an international NGO, the ILA has a consultative status with various UN specialized agencies.

18 ILA, Accountability of International Organizations, Berlin Conference, Final Report (2004); See also I.F. Dekker 'Making Sense of Accountability in International Institutional Law (2007) 36(1) *Netherlands Yearbook of International Law* 83 at 87.

19 The definitional considerations as explained in the ILA Final Report (2004) at 4:

> The Committee's focus *ratione personae* is on intergovernmental Organisations in the traditional sense, i.e. created under international law by an international agreement amongst States, possessing a constitution and organs separate from its Member States. (Report of the Sixty-eighth ILA Conference held at Taipei, at p. 587). The Committee's work is intended also to cover Organisations where not only States are members, but not to cover anomalous cases in which intergovernmental Organisations do not possess a legal personality of their own in international law. Since autonomous institutional arrangements established by treaty (treaty-organs) and entrusted with monitoring functions over the implementation of such treaties by the States parties to them generally have not been created as international legal persons, they are not covered by the present Report unless stated otherwise. However, treaty organs are usually closely linked to IO-s and their functioning has raised a number of accountability questions of a similar nature to those relating to IO-s.

20 ILA Final Report (2004) at 7.

institution's existing or preferred practice.[21] Regardless of these shortcomings, the Report is considered to be an authoritative source, a good point of departure, for the analysis of the accountability of international organizations.[22]

This section therefore discusses the abovementioned RRPs for the first level of accountability (1.1.) and those identified in the context of remedies against international organizations (1.2).[23] This first level of accountability is defined by the ILA to encompass:

> the extent to which international [organizations], … are and should be subject to, or should exercise, forms of internal and external scrutiny and monitoring, *irrespective of potential and subsequent liability and/or responsibility*.[24]

The second and third level of accountability discussed in the ILA Report address the responsibility for wrongful acts[25] and the liability for lawful acts. Both notions are less

21 Idem, at 6:
> The general rubric "Recommended Rules and Practices" was specifically chosen so as not to prejudge whether any RRP should be seen as a recommendation for sound internal practice or whether it was operative on a legal level, and in the latter case whether it was de *lege lata* or de *lege ferenda*; no qualification of status under international law may be inferred from the use of the term "should". Although many of the RRPs reflect existing rules of international law, the Committee's terms of reference did not preclude it from formulating rules constituting, to a reasonable extent, progressive development.

22 For a critical reflection on the approach adopted in the ILA Final Report, see, for example, I.G. Dekker 'Accountability of International Organizations: An Evolving Legal Concept?' in J. Wouters and others (eds.) *Accountability for Human Rights Violations by International Organisations* (Antwerp: Intersentia 2010), 23, 36. D. Curtin and A. Nollkaemper, 'Conceptualizing Accountability in International Law and European law (2005) 36 *Netherlands Yearbook of International Law* 3 at 19. For scholars who refer to the ILA Report in the context of research focusing on the accountability of international institutions, see, for example, Momirov, (2009) who takes this definition as a point of departure for his analysis of the exercise of public power by international organizations in the context of international territorial administrations. A. Momirov, *Accountability of International Territorial Administrations: a Public Law Approach* (2009), 29 and further; See similarly, A. Naudé Fourie, *World Bank Accountability: in Theory and Practise* (2016), at 26-27. See also A. von Bogdandy and others, 'Developing the Publicness of Public International Law' in: *The Exercise of Public Authority by International Institutions* (2010) 3 at 22-23, A. von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field' in: *The Exercise of Public Authority by international institutions* (2010) 727, at 746-748 and further. See also the Report by the Rapporteur (J.M. Beneyto) of the COE Parliamentary Assembly Committee on Legal Affairs and Human Rights, 'Accountability of International Organizations for Human Rights Violations' (2013), which discusses the relevance of the ILA Report in search of an accountability framework for international organizations.

23 This constitutes Part IV of the ILA Report; See for a discussion of the entire ILA Final Report (2004), for example, I.F. Dekker 'Making Sense of Accountability in International Institutional Law (2007) 36(1) *Netherlands Yearbook of International Law* 83-115. See also Curtin and Nollkaemper, 'Conceptualizing Accountability in International and European Law' (2005) 3-20; J. Brunnée, 'International Legal Accountability through the Lens of the Law of State Responsibility' 36(1) *Netherlands Yearbook of International Law* (2005), 21-56.

24 Emphasis added, ILA Final Report (2004) at 5.

25 Later, the question of responsibility was further developed in the ILC Draft Articles on the Responsibility

relevant for this research because, in short, their scope is too limited in light of the adopted broad working definition of the concept of accountability,[26] which contains both prospective and retrospective elements.

The analysis conducted in the subsequent two paragraphs answers the question whether, and to what extent, the Recommended Rules and Practices provide legal standards to address the accountability deficit of international organizations[27] that exercise public power directly affecting individuals. It answers in particular the question about the way in which individuals should be included.

1.1. Recommended Rules and Practices: First Level of Accountability

This paragraph discusses the Recommended Rules and Practices identified for the first level of accountability and the extent to which they are of relevance for an accountability framework for international institutions adopting decisions that affect individuals. The ILA Committee identified eight distinctive relevant principles for this level of accountability:

1. The principle of good governance
2. The principle of good faith
3. The principles of constitutionality and institutional balance
4. The principle of supervision and control
5. The principle of stating the reasons for decisions or a particular course of action
6. The principle of procedural regularity
7. The principle of objectivity and impartiality
8. The principle of due diligence

Some principles are more relevant than others in the context of this research and are therefore discussed in greater detail. In general, the principles can be divided into two groups: those that address the relation of international organizations with third parties, and those that impose constraints on an international organization's exercise of public power irrespective of whom is affected by such exercise of public power.

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of International Organizations, which were discussed in more detail in paragraph 2 of the Introduction. See above, chapter 1, in the text in and around footnote 80.

26 See further chapter 1, section 6, in which the concept of accountability is defined for the purpose of this research.

27 Paragraphs 1.1-1.3 address the recommended rules and practices as derived from the ILA Report for the Accountability of International Organizations vis-à-vis those affected. In section 2, the wider definition of international institutions is upheld. Section 3 explains whether, and to what extent, this differentiation influences the Conceptual Model.

The relation of international organizations with third parties

In the context of the principle of good governance[28], the ILA Committee identified six interconnected elements. The elements of transparency, of a participatory decision-making process, and of access to information address the relation of the international organizations with other actors, including third parties. The other three elements (a well-functioning international civil service, sound financial management and, lastly, sound reporting and evaluation) focus rather on the management of the international organization in question and not on the relation with external actors. The latter three will be discussed below in the context of constraints on the exercise of public power. The element of *transparency* is primarily applicable to the quasi-legislative procedures of international organizations.[29] Non-state entities are to be accorded an "appropriate status" in relation to decisions that affect them.[30] Although this element hints at inclusion, it focuses more on processes of normative development and not so much on administrative decision-making procedures. The element of *participatory decision-making processes* refers to the need to include an international organization's member states in the decision-making procedures of its various organs. In such an organization's plenary organs, all member states should be able to participate. In regard to decision-making by non-plenary organs, those member states whose interests are to be specifically affected should have the opportunity to present their views when it concerns decisions on coercive measures.[31] Hence, the first two elements particularly address the relation of an international organization with its member states and do not address transparency or participatory duties that the organization may owe to affected third parties. The third element, *access to information,* encompasses both the obligations owed by an international organization to its member states and those owed to third parties.[32] The ILA Report lists an obligation to handle information in its possession with care and a duty to communicate policy strategies and activities of the (organs of the) institution to member states.[33] Further, the ILA Report lists three points under the header of access to information that are of particular relevance in the context of this research:

28 The ILA explains that the good-governance principle is to provide "the necessary guidance as to the institutional and operational activities of an IO", ILA Final Report (2004) at 8.

29 Idem, at 8.

30 Idem.

31 The ILA Committee defines 'coercion' broadly: "The term 'coercive' is here used in its widest sense, including not just economic coercion, but also measures related to, for example, membership." ILA Final Report (2004) at 9.

32 Idem, at 9-10, see particularly element 3(1), (4)-(7).

33 In particular, the ILA Report sets out under 10 that:

> Documents should be made available to member states, restrictions on access to information should be regularly reviewed; There is an obligation to formulate and publish general policy strategies; non-plenary organs should provide information about their activities to all member states; institutions ought to regularly report on measures they have taken to implement measures on access to information.

- International organizations when they engage in operational activities, whether it is of a peacekeeping, development, or humanitarian nature, should properly inform "individuals and groups whose interests are particularly affected by such an operation to enable them to make their point of view known in a timely fashion".[34]
- International organizations should ensure that everyone has access to information held by the organization. Access may only be refused for "compelling reasons on limited grounds such as privacy, commercial and industrial secrecy, or protection of the security of [member states] or private parties."[35]
- International organizations should protect confidential information that came into their possession and, as a result, should not disclose this information to third parties without the consent of the owner of the information. [36]

The ILA Report considers the duty to provide reasons to be pivotal in the accountability of international organizations. It describes it as follows:

> Compliance with this principle will contribute to greater transparency, it will have an impact on the kind of procedure for the decision-making process, it will reduce the possibility to misuse power, and it will undoubtedly enhance the chances of accountability to operate properly, inter alia through the exercise of supervision and control, even when no mechanism of judicial review is available or has been put into operation.[37]

International organizations have a duty to state the reasons for an adopted decisions whenever it is considered necessary from the point of view of their accountability.[38] When decisions are made that "directly and immediately [affect] rights and obligations of particular [s]tates and non-[s]tate entities", an organization has the obligation to not merely provide general reasons but to provide the specific reasons for that particular decision, which includes "the principal issues of law and fact upon which the decision is based."[39]

In conclusion, the ILA Report recognizes a wide duty to inform: to duly inform those potentially affected by certain types of operational activities, to provide access to information, and to protect the confidentiality of information in its possession. Furthermore, there should be a possibility to present one's view in relation to certain operational activities, and there is a duty to provide reasons. The duty to inform is more extensive when decisions are adopted that directly affect the rights and obligations of, for example, non-state entities.

34 ILA Final Report (2004), element 3(3), access to information.
35 Idem, element 3(4), access to information.
36 Idem, at 9, element 3(3) access to information.
37 Idem at 14.
38 Idem.
39 ILA Final Report (2004), 13.

Constraints on the exercise of public powers by international institutions

The majority of the principles in the ILA Report addresses the proper functioning of an international organization and the proper exercise of public powers by the international organization in question with some being more relevant to this research than others.

The principle of good faith establishes criteria as to how public power should be exercised. For instance, good faith implies that organs and its agents may not abuse the rights accorded to them.[40] The ILA Committee links the principle of good faith to the need for standards of honesty, fairness, reasonableness and "consistency in treatment in like cases."[41] *The principle of constitutionality and institutional balance* refers to the duty of organizations to exercise public power in accordance with its own constitution and to organs and agents not being allowed to exceed their mandate.[42] In other words, the ILA Committee recognizes the constituent document of each institution as the source of its exercise of public powers and as the main factor of constraint for these powers. *The principle of objectivity and impartiality* requires an IO to be impartial and objective in its exercise of public powers; this principle is applicable to the decision-making bodies and review bodies of the international organization in question.[43] In the execution of their tasks, officers of an organization's organ are expected to act in a fair and impartial manner. *The principle of supervision and control* refers to the power that parent organs (should) have over their subsidiary organs. The ILA Committee stipulates that "parent organs have a duty to exercise a degree of control and supervision over subsidiary organs which corresponds to the functional autonomy granted."[44] In practice, this could imply that a parent organ may overrule a decision adopted by a subsidiary organ if it is of the opinion that the decision contravenes any applicable legal (internal) rules.[45] Considering the level of autonomy exercised by several subsidiary organs, and/or the complex relation with the parent organ, however, a reporting or monitoring function seems better. The principle of *procedural regularity* implies that international organizations should have a regulatory framework in place that is applicable to its organs, subsidiary organs and/or agents to prevent abuse of discretionary powers, to avoid errors of fact or of law, and to ensure respect for due process and fair treatment in an international organization's exercise of public power, especially when organs exercise discretionary powers.[46] The principle of *due diligence* refers to the fundamental obligation that an international organizations' member states and agents have to ensure the lawfulness of actions and decisions of (organs of) that particular international organization. It

40 ILA Final Report (2004), 12.
41 Idem.
42 ILA Final Report (2004), 13.
43 Idem, at 14.
44 ILA Final Report (2004), 13.
45 Idem.
46 ILA Final Report (2004), 14.

further seems to impose a duty on members of an international organization to "exercise adequate supervision of the [international organizations]". This requires scrutiny of the extent to which the organization acts to protect not only its own interests and that of other members but also to protect the interests of third parties. In the context of the principle of good governance, the ILA Report additionally stipulates the need for a *well-functioning international civil service*[47] and ensure good *financial management*[48]. The latter refers to an international institution's duty to adopt a transparent and consistent budgetary process, which facilitates proper internal and external auditing and accountability. The last element of good governance, *reporting and evaluation,* refers to the necessity of regularly having internal evaluations in the organization.[49]

In conclusion, the ILA Report identifies the recommended rules and practices for internally and externally scrutinizing and/or monitoring the conduct of international organizations regardless of questions of liability and responsibility. As the analysis showed, the majority of the RRPs focus on the proper exercise of public power – that is, the limits and/or scope of the (limited) recognized constraints and how an international organization should be managed/organized internally. There is, though, a duty to inform third parties and a duty to provide reasons for decisions adopted.

Overall, these principles serve as broad parameters for regulating the exercise of public power of international organizations. The next paragraph will address the RRPs for *remedies against international organizations*, as discussed in the ILA Report. However, as the next section will show, there are less RRPs to rely on.

1.2. Recommended Rules and Practices for Remedies against International Organizations

The ILA Report also addresses the recommended rules and practices for remedies against international organizations, which refers to "the implementation of the accountability regime i.e. the ways of undertaking remedial action against [international organizations], and the various difficulties faced by those claiming to raise that accountability".[50] The term *remedies* in the ILA Report refers to:

> an acceptable outcome arrived at through a procedure instigated by an aggrieved party and is intended to include, in addition to remedies of a formal kind, other means of redress which

47 This refers to the obligation to ensure that the Secretariat of an IO complies with:
> the highest standards of efficiency, competence and integrity and enforce the principles of impartiality, loyalty to the aims and purposes of the IO, functional independence and discretion, and the principles of equitable geographical representation and gender balance

ILA Final Report (2004), 10.

48 ILA Final Report (2004), 11.

49 Idem, element 6, at 12.

50 ILA Final Report (2004) at 32.

> might be more appropriate to the circumstances of the case e.g. prospective changes of policy or practice by the [international organization].[51]

In general, the remedies are provided in relation to the three levels of accountability discussed in the ILA Report. The right to a remedy – a general principle of law and basic human rights standard according to the ILA – also applies to international organizations in their dealings with non-state parties.[52] Private parties are explicitly mentioned as being entitled to file a claim for an international organization's accountability.[53] The ILA Report sets out, "[a]s a pre-remedial measure, IO-s should inform parties potentially affected by their decisions or actions of the accountability mechanisms that are open to them."[54] Furthermore, no legal interest needs to be proven in order to trigger the accountability of an organization.[55]

The section of the ILA Report on the RRPS for remedies is slightly different than the previous two sections, which is not surprising considering the law and practice being less developed in this respect. The clarity and detail with which the rules are set out suggest a difference, conceptually and normatively. In general terms, the ILA Committee explains that the remedies could be both legal and non-legal; however, they should – at a minimum – be "adequate, effective and in the case of legal remedies enforceable".[56] The ILA Committee does not further define when a remedy is deemed effective and/or adequate. International organizations have an obligation to establish a remedial mechanism for those affected by their exercise of public power.[57] A lack of remedies, termed in the ILA Report as "a denial of justice", constitutes a separate ground for an organization's international responsibility.[58] Further, an international organization has a duty to inform those affected by its decision of the available remedial mechanisms.[59] The substantive outcome of a remedial action initiated by private claimants against an international organization should be made public.[60] And lastly, the ILA Committee noted that:

> IO-s should also set up a mechanism to determine criteria for offering ex gratia payments as a speedy and alternative means of remedial action towards non-state parties claiming [organizational] liability/responsibility.[61]

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51 Idem, at 32. It should be noted that the ILA Report's section on remedies is largely based on a book by Wellens: K. Wellens, *Remedies against International Organisations* (CUP 2002).
52 ILA Final Report, Part IV, Section 1(1).
53 ILA Report, 68th session ILA conference in Taipei, at 600-601; Berlin conference, at 5.
54 ILA Final Report, at 32.
55 ILA Report, 68th session at 603.
56 ILA Final Report (2004), Part IV, Section 1(2), Final Report at 33.
57 ILA Final Report (2004), Part IV, Section 1(4), at 33.
58 Idem, Part IV, Section 1(3).
59 ILA Final Report (2004), Part IV, Section 1(6).
60 Idem.
61 ILA Final Report (2004), at 33.

In the design of an accountability framework, the ILA Committee expects that international organizations keep the balance between "preserving the necessary autonomy in decision-making of international organizations and guaranteeing that the international organizations will not be able to avoid accountability."[62]

One may conclude that, although the ILA Report stipulates that remedies offered by international organizations to those affected should be adequate and effective, it does not give much further guidance as to its content and scope.

1.3. Conclusions

The ILA Report constitutes the first extensive and authoritative study of the practice of international organizations in the recognition and application of accountability principles. Although the normative relevance of the ILA Report is limited by the narrow definition of international organizations it adopted, the introduction to the ILA Report does hint at the fact that other institutions may be expected to face similar problems and that the RRPs identified in the ILA Report can be of relevance in this context.[63] The principles recognized by the ILA Committee provide further guidance as to what is required to hold an international organization to account. There is a duty to inform, to ensure access to information for everyone, and to give those affected a timely opportunity to present their views. International organizations have a duty to provide reasons for their adopted decisions. Furthermore, they have to provide remedies to third parties in relation to the three levels of accountability, which remedies must be adequate and effective. However, the emphasis in the report lies on the proper exercise of public power, which is reflected in the requirement of good faith, procedural regularity, and internal and external scrutiny and monitoring of international organizations.

The next section will examine whether, and to what extent, the various (legal) theories have recognized and addressed the problem of the accountability deficit of international institutions (that is, not only international organizations) vis-à-vis those affected and the extent to which principles of a similar nature can be identified.

2. Existing Theoretical Approaches Addressing the Accountability Problem of International Institutions

This section will discuss the way in which the different theories mentioned above contribute to understanding and addressing the accountability deficit of international institutions exercising public power that directly affects individuals. This research identifies two broad

62 Idem.
63 ILA Final Report (2004), at 5.

categories: theories focusing on global or transnational administrative law (2.1) and those with a constitutional mind-set (2.2). These theories or (theoretical) approaches were chosen as they address the phenomenon of global governance, the role of the individual and/or of the international institution within the international legal order.[64] With regard to each theory and/or approach, the following questions are guiding in the analysis:

- Does the theory recognize the accountability problem that international institutions face while exercising powers that directly affect individuals?
- Does the theory study or address the relation of the institution vis-à-vis third parties / affected individuals?
- Does the theory provide/develop/recognize legal standards for the accountability of international institutions vis-à-vis those affected – for instance for the way in which individuals have to be included?

2.1. Global Administrative Law

In addressing the phenomenon of global governance, Global Administrative Law (GAL)[65] focuses on questions of accountability: on the extent to which a global administrative body "gives account and another [actor] has the power or authority to impose consequences as a result".[66] GAL seeks to explore and map current and emerging accountability practices using a framework borrowed from (domestic) administrative law.[67] GAL offers a lens, a language, to analyze what is happening in terms of governance at an international level. The language is derived from the tools of domestic administrative law, as described by Krisch:

> Administrative law serves as an inspiration and contrast: it serves as a framework for identifying converging and diverging developments in institutional practice, and it helps us sharpen our sensitivity for the problems and possibilities of establishing accountability mechanisms on

64 For those who are interested in a broader discussion of the respective theories, reference to the main literature on the topic can be found in the footnotes below.

65 Even though there is a variety of projects addressing the phenomenon of global governance from an administrative perspective, this book focuses on New York University's research project on this subject. The Global Administrative Law Project of the Institute for International Law and Justice, New York University School of Law; See for an overview on the Global Administrative Law Project: B. Kingsbury, N. Krisch, R.B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68(3-4) *Law & Contemporary Problems* 15; See for research conducted under the umbrella of GAL, www.iilj.org. See for other projects, for instance, IRPA and also the IPA project in Heidelberg, which focuses on the exercise of international public authority. The latter aims to "identify, reconstruct and develop" a theory of international public law that governs the exercise of international public authority. See, for example. A. von Bogdandy, M. Goldmann and I. Venzke 'From Public International to International Public Law – Translating World Public Opinion into International Public Authority' (Sept 18, 2015).

66 N. Krisch quoting Black: N. Krisch, 'Global Administrative Law and the Constitutional Ambition' (2009) *LSE Law, Society and Economy Working Papers 10/2009*, London School of Economics and Political Science available at: www.lse.ac.uk/collections/law/wps/wps.htm at 12; J. Black 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) *Regulation & Governance* 137 at 150.

67 N. Krisch, 'Global Administrative Law and the Constitutional Ambition' (2009) at 12.

> the global level. Through reflection on transferability of domestic concepts, the similarities and dissimilarities in both institutional structures and environmental conditionals come into much clearer view.[68]

As defined in the project of the Institute for International Law and Justice, GAL encompasses "the legal mechanisms, principles, and practices, along with supporting social understandings that promote or otherwise affect the accountability of global administrative bodies."[69] In short, GAL scholars contend that *administrative principles* should be applied whenever *administrative action* is taken by a *global administrative body*. Kuo explains that a GAL framework has as its aim "to make decisions on global regulatory issues more rational, acceptable and thus legitimate, by making global administration more participatory and more accountable."[70] Administrative action is broadly defined as including "all rule-making and adjudications or other decisions of particular matters that are neither treaty-making nor simple dispute settlement between disputing parties."[71] GAL studies all global administrative law bodies that take administrative actions, such as national, international and regional bodies as well as public and private bodies. The focus within GAL literature is on procedural principles:

> The focus of the field of global administrative law is not, therefore, the specific content of substantive rules, but rather the operation of existing or possible principles, procedural rules and reviewing and other mechanisms relating to accountability, transparency, participation, and assurance of legality in global governance.[72]

Within GAL, the term *procedural participation* is broadly defined as the right of affected individuals to have their views and information considered before a decision is taken by an administrative body.[73] The principle of a reasoned decision refers to the decision-making

68 Idem, Krisch at 13.

69 B. Kingsbury, N. Krisch, R.B. Stewart, and J.B. Wiener, 'Foreword: Global Governance as Administration - National and Transnational Approaches to Global Administrative Law' (2005) *68 Law & Contemporary Problems 1* at 5; See also B. Kingsbury, N. Krisch, R.B. Stewart, 'The Emergence of Global Administrative Law', *IILJ working paper 2004/1* at 5, in which GAL is defined as comprising "the structures, procedures and normative standards for regulatory decision-making including transparency, participation, and review, and the rule-governed mechanisms for implementing these standards".

70 Ming-Sung Kuo, 'Taming Governance with Legality: Critical Reflections upon Global Administrative Law as Small-C Global Constitutionalism' (2011-2012) 44 *NYU Journal of International Law and Politics* 55 at 84.

71 At 6; This definition derives from R.B. Stewart, 'US administrative law: a resource for global administrative law?' available at http://www.iilj.org/wp-content/uploads/2016/08/Stewart-U.S.-Administrative-Law-2005-1.pdf. It also gives insight into one of GAL's critiques that the research project is a largely American undertaking, based on American administrative law conceptions. See further below for a discussion of this critique.

72 B B. Kingsbury, N. Krisch, and R.B. Stewart, 'The Emergence of Global Administrative Law', at 15-16.

73 Idem at 25. The World Anti-Doping Agency and the UN Security Council are mentioned as examples of

authorities' obligation to respond to the major arguments made by the affected parties when the former come to a decision.[74] Within GAL's context, the principle of review generally refers to a review by a court or other independent tribunal of the decision made by the decision-making authority in question.[75] Kingsbury, Krisch and Stewart, however, noted already in 2004 that it is questionable:

> how far a right to a review is accepted in different governance areas, with what limitations, and what institutional mechanisms it encompasses, are all unresolved questions. In several important areas, despite strong calls for effective review mechanisms, review mechanisms have not been instituted.[76]

Principles of GAL should, however, not be assessed in isolation from constitutional and more substantive principles.[77] Kingsbury, Krisch and Stewart identify the substantive standards of proportionality, means/ends rationality, avoidance of unnecessarily restrictive means, and legitimate expectations as standards of GAL.[78] Their reasoning is the following:

> Especially where individual rights are placed at the forefront, global administrative law might be expected to embody substantive standards for administrative action, like those applied in a domestic context. [79]

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a (limited) right to be heard. It should be noted, however, that the working paper setting out the contours of the principles of GAL does not recognize transparency as a separate pillar of global administrative, however, procedural participation, reasoned decisions and review are recognized as emerging GAL principles. See B. Kingsbury, N. Krisch, and R.B. Stewart, (2004) at 24, they (decisional transparency and access to information) are however considered to be:

> important foundations for the effective exercise of participation rights and rights of review. They also promote accountability directly by exposing administrative decisions and relevant documents to public and peer scrutiny.

In this GAL working paper, transparency and the duty to inform are considered to be essential components of procedural participation (at 39).

74 B. Kingsbury, N. Krisch, and R.B. Stewart, (2004) at 25.

75 Idem, at 26. The examples mentioned are the World Bank Inspection Panel, which has a mandate to receive complaints from project-affected people and to assess the compliance of the Bank's management with the Bank's rules in their exercise of power, and the Court of Arbitration for Sports, where those sanctioned for alleged use of doping within sports have a right to appeal the underlying decision.

76 Kingsbury, Krisch, Stewart, 'The Emergence of Global Administrative Law', at 26.

77 The next section will further address the more substantive norms as recognized in the context of constitutionalist law approach and how the constitutionalist and global administrative approach are complementary to each other.

78 Kingsbury, Krisch, Stewart, 'The Emergence of Global Administrative Law', (2004) at 26.

79 Idem.

In general, global administrative law presupposes that, for special regimes, different rules may apply.[80] For instance, Kingsbury and Casini argued in relation to the exercise of public power by international institutions in emergency actions that global administrative law principles would usually apply but that, due to the context, the scope might vary:

> In addition to review, other global administrative law principles such as transparency, participation, and reason-giving may be applicable to IO emergency actions, but with specific limits and inflections for different IOs and in different circumstances.[81]

In other words, depending on the context in which an institution operates, the way in which the principles are applied may vary. Further, there are certain constraints, or trade-offs, to be taken into account when applying a GAL framework to ensure that demands for remedies do not become unrealistic or potentially counter-productive in relation to the administrative action taken by the administrative body.

More recently, certain GAL scholars have started to consider the inclusion of third parties and the way GAL can contribute normatively and methodologically to advancing more inclusion. Stewart identified four inter-related normative strands of GAL: improving the effectiveness of regulatory regimes, promoting democracy, promoting more public regard in decisions, and securing rights.[82] The latter two are the most relevant for this research and address the role of the international institution vis-à-vis those affected.[83] First, Stewart refers to how GAL can prevent a global body's unlawful or arbitrary administrative action that have a significant effect on individuals.[84] Global administrative law requires "a form of regulatory due process"[85] from administrative bodies when they exercise public power: an "impartial and accurate execution of general rules in individual cases".[86] Second, Stewart discusses the problem of disregard in global governance.[87] Often the interests and concerns of vulnerable groups, less well-resourced societal interests and vulnerable individuals are not taken into

80 Idem, at 28.
81 B. Kingsbury & L. Casini, 'Global Administrative Law Dimensions of International Organizations Law' (2010) *Global Administrative Law Series, IILJ Working Paper 2009*/9, at 12.
82 Stewart 'The Normative Dimensions and Performance of Global Administrative Law' (2015) at 500.
83 Democracy according to Stewart refers to assigning a significant role in the decision-making procedures being short of voting right to stakeholders (Stewart 2015, 504). It mainly refers to the global bodies stipulating the need for administrative principles in 'country-based distributed' administrations with the objective of making such domestic decision-making procedures more democratic. One example would be the role of the World Bank Inspection Panel in setting 'democratic' standards also for host governments in their decision-making procedures.
84 Stewart, 'The Normative Dimensions and Performance of Global Administrative Law' (2015) at 503.
85 Idem, Stewart, at 503.
86 Idem.
87 It should be noted that Stewart makes the argument in relation to all administrative actions, thus regulatory and decision-making in individual situations, while this research is only addressing the decision-making in individual situations.

account by the various bodies, which may result in decision-making that causes unjustified harm to the people affected.[88] Stewart therefore argues that applying the GAL principles to these administrative actions may ensure better regard for the interests of those affected:[89]

> transparency, participation, reason-giving and review can enable individuals targeted with serious deprivations and representatives of weak and marginalized groups and disregarded environmental and social interests to have decision-makers consider their views and account for them in making decisions[90]

The GAL literature, however, does not further define whose interests should be taken into account or how the principles should be applied and/or interpreted in the given context. This research shares the normative premise that administrative law-like principles can enhance the accountability of international institutions vis-à-vis those affected and ensure their (further) inclusion.

Nevertheless, the GAL framework does not currently offer a sufficiently defined yardstick to analyze the accountability processes of international institutions. GAL literature focuses primarily on how the identified GAL principles are realized in a given context (for example in an international institution) and spends less time on defining these principles or justifying their origin.[91] In short, it lacks a proper horizontal analysis of existing relevant administrative

88 Stewart, at 220.

89 Although the mechanisms defined are quite similar to those described in the context of this research, Stewart does not categorize the former under the accountability. In short, he argues that there are only five accountability mechanisms (that is, "electoral, hierarchical, supervisory, fiscal, and legal") and that only the legal accountability mechanism is able to a certain extent to remedy the disregard by offering a right to a review (Stewart, 2015, 248). Nevertheless, Stewart argues that often the legal accountability is not sufficient to ensure that proper regard is given to the interests of all affected. He identified seven other mechanisms that can promote regard, competition commodity markets, competition in regulatory markets, peer reputational influence, public reputational influence, transparency, non-decisional participation and reason-giving.

90 Stewart, 'The Normative Dimensions and Performance of Global Administrative Law' (2015), at 502.

91 E.g. Stewart noted that:

> GAL scholarship has largely taken a positivist stance and disaggregated approach, analyzing the regulatory programs, structures, and decision-making arrangements of particular global administrative bodies, their distributed administrations, and their inter-institutional relations. Assessments of GAL's performance have generally been rosy.

Stewart 'The Normative Dimensions and Performance of Global Administrative Law' (2015) at 499; it should be noted that the GAL principles first identified in 2004 were considered to emerge from practice, but that its contours were not yet clear, nor was its practice uniform. For example, Kingsbury and Casini reason that the specific structured machinery of international organizations aimed to promote and protect human rights requires a much more systematic analysis from a global administrative law perspective to gain perspective on how the principles are shaped and recognized within these administrative bodies, B. Kingsbury & L. Casini, 'Global Administrative Law Dimensions of International Organizations Law' (2010), at 13-14. Kuo also argued in 2012 that "while the values cherished in GAL are widely accepted, how they are implemented and translated into diverse administrative fields is not beyond contestation", Kuo, 'Taming Governance with Legality: Critical Reflections upon Global Administrative Law as

principles with defined externalized elements of a yardstick. In the analyses of the practice of administrative bodies, the yardstick used is often implicit, which may potentially be a problem, particularly when one considers that the GAL project has been criticized for how it conceptualizes law.[92] According to Somek, there is a strong influence in the approach to administrative law from the American legal culture; it is therefore argued that the focus within GAL is more on the establishment and exercise of regulatory authority than on individual acts.[93] Regardless of the question how to define law and the issue of legal obligation,[94] one may also argue that, perhaps at this stage, a yardstick with clearly defined elements cannot be expected from GAL; moreover, one may also doubt whether this is its aspiration. The majority of the work focuses rather on regulatory governance, which seems to require more open-ended principles.[95] In this research, as the next paragraph will demonstrate, the GAL principles complement the broader constitutionalist values that together form the public law approach,[96] the lens used for the survey of generally recognized inclusionary governance norms.

2.2. Constitutionalization of International Law

Global constitutionalism does not refer to one particular research project, it rather is an umbrella term referring to various approaches taken in academia, which term analyzes developments in the global public sphere through some form of constitutionalist lens.[97] Central

Small-C Global Constitutionalism' (2011-2012) at 94.

92 The central article dealing with the concept of law in global administrative law is from Kingsbury (2009), B. Kingsbury, 'The Concept of Law in Global Administrative Law' (2009) 20 *European Journal of International Law* 23-57; For its critique, see particularly A. Somek, 'The Concept of Law in Global Administrative Law: a Reply to Benedict Kingsbury' (2009) 20 *EJIL* 985-995; Ming-Sung Kuo, 'The Concept of Law in Global Administrative Law: a Reply to Benedict Kingsbury' (2009) 20 *European Journal of International Law* 997-1004.

93 A. Somek, 'The Concept of Law in Global Administrative Law: a Reply to Benedict Kingsbury' (2009) at 985.

94 See also Daugirdas, who reasons in two articles how international law binds international institutions and why international institutions may comply with non-binding norms. The latter is discussed by Daugirdas in the context of the ILC Articles on the Responsibility of International Organizations, K. Daugirdas, 'How and Why International Law Binds International Organizations' (2016) 57 *Harvard International Law Journal* 325; K. Daugirdas, 'Reputation and the Responsibility of International Organizations' (2014) 25(4) *European Journal of International Law* 991-1018. Similarly, Krisch explained that much of global regulatory governance takes the form of officially non-binding norms and "many of the procedural developments GAL describes are not the result of binding rules either. Yet they often share many characteristics of law and many of the elements of its particular internal morality." Krisch, 'Global Administrative Law and the Constitutional Ambition' (2009) at 20.

95 Further, the functional similarity in how a domestic actor exercises this type of public power and how it is exercised at the global level may be questioned, which may justify a further differentiating between the principles. See section 2 of chapter 1, in which the functional similarity was discussed of the way in which domestic actors exercise public power directly affecting individuals and the way in which international institutions exercise public power that affects individuals.

96 The conclusions of section 2.2 and section 3 will further demonstrate how the theories and the ILA Report are considered in the development of the conceptual framework for inclusionary governance.

97 A. Wiener, A.F. Lang jr., J. Tully, M. Poiares Maduro and M. Kumm, 'Global Constitutionalism: Human

to any constitutionalism theory[98] is the enabling and constraining function of a constitution.[99] However, often "contributions address [issues of constitutional theory] without a definite conception of the complex normative concepts of constitution and constitutionalism".[100] This research understands *constitutionalization* to refer to the shift from globalized towards constitutionalized international relations. As discussed by Peters, constitutionalization in the field of international law refers to the "gradual emergence of constitutionalist features in international law", which is expected to "compensate for globalization-induced constitutionalist deficits on the national level".[101] In other words, it refers to a process that in turn refers to the "emergence, creation, and identification of constitution-like elements."[102]

Constitutionalism[103] refers more to a "constitutional mindset".[104] In general, the normative agenda of *Global Constitutionalism* (GC) is more ambitious as it refers to a legal system in:

> ...which the different national, regional and functional regimes form the building blocks of the international community that is underpinned by a core value system common to all communities and embedded in a variety of decentralized legal structures for its enforcement.[105]

Rights Democracy and the Rule of Law' (Editorial) (2010) *Global Constitutionalism* 1(1) 1 at 4-6.

98 D. Bodanksy, 'Is there an International Environmental Constitution' 16(2) *Indiana Journal of Global Legal Studies* (2008) 565 at 572. As described by Bodansky, it is possible "to have either constitutions without constitutionalism or constitutionalism without constitutions."

99 In general, the essence of a constitution is to "create, legitimize, allocate and check power" R. Hirsch, 'Editorial: From Comparative Constitutional Law to Comparative Constitutional Studies' (2013) *I•CON* 1 at 2.

100 S. Besson, 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy' in: J. L. Dunoff and J.P. Trachtmann, *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009), 381 at 383. She further argues that:

> Most discussions of international constitutionalism still rely, however, on many a prioris in national constitutional theory without questioning or reinterpreting them. Basic constitutional questions like those of the constituent and constituted power, those of the values and interest it is meant to share in the constitutionalization process … are often settled very intuitively by reference to positive international law or simply assumed to be self-evident. The problem is that they are not, and their reinterpretation in the international context actually lies at the core of any constitutional inquiry. (383)

101 A. Peters, 'The Merits of Global Constitutionalism' 16(2) *Indiana Journal of Global Legal Studies* (2009) 397-411, cited in A. Wiener and others, 'Global constitutionalism: Human Rights Democracy and the Rule of Law' (Editorial) (2010) *Global Constitutionalism* 1(1) 1 at 4.

102 K. Milewicz, 'Emerging Patterns of Global Constitutionalization: Towards a Conceptual Framework' (2009) *Indiana Journal of Global Legal Studies* 413 at 420-421.

103 Constitutionalism is differently defined by the various scholars. For instance, Neil Walker defined it as

> Constitutionalism is a deeply contested but indispensable symbolic and normative frame for thinking about the problems of viable and legitimate regulations of the complexity overlapping political communities of a post-Westphalian World.

N. Walker, 'Post-National Constitutionalism and the Problem of Translation' in: J.H.H. Weiler and M. Wind (eds.) *European Constitutionalism beyond the State* (Cambridge University Press 2003), 53.

104 M. Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' 9 *Theoretical Inquiries in Law* (2007) at 18-19.

105 E. de Wet, 'The Role of European Courts in the Development of a Hierarchy of Norms within

Dunoff and Trachtmann, who adopt a more functionalist approach to constitutionalism, argue that constitutionalism "can provide a set of conceptual tools and inquiries that scholars can use to identify and evaluate constitutional developments in various international domains."[106] In this regard, the functionalist approach resembles the constitutionalization of international law's approach to international law. Regardless of the approach adopted, the key question is what values or which conceptual tools fall within the ambit of constitutionalism.

There is extensive academic debate on which principles and/or human rights norms (should) form part of the constitutional principles guiding the international legal system. The main reasoning is that constitutionalism embraces two sets of norms: formal norms – rule of law elements – that enable and constrain the exercise of public power by governing authorities and, secondly, a set of substantive norms aimed at guaranteeing fundamental rights to individuals.[107] The rule of law[108] reflects a common idea across various constitutional systems and refers (at a minimum) to the fact that domestic "bodies act according to the prescriptions of law, and [that] law is structured according to principles restricting arbitrariness."[109] There

International Law: Evidence of Constitutionalisation' (2009) *European Constitutional Law Review* 284 at 287; see also Milewicz, who reasons that constitutionalism goes beyond the simple articulation of a constitution's formal rules; instead, it 'defines rights of, and obligations to, individuals, and thus refers to human dignity and the guarantee of fundamental rights to individuals'. Milewicz, 'Emerging Patterns of Global Constitutionalization: Towards a Conceptual Framework' (2009) 413 at 419.

106 J.L. Dunoff and J.P. Trachtman, 'A Functional Approach to International Constitutionalization' in J.L. Dunoff and J.P. Trachtman (eds.) *Ruling the World: Constitutionalism, International Law and Global Governance* (Cambridge, Cambridge University Press 2009) 1 at 4.

107 Milewicz, 'Emerging Patterns of Global Constitutionalization: Towards a Conceptual Framework' (2009), at 423; See also M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' *European Journal of International Law* (2004) 907-9.

108 Waldron adopts, for instance, a wider definition and reasons that the rule of law generally has four elements:

(1) the power is exercised within a constraining framework of public norms; (2) there are general rules that are promulgated in advance so that individuals know beforehand what is required, what the legal consequences of their actions will be, and what they can rely on so far as official action is concerned; (3) there have to be courts that operate according to recognized standards of procedural due process and/or natural justice. Said courts also offer an impartial and independent forum where disputes can be resolved and which allow people an opportunity to present evidence and make arguments challenging the legality of official action, in particular when it impacts on essential interests concerning life, liberty, or economic well-being; and (4) a principle of legal equality, which ensures that the law is the same for everyone, that everyone has access to the courts, and that no one is above the law.

J. Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law' (2011) 22 *European Journal of International Law* 315 at 317.

109 A. Sajo, 'Limiting government: An Introduction to Constitutionalism' (Central European University Press 1999) at 205, quoted in K. Milewicz, 'Emerging Patterns of Global Constitutionalization: Towards a Conceptual Framework' (2009); See also T. Koopmans, (*Courts and Political Institutions: a Comparative View* (Cambridge: Cambridge University Press 2003) at 245), who argues that constitutionalism refers to an exercise of powers that "are not exercised arbitrarily, reflecting the mere will of the political leaders of the day, but in accordance with the law, which creates or recognizes permanent institutions and organizes the powers to be exercised by them." Already in 1788, Madison argued along similar lines:

If men were angels, no government would be necessary. If angels were to govern men, neither external

is, however, still quite some discussion what the rule-of-law concept should include and the difference between a international and national rule of law.[110] Chesterman argues that, over time, three core elements have emerged from the rule of law: the government of laws, the supremacy of the law, and equality before the law.[111] Those that uphold a more substantive understanding of the rule of law, beyond its formal understanding, regard it:

> … more broadly as a set of ideals, whether understood in terms of protection of human rights, specific forms of organized government, or particular economic arrangements such as free market capitalism.[112]

Regardless whether it falls within the substantive understanding of the rule of law or not, constitutionalism's second set of norms are generally the substantive rights that individuals should enjoy vis-à-vis public authorities. There is quite some discussion as to which norms should be covered. Nevertheless, there is broader consensus that, at a minimum, it includes *ius*

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nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

J. Madison, 'The Federalist No. 51- The Structure of Government Must Furnish the Proper Checks and Balances Between Different Departments' (1788) *Independent Journal,* http://www.constitution.org/fed/federa51.htm; H.L.A. Hart, *The Concept of Law* (Oxford University Press 1994).

110 See, for example, E. Mak and S. Taekema, 'The European Union's Rule of Law Agenda: Identifying its Core and Contextualizing its Application (2016) 8 *Hague Journal on the Rule of Law* 25 at 26-30; J.E. Alvarez, 'International Organizations and the Rule of Law' *IILJ Working Paper 2016/4 (Global Administrative Law Series)* available at www.iilj.org; The Secretary General of the UN stated that the rule of law in the national context refers to:

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

UN Secretary General, 'Report of the UN Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' UN Doc S/2004/616, at 6. For an elaborative discussion of how international rule of law "understands, accepts, or resists the national rule of law" (at 269), see M. Kanetake, 'The Interfaces between the National and International Rule of Law: the Case of UN Targeted Sanctions (2012) *International Organizations Law Review* 267 at 268-280. See also M. Kumm 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' (2003-2004) 44 *Virginia Journal of International Law* 19-32.

111 S. Chesterman, 'An International Rule of Law?' (2008) 56 *American Journal of Comparative Law*, 331-361; NYU Law School, Public Law Research Paper No. 08-11 at 15; See also A.V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan 1st ed. 1885), 171, discussed in Chesterman (2008). J. Madison explained the danger of lack of separation of powers: "the accumulation of all powers, legislative, executive, and judiciary, in the same hands … may justly be pronounced the very definition of tyranny." J. Madison, 'The particular structure of the new government and the distribution of power among its different parts' (1788) *Federalist* 47.

112 Chesterman, at 13.

cogens norms.[113] De Wet does warn that, noting the limited category of *ius cogens* norms and the debate concerning the *erga omnes* status (and the customary international law) of human rights norms,[114] the international value system is very limited today.[115] Regardless of precisely which elements are covered by a constitutional theory, one cannot in general expect the exact same constitutional elements at an international level as can be expected at a national level. In other words, the context in which international institutions operate ought to be taken account.

There are, however, certain constraints to the normative relevance of norms identified in the context of constitutionalist theories. First, constitutionalist approaches focus more on the legitimacy of international law or law making, and on the legitimacy of international institutions,[116] and less on questions of accountability. Second, as Chesterman, for example, held in relation to the rule of law, "[s]uch a high degree of consensus on the virtues of the rule of law is possible only because of dissensus as to its meaning".[117] Considering the wide variety of the different approaches within the constitutionalism discourse and the lack of consensus on the precise meaning of the different constitutional norms, the theory[118] as it stands lacks the precision to serve as a stand-alone yardstick for this research. Moreover, as the theory's focus is mostly on the legitimacy of international institutions (and their lawmaking) the normative aim is also different than of this research.

The normative premises of the GAL and GC theories are quite different, which affects the way in which accountability and legitimacy concerns are addressed. Within GAL, states and their representatives only play a marginal role: the scope of the global administrative space is functionally determined, while it is defined by the source of its delegated authority at a national

113 In general, see section 1 of this chapter and, in particular, the text in and around footnotes 8-10; E. de Wet, 'The Role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalisation' (2009) *European Constitutional Law Review* 284 at 289. The superiority of these norms is also laid down in Article 53 of the Vienna Convention on the Law of Treaties (1969).

114 De Wet and others argue that *erga omnes* obligations seem to be part of the international value system. As described by the International Court of Justice in the Barcelona Traction case, *erga omnes* obligations are the concern of all states, all states have a legal interest in upholding these obligations (Id., at 290); ICJ, *Barcelona Traction Case*, Judgment, ICJ Reports (1970) at 3.

115 There is, for example, extensive debate whether, and to what extent, all human rights standards stipulated in the ICCPR and the ICESCR have become rules of customary international law. See E. de Wet, 'The Role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalisation', at 291.

116 M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) *European Journal of International Law* 907 at 929. He defines four criteria for legitimacy: (1) legality (which is presumed to be present unless rebutted by one of the following three criteria), (2) jurisdictional legitimacy (referring primarily to the principle of subsidiarity), (3) procedural legitimacy (including participation and accountability), and (4) outcome legitimacy.

117 S. Chesterman, 'An International Rule of Law?' (2008) NYU Law School, Public Law Research Paper No. 08-11, available at SSRN: https://ssrn.com/abstract=1081738 at 2.

118 For the sake of clarity of the argument, all scholarly work addressing/utilizing a constitutionalism/constitutionalist framework is here considered as one.

level.[119] There is a general belief that when the administrative principles of transparency, access to a remedy and participation are present, the administrative decision-making procedure is (in principle) legitimate and the global administrative bodies in questions are accountable. In the context of constitutionalism, the analytical (and normative) framework encompasses more than that: there is a stronger focus on the role of the state and the need to compensate for the diminished role of the state (and its citizens) within global governance. The legitimacy of international law or law-making and international institutions is assessed by applying a constitutionalist framework, which encompasses both formal rules derived from the rule of law and a more value-laden system, to guarantee rights for individuals. Krisch therefore explains that GAL has a more limited ambition in comparison to the "large-scale, constitutionalist endeavours." Considering that GAL predominantly focuses on the accountability of global regulatory governance, it is less prescriptive about the use of domestic models,[120] and it operates on a narrower normative basis.[121] Constitutionalization of international law and global administrative law may fulfil a complementary role. For the purpose of this book, the argument is therefore that the strength of the two theories (GAL and GC) lies in combining them, as explained by Schwöbel:

> Both global constitutionalism and global administrative law attempt to explain the shifting power and legal structures that have accompanied the growth in international decision-making bodies (…) both address concerns of legitimacy and participation that have occurred through such a shift.[122]

Moreover, completely separating the two theoretical approaches is complicated and unwarranted. Krisch similarly argued that:

> The adequacy of [GAL] safeguards, though, cannot be assessed without taking into account the bigger picture of the overall regime complex, i.e. the different institutions involved, their authority, composition, procedures and control mechanisms, and the formal and factual links between them. Disentangling the 'administrative' from the 'constitutional,' then looks increasingly difficult.[123]

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119 Ming-Sung Kuo 'Between Fragmentation and Unity' (2009) *San Diego International Law Journa*l 439 at 447-8.

120 It should be noted that this argument should be placed in the context of the general criticism on GAL raised in this section (that is, that the yardstick used is not sufficiently externalized nor conceptualized).

121 Krisch, 'Global Administrative Law and the Constitutional Ambition' (2009), at 21.

122 C.E.J. Schwöbel, 'Situating the debate on global constitutionalism' (2010) 8 *I•CON* 611 at 621.

123 N. Krisch, 'Global Administrative Law and the Constitutional Ambition' (2009) at 16; Similarly, Harlow reasoned that sometimes "it is difficult to distinguish the values and principles of constitutional and administrative law", C. Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *European journal of International Law* 187 at 208. Kuo described the interrelation between GAL and GC as followed:

One the one hand, in attempting to go beyond organizational aspects to the normative issues of global

Accordingly, it is also not always necessary – nor warranted – to distinguish sharply between the GAL and GC research.[124] There is an overlap in core principles: for instance, the principle of due process, proportionality, legality and transparency are all both administrative and constitutional in nature.[125] This resulted in a convergence of norms and principles. Although the GAL project's approach is more aligned with this research's object and purpose, this study therefore argues that a combined approach taking into account GAL and the constitutionalization of international law strengthens the analysis. In the conclusions below, it will be further explained how this combined approach influences the Conceptual Model.

3. Conclusions: A Conceptual Model for Inclusionary Governance

In this chapter, a Conceptual Model has been set out which will serve as a point of reference for the legal survey to be conducted in Part II. Section 1 constituted an evaluation of the *state of play* of the rules on the accountability of international institutions. The evaluation thereof shows that although there is normative agreement that internationals institutions are subjects of international law and are therefore bound by any obligation incumbent upon them under general rules of international law, there is still quite some debate as to which rules of international law bind international institutions. However, international institutions are at minimum bound by *ius cogens* norms. The ILA Report demonstrates that certain general principles for the accountability of international institutions can be identified across the international organizations concerned. Although the scope of the ILA Report is more limited, partly due to its narrow definition of international organizations, the principles identified in the ILA Final Report find their reflection in the principles charted in section 2. Said section showed how the principles identified in both global administrative law and the constitutionalization of international law complement each other despite the different normative aspirations of the two theoretical approaches. In general, the analysis revealed that there are two sets of principles that are relevant to realizing the accountability of international institutions vis-à-vis those affected by their decisions, which is reflected both in the ILA Report and in the evaluated theories. First, there are the identified duties that international institutions owe to third parties; second, there are the recognized constraints to the exercise of public power by international institutions.

governance, [GAL] incorporates values that are derived from national constitutional experiences, constituting an integral part of a multilevel global constitutional order. On the other hand, [GC] refers to the development of [GAL] as evidence for the emerging constitutionalization of global governance. Ming-Sung Kuo 'Between Fragmentation and Unity' (2009), at 465;

124 A. Peters and K. Armingoen, 'Introduction: Global Constitutionalism from an Interdisciplinary Perspective' (2009) *Indiana Journal of Global Legal Studies* 385 at 388.

125 Idem, at 388.

Taking these two sets of principles into account, the analysis conducted in this chapter results in the identification of the elements for a conceptual basis for a model for inclusionary governance:

CONCEPTUAL MODEL FOR INCLUSIONARY GOVERNANCE
An international institution exercising public power directly affecting individuals:
- has to provide access to information; - has to duly inform those affected; - has to provide participation in the decision-making procedure; - has to provide an effective and adequate remedy; and - has to provide reasons for any decision reached.
In addition, any such public power should be exercised:
- in accordance with the law; - not in an arbitrary manner; and - in such a way that it does not result into a violation of ius cogens norms. - Moreover, any decision-making procedure should ensure a certain quality of the procedure.

Table 2: Conceptual Model for Inclusionary Governance

Regarding the first set of principles, the duties owed by international institutions to individuals can be divided into three broad categories: the duty to inform, the duty to ensure participation and the duty to ensure the availability of an effective remedy. These duties correspond with the initial working definition of inclusionary governance as adopted in the Introduction of this book.[126] The duty to provide reasons is instrumental to said three dimensions and forms a separate duty owed by international institutions in the Conceptual Model. The second set of principles consists of the identified constraints to the exercise of public power by international institutions. Said constraints aim to prevent an abuse of power by ensuring that there is a regulatory framework in place that governs the exercise of public power by international institutions.

Moreover, both the theoretical approaches and the ILA Report recognize that the context in which an actor operates and exercises its public power matters. Accordingly, any yardstick aiming to address the accountability of international institutions should acknowledge this context and incorporate a form of norm flexibility to accommodate the specific context in which an international institution operates.

126 See chapter 1, section 3, in which the three-dimensional concept of inclusionary governance was introduced.

In conclusion, the Conceptual Model presented in this section serves as a lens for the legal survey to be conducted in Part II. Through the legal survey, the building blocks of the Draft Inclusionary Governance Model will be identified. It is expected that the two sets of principles can similarly be distinguished in the international legal standards that constrain the exercise of public power by public authorities at a national level.

PART

II

Developing the Building Blocks of the Draft Inclusionary Governance Model

Part II will develop the building blocks of the Draft Inclusionary Governance Model through a legal survey of relevant international instruments that address the exercise of public power by national public authorities. The point of departure is the three-dimensional concept of inclusionary governance and the way in which chapter 2 gave further substance to it, as summarized in the Conceptual Model. Part I focused on the existing rules on the accountability of international institutions and the obligations international institutions have under international law to ensure that those affected will be sufficiently included in the procedure. As a result, the Conceptual Model identifies the duties owed by international institutions to third parties, including individuals.

In Part II it is expected that the legal survey will identify both the duties owed by public authorities and the rights enjoyed by individuals. In short, most of the surveyed international instruments aim to identify the rights that individuals enjoy in their relation to the state parties to the respective instruments. Therefore, the legal survey charts both the way in which international law imposes constraints on the exercise of public power by public authorities and how it identifies the rights enjoyed by individuals and the obligations owed by public authorities. In the concluding chapter of Part II, it will be assessed whether, and to what extent, this stronger focus on rights set out in chapters 3-5 influences the Draft Inclusionary Governance Model.

Considering that the rights are recognized across, and shaped by, a variety of treaty regimes, which are distinctive in their reach (for example, universal vs. regional, general vs. specific), this part will identify the common denominators of the various instruments on a right-by-right basis. This research anticipates that there will be differences in the scope of each right. In the mapping exercise, attention is therefore devoted to the authority and normative relevance of the various standards, and the treaty monitoring bodies' interpretation of said standards. The analysis will use terms like *general standards*, *progressive development*, *deviating practice* and other similar terms to describe the (relative) normative scope of each right surveyed in Part II.

The three dimensions (right to information, right to participation in the decision-making procedure and right to an effective remedy) will each be discussed in a separate chapter (chapters 3-5). Chapter 6 will present the Draft Inclusionary Governance Model and its elements and will demonstrate the Draft Model's dynamic aspect.

3 Access to Information

This chapter develops the building blocks of the first pillar of the Draft Inclusionary Governance Model: access to information. The point of departure for the analysis is the Conceptual Model that includes a duty to inform those affected by decisions of international institutions and a right to access information.

In its basic form, access to information refers to the right of individuals[1] to seek and receive information from authorities and the latter's corresponding duties to provide such information. The research will identify two distinctive rights to information that are relevant in the context of decision-making procedures that directly affect individuals.[2] The difference between the rights lies in the relation of the rights-holder to the information – that is, the rationale why someone has a right to receive or access any particular information. The *right to public interest information* (section 1) concerns the right of individuals to access public interest information held by authorities.[3] The *right to personal information*, which is the second identified right, concerns the right of individuals to access information concerning them that is held, collected and/or stored by public authorities (section 2). Each right will be discussed in light of its legal bases, the holders of the right, the scope of the right and any concomitant duties for the authorities concerned, and lastly, any recognized limitations to the right. The chapter will conclude with a schematic overview listing the identified elements of each distinctive right, which form the building blocks of the first pillar of the Draft Inclusionary Governance Model (section 3).

In this book, only the right to information held by *public authorities* will be discussed, thus excluding any possible duties and obligations of private parties.[4] Furthermore, although

1 It should be noted that, in this and the following chapters, reference is made to the right of individuals, which does not imply that NGOs, groups of individuals or entities do not have such rights; referring to individuals is rather a choice in terms of clarity and style. It will be specified in every chapter when the holders of the rights are discussed who has the right and whether the authorities owe an obligation to others than individuals. See, for example, section 3.2.

2 See, in general, on informational rights C.A. Bishop, *Access to Information as a Human Right* (El Paso: LFB Scholarly Publishing LLC 2012) and M. McDonagh, 'Right to Information in International Human Rights Law' (2013) 13(1) *Human Rights Law Review* 1. See also an article by Weeramantry, former Judge of the International Court of Justice, who wrote in 1995 that the right to governmental information is developing into a *new* human right. He then identified various formulations of an emerging right to information, include those identified in the context of this research. C.G. Weeramanty 'Access to information: A New Human Right. The Right to information' (1994) *Asian Yearbook of International Law* 99-125.

3 In this chapter, the term *a right to public interest information* will be used instead of the often-used terms of *state-held information* or *government-held information*. The latter terms seem to indicate – falsely – that the right to personal information is not held, stored or collected by public authorities.

4 Even though the convincing argument can be made that private actors also have certain duties to provide information to affected individuals it falls outside the scope of this research; this research focuses on international institutions, which (according to the definition adopted in the project) entails public actors only (see further chapter 1, section 6.1). Section 1.2. will address the question of how to define the public authorities that hold public interest information. For research that addresses the role of private actors, and particularly the extent to which international human rights norms are applicable

the terms transparency and the right to information are sometimes used interchangeably in the relevant literature, this work will consider these two concepts to be different. The two rights to information identified in this research (public interest and personal information) constitute two distinctive substantive rights, whereas transparency refers to an authority's the duty to ensure transparent procedures. As will be further explained in this chapter and the following two chapters respectively, this duty includes the duty for authorities to properly inform individuals of the decision-making and review procedures and of any applicable rules.

1. The Right to Public Interest Information

The Conceptual Model recognizes a duty to ensure access to information in possession of international institutions but offers no further guidance as to the content and scope of this duty. Through a survey, this section will examine whether, and to what extent, international law recognizes the right[5] to public interest information. Firstly, this section will examine and compare the legal bases of the right to public interest information in international law (1.1) and identfy what constitutes public interest information (1.2). It will then discuss who are the holders of said right (1.3), the scope of the obligations for authorities (1.4), and the procedure to be followed (1.5). Lastly, it will show under what circumstances the right to public interest information may be limited (1.6). Section 1 will conclude with a schematic overview of the building block of the right to public interest information (1.7).

1.1. The Right's Legal Bases

This research distinguishes between an explicit right to public interest information and a non-explicit or implied right to said information. Only the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) explicitly recognizes a right for individuals to request public interest

and useful as a framework, see, for instance, Temperman who addresses it in light of the right to public participation J.D. Temperman, 'Public Participation in Times of Privatization' (2011) 4(2) *Erasmus Law Review* 43.

5 As highlighted in the introduction to Part II, chapters 3-5 will chart the recognition of the *rights* to information, to participation in the decision-making procedure, and to an effective remedy, which is in contrast with the Conceptual Model that focused on the duties of international institutions. The Conceptual Model was developed examining the existing standards applicable to international institutions, and accordingly, the focus lies on the obligations of international institutions. In part II, the legal survey will sketch whether, and to what extent, international law recognizes and identifies constraints on the exercise of public power by public authorities, and more in particular, whether there are procedural arrangements in place to ensure the inclusion of individuals (and groups) in a public authority's decision-making procedure. The emphasize in the language lies accordingly on the rights enjoyed by individuals as the majority of the surveyed instruments is rights-based; its main aim is the recognition and accordance of rights enjoyed by individuals (and groups) vis-à-vis the parties to the respective instruments. Chapter 6 will address whether, and to what extent, this 'switch' influences the Draft Model developed in part II.

information (1.1.1). In the context of other treaty instruments, a right to public interest information has been developed over time through the works of treaty monitoring bodies who have read a right to public interest information into the substantive rights of the treaties they monitor (1.1.2). This section will discuss the two different ways in which a right to public interest information has crystallized in international law.

1.1.1 Explicit Legal Basis

The Aarhus Convention is one of the few instruments that contain an explicit legal basis for the right to public interest information.[6] It[7] accords the public[8] with procedural rights in environmental matters, including the right to access environmental information.[9] Article 4 of the Aarhus Convention gives everyone – that is, individuals, groups and NGOs – a right to seek information and imposes a duty on authorities to provide the requested environmental information[10] unless duly restricted. The provision sets the criteria for who

6 Similarly, the 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean ('Escazú Agreement') contains an explicit legal basis for the right to public interest information in its article 5 (access to environmental information) and article 6 (generation and dissemination of environmental information). The Convention was adopted in context of the UN Economic Commission for Latin-America, on March 4, 2018 in Escazú, Costa Rica and has not yet entered into force. So far 5 states have ratified the convention and there are 22 signatories. The convention enters into force once there are 11 ratifications. See further, https://acuerdodeescazu.cepal.org/s1/en. It should be noted that the content of the convention is comparable to that of the Aarhus Convention, and similarly stipulates extensive rights to information, participation and access to justice.

7 The Aarhus Convention, developed by the UN Economic Commission for Europe, currently has 47 parties, including the European Union. See for the current status of ratifications, http://www.unece.org/env/pp/ratification.html. The Convention is also open to parties outside the UN/ECE region subject to the approval of the Meeting of the Parties. Interestingly, Article 3(7) of the Aarhus Convention stipulates the obligation for each of the parties to promote the application of the principles in *international* fora; the Almaty Guidelines in Promoting the Application of the Principles of the Aarhus Convention in International Forums (Annex to decision II/4 (June 20, 2005) Doc. ECE/MP.PP/2005/2/Add.5) and decision IV/3 (Chisinau 2011) reaffirmed the importance of promoting the principles of the Convention in international fora. However, for a skeptical view of the normative potential of this obligation, see, for example, U. Beyerlin, 'Aligning international Environmental Governance with the 'Aarhus Principles' and Participatory Human Rights' in: A. Grear and L.J. Kotzé (eds.) *Research Handbook on Human Rights and the Environment* (Edward Elgar 2015) 333 at 339.

8 Article 2(4) of the Aarhus Convention defines public as "one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups." The term *individuals* or *groups* will hereafter be used to refer to those holding the right for the sake of comparability. In section 1.4, the holders of the right to public interest information will be discussed in more detail.

9 The Convention follows a rights-based approach just like the human rights treaties. See, e.g., paragraphs 7-8 of the preamble and article 1 of the Convention. As chapters 4 and 5 will show, the Convention also accords those affected with a right to participation and a right to an effective remedy. For a further introduction into the Aarhus Convention and its compliance mechanism, see, for example, M. Macchia, 'Global Administrative Law Compliance: the Aarhus Convention Compliance Review System' (2008) 4 *ERPL/REDP* 1317; E. Hey, 'Human Rights and the environment in the European 'Aarhus Space" in: A. Grear and L.J. Kotze (eds.) *Research Handbooks on Human Rights and the Environment* (Edward Elgar 2015).

10 Environmental information as defined in article 2(3) by the Aarhus Convention concerns:

may seek information from public authorities, and it provides guidance on the rules for such a procedure.[11] For instance, the requested information has to be made available as soon as possible, at the latest within one month after submitting a request to that end.[12] The Aarhus Convention Compliance Committee (ACCC),[13] the treaty monitoring body of the Aarhus Convention, provides authoritative interpretations of the obligations of public authorities vis-à-vis individuals under the treaty[14] by way of its review mechanism.[15]

In addition to article 4 of the Aarhus Convention, which provides a right to request public interest information, article 5 of the Aarhus Convention recognizes a duty for public authorities to collect and disseminate environmental information without a specific request to that end. It is a very specific duty, which can similarly be found in the work of some of the treaty monitoring bodies, particularly in the context of decision-making procedures on environmental matters.[16] Amongst others, the provisions require parties to the Aarhus

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any information in written, visual, aural, electronic or any other material form (…): including the state of the elements of the environment, facts that affect the environment, decision-making processes, and the state of human health and safety. The convention does not qualify the form of the information or whether such form maybe in the form of raw or processed data, instead it refers to *any* information.
ACCC, *ACCC/C/2010/53 (United Kingdom),* ECE/MP.PP/C.1/2013/3 (January 11, 2013), §74.

11 In particular, see paragraphs 1 (no interest to be stated and information in principle to be provided in the form requested), 2 (timeframe) and 8 (any costs charged for producing the information may not exceed a reasonable amount) for the general conditions. The remaining paragraphs (3-7) set out the conditions under which a request for information may be refused and the procedural guarantees that have to be in place to avoid an arbitrary decision. In general, the grounds for refusing information have to be interpreted restrictively (paragraph 4).

12 Article 4(2) Aarhus Convention; an extension up to two months is permitted when the volume and the complexity of the information justifies such an extension. Nevertheless, after two months authorities must provide access to the information or deny access based on the grounds listed in article 4 and in accordance with the criteria of article 4(7). See also ACCC, *ACCC/C/2008/24 (Spain),* ECE/MP.PP/C.1/2009/8/Add.1, (September 30, 2010), §74.

13 Meeting of the Parties to the Aarhus Convention, Decision I/7, ECE/MP.PP/2/Add.8, (April 2, 2004).

14 Its views, although non-binding, provide an authoritative interpretation of the treaty obligations. For instance, the ACCC gave guidance on what constitutes environmental information (e.g. *ACCC/C/2004/1 Kazakhstan,* §18; *ACCC/C/2004/8 (Armenia),* §20; *ACCC/C/2008/30 Moldova,* §29), and how to strike a proper balance between the public interest in disclosing certain information and harm to interests involved when disclosing this information (e.g., ACCC/C/2007/21 (*European Community*) §30(c)).

15 Review by the Aarhus Convention Compliance Committee may be triggered in four different ways. First, the ACCC may consider a submission from a party about another party's compliance or that of the party itself (this option has so far only been used three times: twice for the compliance of other states and once regarding a party's own compliance), see further https://www.unece.org/submissions.html. Second, it may consider referrals of the ACCC's secretariat concerning a party's compliance to the Convention (no referrals thus far, see further http://www.unece.org/env/pp/referrals.html). Third, and most commonly, it may consider communications of members of the public concerning a party's compliance with the Convention. So far, 174 communications have been submitted by members of the public, see for an overview of communications submitted and its status in the process: http://www.unece.org/env/pp/pubcom.html. Lastly, it should be noted that the Committee may also examine compliance issues on its own initiative and prepare reports on compliance at the request of the Meeting of the Parties (MoP). So far, the MoP has issued such a request for three times. (statistics up-to-date until December 19, 2019).

16 See in particular the case law of the ECtHR in the context of article 8 (right to family life), ECtHR,

Convention to provide information on the type of information held by authorities (meta-information), the basic terms and the conditions under which the public interest information is made available, and the procedure that is to be followed to disseminate information.[17] The information must be *sufficient*, or complete enough, to ensure that the public can effectively gain access to information.[18] There are, however, no requirements for the format in which the information is to be provided.

In sum, the Aarhus Convention provides an explicit legal basis for the right to public interest information. Considering that it concerns a regional convention[19] and focuses only on environmental information, its normative scope is limited. However, a similar – although less extensive – right to public interest information has been developed through the work of various treaty monitoring bodies, as the next section will show.

1.1.2 Authoritative Interpretation

Even though there is no explicit legal provision stipulating a right to public interest information in international human rights treaties, the right is firmly recognized by the various treaty monitoring bodies in their case law.[20] The treaty monitoring bodies have read the right to public interest information into the right to freedom of expression.

The UN Human Rights Committee (HRCee) has read a right to public interest information into the freedom to seek, receive, and impart information (freedom of expression) as stipulated in article 19 of the International Covenant on Civil and Political Rights (ICCPR).[21]

Taşkin v. Turkey (app no 46117/99 (2005), §119; ECtHR, *Hatton v. United Kingdom, App no 36022/97* (2003) §99, 128-129; ECtHR, *Buckley v. United Kingdom, App no 20348/92* (1996); ECtHR, *Giacomelli v. Italy, app no 59909/00* (2007) §82-83; See also p 316-322 of O. de Schutter, *International Human Rights Law* (Cambridge Cambridge University Press, 2010). J. Ebbesson, 'Transparency in Environmental Matters' in A. Bianchi and A. Peters (eds) *Transparency in International Law* (Cambridge University Press, 2013), 49-74 at 65.

17 Article 5(2) of the Convention: the provision must ensure that the way in which environmental information is provided is transparent and that the information is effectively accessible.

18 Article 5(2)(a) of the Aarhus Convention.

19 See n. 5 above. The Convention is open to parties outside the European region, but its parties to date are primarily based in Europe. Furthermore, once the Escazú Agreement enters into force in the Latin America and Caribbean region, the normative relevance of the conventional rights is expected to increase considering that there is an overlap in the type of norms and procedural guarantees stipulated in both conventions. See further, n. 6 above.

20 This research uses the term *case law* broadly by applying it to all the treaty interpreting documents of the treaty monitoring bodies including judgments, non-binding views, and general comments, concluding observations, and other documents alike. They all have in common that they are deemed to be an authoritative interpretation of the treaty provisions. See, e.g., Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6 *Human Rights Law Review* 27, 33.

21 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 999 UN GAOR Supp. (no 16) at 52, UN Doc A/6316 (1966) 999 UNTS 171 of December 16, 1966 [ICCPR] (entered into force on March 23, 1976).

In *Toktakunov v. Kyrgyzstan*,[22] the HRCee held that "the reference to the right to 'seek' and 'receive information' as contained in article 19(2) of the Covenant, includes the right of individuals to request public interest information".[23] This interpretation was reaffirmed by the Committee in a *General Comment* on article 19 ICCPR,[24] restating that the provision embraces "a right of access to information held by public bodies."[25]

Further, other UN human rights instruments similarly contain a provision on the right to seek, receive and impart information for individuals;[26] however, the respective treaty

22 It should be noted that there is discussion whether the views of the HRCee are legally binding. Nowak reasons that the views are not binding, but he refers to the views (and general comments) in his commentary to the CCPR as an authoritative interpretation of the covenant (M. Nowak, *CCPR Commentary UN Covenant on Civil and Political Rights* (NP Engel 2nd rev. ed. 2005), XXVII). Scheinin, on the other hand, reasons that:

> It would be wrong to categorize the Committee's views as mere 'recommendations.' They are the result of a quasi-judicial adversarial international body established and elected by the States Parties for the purpose of interpreting the provisions of the Covenant and monitoring compliance with them … the presumption should be that the Committee's views in Optional Protocol cases are treated as the authoritative interpretation of the Covenant under international law.

M.R. Hanski and M. Scheinin (eds.) *Leading Cases of the Human Rights Committee* (2003) at 22. Irrespective of whether the views have to be considered as binding, they are at a minimum considered to be an authoritative interpretation of the treaty obligations of member states vis-à-vis individuals.

23 State-held information in this case has to be equated with public interest information. HRCee, *Toktakunov v. Kyrgyzstan*, Merits, Communication no 1470/2006, (March 28, 2011) §6.3, 7.4; HRCee, *Rafael Rodríguez Castañeda v. Mexico*, Communication no. 2202/2012, (2013), §7.4.

24 Even though a General Comment is not legally binding on a state party, they are of high normative relevance. In the UN human rights system, all treaty monitoring bodies publish their authoritative interpretation of provisions of the respective treaty instrument they oversee in general comments or general recommendations. Alston also refers to it as "one of the potentially most significant and influential tools available" to the treaty monitoring bodies (P. Alston, 'The Historical Origins of the Concept of General Comments in Human Rights Law' in: L. Boisson de Chazournes and V. Gowland Debbas (eds.), *The international legal system in quest of equity and universality: liber amicorum Georges Abi-Saab* (2001) 763). General comments often consist of restatements of case law already established by treaty monitoring bodies (J. Th. Moller and A. De Zayas, *United Nations Human Rights Committee Case Law 1977-2008 a Handbook* (NP Engel 2009), 50). For instance, they may cover a comprehensive interpretation of substantive provisions, wider cross-cutting thematic issues, or provide general guidance to states on the information they have to submit as part of the state reporting procedure. See, for example. the compilation of the general comments of the UN treaty bodies, available at http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx.

25 Human Rights Committee, *General Comment 34, article 19, Freedoms of opinion and expression*, (September 12, 2011), §18. See also HRCee, *Rafael Rodriquez Castañeda v. Mexico* (2012), §6-7. In addition, the UN Commission on Human rights and the Human Rights Council recognized a right of access to public interest information. See, for instance, UN Commission on Human Rights, Res 2005/38, preamble, §4(I), UN Doc. E/CN.4/RES/2005/38 (April 19, 2005); UN Human Rights Council, Res 12/16 Freedom of Expression UN Doc A/HRC/12/L.4/Rev.1 §5(I) (October 2, 2009).

26 Even though these are UN, and thus global, instruments, these conventions are limited, however, in their scope as they only address the rights of a particular group of people. See particularly article 13(1) of the *Convention on the Rights of the Child [CRC]*, (November 20, 1989), United Nations, Treaty Series, vol. 1577, p. 3, 196 states are party to the CRC; article 13(2) of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, (December 18, 1990) A/RES/45/158, the Migrant Workers Convention currently has 48 member states, http://indicators.ohchr.org/ (last accessed September 12, 2016); article 21 of the *Convention on the Rights of Persons with*

monitoring bodies of these conventions have not yet interpreted the right as including a right to public interest information.

At a regional level, the American Convention on Human Rights (ACHR), the European Convention on Human Rights (ECHR), and the African Charter on Human Rights (AfCHPR) all recognize a right to public interest information, although the scope of the right differs.[27] The ACHR contains a provision on the right to seek, receive and impart information,[28] which the Inter-American Court of Human Rights interpreted as including the right to access public interest information.[29] Several other organs of the Organization of American States (OAS) adopted a similar interpretation of article 13 ACHR and recognize the right to access public interest information.[30] The right to receive information as laid down in the AfCHPR[31] has been interpreted by the African Commission on Human Rights to include the right to public interest information.[32] The European Court of Human Rights (ECtHR) has only recently

Disabilities: resolution / adopted by the General Assembly, (January 24, 2007), A/RES/61/106, 166 states are party to this treaty, see further http://indicators.ohchr.org/.

27 It should be noted that this section discusses the right to request public interest information, which is to be distinguished from the duty to inform as recognized in the context of the right to meaningful participation in decision-making procedures. As chapter 4, section 3.1 will show, the duty to inform refers to the obligation of authorities to inform those affected of an upcoming decision and the participatory process, and to provide them with all information that is necessary to participate in a meaningful way in the decision-making procedure. As this information may be of a public-interest nature, a certain overlap may therefore be detected between the two in the case law of the various courts. This research finds it more useful to distinguish them and discusses them therefore separately.

28 Article 13 of the American Convention on Human Rights, "Pact of San Jose", *Costa Rica*, (November 22, 1969).

29 IACtHR, *Claude Reyes v. Chile*, Ser. C. No. 151, (September 19, 2006), §77; the approach has been affirmed in various cases afterwards, including in IACtHR, *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil* (November 24, 2010).

30 See, e.g., Inter-American Juridical Committee, Principles on the Right to Access to Information, CJI/RES. 147 (LXXIII-O/08); Inter-American Commission on Human Rights, Annual Report of the Special Rapporteur for Freedom of Expression (2003) Inter-Am. CHR OAS Doc. OEA/SER.G, CP/Doc. 3790/03, at 8.

31 Article 9 African Charter on Human and Peoples' Rights (adopted June 27, 1981, entered into force on October 21, 1986) (1982) 21 ILM 58 [African Charter].

32 In 2002, the African Commission on Human and Peoples' Rights adopted a declaration of Principles on Freedom of Expression in Africa to supplement article 9 of the Charter. Even though the declaration is non-binding, it is relevant to interpret said charter provision. Principle 4 (1) of the declaration reads:

> Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

Declaration of Principles on Freedom of Expression in Africa, the African Commission on Human and Peoples' Rights, 32nd Session, (October 17-23, 2002: Banjul, The Gambia). Further support for this reading can be found in other instruments adopted in the African region, including article 9 of the African Union Convention on Prevention and Combating Corruption, which requires member States to adopt legislative measures and alike to "give effect to the right of access to any information that is required to assist in the fight of corruption." See further, the objectives of the African Charter on Democracy, Elections and governance, "the establishment of the necessary conditions to foster citizens participation, transparency, access to information." African Union, African Charter on Democracy, Elections and Governance (January 30, 2007) (entered into force on February 15, 2012).

progressed to recognize a right to public interest information[33] as part of the freedom of expression provision of article 10 ECHR (the right to receive and impart information), albeit only under specific conditions.[34] The recent Council of Europe[35] Convention on Access to Official Documents does include a right to request information and thereby recognizes a right for everyone to request public interest information; however, this Convention has not yet entered into force.[36]

In conclusion, the right to public interest information finds broad support among the various instruments. Although only the Aarhus Convention provides an explicit legal basis for the right, the HRCee has read a right to public interest information into the freedom of expression provision of the near universally ratified ICCPR. In addition, all treaty monitoring bodies of the regional human rights instruments have interpreted the freedom of expression provision as to include a right to public interest information. The following sections will examine the way in which the treaty monitoring bodies interpret the right to public interest information and the content and scope of this right.

33 ECtHR, *Magyar Helsinki Bizottság v. Hungary,* §156. Below the position of the ECtHR is discussed in greater detail.

34 Article 10 (European) Convention for the Protection of Human Rights and Fundamental Freedoms, ETS no. 5, 213 UNTS 222, November 4, 1950 (ECHR).

35 Within the context of the Council of Europe, more than 210 treaties (including protocols amending treaties) have been concluded. For every treaty, it has been determined whether states outside the COE region may also join the treaty. See further https://www.coe.int/en/web/conventions/about-treaties for an overview of the various treaty regimes, and their content and scope. It should be noted that the ECtHR only has jurisdiction to hear individual complaints of alleged violations of the European Convention on Human Rights, article 32 (1) ECHR. The Court does not have jurisdiction to assess compliance with any of the other COE conventions. However, sometimes the Court refers to other Conventions, including COE Conventions, in its reasoning. In this context, see particularly the discussion of the right to personal information and the normative relevance of the standards of other COE conventions.

36 Article 2(1) stipulates that everyone has the right to access official documents, and article (4) specifies that no reasons need to be provided for requesting access to official documents, Council of Europe Convention on Access to Official Documents, CETS No. 205 (June 18, 2009) not yet entered into force; see further the Explanatory Report to the COE Convention on Access to Official Documents, §17-19. At this moment, 9 countries have ratified the Convention. The Convention will enter into force after ratification by 10 parties. See for an overview of the ratifications and signatures to the Convention https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205/signatures. The Convention will be referred to where it is relevant to show the comparability with and/or deviations from current human rights standards within the Council of Europe region. Interestingly, in the Explanatory Report to the COE Convention, reference is made to the IACtHR's recognition of the aforementioned right in the *Claude Reyes v. Chile* case, Explanatory Report to the COE Convention on Access to Information, Part II.

1.2. Public Interest Information Defined

All treaty regimes recognize that the right to public interest information has two components: (1) the information is in the possession[37] of a public authority,[38] and (2) the information is of public interest.

The concept of public authorities is similarly defined across the various instruments. All branches of the state (governmental, legislative and judicial bodies) are public authorities. However, several treaty regimes exclude legislative and judicial authorities from being required to disclose public interest information upon request.[39] In addition, all authorities exercising public power are regarded to be public authorities for such exercise of power, and are, in principle, required to disclose public interest information when requested to do so.

The second component is that the information has to be of *public interest*. All treaty regimes adopt a broad definition as to which *type* of information is included.[40] For instance, the Aarhus Convention stipulates that "any information in written, visual, aural, electronic or any other material form"[41] is included and one can find similar phrasing in the context of the ICCPR,[42] OAS,[43]

37 Section 1.3. will discuss whether, and to what extent, public authorities have to actively collect information, whether information has to be in possession of public authorities or, instead, whether the right only applies to information that is already in their possession.

38 It should be noted that this research only discusses the obligations for public authorities and thus excludes any obligations for private actors. This does however not imply that legal or natural persons, which are not public authorities, cannot have duties or obligations regarding the right to information. Instead, a convincing argument can be made for them still having certain obligations. Rather, the research's focus is on international institutions exercising public power, which meet the qualification of public authorities. Other actors are therefore excluded from the analysis for the sake of clarity and scope of the research. See further the introduction to Part II.

39 Aarhus Convention in article 2(2) explicitly excludes bodies or institutions acting in a judicial or legislative capacity. With regard to the Council of Europe, see, for example, Committee of Ministers Recommendation No. R (81) 19 on the Access to Information Held by Public Authorities, (November 25, 1981), 340th Meeting of Ministers' Deputies, Appendix 1, principle 1. In this recommendation, the Committee of Ministers excluded legislative bodies and judicial authorities from the definition of public authorities, from whom one may request information; see similarly Committee of Ministers Recommendation Rec. (2002) 2 on Access to Official Documents, at 2 (1).

40 See also Bishop, *Access to Information*, at 75.

41 Article 2(3) Aarhus Convention. The Convention does not qualify the form of the information or whether it (only) encompasses raw and/or processed data; instead, it refers to *any* information. Aarhus Convention Compliance Committee, *ACCC/C/2010/53 (United Kingdom),* ECE/MP.PP/C.1/2013/3 (January 11, 2013) at §74.

42 HRCee, *GC 34,* §18; see also UN Special Rapporteur on Freedom of Opinion and Expression, 1999, UN Doc. E/CN.4/1999/64, §12; UN Comm. HR, Resolution 1999/36, §2; 2000 Annual report of the UN Special Rapporteur on Freedom of Opinion and Expression, UN Doc. E/CN.4/2000/63 (January 18, 2000) §43-44.

43 See, e.g., Inter-American Commission on Human Rights, Annual Report of the Special Rapporteur for Freedom of Expression, August 29, 2003a) at 8; Inter-American Juridical Committee, Principles on the Right to Access to information, CJI/RES. 147 (LXXIII-O/08), principles 1 and 3. Model Inter-American Law on Access to Public Information General Assembly Resolution 2607 (June 8, 2010), preamble and provision 1(1) (a), available at http://www.oas.org/dil/AG-RES_2607-2010_eng.pdf.

the Council of Europe (COE),[44] and the African Union.[45] Only the Aarhus Convention defines what constitutes *information*,[46] but in the other treaty regimes, it has to be deduced from case law of the treaty monitoring bodies. The Aarhus Convention starts from the premise that "public authorities hold environmental information in the public interest,"[47] and environmental information is then broadly defined as:

> Any information … on … the state of the elements of the environment, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment (…) the state of human health and safety.[48]

The ACCC dealt in various cases with the question whether the information requested was of public interest.[49] For instance, the Aarhus Convention Compliance Committee held in *ACCC/C/2004/1 (Kazakhstan)* that the information requested, a feasibility study conducted into the draft amendments that would allow for the import and disposal of foreign low-level and medium-level radioactive waste in Kazakhstan, was considered to be of public interest and thus fell within the ambit of article 2, paragraph 3 (b) of the Convention.[50]

The approach of the other human rights treaty monitoring bodies considered in the context of this research must be deduced from a small number of cases addressing the scope of public interest information. Overall, the monitoring bodies seem to determine whether the nature of the information requested is one of public interest on a case-by-case basis. In general, two criteria are referred to by the bodies: the content of the information, and/or to whom

44 In the Council of Europe, the focus is *on access to documents* instead of on access to information: Committee of Ministers Recommendation Rec (2002) 2 on Access to Official Documents, definitions, provision 1. See also, article 1(2)(b) of the COE CETS 205 Convention on Access to Official Documents (2009, not yet entered into force).

45 Model law on access to information for Africa, in article 1 reads:
information includes any original or copy of documentary material irrespective of its physical characteristics, such as records, correspondence, fact, opinion, advice, memorandum, data, statistic, book, drawing, plan, map, diagram, photograph, audio or visual record, and any other tangible or intangible material, regardless of the form or medium in which it is held, in the possession or under the control of the information holder to whom a request has been made under this Act.
See also the Declaration of Principles on Freedom of Expression, which in more general terms – in relation to the right of freedom of expression and information – embraces a wide definition of information in principle 1(1).

46 It should be noted that the other treaty defining what constitutes information is the COE Convention on Access to Official Documents, which has however not yet entered into force.

47 Aarhus Convention, preamble.

48 Article 2(3) of the Aarhus Convention.

49 See, e.g., ACCC, *ACCC/C/2004/8* (*Armenia),* ECE/MP.PP/C.1/2006/2/Add.1 (May 10, 2006), §13, 20; "contracts for rent of lands" also considered as environmental information in ACCC, *ACCC/C/2008/30 (Moldova)*, ECE/MP.PP/C.1/2009/6/Add.3 (February 8, 2011), §29.

50 ACCC, *ACCC/C/2004/1 (Kazakhstan)*, ECE/MP.PP/C.1/2005/2/Add.1 (March 14, 2005), §8, 18.

the information relates or who holds it. For instance, the ECtHR held in *Magyar Helsinki Bizottság v. Hungary* that, as a general guidance:

> [T]he public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, (…) matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about.[51]

However, the ECtHR held that the right to public interest information does not imply a right to all information. For instance, the Court considered that not "all the technical details relating to the construction of a power station" were of general public interest in *Sdruženi Jihočeské Matky v. Czech Republic*.[52] Turning to the Americas, the IACtHR explained in *Claude Reyes v. Chile* that the information requested was of public interest as:

> …it related to the foreign investment contract signed originally between the State and two foreign companies and a Chilean company (which would receive the investment), in order to develop [a] forestry exploitation project that caused considerable public debate owing to its potential environmental impact.[53]

The parties involved in the contract, the subject of the contract and the (environmental) impact of the contract were therefore considered to be relevant factors in determining whether the information was of public interest.[54]

The HRCee has not provided criteria to determine the scope of public interest information; however, the Committee concluded in two cases on the access to information that the information requested was of public interest. In *Toktakunov v. Kyrgyzst*an, the Committee considered the requested information – the number of individuals sentenced to death in

51 ECtHR, *Magyar Helsinki Bizottság v. Hungary,* §162; for example, the information on how many people were subjected to electronic surveillance by a domestic intelligence agency was considered to be of public interest, ECtHR, *Youth initiative for Human Rights v. Serbia*. Similarly, documents at the Ministry of the Interior regarding the functioning of the State Security Services in Hungary in the 1960s were deemed to be of public interest, ECtHR, *Kenedi v. Hungary,* App. No. 31475/05 (May 26, 2009), §43.

52 ECtHR, *Sdruženi Jihočeské Matky v. Czech Republic* (Application no. 19101/03, 2006 admissibility decision).

53 IACtHR, *Claude Reyes v. Chile*, §73; see also Inter-American Juridical Committee, Principles on the right to access to information, CJI/RES. 147 (LXXIII-O/08), OAS/Ser.Q (August 7, 2008), principle 1.

54 The Court further referred to the reason provided for asking the information – namely, to hold the authorities to account for a proper exercise of power. Although the rationale for requesting access is not of relevance for qualifying the information to be of public interest, it is relevant in light of the general features of the right to public interest information. IACtHR, *Claude Reyes v. Chile*, §73. See further 1.3 below.

Kyrgyzstan – to be of public interest.[55] Similarly in *Rafael Rodriquez Castañeda v. Mexico,* the HRCee considered original ballot papers used in an election to be information of public interest.[56] In the African human rights regime it has thus far – to the author's knowledge – not been further defined when information has a public interest nature beyond the general phrase that it has to concern information held by public authorities.

1.3. The Scope of the Right

This section will address the scope of the public authorities' obligations regarding the right to public interest information. This research will identify a general standard to disclose requested public interest information unless a set of predetermined limitation grounds apply. The majority of the treaty instruments therefore refers to a presumption of disclosure for public authorities.[57] In article 4, the Aarhus Convention stipulates, for instance, a positive obligation for authorities to provide the requested information or to provide a written justification for the refusal to (partially) disclose the information.[58] Also within the OAS human rights system, there exists strong support for the presumption of disclosure of requested public interest information.[59] For example, the Inter-American Court of Human Rights held in *Claude Reyes v. Chile* that the state has a positive obligation to provide the requested public interest information unless access to the information is legitimately restricted by authorities.[60]

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55 The Committee referred to resolutions of the Commission on Human Rights and to the Copenhagen document to prove the public interest nature of the information, HRCee, *Toktakunov. v. Kyrgyzstan*, §6.3.

56 HRCee, *Toktakunov. v. Kyrgyzstan,* §7.2.

57 HRCee, *Toktakunov. v. Kyrgyzstan,* §7.4; article 4(1) Aarhus Convention; ACCC, *ACCC/C/2005/15 (Romania)*, ECE/MP/PP/2008/5/Add. 7 (April 16, 2008), §30; OAS Declaration of Principles on Freedom of Expression (2000), principle 4; IACtHR, *Claude Reyes v. Chile* (2009); 2004 Joint Declaration by the UN Special Rapporteur on Freedom of opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression, December 6, 2004; Inter-American Commission on Human Rights, Annual Report of the Special Rapporteur for Freedom of Expression, (August 29, 2003), at 8; IACHR, Office of the Special Rapporteur for Freedom of Expression, *A Hemispheric Agenda for the Defense of Freedom of Expression,* OEA/Ser.L/V/II/CIDH/RELE/INF.4/09 (February 25, 2009) §15.

58 Article 4(1) Aarhus Convention reads:

> Each Party shall ensure that, subject to the following paragraphs of this Article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information…

See further ACCC, *ACCC/C2005/15 (Romania)*, ECE/MP/PP/2008/5/Add. 7 (April 16, 2008), §30; ACCC, *ACCC/C/2008/30 (Moldova),* ECE/MP.PP/C.1/2009/6/Add.3 (February 8, 2011), §31.

59 Within the OAS, it is referred to as the principle of maximum disclosure; OAS Declaration of Principles on Freedom of Expression (2000), principle 4; 2004 Joint Declaration by the UN Special Rapporteur on Freedom of opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression, December 6, 2004; Inter-American Commission on Human Rights, Annual Report of the Special Rapporteur for Freedom of Expression, (August 29, 2003), at 8; IACHR, Office of the Special Rapporteur for Freedom of Expression, *A Hemispheric Agenda for the Defense of Freedom of Expression,* OEA/Ser.L/v/II/CIDH/RELE/INF.4/09 (February 25, 2009) §15.

60 IACtHR, *Claude Reyes v. Chile*, §77.

Similarly, both the Human Rights Committee and the European Court of Human Rights have held that there is a corollary positive obligation for authorities to disclose requested public interest information, albeit under limited circumstances only.

In ECtHR's case law, it has always been a central question whether article 10 can be interpreted to include a positive obligation for authorities to disclose information upon an individual's request. Already in 1987, the Court established in *Leander v. Sweden* that "the right to freedom to receive information prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him."[61] Thus – in principle – article 10 ECHR cannot be interpreted as imposing a positive obligation on authorities to disclose information upon request.[62] Even though the Court still adheres to these classic principles,[63] in later case law, it identified two situations in which the right of access to information corresponds with a positive obligation to disclose the information. First, authorities are required to disclose information when forced to do so by a judicial order that has gained legal force.[64] Second, authorities have a duty to disclose information when access to such information is instrumental in the individual's exercise of his or her right to freedom of expression, in particular the right to receive and impart information.[65] In regards to the latter, the Court established four cumulative threshold criteria in *Magyar Helsinki Bizottság v. Hungary*:

- the information is of public interest;
- the information requested contributes to the public debate;
- the requesting person/entity has to be a social watchdog or perform a similar function; and
- the information needs to be readily available to public authorities.[66]

The first two criteria have already been discussed above. The third criterion will be discussed below in section 1.4 (Rightsholders). In short, the ECtHR examines whether the person seeking access to the information in question does so intending to inform the public in its capacity of a public *watchdog*. NGOs, academics and researchers are considered to fall within

61 ECtHR, *Leander v. Sweden* at §74; ECtHR, *Magyar Helsinki Bizottság v. Hungary*, §156.
62 ECtHR, *Leander v. Sweden* §74; ECtHR, *Guerra and others v. Italy*, §53.
63 ECtHR, *Magyar Helsinki Bizottság v. Hungary,* §156.
64 T*SAZ v. Hungary* (§ 35) the Court reasoned that, in this case, the request of information should not be interpreted as a "denial of a general right of access to official documents" but instead as "an interference – by virtue of the censorial power of an information monopoly – with the exercise of the functions of a social watchdog, like the press." See also Youth initiative for Human Rights v. Serbia where the ECtHR concluded that the Serbian intelligence agency's "obstinate reluctance" to comply with the order of the Serbian Information Commissioner to disclose the information constituted a violation of Article 10 ECHR. This case focused on the refusal of public authorities to comply with a domestic order to release information.
65 ECtHR, *Magyar Helsinki Bizottság v. Hungary* §156.
66 Idem, §156.

this category, for instance.[67] The last criterion implies that authorities are not expected to *actively* collect the information requested. Thus, the obligation for authorities only embraces a duty to disclose public interest information which is readily available and sought by watchdogs and alike for the purpose of contributing to the public debate. As opposed to the ECtHR's more stringent approach, other COE organs recognize a wider set of positive obligations for public authorities in relation to the right to public interest information, including a presumption of disclosure.[68]

The approach of the HRCee is less straightforward; its approach has to be deduced from one case only.[69] In the case *Toktakunov v. Kyrgyzstan*, the HRCee determined that the public authorities of Kyrgyzstan had a duty to either provide the requested information or to justify their refusal to disclose in accordance with article 19(3) ICCPR.[70] The Committee reasoned that when a *social watchdog*[71] exercises its functions on matters of legitimate public concern, it has to be provided with the requested public interest information.[72] The question remains whether the Committee only recognizes a positive obligation for authorities to provide information under these specific circumstances. Further, it is not clear how these conditions have to be interpreted – for instance, what constitutes a matter of legitimate public concern – and whether the same reasoning applies to others exercising such functions.[73]

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67 See, e.g., ECtHR, *Youth Initiative for Human Rights;* ECtHR, *Österreichische Vereinigung Zur Erhaltung, Stärkung and Schaffung Eines Wirtschaftlich Gesunden Land- und Forstwirtschaftlichen Grundbesitzes v. Austria (OVESSG v. Austria),* application no. 39534/07 (November 28, 2013); ECtHR, *Kenedi v. Hungary,* App No 31475/05 (May 26, 2009), §43.

68 Council of Europe, Committee of Ministers, *Recommendation No. R (81) 19* (1981), Appendix 1; COE Convention on Access to Official Documents, preamble (not yet entered into force, 2009), preamble.

69 So far, there is no General Comment that addresses this issue, and other cases have similarly not touched upon this issue.

70 HRCee, *Toktakunov. v. Kyrgyzstan* §7.3 reads:

> The first issue before the Committee is, therefore, whether the right of the individual to receive State-held information, protected by Article 19, paragraph 2, of the Covenant, brings about a corollary obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Covenant, the State is allowed to restrict access to the information in a specific case.

71 It should be noted that the context of a social watchdog asking for the information is relevant for the HRCee at two different levels: at the level of admissibility and at the level of the substantive right to access information (see below, section 1.4).

72 The HRCee drew a parallel with the case law that had established the necessity for the media to have access to information of public interest:

> The delivery of information to an individual can, in turn, permit it to circulate in society so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social.

Toktakunov. v. Kyrgyzstan, §7.4; it should be noted that this phrase is word-for-word the same as the reasoning used by the Inter-American Court of Human Rights in the *Claude Reyes v. Chile* in case (§77).

73 See *Magyar Helsinki Bizottság v. Hungary,* however, in which the ECtHR deals exactly with this question in §156-168.

Within the African human rights system, there is no single coherent approach to the existence and content of positive obligations for authorities. Neither is there any relevant case law of human rights bodies in the African region that could shed light on the interpretation of the right to public interest information. However, the Declaration of Principles on the Freedom of Expression in Africa – which is the main source indicating the recognition of a right to public interest information – does not stipulate a presumption of disclosure: it only states that refusals to disclose information are subject to appeal.[74] The Model Law on Access to Information in Africa, however, does stipulate that there is a presumption of disclosure of requested information.[75]

Treaty monitoring bodies increasingly recognize a duty for authorities to disclose information proactively. This positive obligation goes beyond the requirement to disclose information upon request and instead requires authorities to release or publish information on their own initiative.[76]

In conclusion, the general standard deduced from the legal survey is that there is a right to receive public interest information requested from public authorities. There is a corresponding duty for public authorities to disclose the information requested unless a limitation applies. Although the approach adopted by the HRCee and ECtHR may condition this positive obligation, the duty to disclose public interest information is recognized.

1.4. Rightsholders

Two different approaches can be discerned as to who has a right to public interest information. Firstly, the identified general (minimum) standard is that everyone has a right to public interest information (that is, no interest to be stated). Secondly, a deviating – or less progressive – standard can be identified where access to public interest information may only be requested by those involved in the legitimate gathering of information, such as

74 Principle IV of the 2002 Banjul Declaration of Principles on Freedom of Expression in Africa, the African Commission on Human and Peoples' Rights.

75 Article 2 (General Principles) (c) of the Model Law on Access to Information for Africa, African Commission on Human and Peoples' Rights, Model Law on Access to Information for Africa, (2011,) available at http://archives.au.int/handle/123456789/2062.

76 See, e.g., Article 5 of the Aarhus Convention. It should be noted that this development is similar to the duty to inform those affected, which will be discussed in chapter 4, section 3.1. For instance, HRCee, *GC 34*, §19 reads "States parties should proactively put in the public domain Government information of public interest." Article 5 Aarhus Convention explicitly stipulates the obligation of authorities to put into the public domain information of public interest at their own initiative. See further Principle IV of the 2002 Banjul Declaration of Principles on Freedom of Expression in Africa; COE Committee of Ministers, *Recommendation Res. (2002)2*, §IX. In its case law addressing environmental decision-making, the ECtHR has also recognized the obligation authorities have to proactively disseminate information in the context of article 2 (right to life) and article 8 (right to family life). The ECtHR's approach to these provisions will be further discussed in the context of the duty to inform those affected by decisions.

social watchdogs. This section will start with the former and subsequently explain why not all treaty monitoring bodies have recognized the right for everyone yet.

The Aarhus Convention stipulates in article 4 that members of the public, including NGOs, do not need to state their interest in the requested environmental information to be able to receive it.[77] In other words, the right to public interest information is a right that belongs to everyone.

Similarly, the Inter-American Court of Human Rights determined in *Claude Reyes v. Chile* that authorities have to provide the requested information without the applicant having to prove a direct interest.[78] The Court clarified that public interest information is a public good and that thus everyone has to have access to this information.[79] The rationale is that the information held by the public authorities is information gathered or produced for the people, and that it therefore belongs to the people.[80] This approach, adopted by the Court, has been widely reaffirmed within the OAS human rights regime.[81]

In their 2002 Declaration on Freedom of Expression in Africa, the African Commission on Human and Peoples' Rights similarly recognized a right to public interest information for everyone.[82] Further support for a right for the general public to said information can be

77 Article 4(1)(a) Aarhus Convention; ACCC, *ACCC/C/2004/1 (Kazakhstan),* §20.

78 IACtHR, *Claude Reyes v. Chile*, §77; IACtHR, *Case of Gomes Lund et al. v. Brazil (Guerrilha do Araguaia)*, judgment (November 24, 2010) Series C No. 219, §197.

79 IACtHR, *Claude Reyes v. Chile*, §77; see also Inter-American Commission on Human Rights, Annual Report of the Special Rapporteur for Freedom of Expression, (2001) Inter-Am. CHR OAS Doc. OEA/SER.L/V/II.111, doc 20 rev., CP/Doc.3790/03, §18; 2003 report of the OAS Special Rapporteur on the Situation of Freedom of Expression in Haiti, OAS Doc. OEA/SER.L/V/II.117, Doc. 48, §28; 2003 Report of OAS Special Rapporteur on the Situation of Freedom of Expression in Panama, OAS Doc. OEA/SER.L/V/II.117, Doc. 47, §128.

80 See, for instance, the Special Rapporteur of IACHR who noted that "the owner of the information is the individual who has delegated the management of public affairs to his or her representatives", paragraph 18 interpreting principle 2, Special Rapporteur of the IACHR, The Interpretation of the Declaration of Principles, as available on the website of the Special Rapporteur of the IACHR, accessible via http://www.oas.org/en/iachr/expression/showArticle.asp?artID=132 .

81 For example, the Inter-American Juridical Committee's Resolution CJI/RES.147 (LXXIII-O/08) on 'Principles on the Right of Access to Information,' which confirm in principle 1 that everyone has the right to public interest information; 2003 report of the OAS Special Rapporteur on the Situation of Freedom of Expression in Haiti, §28; 2003 Report of OAS Special Rapporteur on the Situation of Freedom of Expression in Panama, §128.

82 African Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression in Africa, (2002), principle IV. In various resolutions, the African Commission affirmed their commitment to oversee the implementation of the declaration within the African Union member states. See, e.g., Commission Res. 122 'Resolution on the Expansion of the Mandate and Re-appointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa' (November 15-28, 2007); the African Commission on Human and Peoples' Rights, Resolution no. 167 'Securing the Effective Realization of Access to Information in Africa' (November 10-24, 2010) in which the Commission noted the importance of implementing the principles of the declaration. However,

found in the Model Law on Access to Information for Africa,[83] which was developed by the Special Rapporteur who was mandated by the Commission to draft the Model Law.[84] The Commission and African Court on Human and Peoples Rights have not considered the issue in individual communications.[85]

In *Toktakunov v. Kyrgyzstan,* the Human Rights Committee held that the Kyrgyz public authorities had an obligation to provide the information requested (statistics on the execution of the death penalty in Kyrgyzstan) and that those requesting the information did not need to prove a direct interest or personal involvement to obtain the information.[86] So far, there have not been other cases in which this approach was affirmed or rejected.[87] Neither *General Comment 34 (on article 19 ICCPR)*[88] nor the *travaux préparatoires* to the ICCPR[89] address who are the holders of the right. However, the Committee did state in *Toktakunov v. Kyrgyzstan* that it mattered *who was seeking* access to the information and for *which purpose* in the context of the admissibility criteria.[90] The Committee drew an analogy between members of the media who have a right to access information on public affairs in light of their

the Commission also noted that only a few African States in 2010 had access-to-information laws in place. This questions the extent in which access to public interest information is a right that is broadly recognized within the region.

83 See particularly articles 2(a) and 12(1). The Model Law, although non-binding, serves the purpose of guiding "law makers in translating obligations emanating from international treaties into detailed national legislation" (preface), the African Commission on Human and Peoples' Rights, Model Law on Access to Information for Africa, 2011.

84 By Resolution 167 (XLVII), the African Commission mandated the Special Rapporteur on Freedom of Expression and Access to Information (Special Rapporteur) to lead the process of drafting the Model Law. He established a ten-member working group of access to information (ATI) experts who were tasked with developing an initial draft of the Model Law. The process included various expert meetings, four sub-regional consultations with stakeholders and a public call for comments on the draft Model Law. See further at 7-9 of the Model Law. The African Commission on Human and Peoples' Rights, Model Law on Access to Information for Africa (2011).

85 See for a complete list of all communications submitted to the Commission, http://www.achpr.org/communications/ with regard to the Court see http://en.african-court.org/index.php/cases

86 HRCee, *Toktakunov. v. Kyrgyzstan*, §6.3.

87 The only other case on access to public interest information did not restate that the right belongs to everyone; however, this could also be caused by the parties' not contesting this element, see HRCee, *Rafael Rodriquez Castañeda v. Mexico* (2012).

88 HRCee, *GC 34*, §18; interestingly, the Committee does explicitly stipulate in the same paragraph that every individual "has to have a right to see and rectify *personal* information" (emphasis added).

89 In the *travaux preparatoires* to the ICCPR, one finds the discussion whether a right to seek information is not too 'aggressive' and whether a right to gather information would therefore not be better suited. However, this proposal was defeated by a vote of 59/25 with 6 abstentions. Among the reasons why a right to seek would be better suited was the consideration "that it implied the right of active inquiry while 'gather' had a connotation of passively accepting news provided by Governments or news agencies", §22; M.J. Bosschuyt, *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff 1987) at 384, referring to the discussion in the 16th session of the Third Committee, A/5000, §9, 11, 22, 34; See further Nowak, at 446-448.

90 Article 2 of the Optional Protocol to the International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI) (December 16, 1966, entry into force on March 23, 1976).

contribution to public debate and others who similarly exercise "social watchdog functions", including public associations or private individuals.[91] In the case at hand, Mr. Toktakunov, a legal consultant for an NGO, requested access to the statistics on the execution of the death penalty in Kyrgyzstan. The Committee argued that Mr. Toktakunov had a watchdog function on issues of public interest.[92] Accordingly, the complaint was deemed admissible:

> due to the particular nature of the information sought, that the author has substantiated, for purposes of admissibility, that he, as an individual member of the public, was directly affected by the refusal of the State party's authorities to make available to him, on request, the information on use of the death penalty.[93]

Thus, individuals need to prove their interest and demonstrate that they are directly affected by the refusal of the requested information to be able to file an admissible complaint to the Human Rights Committee.

The approach of the European Court of Human Rights is different than that of the other treaty monitoring bodies. The ECtHR recognizes a right to public interest information only under limited circumstances. In *Magyar Helsinki Bizottság v. Hungary*, the Court confirmed its earlier case law and held that it matters *who* requests public interest information and for *which purpose*.[94] The Court drew an analogy with the ECtHR's long-established practice of according special protection to the press by restating that the gathering of information is an essential preparatory step in journalism and forms an inherent, protected part of the freedom of the press. Accordingly, the Court recognized an implied right of access to public interest information for the media. It is in this light that the Court examines whether the person seeking access to the information does so in the capacity of a public watchdog with the intent to inform the public.[95] The question is who may receive such special protection. In previous cases, the Court established that NGOs, as social watchdogs, have to be offered similar protection[96]

91 HRCee, *Toktakunov. v. Kyrgyzstan*, §6.3.
92 Idem.
93 Idem at §6.3.
94 ECtHR, *Magyar Helsinki Bizottság v. Hungary,* §156.
95 Idem, §168; see also ECtHR, *Youth Initiative for Human Rights v. Serbia,* 48135/06 (June 25, 2013), §20: "freedom to receive information" embraces a right of access to information. (…) when an NGO is involved in matters of public interest, such as the present applicant, it is exercising a role as a public watchdog of similar importance to that of the press. (...) applicant's activities thus warrant similar convention protection to that afforded to the press.
See for further case law confirming this line of the ECtHR's reasoning also ECtHR [GC] *Animal Defenders International v. United Kingdom* Appl. No. 48876/08 (April 22, 2013), §103; ECtHR, *Tarsasag a Szabadsag (TSAZ) v. Hungary* application no 37374/05 (merits) (April 14, 2009) §36; See also, e.g., ECtHR, *Jersild v. Denmark*, (September 23, 1994), Series A no. 298; ECtHR, *Stoll v. Switzerland*, no. 69698/01, (April 25, 2006); ECtHR, *Monnat v. Switzerland*, no. 73604/01, ECHR 2006-X.
96 The exact same reasoning was used by the HRCee, in *Toktakunov. v. Kyrgyzstan*.

as is provided to the press.[97] Similarly, the ECtHR has recognized the crucial role of academic researchers and authors of literature on matters of public concern,[98] and the Court anticipated that further categories may warrant similar protection under article 10 in the future.[99] This reasoning resembles the reasoning of the HRCee; for the ECtHR, however, the factor who requests information and for what purpose is not only of relevance for the admissibility of the claim but also for determining the scope of the substantive right to public interest information.

One explanation for the ECtHR's restrictive approach is that the Court has construed a right to access to information in the context of the freedom to *receive* information:[100] recognizing a right to access information in the course of legitimate information gathering for the purpose of contributing to the public debate. On the other hand, the Human Rights Committee and the Inter-American Court of Human Rights have read a right to public interest information into the freedom *to seek* information.[101] The African Commission on Human and Peoples' Rights has interpreted the freedom to receive information to include the right to seek information and accordingly that there is a right to public interest information.

Other organs of the Council of Europe do embrace a wider substantive right and recognize a right for the general public.[102] A 1981 Recommendation of the Committee of Ministers provided "[e]veryone within the jurisdiction of a member [s]tate shall have the right to obtain, on request, information held by the public authorities."[103] The COE Convention on

97 See also ECtHR, *Youth Initiative for Human Rights;* ECtHR, *Österreichische Vereinigung Zur Erhaltung, Stärkung and Schaffung Eines Wirtschaftlich Gesunden Land- und Forstwirtschaftlichen Grundbesitzes v. Austria (OVESSG v. Austria),* application no. 39534/07 (November 28, 2013).

98 For instance, in *Kenedi v. Hungary*, the ECtHR ruled that withholding access to materials "for legitimate historical research" violated a historian's right to information under article 10 ECHR; ECtHR, *Kenedi v. Hungary,* App. No. 31475/05 (May 26, 2009), §43; see further for the importance of historical studies and thereby the need for access to archives the Council of Europe, Committee of Ministers, Recommendation no. 13 (2000) '*on a European Policy on Access to Archives*' (July 13, 2000) available via www.coe.int.

99 ECtHR, *Magyar Helsinki Bizottság v. Hungary*.

100 ECtHR, *Magyar Helsinki Bizottság v. Hungary*, §117, 128, 150-156.

101 See further the *travaux preparatoires* to the ECHR. It mentions the draft text suggested by the UN Commission on Freedom of Information (right to seek, receive, and impart) as one of the two text proposals which were discussed in the preliminary drafting phase by the Commission of Experts, but no further reference to a discussion on this phrase was found in the *travaux preparatoires*. COE, Doc. DH(56)15, CDH (75) 16 (August 17, 1956).

102 See, e.g., COE Committee of Ministers Recommendation R (81) 19 (1981); Council of Minister recommendations are non-binding. However, they do show the agreement of all the ministers of all the member states on the topic; article 4 of the COE Convention on Access to Official Documents.

103 Council of Ministers of the Council of Europe, *R (81) 19* (1981); in 2002 the Committee of Ministers affirmed this approach:

> Member states should guarantee the *right of everyone* to have access, on request, to official documents held by the public authorities. This principle should apply without discrimination on any ground, including national origin.

Access to Official Documents also recognizes a right for everyone to seek access to public interest information with no interest having to be stated.[104]

In conclusion, even though the ECtHR has a diverging approach, the general standard across the international instruments is that the right to public interest information belongs to everyone.[105] Across *all* treaty monitoring bodies, there is a qualified right to public interest information for social watchdogs and (other) individuals who request public interest information with the purpose of contributing to the public debate.

1.5. Procedure

Each instrument prescribes that public authorities have to have procedures in place for individuals to request access to information, but confers discretion on the parties to the conventions in arranging it. The requirements for a procedure to request information seem to be rather similar across the various treaty regimes: they have to be low-cost, simple, and fast.[106] Authorities are granted wide discretion as to how to fulfil these requirements. Accordingly, treaty monitoring bodies apply a lower level of scrutiny when assessing the compliance of authorities.[107]

Committee of Ministers, *R (2002)2 on Access to Official Documents*, (February 21, 2002), §III (emphasis added).

104 Article 2(1) stipulates that everyone has the right to access official documents, and article (4) stipulates that no reasons need to be provided for requesting access to official documents, Council of Europe Convention on Access to Official Documents, CETS No. 205 (not yet entered into force); see further the explanatory report to the COE Convention on access to official documents, §17-19.

105 See also Article 19, The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, (October 1, 1995), available at: http://www.refworld.org/docid/4653fa1f2.html; Article 19, The Public's Right to Know: Principles on Freedom of Information Legislation (June 1999) available at: https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf. These principles were endorsed and referred to by various Special Rapporteurs on Freedom of Expression: Organization of American States, Inter-American Commission On Human Rights, 1999 Report of the Rapporteur For Freedom of Expression, OEA/Ser.L/V/II.106, Doc. 3 rev. (April 13, 2000); Lima Principles (principle 1) UN Doc E/CN.4/2001/63, Annex II; Lagos Declaration on the Right of Access to Information, organized by Media Rights Agenda, Open Society Justice Initiative (30 NGO from 16 African countries), available at http://tinyurl.com/osl823m , §1.

106 HRCee, *GC 34,* §19 "easy, prompt effective and practical access"; article 4(1)(b) Aarhus Convention; 2006 Joint Declaration by the UN Special Rapporteur on Freedom of opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression; Report of the OAS Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights 2009, OEA Doc Ser.L/V/II Doc 51, Chapter IV, The Right of Access to Information, §26-28; article 5 COE Convention on Access to Official Documents (2009); Inter-American Juridical Committee, Principles on the Right to Access to Information, principle 5; COE, Committee of Ministers, Recommendation R (81) 19, Appendix 1, principle VI; COE Committee of Ministers, *Recommendation (2002) 2,* principle VIII.

107 The interrelation between the degree of enjoyed discretion and the level of exercised scrutiny is a general theme within this research. In the context of the right to information, see particularly paragraphs 1.6 and 2.6. For a broader discussion of discretionary norms and the level of exercised scrutiny exercised and its implication for the Inclusionary Governance Model chapter 6, section 2.

Only some treaties further define the procedures. For instance, the Aarhus Convention stipulates that, in principle, information has to be provided in the format sought,[108] information has to be made available as soon as possible, latest within one month after submitting the request.[109] Further, authorities may only charge a reasonable fee for supplying information.[110]

1.6. Limitations

This section will describe two ways in which the right to public interest information may be constrained: authorities may explicitly limit the right or they may impose conditions on the exercise of the right, which in practice may result in a limitation of the exercise of the right. Each instrument stipulates what limitations to the right of public interest information are permitted. As argued in section 1.4, there is a presumption of disclosure when public interest information is requested. As a result, limitations are to be interpreted restrictively,[111] and there is an exhaustive list of limitation grounds. As a minimum, a limitation may not render a right illusory.[112] Despite small differences in phrasing, each of the instrument requires that a tripartite test has to be fulfilled to limit the right to public interest information in accordance with the respective instrument.[113] Generally speaking, the tripartite test comprises tests of legality, legitimacy, and necessity.[114] Even though the tripartite test originated in human rights law, similar language may be found in the context of the Aarhus Convention.[115]

Firstly, the restriction has to comply with the criterion of legality. Legality has been interpreted relatively similarly across the various treaty regimes:[116] it requires more than merely a legal basis for the limitation in domestic law; instead, the instruments set quality criteria for such

108 Article 4(1)(b) Aarhus Convention; ACCC, *ACCC/C/2008/24 (Spain),* ECE/MP.PP/C.1/2009/8/Add. 1, (September 30, 2010), §70.

109 Article 4(2) Aarhus Convention: an extension up to two months is permitted when the volume and the complexity of the information justifies such an extension.

110 Article 4(8) Aarhus Convention, see for a further explanation of what constitutes a reasonable amount, for example, ACCC, *ACCC/C/2008/24 (Spain)*, §77-79; see similarly *General Comment 34* (§19) of the HRCee in which the Committee stated that "[f]ees for requests for information should not be such as to constitute an unreasonable impediment to access to information".

111 See e.g., article 4(4) Aarhus Convention; ACCC, *ACCC/C/2007/21* (*European Community)*, ECE/MP.PP/C.1/2009/2/Add.1 (December 11, 2009), §30; HRCee, *GC 34*, §19; IACtHR, *Claude Reyes v. Chile*, §85-87.

112 See, e.g., HRCee, *GC 34,* §21. The African Commission for Human Rights, *Media Rights Agenda and others v. Nigeria* (2000) AHRLR 200 (October 1998), §70.

113 See, e.g., HRCee, *GC 34,* §22; See HRCee, *Velichkin v. Belarus* communication No. 1022/2001 (October 20, 2005); ECtHR, *Kenedi v. Hungary,* §43.

114 Article 10 (2) ECHR; article 13 (2) IACHR; article 19(3) ICCPR; article 9 ACHR, African Commission, Resolution on the Adoption of Declaration of Principles on Freedom of Expression in Africa, ACHPR/Res. 62 (XXXII) (October 2002), principle II.

115 Article 4(4) Aarhus Convention.

116 ECtHR, Delfi AS v. Estonia [GC], no. 64569/09, ECHR 2015; article 4(3)(c) Aarhus Convention; IACtHR, *The Word "Laws" in Article 30 of the American Convention on Human Rights. Advisory Opinion, OC-6/86* (May 9, 1986) Series A No. 6, §26-29; HRCee *GC 34*, §25.

laws.[117] These criteria intend, inter alia, to prevent arbitrary withholding of information.[118] For instance:

- Legislation has to clearly define the conditions under which information may be withheld and define the (administrative) discretion of authorities.
- At a minimum, legislation stipulating the limitation has to be compatible with the obligations of states under the convention in question.[119]

Secondly, any restriction needs to be legitimate, which implies that the (partial) withholding of the information by authorities has to pursue one of the legitimate aims recognized by the respective treaty. When comparing the recognized legitimate aims, the majority of the provisions includes the following grounds: protection of the rights or reputation of others, national security or public order, and public health or morals.[120] The ECHR and the Aarhus Convention list further grounds for limiting access to the information.[121]

Thirdly, the restriction has to be necessary (in a democratic society). This criterion contains two elements: necessity and proportionality.[122] Even though different terminology is used across the various treaty regimes, the meaning of the requirement of necessity is fairly similar. For instance, the ECtHR requires a pressing social need,[123] the Inter-American Court

117 Regarding the position of the ECtHR, see, for example, *Sunday Times v. UK* (1979-1980) 2 EHRR 245, §49 and ECtHR *Hasan v. Bulgaria* (2000) 24 EHRR 55.

118 See, e.g., ACCC, *ACCC/C/2010/51 (Romania),* ECE/MP.PP/C.1/2014/12, (July 14, 2014), §89-90; in *Kenedi v. Hungary*, the ECtHR came to the conclusion that the government's refusal to comply with a domestic court decision that ordered the disclosure of information resulted into defiance of domestic law and arbitrary exercise of power (§ 44-45).

119 For example, in regards to the African Charter, see the African Commission on Human Rights and Peoples Rights, *Interight and others v. Mauritania* (2004) AHRLR 87 (ACHPR 2004), §77. HRCee, *GC 34*, §26 and HRCee, *Toonen v. Australia communication No. 488/1992* (March 30, 1994).

120 The ICCPR, the ECHR and the IACHR mention these as legitimate aims. Aarhus speaks of national defence or public security. The African Charter phrases it slightly differently in article 27(2) "the rights of others, collective security, morality and common interest."

121 ECHR 10(2) further includes territorial integrity, prevention of the disclosure of information received in confidentiality, and maintaining the authority and impartiality of the judiciary. The Aarhus Convention has quite a wide list of limitations, article 4(4) provides the following: the confidentiality of the proceedings of public authorities, international relation, the course of justice, the confidentiality of commercial and industrial information, intellectual property rights, the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, the interests of a third party which has supplied the information, and the environment to which the information relates, such as breeding sites of rare species.

122 Not all treaty regimes distinguish clearly between the requirement of the necessity of the imposed restriction and the question whether the chosen restriction is proportional to achieve the legitimate aim; however, this research identified a similarity in the type of reasoning across the instruments, which is set out in this section; in *R*afael Rodríguez Castañeda v. Mexico ((2013), §7.7), for example, the HRCee assessed the refusal of authorities to disclose the physical ballot papers used in a popular election and concluded that there was no violation in this case by listing various factors, including those hinting at the proportionality and necessity of the restriction.

123 See, e.g., ECtHR, *Delfi AS v. Estonia [GC]*, no. 64569/09, ECHR 2015 §131. The ECtHR's approach to the principle of proportionality is closely connected to their margin-of-appreciation doctrine. This approach

of Human Rights a compelling public interest,[124] and the African Commission on Human and Peoples' Rights a legitimate state interest[125] to justify a refusal to disclose the information. In the case law, it often ends in a balancing act of competing interests: the public interest in disclosing information is balanced against the state interest (that is, the legitimate aim) protected by the restriction.[126] The parameters for such a balancing act are decided through a case-by-case analysis. Overall, authorities have a certain discretion in determining what constitutes a proper balancing of the interests. Accordingly, treaty monitoring bodies engage in a form of deferential review when they assess the limitations adopted by authorities. Such deferential review is based on the presumption that administrative authorities are best suited to decide on the basis of the available facts. The discretion enjoyed by authorities and the exercised level of deferential review (or extent of scrutiny) are related to each other. For instance, the legal survey charts that whenever the right to public interest information was limited for national security reasons, treaty bodies were more explicit in defining the extent of administrative discretion that authorities enjoy, and the level of scrutiny that treaty monitoring bodies exercised was higher than when limitations were reviewed on other grounds.[127] As stated by various treaty monitoring bodies, it is even more pertinent to clearly define the authorities' discretionary power to prevent arbitrary use thereof when information is withheld for national security reasons.[128] The OAS, for instance, limits the discretionary powers of authorities by imposing a higher necessity standard: the right to access public interest information may only be limited in situations of "real and imminent danger that threatens national security in democratic society".[129]

The proportionality principle refers to the need to choose the least restrictive means to achieve the legitimate aim whenever the right is limited. It should be noted that not one

has been criticised for being neither coherent nor transparent. See, e.g., M. Ambrus, 'Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law' (2009) 2(3) *Erasmus Law Review* 353-371. Benvenisti criticized the usage of the approach particularly when dealing with minority rights, E. Benvenisti 'Margin of Appreciation, Consensus and Universal Standards (1999) 31 *International law and politics* 843.

124 See, e.g., IACtHR, *Claude Reyes v. Chile,* §91.

125 The African Commission for Human Rights, *Media Rights Agenda and others v. Nigeria* (2000) §69; the African Commission on Human Rights and Peoples, *Interight and others v. Mauritania* (2004), §78.

126 See, e.g., IACtHR, *Claude Reyes v. Chile,* 88-90; HRCee, *Rafael Rodriquez Castañeda v. Mexico* §7.5-7.7.

127 *Claude Reyes v. Chile*, §58; see also IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III (The Right to Access to Public Information in the Americas). OEA/Ser.L/V/II. Doc. 69 (December 30, 2011), §343. 2004 Joint Declaration by the UN Special Rapporteur on Freedom of opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression.

128 *Claude Reyes v. Chile,* §98; Inter-American Juridical Committee, Principles on the right to access to information, principle 4; 2004 Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression.

129 Inter-American Juridical Committee, Principles on the Right to Access to Information, principle 4; *Claude Reyes v. Chile,* §98.

uniform methodology has been used across the international instruments to assess the proportionality of a given interference.[130] The need to choose the least restrictive means implies that whenever authorities decide to refuse a full or a partial disclosure, authorities have to justify why.[131] When partial disclosure of the information may just as well achieve the legitimate aim by editing some information, authorities are expected to choose this less restrictive means.[132] Further, several treaty monitoring bodies stipulate that authorities may only classify information for a particular period. Authorities are expected to set a reasonable timeframe after which the information will become available to the public.[133]

In addition, the instruments stipulate that whenever the right to public interest information is limited by authorities, certain conditions have to be met. Whether it concerns a refusal to partially or fully disclose of information, any refusal to disclose information needs to be provided in a written response in which authorities set out the reasons underlying the refusal.[134] Furthermore, whenever the information is refused or partly refused, applicants have to have an opportunity to appeal the decision and be informed about this option.[135]

1.7. Conclusions: The Building Block of a Right to Public Interest Information

The Conceptual Model includes a right to access information for those affected by decisions of international institutions. This section examined whether, and to what extent, the international law applicable at a domestic level recognizes a right to public interest information and what the scope is of this right.

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130 See in general on the proportionality principle, for example, J. Rivers 'Proportionality and Variable Intensity of Review (2006) 65 *Cambridge Law Journal* 174 at 195-206.

131 Another option may be the use of a document's anonymized version to protect national security or to uphold the confidentiality of certain personal data. See, e.g., ECtHR, *OVESSG v. Austria*, 45-47.

132 Idem, §45-47; see also article 5(6) COE Convention on Access to Official Documents.

133 See, e.g., 2009 Report of the OAS Special Rapporteur for Freedom of Expression, §54.

134 For the duty to provide reasons, for example, see HRCee, *GC 34*, §19; COE, Committee of Ministers recommendation No. R. (81) 19, Appendix 1, principle VII; 2009 Report of the OAS Special Rapporteur for Freedom of Expression, §26; Inter-American Juridical Committee, Principles on the Right to Access to Information, principle 5; an individual participation right (OECD Recommendation of the Council concerning Guidelines Governing the Protection of Privacy and Trans-Border Flows of Personal Data (2013) C(80)58/FINAL, as amended on July 11, 2013 by C (2013)79, Annex paragraph 13(b)(c). IACtHR, Claude Reyes v. Chile, §55; the Court further reasoned (§120) that if public authorities fail to provide access to information without explaining the rules or reasons on which it based its decision, it will lead to a violation of due process rights; see also the explanatory report to COE Convention on Access to Official Documents, §53.

135 The possibility of appeal and its procedural requirements will be discussed in detail in chapter 5. For the right to appeal a (partial) refusal to provide information, see, for example, Council of Europe, Committee of Ministers recommendation No. R. (81) 19, Appendix 1, principle VIII; Inter-American Juridical Committee, Principles on the right to access to information, principle 8; 2004 Joint Declaration by the UN Special Rapporteur on Freedom of opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression; 2009 Report of the OAS Special Rapporteur for Freedom of Expression, §26. Also, article 4(7) Aarhus Convention addresses the obligation to inform parties of the possibility of appeal.

The legal survey charted that the right to public interest information has a relatively firm legal basis in international law. Although there is strong support for a right to public interest information at a regional level, at UN level, only the ICCPR recognizes a right to public interest information.[136] This section discussed the benchmarks of the right to public interest information, summarized in the schematic overview below. Although not all instruments recognize a right to public interest information, those that have recognized it, hold a rather uniform interpretation of its content and scope.

RIGHT TO PUBLIC INTEREST INFORMATION	
Legal basis	Broad support in ICCPR, Aarhus, ECHR, AfCPHR, IACHR No basis in CMW, CEDAW, CRC, CRPD, CED
Who is the duty bearer	Public authorities: all branches of state government, all actors who exercise public (administrative) authority
Which information	Information of public interest Relevant factors: subject of the information and who holds the information / to whom it relates
Holder of the right	General standard: general public, no interest needs to be stated Deviating standard: only social watchdogs and similar parties
Scope of obligations	Presumption of disclosure of the information
Procedure	Fair, timely and low-cost
Limitations	Exhaustive list of limitations Three-part test: legality, legitimacy, and necessity Legitimate aims are protection of the rights or reputation of others, national security, public order, or public health or morals When limiting: avoid arbitrariness and appropriately balance interests

Table 3: Building block - right to public interest information

2. Right to Personal Information

The Conceptual Model includes a duty to provide access to information and a duty to protect the confidentiality of information in the possession of international institutions without further specifying the contours of these duties. Through the legal survey, this section will examine whether, and to what extent, international law recognizes a right to personal information. Said right[137] refers in its most basic form to a right to access information held by public authorities and that relates to an individual. This section will explore the legal basis of the right (2.1), who is entitled to what information (2.2-2.3), the scope of the right and the

136 Note that the ICCPR has a near-universal ratification record, 172 countries are party to the convention. See further, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND.

137 Although human rights literature uses different terms (personal data, habeas data, personal information), this research will use the term *personal information* throughout the research.

procedure that is to be followed to obtain such information (2.4-2.5), and the limitations to the right (2.6). The section will conclude with a schematic overview of the building block of the right to personal information (2.7).

2.1. The Right's Legal Bases

The right to personal information finds its basis primarily in human rights law. This research distinguishes between an explicit right to personal information and an implicit right. The former refers to legal provisions that explicitly recognize a right to personal information (2.1.1), the latter refers to the recognition of such a right through the treaty monitoring bodies' authoritative interpretation (2.1.2). This section will discuss the different ways in which the right has crystallized in international law.

2.1.1. Explicit Legal Bases

As this section will demonstrate, the right to personal information is rather similar across the various instruments. The 1981 COE Data Protection Convention[138] is dedicated solely to the protection of the right to personal information. Before going into the content of this Convention, two preliminary remarks are necessary regarding its normative relevance. Firstly, the Convention only applies to the automatic processing of personal information and thereby does not deal with all cases of personal information held by authorities.[139] Secondly, 45 of the 46 member states that ratified the COE Data Protection Convention are member states of the Council of Europe, which demonstrates a strong European focus.[140] As to the substance, the Convention stipulates a right to access personal information. Article 8 provides four related guarantees: individuals have to (1) be enabled to know about the existence of an automated data file, (2) know the content of the information kept, (3) get a rectification of erroneous or inappropriate information, and (4) have access to a remedy if any of the previous elements is not respected.[141] The Convention is not self-executing; individuals cannot directly derive rights from it. Instead, state parties are required to implement the obligations in their domestic legislation.[142] However, the Convention is relevant for the scope and content of the recognized procedural safeguards.

138 COE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETC no. 108, (Strasbourg, January 28, 1981, entry into force on October 1, 1985).

139 The following sections will further explain the extent to which the convention is considered to be of normative relevance.

140 At the moment of writing, the Convention has 46 state parties: all the Council of Europe members with the exception of San Marino and Turkey, and non-COE member Uruguay. The Convention is open to parties outside the Council of Europe region upon approval of the Committee of Ministers, article 23 of the COE Data Protection Convention.

141 Article 8 (a-d) COE Data protection Convention; explanatory report to the COE Data Protection Convention, §50-54.

142 Article 4 COE Data Protection Convention; explanatory report to the COE Data Protection Convention, §38.

Various non-binding yet authoritative guidelines recognize a right to personal information as well. For instance, the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data[143] acknowledges the right to access, see and verify personal information[144] and stipulate procedural safeguards against the risk of "loss or unauthorized access, destruction, use, modification or disclosure of [personal] data."[145] Similar considerations are included in the guidelines of the Asia-Pacific Economic Cooperation's (APEC) privacy framework[146] and the UN Guidelines for the Regulation of Computerized Personal Data Files.[147] Also, the Economic Community of West African States (ECOWAS)[148] recognizes a right to access, modify, rectify personal information and stipulates clear rules for the processing, collecting and disclosing personal information.[149]

Besides international instruments that address the need for data protection, the right to personal information also finds an explicit legal basis in the Convention for the Protection of All Persons from Enforced Disappearances (CED).[150] In article 18, the CED recognizes a right to access personal information for persons deprived of liberty and others related to them

143 Council of the OECD, OECD Council Recommendation: OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, (adopted and became applicable on September 23, 1980 (updated 2013), Principle 11.

144 Idem, Principle 13 (individual participation principle).

145 The OECD Recommendations are qualified as OECD Acts together with the OECD Decisions (article 5 OECD), they are however not binding on the members, article 8 OECD. Nevertheless, they are normatively relevant as the Recommendations are considered to be a "great moral force as representing the political will of Member countries." https://www.oecd.org/legal/legal-instruments.htm. Currently, 35 states are member of the OECD, see further http://www.oecd.org/about/membersandpartners/.

146 The Asia-Pacific Economic Cooperation (APEC) is a regional economic forum, which has as its aim to "create greater prosperity for the people of the region by promoting balanced, inclusive, sustainable, innovative and secure growth and by accelerating regional economic integration." Established in 1989, APEC currently has 21 members, see further https://www.apec.org/About-Us/About-APEC/Member-Economies.aspx. APEC has adopted a privacy framework that has as its starting point "recognizing the importance of the development of effective privacy protections that avoid barriers to information flows, ensure continued trade, and economic growth in the APEC region." For the purpose of this research, see in particular principles 15-26. Normative overlap exists between principle 13 of the OECD, article 8 of the COE Convention and principle 23 of the APEC. The APEC privacy framework (2004) can be accessed via http://www.apec.org/Groups/Committee-on-Trade-and-Investment/~/media/Files/Groups/ECSG/05_ecsg_privacyframewk.ashx.

147 See similarly the UN Guidelines for the Regulation of Computerized Personal Data Files of the UN Commission on Human Rights, adopted by UN GA, UN Doc, E/CN.4/1990/72, (February 20 1990), UN Doc A/Res/45/94 (December 14, 1990), principle 4.

148 ECOWAS is a regional organization comprising – currently – 15 West-African states and aimed at economic integration within this region. See for more details Economic Community of West African States (ECOWAS), Revised Treaty of the Economic Community of West African States (ECOWAS), (July 24, 1993). See further, http://www.ecowas.int.

149 Articles 23-28 for the obligations of authorities, articles 38-41 for the rights of the individuals, ECOWAS, Supplementary Act A/SA.1/01/10 on Personal Data Protection within ECOWAS (February 16, 2010). The supplementary acts are binding upon all member States to the ECOWAS.

150 United Nations, *Treaty Series*, vol. 2716, at 3, (New York, December 20, 2006, entry into force on December 23, 2010), the CED has 53 parties and 96 signatories. See for a current list of ratifications, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&Chapter=4&clang=_en.

(such as their relatives, representatives or counsel).[151] Despite this provision's limited scope of applicability, it is nevertheless evidence of the substantive terminology more generally adopted across the relevant instruments, as will be illustrated in the following section.

To conclude, there are a few explicit legal bases for the right to personal information. The CED recognizes a right to personal information, however it is applicable in a very limited set of situations which are less relevant for this research. Instruments that grant a right to personal information of a general nature have a rather more regional scope of applicability. Nevertheless, the language used is rather similar across the instruments. The next section will explain how the right to personal information has further developed through the work of treaty monitoring bodies.

2.1.2. Authoritative Interpretation

Although most instruments do not contain an explicit provision stipulating a right to personal information, several treaty monitoring bodies have read such a right into the right to privacy and/or the right of freedom of expression. As this section will show, the right to personal information has been shaped differently, depending on the instrument and the treaty monitoring body.

The Human Rights Committee is the only UN treaty monitoring body that has explicitly recognized a right to personal information. In *General Comment 16* (article 17 ICCPR) the HRCee states that:

> …every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.[152]

In *General Comment 34* (regarding Article 19), the HRCee reaffirmed the importance of the protection of personal information, whether in automated data files or other files.[153] The right to personal information is also recognized in the Committee's case law, albeit only in a

151 Article 18 CED. The holders of the right as laid down in article 18 have to have access to the information on the authority that ordered the deprivation of liberty; the date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty; elements relating to the state of health of the person deprived of liberty; in the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.

152 HRCee, *GC 16 (Article 17 ICCPR),* §10.

153 HRCee, *GC 34 (Article 19),* §18.

few cases. The HRCee identified a right to personal information in the context of the right to privacy (article 17 ICCPR)[154] and in context of article 10 ICCPR (humane treatment of persons deprived of their liberty).[155] Several UN organs have adopted a similar approach; they recognize a right to access personal information for all those who offer proof of identity.[156]

Treaty monitoring bodies of the other UN human rights conventions do not currently recognize a right for individuals to access personal information held by authorities.[157] Nevertheless, as will be shown in section 2.4 in particular, several of these treaty monitoring bodies do emphasize the role of authorities in the prevention of personal information misuse as a result of unauthorized access to the information.[158]

At a regional level, the right to personal information has been mainly recognized in the European and Inter-American region. The European Court of Human Rights acknowledges said right in the context of article 8 ECHR (the right to private and family life) and developed extensive case law on the scope and content of this right to personal information.[159] The Court has established that the right to personal information, under the protection of article

154 HRCee, *Van Hulst v. The Netherlands* (903/2000), (November 1, 2004) 29, §7.9: the HRCee decided that the separate storage of the recordings of the author's taped conversations with someone else in the context of a criminal investigation was reasonable, proportionate and necessary to achieve the legitimate purpose of combating crime. Thus, in this case, there was no violation of article 17 ICCPR.

155 The Committee held that the right of the detainee was violated as, amongst other things, he did not receive access to his medical records while in prison. HRCee, *Zheludkova (on behalf of Zheludkov) v. Ukraine,* Communication No. 726/1996, (December 6, 2002), §8.4 and 9; three members of the Committee attached an individual opinion to the case in which they disagreed with the majority of the Committee, which majority held that the denial of access to the medical records constituted a violation of article 10 ICCPR. The three dissenting members argued that the article should not be stretched that far; HRCee, *Zheludkova (on behalf of Zheludkov) v. Ukraine,* at 10-11, 13-14.

156 UN Commission on Human Rights, Guidelines for the Regulation of Computerized Personal Data Files, (1990), principle 4; UN General Assembly, *Resolution 69/166 the right to privacy in the digital age* (February 10, 2015) UN Doc. A/Res/69/166; UN Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (Frank de la Rue), UN Doc. A/HRC/17/27 (May 16, 2011), §58; see also the various joint declarations of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information: for example, the 2004 declaration on access to information, the 2006 Declaration on Openness of National and International Public Bodies, 2015 Declaration on Freedom of Expression and Responses to Conflict Situations, and the 2016 Declaration on Freedom of Expression and Countering Violent Extremism. All available via http://www.osce.org/fom/66176.

157 The right to privacy is recognized though in article 14 CEDAW, article 16 CRC, and article 22 CRPD. Currently however, no case law or other documents exists that interpret the content and scope of the right to privacy.

158 It focuses particularly on the right to have one's personal data, for instance health information, treated with confidentiality. See, e.g., CESCR *GC 14* §12(B)(iv). The issue of confidentiality will be further discussed in section 2.3.

159 It should be noted that, at a European level, the COE Data Protection Convention contains an explicit legal basis for a right to personal information, as addressed in section 2.1.1.

8 ECHR, encompasses, inter alia, the storage and collection of personal information,[160] the disclosure of personal information to authorities or third parties,[161] the erasure or destruction of personal information,[162] and the right to access personal information[163].

In the Inter-American region, the right to personal information has mainly developed through the recognition of the right in non-binding documents of various organs of the OAS.[164] So far, neither the IACtHR nor the Inter-American Commission on Human Rights has addressed the issue of personal information in the cases submitted to them. The Inter-American Commission on Human Rights, however, has extensively dealt with this issue in light of their "promotion and monitoring" task.[165] At various occasions, the Commission affirmed the right of individuals to access personal information and to request a rectification or removal of erroneous information.[166] Moreover, the OAS Special Rapporteur on Freedom of Expression has adopted numerous declarations recognizing the right to personal information.[167]

160 Regarding the storing by the secret service, see, for example, ECtHR, *Leander v. Sweden*, Merits, App. No. 9248/81, A/116, (1987); regarding health data, see, for example, ECtHR, *L.H. v. Slovakia* App. No. 32881/04 (2009).

161 See, e.g., *M.S. v. Sweden* (August 27, 1997). The case concerned a Swedish national, M.S., who requested access to her file held by the Social Insurance Office after she had applied for social security benefits, which application had subsequently been denied. She found out that the file contained her personal medical records to which release she had not consented. The medical records in question contained highly personal and sensitive data about the applicant, including information relating to an abortion. M.S. complained that the disclosure of her personal medical information to another public authority constituted a violation of article 8 ECHR. The Court concluded that the interference was in accordance with the law and the measure was not disproportionate to the legitimate aim pursued. § 35-44; ECtHR, *Z v. Finland (Application no. 22009/93*) judgment, (February 25, 1997), §95.

162 ECtHR [GC], *Rotaru v. Romania*, Preliminary objection, merits, just satisfaction, App. No. 28341/95, (May 4, 2000) §46.

163 ECtHR [GC], *Amann v. Switzerland*, Merits, App. No. 27798/95, (February 16, 2000); ECtHR [GC], *Odièvre v. France*, judgment on merits, App. No. 42326/98, (February 13, 2003); ECtHR, *Gaskin v. United Kingdom*, merits and just satisfaction, App. No. 10454/83, (July 7, 1989).

164 Inter-American Commission on Human Rights, Declaration of Principles on Freedom of Expression; Principle 9 and 10 of the Preliminary Principles and Recommendations on Data Protection (The Protection of Personal Data) (Committee on Juridical and Political Affairs, OEA/Ser.G, CP/CAJP-2921/10 Rev. 1 Corr. 1, October 17, 2011); Inter-American Commission Report on Terrorism and Human Rights, OAS Doc OEA/Ser.L/V/II.116 Doc 5, Rev. 1 (October 22, 2002) §289; IA Comm. Report of the Situation of Human Rights Defenders in the Americas, OAS Doc OEA/Ser.L/V/II.124, Doc. 5, rev. 1, (March 7, 2006), §77; Report of OAS Special Rapporteur for Freedom of Expression (2001), §12, 36, 38; 1999 Annual Report of the OAS Special Rapporteur for Freedom of Expression (2000); 2000 Annual report of Inter-American Commission on Human Rights, Report of the OAS Special Rapporteur for Freedom of Expression (2001), §13-14.

165 See, e.g., Inter-American Commission on Human Rights, Declaration of Principles on Freedom of Expression, principle 3.

166 See, e.g., principle 9 and 10 of the Preliminary Principles and Recommendations on Data Protection (Committee on Juridical and Political Affairs, 2011), principle 10 reads: "The individual has the right to request that the data controller correct or delete personal data retained by the controller that may be incomplete, inaccurate, unnecessary, or excessive."

167 Report of OAS Special Rapporteur for Freedom of Expression (2001), §12, 36, 38; 1999 Annual Report

The African Charter does not contain a right to privacy. So far, not the African Commission nor the African Court have addressed a right to personal information in the context of freedom of expression. However, the Principles on Freedom of Expression in Africa do acknowledge the right to access, update, and correct personal information.[168]

In conclusion, the right to personal information has a firm basis in international law. The following sections will discuss the content and scope of this right and the extent to which general normative patterns can be identified across the various treaty regimes.

2.2. Personal Information Defined

All the instruments define personal information rather similarly, and all uphold a broad definition that includes "any information relating to an identified or identifiable individual ('data subject')."[169] Some instruments elaborate what constitutes an identifiable individual, but overall, authorities are accorded discretion to set criteria.[170] So far, only the HRCee and the ECtHR have relevant case law that helps in identifying what information is included. For instance, the HRCee considered medical records[171] and taped conversations of a person in the context of criminal proceedings[172] to be regarded as personal information. The ECtHR held in *Magyar Helsinki Bizottság v. Hungary* that even though there is no

of the OAS Special Rapporteur for Freedom of Expression (2000); 2000 Annual report of IA Comm. HR, Report of the OAS Special Rapporteur for Freedom of Expression (2001), §13-14; see also the joint declarations by the Special Rapporteurs to the UN, COE and African Union, above n. 154.

168 African Commission Resolution on the Adopting of the Declaration of Principles on Freedom of Expression in Africa ACHPR/Res.62 (XXXII) (October 2002), principle IV. (3). It should be noted though that ECOWAS explicitly recognizes a right to personal information, as discussed in 2.1.1.

169 Article 2(a) of the COE Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data; the ECtHR with reference to Article 2 COE Convention used the same definition in *Amann v. Switzerland* [GC], §65; see similarly OECD Recommendation of the Council concerning Guidelines Governing the Protection of Privacy and Trans-border Flows of Personal Data (2013) Annex paragraph 1 (b); the UN Comm. HR Guidelines for the Regulation of Computerized Personal Data Files of the UN Commission on Human Rights, principle 4; Inter-American Commission on Human Rights, Declaration of Principles on Freedom of Expression, principle 3; African Commission Resolution on the Adopting of the Declaration of Principles on Freedom of Expression in Africa, ACHPR/Res.62 (XXXII) (October 2002), principle IV. On the definition of personal data, see also, for example, HRCee, *General Comment 16* (April 8, 1988) §10; HRCee, *Van Hulst v. The Netherlands*, §7.6; see also COE Committee of Ministers, *Recommendation No. R (91) 10 on the Communication to Third Parties of Personal Data Held by Public Bodies* (September 9, 1991), appendix §1.3. See also the OAS Special Rapporteur reports that also include the right of information about one's property in the ambit of the right to personal information, 2000 Special Rapporteur report of the OAS, §12; 2001 OAS Special Rapporteur report, at 26; 2001 OAS Special Rapporteur Report on Paraguay, OAS Doc OEA/Ser.L/V/II.110, doc 53, §21. See also §28-29 of the Explanatory report to the COE Convention on Data Protection.

170 COE Committee of Ministers, *Recommendation No. R (91) 10*, appendix, paragraph 1.3; see also §28-29 of the Explanatory report to the COE Convention on Data Protection. OECD Guidelines, Explanatory Memorandum, §41. HRCee, *Zheludkova (on behalf of Zheludkov) v. Ukraine,* (2002), §8.4; HRCee, *Van Hulst v. The Netherlands*, §7.6; HRCee, *GC 16*, §10.

171 HRCee, *Zheludkova (on behalf of Zheludkov) v. Ukraine,* (2002), §8.4.

172 HRCee, *Van Hulst v. The Netherlands*, §7.6.

definition of what constitutes personal information under the right to privacy, the Court had in the past:

> identified examples of personal data relating to the most intimate and personal aspects of an individual… such categories of data constituted particular elements of private life falling within the scope of the protection of Article 8 of the Convention.[173]

The Court has concluded that, amongst other things, birth mother records,[174] foster care records,[175] social service records,[176] and (personal) intelligence agencies records[177] constitute personal information.

In other words, each of the instruments upholds a broad definition of what constitutes personal information, which includes any information relating to an identifiable individual. As the next section will demonstrate, this broad definition affects who is the holder of the right.

2.3. The Scope of the Right

The obligations stemming from the right to personal information can be divided into three broad categories.

Collection/storage of personal information by public authorities:

i. right to challenge legality of storage/collection of the personal information

Once the personal information is in an authority's possession:

ii. individuals have a right to access this personal information, challenge its accuracy and request its removal
iii. authorities have a duty to prevent unauthorized access to or disclosure of the information

Each set of obligations is discussed separately. However, as this and the next section will demonstrate, the scope of any obligations and the permissibility of any limitations to the right of personal information are closely related. Furthermore, although the scope of personal information is broad, this section will demonstrate that the obligations concerned may vary to a certain extent depending on the type of personal information.

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173 ECtHR [GC], *Magyar Helsinki Bizottság v. Hungary,* §192.
174 ECtHR [GC], *Odièvre v. France*, (2003).
175 ECtHR, *Gaskin v. United Kingdom*, Merits and Just Satisfaction, App No 10454/83, (July 7, 1989).
176 ECtHR, *M.G v. United Kingdom*, judgment, application no. 39393/98 (September 24, 2002).
177 ECtHR, *Leander v. Sweden*, Merits; ECtHR, *Segerstedt-Wiberg and ors v. Sweden*, (2006); ECtHR [GC], *Rotaru v. Romania*, (2000); ECtHR, *Turek and Helsinki Foundation for Human Rights (intervening) v. Slovakia*, (2006); ECtHR [GC], *Amann v. Switzerland* (2000).

The *right to challenge the legality of the storing of personal information by authorities*[178] refers to an authority's obligation to only store personal information in accordance with the law. In other words, there is a presumption that the storing of personal information interferes with an individual's private life and that authorities are only allowed to do so when it is justified according to the respective treaty instrument.[179] Authorities are accorded wide discretion in determining the conditions for its storage as long as it meets the tests of legality, necessity and legitimacy.[180] At a minimum, an individual whose personal information has been stored has to have the possibility to challenge the legality of the storage by public authorities. Some instruments stipulate an extra criterion for the legality of storing information, namely that the purpose for collecting or storing personal information has to be specified. For instance, the OECD Guidelines on Data protection requires that the law which regulates the storage of the information has to stipulate for which purpose personal information may be stored and subsequently used.[181]

Most case law focuses on the right of individuals to *access* their personal information held by authorities, which concerns the second category of the above-mentioned obligations. The survey has established that the right of access to personal information may be subdivided into two broad categories: (1) cases that deal with access to information on one's birth, childhood or social service records; and (2) cases that deal with access to personal files created and/or held by national security agencies. With regard to both categories, authorities have an obligation to provide access to such personal information unless the right thereto is limited in accordance with provisions of the respective instrument.[182] The rationale of the access right is that the mere existence of personal information in public (and also classified) records triggers the right to access these files.[183] Regarding the first category of the above-mentioned two categories, the request to access is often aimed at learning more about one's early development.[184] For instance, adopted children may request access to adoption files or

178 See, for example, HRCee, *Van Hulst v. The Netherlands* (November 1, 2004, § 7.9), in which the HRCee recalled that the right to challenge the correctness of the data stored is a separate issue from the question as to the legality of the storage of any data.

179 The discussion of what limitations are allowed under what circumstances will be discussed in more detail in section 2.6. It should be noted that quite recently the Court of Justice of the European Union also acknowledged a right to be forgotten in relation to information that was stored by Google in their search engine. This is the latest development in the right to personal data. CJEU, Case C-131/12 *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González* (2014).

180 See below in section 2.6, in which this tripartite test will be discussed further.

181 OECD Guidelines on Data Protection, principle 9. See similarly article 5 (Quality of data) of the COE Data Protection Convention; principle 3 of the UN Comm. HR, Guidelines for the Regulation of Computerized Personal Data Files, adopted by UN GA, (1990), and article 19(1) CED.

182 The scope and type of limitations will be addressed further in section 2.6.

183 See, e.g., Inter-American Special Rapporteur, 2001 Annual Report of the Rapporteur on Freedom of Expression. (April 16, 2001), §38.

184 For instance, the importance of knowing one's origin is emphasized by the Committee on the Rights of the Child; for example, CRC, *GC 14* (2013) on the right of a child to have his or her best interests taken

birth certificates to find out the identity of their birth parents.[185] As to the second category, access to personal files created by intelligence agencies, an individual often requests access to see the nature of the information collected and verify its content.[186] As recognized across the instruments, individuals do not only have a right of access to the personal information but they also have a right to have their personal information modified, corrected or removed if inaccurate.[187] Accordingly, authorities are required to establish procedures that allow individuals to assert their rights. The existence of such a procedure is a key factor in determining whether an interference with the right to personal information was in accordance with the law.[188] It should be noted that the request to access this information is often hindered by an individual being unaware that the information is in the authorities' possession.

The third set of obligations relates to the *duty to protect personal information in the possession of authorities from unauthorized access* by third parties. The positive obligations are therefore more well-defined; as a result, authorities enjoy less discretion in this respect. Authorities have a duty to protect individuals against unauthorized access of their personal files by others.[189] In principle, personal information may only be used or disclosed with the data subject's consent unless the right is limited in conformity with a provision of the respective instrument.[190] Across all instruments the criterion for such legislation is that, at minimum, the law has to stipulate who may access the information and under which circumstances.[191] The other criteria for limiting the right are discussed in section 2.6. The obligation to take

as a primary consideration, (May 29, 2013), Section V(A)(1)(b).

185 See ECtHR, *Odievre v. France* and ECtHR, *Godelli v. Italy*. Similarly, other cases before the ECtHR dealt with a request to access foster care files to verify, for example, whether the individual requesting the information had suffered abuse when in foster care. See, for example, *Gaskin v.UK*, which concerned a partial refusal to disclose such information. The Court concluded that due to the lack of a mechanism to provide procedural safeguards (and thus test whether the refusal to disclose information was legitimate) to Mr. Gaskin, the UK had violated article 8 ECHR, §44-49. See similarly *M.G. v. UK*.

186 See, e.g., ECtHR, *Leander v. Sweden*; ECtHR [GC], Rotaru v. Romania, (violation of article 8 ECHR considering that the holding and use of the intelligence information was not in accordance with the law as no procedural safeguards had been instituted); ECtHR, *Turek v. Slovakia*, article 8 had been violated as there was no procedure via which the applicant could seek protection of his rights. ECtHR, *Segerstedt and others v. Sweden* (refusal to grant full access did not result in violation of Article 8).

187 In relation to the ECHR, see, e.g., ECtHR, *Turek v. Slovakia; COE Convention on Data Protection Article 8(c-d);* HRCee, *GC 16,* §10, see also HRCee, *Concluding Observations on Korea*, UN Doc A/55/40 vol. 1 §149 (2000); OECD Guidelines on Data Protection, principle 13(d); OAS Report on Human Rights Defenders, §89; Inter-American Commission on Human Rights, Declaration of Principles on Freedom of Expression, principle 3; African Commission Resolution on the Adopting of the Declaration of Principles on freedom of expression in Africa ACHPR/Res.62 (XXXII) (October 2002), principle IV(3).

188 This is the overlap with the first set of obligations, those related to the legality of information storage.

189 ECtHR, *L.L v. France,* app. No. 7508/02 (October 10, 2006); ECtHR, *I. v. Finland* app. No. 20511/03 (April 3, 2007); CESCR, *GC 14: article 12: The Right to the Highest Attainable Standard of Health*, E/2001/22 (2000) 128 at §23; HRCee, *GC 16*, §10.

190 See further section 2.6, in which the limitations to the right to personal information will be discussed.

191 See, e.g., the OECD Use Limitation Principle (principle 10).

measures to protect an individual's personal files is closely connected to the protection of the right to confidentiality, which is particularly noticeable in the context of health (care) data.[192]

2.4. Rightsholders

All instruments recognize a right to personal information for those individuals who can offer proof of identity, in other words, that they are the subject of the personal information in question.[193] In some treaty regimes, however, a wider definition is used for the holder of the right, stipulating a right of access for others than those to whom the information refers too.[194] In that case, the relation of such other person to the individual the information belongs to is determinative for deciding whether said person is also a holder of the right. For the right to personal information, the purpose for seeking access to the information is not considered relevant.[195] In other words, no interest needs to be stated.[196]

2.5. Procedure

The procedural requirements relate mainly to the procedure of requesting *access* to personal information, and they are similar to those stipulated for access to public interest information:[197] the procedures have to be low-cost, simple, and expeditious.[198] Authorities are accorded wide discretion in realizing these procedures.

Regarding the other procedures concerning personal information (that is, the procedure to challenge the legality of the storage and to request removal or modification of the information), the various instruments stress the obligations of authorities to ensure proper

192 For instance, the CESCR reasoned that "accessibility of information should not impair the right to have personal health data treated with confidentiality," CESCR, *General Comment 14: Article 12: The Right to the Highest Attainable Standard of Health*, E/2001/22 (2000) 128 at §12(b) (iv).

193 See, e.g., UN Comm. HR, Guidelines for the Regulation of Computerized Personal Data Files, adopted by UN GA, (1990), principle 4; see further in n. 154 above.

194 The ECtHR recognized that an individual may also have a right to information that is of direct concern to you but does not relate to you personally. For instance, in the case of *Tsourlakis v. Greece* (app. no. 50796/07, October 15, 2009), a father sought access to his son's medical and welfare file. The ECtHR agreed that the refusal to disclose the file to the father constituted a violation of article 8 ECHR. The Convention against Enforced Disappearances also embraces a wider category of persons who have a right to personal information; namely, not only the persons deprived of liberty have such a right but also others related to them including their relatives, their representatives or counsel, see Article 18 CED.

195 See, e.g., ECtHR, *Amann v. Switzerland*, §70, ECtHR, *Segerstedt-Wiberg and ors v. Sweden*, §71.

196 It should be noted that although the ECtHR does not impose a proof of interest requirement for the right to access personal information, in the context of the right to public interest information, it does however consider the purpose for which it is sought relevant.

197 See above, in section 1.6 of this chapter in which the three principles for limitations were further explained.

198 HRCee, *GC 34* at §19 "easy, prompt effective and practical access"; 2004 Joint Declaration by the UN Special Rapporteur, OSCE Representative and OAS Special Rapporteur on Freedom of Expression; 2009 Report of the OAS Special Rapporteur for Freedom of Expression, §26-28; Inter-American Juridical Committee, Principles on the right to access to information; article 5 COE Convention on Access to Official Documents. See also principle 20 of the APEC Privacy Framework.

handling of personal information and that authorities need to establish such procedures. These procedural requirements or procedural safeguards are further discussed below in the context of limitations to the right to personal information.

2.6. Limitations

Similar to what was discussed in the context of the right to public interest information (section 1.6), limitations are permitted to the right to personal information provided that the aforementioned tripartite test is fulfilled. In short, said tripartite test requires that a restriction, and thus each interference with the right in question, complies with the criteria of legality, legitimacy, and necessity. This section discusses the criteria for limiting the right to personal information and the extent to which they differ from those discussed in the context of the right to public interest information. The right to personal information may be interfered with by public authorities in the following ways:

- The information is stored or collected by public authorities, which at a minimum, implies a right to challenge the legality of the storage and/or collection of the information
- The personal information is held by public authorities, which at a minimum, implies a right to access this information as well as a right to challenge the accuracy of the information and/or to request its removal;
- Whenever personal information is held by public authorities, public authorities have a duty to protect this information from third-party access. A failure to do so or actively sharing it with third parties without the consent of the individual constitutes an interference which needs to be justified.

The limitations to the right to personal information are less explicit than those recognized for the right to public interest information. Only the ECHR, COE Data Protection Convention, the UN Guidelines and the OECD Guidelines explicitly address what limitations to the right to personal information are permissible. The IACHR stated no restrictions to the right to privacy (the substantive right into which a right to personal information is read), and neither the IACtHR nor the IACommHR has addressed the issue of limitations to the right to privacy in the cases submitted to them; the African Principles on Freedom of Expression similarly do not address any possible limitations. Article 17 of the ICCPR merely states that "no one shall be subjected to arbitrary or unlawful interference with their private life" and does not further qualify the limitations allowed. Accordingly, the following discussion of the tripartite test of legality, necessity and legitimacy, is based on the limited legal provisions and the relevant case law available.

The criterion of legality is interpreted rather similarly as to how it is interpreted in the context of the right to public interest information.[199] Legality requires that any limitations to the right

199 See above section 1.6.

personal information have to be in accordance with the law. This implies a certain quality of the law; in other words, some form of procedural guarantee that prevents an arbitrary exercise of powers.[200] Moreover, it requires authorities to provide for a review procedure: individuals whose personal information has been collected, stored and/or shared have to have a right to request access, modification and/or removal of their personal information. When access to the personal information is refused, those affected have a right to appeal this decision.[201]

The ECtHR is the only treaty monitoring body with extensive case law on the criterion of legality in the context of the right to personal information.[202] In general, the law needs to be compatible with the rule of law[203] and accessible to the individuals concerned.[204] The consequences of the law have to be foreseeable,[205] and thus, the law has to indicate the scope of and manner in which the discretion conferred on the competent authorities is to be exercised. In other words, the law has to regulate what individuals or authorities may under what circumstances access, collect, store, or disclose personal information.[206]

The second criterion is that the interference has to pursue a legitimate aim. The ECHR, COE, UN Guidelines and the OECD guidelines overlap in the recognized legitimate aims.[207] All of

200 The COE Data Protection Convention was modelled after article 8(2) ECHR (see §55 Explanatory Report to the COE Data Protection Convention) and has been referred to by the ECtHR as an important instrument when interpreting the ECHR. In regards to the IACtHR, see, for example. *Claude Reyes v. Chile,* §88-89. The OECD Guidelines, for example, allow only the collection of data obtained via legal and fair means, principle 7 OECD Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data; for instance, the HRCee has stipulated that article 17 ICCPR's concept of legality encompasses more than procedural arbitrariness and, instead, requires that the interference also has to be in conformity with the provisions of the Convention and that it has to be reasonable. HRCee, *GC 16*, §4. The position was later confirmed in HRCee, *Rojas Garcia v. Colombia*, communication no. 687/1996, §10.3; HRCee, *Canepa v. Canada*, 558/1993, §11.4.

201 ECtHR, *Gaskin v. UK* (1989), §49; ECtHR, *M.G v. United Kingdom* judgment, (September 24, 2002) application no. 39393/98, §30: "Procedure to appeal denials of information must be in place in order to be 'in accordance with the law' "; *COE Convention on Data protection Article 8(c-d);* HRCee, *GC 16,* §10, see also HRCee, *Concluding Observations on Korea*, UN Doc A/55/40 vol. 1 §149 (2000); OECD Guidelines on Data Protection, principle 13(d); OAS Report on Human Rights Defenders, §89; Inter-American Commission on Human Rights, Declaration of Principles on Freedom of Expression, principle 3; African Commission Resolution on the Adopting of the Declaration of Principles on Freedom of Expression in Africa ACHPR/Res.62 (XXXII) (October 2002), principle IV(3).

202 See, e.g., ECtHR, *Leander v. Sweden,* §50. See also ECtHR, Segerstedt-Wiberg and ors v. Sweden, §76; ECtHR, *Gaskin v. UK* (1989), §49; ECtHR, *M.G v. United Kingdom*, judgment, (September 24, 2002) application no. 39393/98, §30.

203 ECtHR, *Segerstedt-Wiberg and ors v. Sweden*.

204 ECtHR, *Leander v. Sweden*, §50; see similarly ECtHR, *Malone* (August 2, 1984), Series A, no. 82, §66.

205 Idem, §50-57, see also *Rotaru v. Romania*, §61.

206 ECtHR, *Segerstedt-Wiberg and ors v. Sweden*, §76.

207 It should be noted that the ECHR and UN Guidelines also list the protection of health or morals: article 8 ECHR and principle 6 UN Guidelines; the COE also lists the protection of the data subject as a legitimate aim, article 9 COE Convention on Data Protection. The COE Convention and the ECHR both also list the economic well-being of a country as a legitimate aim, OECD guidelines principle

those instruments recognize national security, public safety, the prevention of disorder or crime, and the protection of the rights and freedoms of others as legitimate aims.[208] Although instruments exist that do not contain any explicit limitations to the right, the relevant monitoring bodies, however, have nevertheless read implicit limitations into the right in those instances. The treaty monitoring bodies use similar language in their interpretations of the treaty obligations in the context of the right to personal information to that used in the context of the right to public interest information when defining the principles of legality and necessity.[209]

The criterion of necessity is interpreted similarly across the instruments. Including those without an explicit requirement of necessity,[210] the emphasis throughout is on the necessity of the interference in a given case. Similarly, the principle of necessity often results in a balancing act of competing interests just as it does in the context of the right to public interest information. Said balancing act consist of weighing an individual's interest in protecting their personal information and respecting their privacy against a state's interest (that is, the legitimate aim) protected by the restriction in question. In general, authorities do have quite some discretion to determine how to precisely balance the interests in the context of the principle of necessity.[211] At a minimum, however, the treaty monitoring bodies examine whether, and to what extent, procedural safeguards are in place to prevent an arbitrary exercise of public power. For instance, discretionary powers accorded to administrative authorities to decide on the collection, use, and disclosure of personal information has to be restricted. [212] At the very minimum, there has to be an appeals procedure in place via

4(1-2). The CESCR only stipulates positive obligations for authorities to respect the confidentiality of certain personal data and has not addressed as such the issue of limitations.

208 It should be noted that the OECD guidelines do not mention this last ground; however, they also do not provide an exhaustive list of limitations. Principle 4 of the OECD Guidelines states "exceptions to the Principles contained in Parts Two and Three of these Guidelines, including those relating to national sovereignty, national security and public policy ("ordre public"), should be a) as few as possible, and b) made known to the public; the CED uses a broader term and stipulates that the collection, processing, storage and use of personal information "shall not infringe or have the effect of infringing the human rights, fundamental freedoms or human dignity of an individual", article 19(2) CED.

209 See, e.g., IACtHR, *Claude Reyes v. Chile case,* §88-93.

210 The ECHR, the COE, the IACHR, and the CED stipulate a requirement of necessity: article 8(2) ECHR; article 9(2) COE Data Protection Convention; article 19(2) CED. In relation to the IACtHR approach, see the case *Claude Reyes v. Chile* §88-93. It should be noted though that the right to personal information is construed in the context of the right to freedom of expression. It thus coincides with the analysis of the right to public interest information, see above section 1.6. The OECD, UN guidelines and the ICCPR do not contain an explicit limitation clause; see the principles 7-11, 13(d), 14 of the OECD guidelines; principles 14, 22, 23(C) and 25 APEC Privacy Framework; principles 1, 4, 6 of the UN Guidelines concerning computerized personal data files.

211 It should be noted though that the ECtHR, for example, has determined that when authorities have no discretion in balancing the interests at stake and are thus unable to take the circumstances of the case into account this can lead to a violation of the respective substantive right (i.e., the principle of necessity had not been complied with and the interference was therefore not justified)

212 See, for example, ECtHR, *Leander v. Sweden*, in which the issue of procedural safeguards was examined

which affected individuals may challenge a (partial) refusal to disclose information and/or an improper collection/storage, usage or sharing of personal information.[213]

2.7. Conclusions: The Building Block of a Right to Personal Information

The Conceptual Model includes a duty to ensure access to information as well as one to protect the confidentiality of information in possession of international institutions. This section examined the extent to which the right to personal information is recognized in international law. Said right developed from a positive obligation to prevent misuse of personal data to a right for individuals to access, modify and remove personal information in possession of public authorities. The right is primarily recognized in the regional conventions, both specific and general instruments, and in addition, in the near-universally ratified ICCPR. The legal terminology and language used in the various binding and non-binding instruments are remarkably similar and attest of a broad normative consensus on the scope and content of the right to personal information.

in the context of the requirement of necessity whereas in *Godelli v. Italy*, the Court examined it in the context of the legality principle. See also, e.g., ECtHR, *I. v. Finland*, app. (2007).

213 See, e.g., HRCee, *GC 16 (Article 17 ICCPR),* §10; ECtHR, *Gaskin v. UK* (1989), §49; ECtHR, *M.G v. United Kingdom*, judgment, (September 24, 2002) application no. 39393/98, §30: "Procedure to appeal denials of information must be in place in order to be 'in accordance with the law' ", article 8(d) COE Data protection Convention; explanatory report to the COE Data Protection Convention, §50-54; article 9(1) Aarhus Convention; Principle 13 (Individual Participation Principle) of the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data; APEC principle 23; articles 23-28 for the obligations of authorities, articles 38-41 for the rights of the individuals, ECOWAS, heads of States and governments, Supplementary act A/SA.1/01/10 on Personal Data Protection within ECOWAS (February 16, 2010).

The building block of the right to personal information can be summarized as followed:

RIGHT TO PERSONAL INFORMATION	
Legal basis	Broad support: ICCPR, UN organs, COE, ECHR, OECD, APEC, IACHR, CED Partial basis in CESCR, CEDAW, CRC, ACPHR No basis in CMW, CRPD, CAT
Who is the duty bearer	Public authorities: all branches of state, all actors that exercise public (administrative) authority
Which information	Information relating to an identified or identifiable person
Holder of the right	Everyone with proof of identity that they are the data subject: no interest to be stated. Under circumstances, family members of the data subject may be a holder of the right as well.
Scope of obligations	Right to access, modify and remove personal information Challenge the legality of the storage of personal information Prevent unauthorized access to and disclosure of personal information
Procedure	Fair, timely, low-cost procedure to request information.
Limitations	Exhaustive list of limitations Three-part test: legality, legitimacy, and necessity Legitimate aims: national security, public safety, the prevention of disorder or crime, and the protection of the rights and freedoms of others Limited discretionary powers for authorities, procedural safeguards required, prevention of arbitrary exercise of powers

Table 4: Building block - right to personal information

The legal survey shows that one of the rationales for the development of the right to personal information is the proper exercise of public power. The obligations identified for public authorities in the context of the right reflect this, in particular in the way treaty monitoring bodies discuss limitations to the right to personal information. Regarding the latter, monitoring bodies place a strong emphasis on the need to prevent a misuse of the powers accorded to public authorities and on the need to have procedural safeguards to prevent such misuse – that is, to prevent an arbitrary exercise of public power and to ensure that everyone has a right to access, modify and remove personal information in possession of public authorities. Although the Conceptual Model encompasses only a general, not further defined, right to access information and a general duty to protect the confidentiality of information in the possession of international organizations, it also includes constraints on the exercise of public power. At a minimum, these constraints include a prohibition of an arbitrary use of power and the need to ensure a certain level of quality in the decision-making procedure as was also discussed in the context of the right to personal information. The following chapters will examine whether these type of constraints on the exercise of public power form a general trend across the rights identified and discussed in this research.

3. Overall Conclusions

The Conceptual Model recognizes that international institutions that exercise a form of public power that directly affects individuals have to provide access to information to the general public. Besides, they have a duty to protect the confidentiality of any information in their possession. The legal survey of the international standards applied at a national level, which was conducted in this chapter, established that international law recognizes the right to (access) information to be exercised by individuals against domestic authorities exercising public power that affects said individuals.

This chapter identified two distinctive informational rights: the right to public interest information and the right to personal information. There are quite some similarities in their content and scope. Both rights (and their concomitant duties) exist whenever authorities hold (or collect, store or share) personal or public interest information. At a minimum, there is a right to request access to the information, which has to be realized via a timely, low-cost and fair procedure. Both rights may only be limited if the tripartite test mentioned is met. In this context, the relevant treaty monitoring bodies use similar language when interpreting the conditions under which a limitation is permitted. In the assessment of both the criterion of legality and the criterion of necessity, it was evaluated whether, and to what extent, decision-making bodies had adopted procedural safeguards to prevent an arbitrary use of public power. For instance, it revealed that when discretionary powers have been accorded to public authorities, this discretion may not be unfettered – that is, there have to be certain conditions to and constraints on the exercise of such a discretion. Moreover, at a minimum, individuals have to have access to a review procedure to challenge an adopted decision. As the following chapters will demonstrate, these considerations form part of a larger claim for a certain quality of decision-making and review procedures that is closely related to a demand to prevent an arbitrary exercise of public power. Quite some overlap thus exists with the constraints on the exercise of public power as recognized for international institutions, which was discussed in chapter 2. The Conceptual Model states that public power has to be exercised in accordance with the law, may not be arbitrary nor may it violate *ius cogens* norms, and that a certain quality of the decision-making procedure is expected.

Moreover, it is expected for the remainder of the legal survey that the informational rights will inform and strengthen the content and scope of the rights of the two other dimensions (that is, the right to participation in the decision-making procedure and the right to an effective remedy), which will be addressed in the following chapters.

4 Right to Meaningful Participation in Decision-Making Procedures

This chapter will outline the building block of the second pillar of the Inclusionary Governance Model: the right to meaningful participation in the decision-making procedures. The Conceptual Model recognizes a duty to enable an individual to participate in the decision-making procedures of international institutions, but existing international standards do not give further guidance as to the content and scope of this duty. This chapter will examine through the legal survey whether, and to what extent, international law recognizes a person's right[1] to participation in the decision-making procedure carried out by domestic public authorities. The right to participation refers to the possibility of affected individuals to have their views and opinions heard and considered *before* a decision is made.[2]

This chapter will explore the legal bases of the right (section 1), the holders of the right (section 2), the scope of the right to meaningful participation (section 3), and the limitations to the right (section 4). The chapter will conclude with a schematic overview of the building block of the right to meaningful participation in the decision-making procedure (section 5).[3]

1. The Legal Bases of the Right

In international law, the right to participation in the decision-making procedure has developed in a relatively fragmented manner. However, the legal survey establishes that normative patterns can be identified, revealing a general right to meaningful participation in administrative decision-making. This section will discuss the few explicit provisions (section 1.1), and how the right to participation has mainly developed through the work of treaty monitoring bodies (section 1.2).

1 The Conceptual Model addresses the duties owed by international institutions whereas, in this Part II, the legal survey primarily charts the rights enjoyed by individuals (and groups) with the concomitant duties for public authorities. The emphasis is in this chapter is on the rights enjoyed by individuals as the majority of the instruments that are surveyed are rights-based instruments. It is the survey's main aim to recognize the rights that individuals (and groups) enjoy vis-à-vis the parties to the respective instruments. Chapter 6 will address whether this 'switch' influences the language used in the Draft Inclusionary Governance Model. See similarly the introduction to Part II, fn. 5 to chapter 3, fn. 1 to chapter 5, and the discussion in chapter 6.

2 L. Boisson de Chazournes, 'Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies' (2009) 6 *International Organizations Law Review* 655 at 661. The right to be heard after a decision is taken (that is, in a review or reconsideration procedure) forms part of the right to an effective remedy. The right to an effective remedy will be discussed in chapter 5.

3 It should be noted that this chapter only explores the obligations for public authorities as the (principal) duty bearer to enable its people to participate meaningfully in the decision-making procedure, and it does not address a private authority's (potential) obligations to ensure this right; see however Temperman (J.D. Temperman, 'Public Participation in Times of Privatization' (2011) 4(2) *Erasmus Law Review* 43) who does discuss the role of public and private authorities in relation to the right to public participation.

1.1. Explicit Legal Bases

The right to meaningful participation in the decision-making procedure has been recognized in various explicit provisions; however, all these provisions recognize a right to participation in a particular context only. Remarkably, those human rights provisions that contain a general explicit right to public participation (the right to participate in public affairs) do not encompass an explicit right to participation in *administrative* decision-making procedures.[4] For instance, article 25 ICCPR stipulates an individual's right to participate in the conduct of public affairs through the right to vote and to be elected,[5] and thus focuses on general suffrage and the right to participate indirectly in legislative procedures.[6] The content of the right to participate in public affairs has a relatively similar content in regional human rights treaties;[7] they all focus on the right to participate directly or indirectly in political affairs and normative development and not on the right to participation in administrative decision-making procedures that may affect individuals.[8]

Those instruments that do explicitly recognize a right to participation in administrative decision-making procedures recognize the right in a particular context only – that is, for a particular type of decision-making procedure or for a particular (group of) affected

4 Article 21 UDHR; article 25 ICCPR; article 7 CEDAW; article 5(c) International Convention on the Elimination of All forms of Racial Discrimination (CERD); article 29 Convention on the Rights of Persons with Disabilities.

5 HRCee, *General Comment 25* (1996), reprinted in HRI/GEN/1/Rev.7, at 167-172; so far there is no support in the work of the HRCee that article 25 ICCPR should be interpreted as including participation in administrative decision-making procedures. See HRCee, *Marshall v. Canada,* Communication 205/l986 (1991).

6 The emphasis thus lies on the right to public participation in relation to procedures concerning the exercise of political power. For example, Temperman signalled a strong nexus between these two concepts under the ICCPR; J.D. Temperman, 'Public Participation in Times of Privatization' (2011), at 48-49. See further for article 25 ICCPR, (the right to vote and the right to stand for elections) HRCee, *General Comment 25*, §7-15 and 19-22. See also, e.g., HRCee, *Guido Jacobs v. Belgium, Comm. no. 943/2000*, (2004); HRCee, *Gillot v. France* (932/2000), (July 15, 2002); HRCee, *Mátyus v. Slovakia* (923/2000) (July 22, 2002); HRCee, *Svetik v. Belarus* (927/2000) (July, 8 2004); HRCee, *Gorji-Dinka v. Cameroon* (1134/2002), (March 17, 2005); HRCee, *Concluding Observations on United Kingdom of Great Britain and Northern Ireland*, UN Doc. A/57/40 vol. I (2002) 36 at §75(10), 75(13) and 75(15); CESCR, *Concluding Observations on Kuwait*, UN Doc. E/2005/22 (2004) 29 at §187 and 206; CEDAW, *Concluding Observations on Yemen*, UN Doc. A/57/38 part III (2002) 200 §402 and 403; CEDAW, *Concluding observations on Kuwait*, UN Doc. A/59/38 part I (2004) 15 at §60, 61, 75; HRCee, *Concluding Observations on Colombia,* UN Doc. A/59/40 vol. I (2004) 35 at §67(6), 67(11) and 67(19).

7 Temperman, at 54; article 23 American Convention on Human Rights; article 13 African Charter on People's rights. See also article 3(1) of the first protocol to the European Convention on Human Rights, which stipulated merely a right to free elections. See in this regard also ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, (1987) app. no. 9267/81 at 46-51. ECtHR, *Sejdic and Finci v. Bosnia and Herzegovina* (application nos. 27996/06 and 34836/06) ECHR (2009), at 50.

8 Temperman, at 44; see, e.g., the CESCR (UN Doc E/C.12/2001/10 (May, 10 2001) statement of the CESCR on poverty and the ICESCR, §12) stating that:

> Although free and fair elections are a crucial component of the right to participate, they are not enough to ensure that those living in poverty enjoy the right to participate in key decisions affecting their lives.

individuals. For example, article 6 of the ILO Convention Nº 169 on Indigenous and Tribal Peoples stipulates a right to consultation for the people concerned whenever "consideration is being given to… administrative measures which may affect them directly."[9] Similarly, article 19 of the UN Declaration on the Rights of Indigenous People stipulates an obligation for authorities to consult with the aim of obtaining prior informed consent before they can adopt any decision that may affect the indigenous people concerned.[10] Thus, indigenous and tribal people are accorded participatory rights in regard to any kind of decision affecting them. As the next section will demonstrate, this extensive right to participation for indigenous peoples is well-recognized in the works of various human rights treaty monitoring bodies.

Article 12 of the Convention on the Rights of the Child stipulates that every child has the right to express their views on decisions that affect them.[11] The Committee on the Rights of the Child (CRC) has further strengthened this right in its *General Comments* and *Concluding Observations* on the compliance of member states. Participatory rights are accorded to children who are capable of forming their own views[12] in regards to all matters that affect the child,[13] including any administrative and judicial decision-making procedures.[14]

9 International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169 (June 27, 1989, entry into force September 5, 1991). Currently, the Convention has 22 member states. Despite the low number of ratifications, the Convention is seen as authoritative as can be deduced from the numerous references to it in other instruments and in the documents of UN IHRL bodies. See, e.g., Inter-American Commission on Human Rights, Report on indigenous and tribal peoples' rights over their ancestral lands and natural resources: norms and jurisprudence of the Inter-American human rights system, OEA/SER.l/v/ii doc 56/09 (December 30, 2009).

10 UN General Assembly resolution 61/295, 107th plenary meeting, (September 13, 2007). For the normative value of the Declaration, see also K. Göcke 'The Case of Angela Poma Poma v. Peru before the Human Rights Committee' (2010) 14 *MAX Planck UNYB* 337 at 350-357; M. Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of indigenous Peoples' (2009) 58 *International and Comparative Law Quarterly* 958. See also the report of the UN Special Rapporteur Anaya in which he discusses the normative relevance of the Declaration and the normative background of the duty to consult in international law; Special Rapporteur on the situation of human rights and fundamental rights of indigenous people, J. Anaya, report 'Promotion and Protection of All Human Rights, Civil, Political Economic, Social and Cultural Rights' (July 25, 2009) UN Doc, A/HRC/12/34, p. 12, at 38-42.

11 (emphasis added) article 12 CRC; CRC, *General Comment No. 14* (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3(1)) CRC/C/GC/14 (May 29, 2013), §53.

12 See, e.g., CRC, *Concluding Observations on Portugal*, CRC/C/111 (2001) 48 at §226.

13 See, e.g., CRC, *Concluding Observations on Cameroon*, CRC/C/111 (2001) 71 at 355; CRC, *Concluding Observations on Gabon*, CRC/C/114 (2002) 47 at 203-204. CRC, *Concluding Observations on Mozambique* CRC/C/114 (2002) 65 at 281. Article 12 should be read together with articles 2 (non-discrimination), 3 (Best interests of the child), and 6 (the right to life, survival and development) of the Convention on the Rights of the Child. Together they form the general principles of the Convention. See also the Committee on the Rights of the Child, 'Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under Article 44, paragraph 1(b), of the Convention on the Rights of the Child' (March 3, 2015) UN Doc CRC/C/58/Rev.3.

14 See for example, CRC, *Concluding Observations on Belgium*, CRC/C/18 (2002) 29, §19-20. Similarly, participatory rights have been recognized in the context of serious disciplinary procedures (Article 40 CRC), decisions related to children's health, care and custody procedures (articles 5, 9, 10, 20, 21

The Migrant Workers Convention also provides a right to participation in the decision-making procedures. It requires authorities to facilitate "the consultation or participation of migrant workers and members of their families in decisions concerning the life and administration of local communities."[15] Thus far, the *Concluding Observations* and *General Comments* of the Committee on Migrant Workers have not shed much light on how this provision should be interpreted.[16] However, the Committee did adopt a joint *General Comment* with the Committee on the Rights of the Child in which the two Committees reaffirmed the obligations of authorities to realize and respect participatory rights for children, particularly in a migrant context.[17]

The Aarhus Convention accords members of the public concerned[18] a right to participate in administrative decision-making procedures concerning environmental matters.[19] The Aarhus Convention lists minimum criteria for meaningful participatory processes in (administrative) decision-making. For instance, the right to participation in the decision-

25 CRC), refugee application procedures (article 22 CRC, and see CRC, *Concluding Observations on Poland*, CRC/C/121 (2002) 120 at 523-524). Further see for example, regarding adolescents' rights to participate in decision-making affecting their health, CRC, *GC 4:Adolescent Health and Development in the context of the Convention on the Rights of the Child* (2003) reprinted in HRI/GEN/1/rev.7 at 322 and ff., §4, 8, 13, 18, 28, 38. See similarly with regard to HIV/AIDS and the participatory rights of the Child, CRC *General Comment No 3*, CRC/GC/2003/3 (March 17, 2003) §10. With regard to divorce/custody procedures see for example, CRC, *Concluding Observations on Greece,* CRC/C/114 (2002) 25 at 130.

15 Article 42 (2) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

16 The *Concluding Observations* thus far focus on the participation in the "implementation of the Convention and design and evaluation of public policies," see, for instance, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Concluding Observations on the Third Periodic Report of Mexico* (September 27, 2017) CMW/C/MEX/CO/3, §19.

17 Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and the Committee on the Rights of the Child, *Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the General Principles regarding the Human Rights of Children in the Context of International Migration* (November 16, 2007), §32(2), 34-39.

18 In principle, article 6 stipulates the right to participate for members of the public. In paragraph 7, however, the *public* is mentioned instead of the *public concerned*, which is used throughout article 6 of the Aarhus Convention. It is assumed that those members of the public that participate in the decision-making procedure on the basis of article 6(7) of the Aarhus Convention acquire the status of the public concerned in relation to article 9(2) of the Aarhus Convention (the possibility of access to justice); see also, ACCC, *ACCC/C/2006/16* (*Lithuania)*, ECE/MP.PP/2008/5/Add.6, (April 4, 2008), §80.

19 In the context of article 6(1)(a) of the Aarhus Convention, authorities have to facilitate participatory procedures for decisions either permitting one of the proposed activities as listed in Annex I to the Convention or for other decisions that may have a significant impact on the environment; the listed activities are presumed to have a potential significant effect on the environment. Said activities include, for example, decisions on spatial planning, development consents, construction and operating permits, permits for the use of water or other natural resources. Article 7 stipulates the obligation to realize participatory procedures during the preparation of plans and programmes relating to the environment. See also J. Ebbesson and others, *The Aarhus Convention: An Implementation Guide* (United Nations Publications 2014) at 92, 126. In addition to articles 6 and 7, the Aarhus Convention stipulates the right to public participation in the preparation by public authorities of laws and regulations in article 8.

making has to take place when all options are open,[20] participation has to include at least a possibility for members of the public concerned to submit comments, information, analyses or opinions that they consider to be relevant to the proposed activity[21] and public authorities have a duty to duly take into account those interests expressed.[22]

Lastly, there is a right to participation in decision-making procedures for those persons who are facing expulsion. Both universal and regional instruments have recognized limited participatory rights in this context.[23] These individuals have the right to submit reasons or evidence against a (possible) expulsion[24] unless compelling reasons of national security require otherwise.[25]

In sum, the explicit provisions recognizing a right to participation in the decision-making procedure all accord participatory rights applicable in a particular context: for a particular type of decision-making procedure or for a particular group of affected individuals.

1.2. Authoritative Interpretation

Increasingly, bodies responsible for the interpretation of treaties have read procedural guarantees into substantive provisions, including the right to participation in the decision-making procedures concerned.[26] This section will demonstrate how a procedural right to meaningful participation has crystallized through the works of the treaty monitoring bodies.

The body that has done so most extensively is the Committee on Economic, Social and Cultural Rights (CESCR). The CESCR recognizes a right to participation for the poor,[27] the homeless,[28] and the elderly[29] whenever they are affected by an administrative decision.

20 Article 6(4) Aarhus Convention; ACCC, *ACCC/C/2008/26 (Austria)*, ECE/MP.PP/C.1/2009/6/Add.1 (February 8, 2011), §66; *ACCC, ACCC/C/2008/24 (Spain)*, §117(a)(iii).
21 Article 6(7) Aarhus Convention.
22 Article 6(8) Aarhus Convention; this is also reflected in the duty to provide reasons for adopting a decision, including the considerations leading to said decision, as discussed below in 4.3.
23 Article 13 ICCPR; article 1 Additional Prot. 7 to the ECHR; article 32 of the 1951 Refugee Convention; article 22(5) and (6) American Convention on Human Rights; article 12(4) African Charter on Human and Peoples' Rights.
24 The explanatory report to article 1 Prot. 7 to the ECHR explains that individuals have to have such an opportunity before the case is reviewed by a court – that is, before the decision is adopted by the authorities concerned. Explanatory report to Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 117), §12.
25 See also HRCee, *General Comment 15* (1986): The Position of Aliens under the Covenant, A/41/40 (1986) 117 §9-10; See, for instance, *Karker v. France* (833/1998), ICCPR, A/56/40 vol. II (October 26, 2000) 144 at §9.3.
26 J.D. Temperman, 'Public Participation in Times of Privatization' (2011) 4(2) *ELR* 43 at 59-60.
27 CESCR, *Statement of the CESCR on Poverty and the ICESCR,* (May 10, 2001) §12.
28 CESCR, *General Comment 7: the Right to Adequate Housing: Forced Evictions*, §16.
29 CESCR, *General Comment 6: The Economic, Social and Cultural Rights of Older Persons* (December 8, 1995), §5, 34, 38.

In addition, the CESCR recognizes a right to particpation for whomever is affected by forced evictions,[30] by decisions on adequate housing,[31] by decisions on water,[32] by decisions interfering with the right to cultural life,[33] and lastly, by decisions related to one's health.[34] For instance, the Committee acknowledges an obligation for authorities to realize extensive genuine consultation with, and participation of, everyone affected by decisions on matters of housing.[35] In the various General Comments, the Committee further defines when authorities have an obligation to ensure the right to participation in the decision-making of those affected by decisions.[36]

Also, other UN human rights bodies recognized a right to participation for those affected. The Human Rights Committee (HRCee) recognizes a right to participation in the decision-making for minorities and indigenous people affected by decisions,[37] for those affected by forced evictions[38] and for those subjected to expulsion.[39] Similarly, the Committee on the Elimination of Racial Discrimination (CERD) has identified an obligation to provide for participatory procedures in the context of decision-making that affects descent-based communities,[40] indigenous peoples,[41] and minorities.[42] Also, the CERD has explained extensively in its General Comments the scope of the obligations for authorities to ensure participatory rights under the CERD.[43] The Committee on the Elimination of Discrimination against Women (CEDAW) has also recognized a right to participate in the administrative decision-making, albeit in fewer cases.[44] For instance, in its *Concluding Observations*

30 CESCR, *General Comment 7*: *the right to adequate housing: forced evictions*, §16.
31 CESCR, *General Comment 4*, §9.
32 CESCR, *General Comment 15,* §56.
33 CESCR, *General Comment 21*.
34 CESCR, *General Comment 14*; CRC, *General Comment 4,* §4; CRC, *General Comment 3,* §10.
35 Committee on Economic, Social and Cultural rights, *General Comment 4: Right to Adequate Housing (article 11(1) of the Covenant)*, (1991), UN Doc E/1992/23, §9; regarding link access to information and right to health, see CESCR, *General Comment 14: Right to the Highest Attainable Standard of Health,* (2000), § 3, 11, 12(b).
36 See, e.g., *General Comments 7, 15, 18, 19, 21, 22* of the CESCR.
37 HRCee, *General Comment 23*: *Article 27 (Rights of Minorities)*, (April 8, 1994) CCPR/C/21/Rev.1/Add.5, §7; HRCee, *Lansman et al v. Finland,* communication 511/1992 (1994), §9.5-9.6; HRCee, *Apirana Mahuika et al v. New Zealand communication no 543/1993* (2000), §9.5; HRCee, *Angela Poma Poma v. Peru,* §7.6.
38 HRCee, *CO on Kenya*, A/60/40 (2005) 44, §86(22).
39 HRCee, *General Comment 15: the Position of Aliens under the Covenant* A/41/40 (1986) 117, §9-10; HRCee, *Karker v. France,* (833/1998) (2000), §9.3.
40 CERD, *General Comment XXIX on Article 1, paragraph 1 of the Convention*, §6 (aa).
41 CERD, *General Comment XXIII on the Rights of Indigenous Peoples*, UN Doc A/52/19, Annex V, §4(d).
42 See, e.g., Committee on Elimination of Racial Discrimination, *General Comment XXVII on Discrimination Against Roma,* adopted at 57th session (2000) **UN Doc. A/55/18, annex V, 154, at** §41-44. In this General Comment, the CERD stipulates the need of the inclusion of the Roma communities in decision-making procedures that affect them.
43 See, for instance, CERD, *General Comment XXIII*, §4(d).
44 Instead, most of the treaty interpreting documents focus on the right to public participation as part of the right to participate in public affairs; CEDAW, *Concluding Observations on Yemen*, UN Doc. A/57/38

on Argentina, the Committee emphasized the obligations of authorities to ensure that indigenous women can participate meaningfully in decision-making processes regarding the use of traditional lands.[45]

At a regional level, the right to participation in decision-making procedures is firmly established as well. The European Court of Human Rights (ECtHR), in the context of the right to family life (article 8 ECHR), recognized already in 1987 the need for participatory rights in decision-making procedures.[46] These rights include, according to the Court, the right to present one's views and the duty of authorities to duly take into account the views expressed by affected individuals.[47] The ECtHR has taken this approach concerning cases on the right to family life,[48] deprivation of legal capacity,[49] data registration,[50] registration of ethnic identity,[51] issues of planning and environment,[52] and access to abortion.[53] Similarly, the Inter-American Court of Human Rights has strengthened the right to participation in various cases dealing particularly with the rights of minorities and indigenous peoples. The Court relied, amongst other things, on the principle of participation as stipulated in the Inter-American Democratic Charter.[54] The African Court on Human and People's Rights

part III (2002) 200 at §402 and 403; CEDAW, *Concluding Observations on Kuwait*, UN Doc. A/59/38 part I (2004) 15 at §60, 61, 75.

45 CEDAW, *Concluding Observations on the Seventh Periodic Report of Argentina*, (November 18, 2016), CEDAW/C/ARG/CO/ §40(a) (d), 41(b) (e).

46 ECtHR, *W v. United Kingdom, app 9749/82* (1987) §62.

47 ECtHR, *McMichael v. United Kingdom, App. no. 16424/90* (1995) §87; see also ECtHR, *Buckley v. United Kingdom, App. no. 20348/92* (1996) §76; ECtHR, Görgülü v. Germany, app no 74969/01 (February 26, 2004) §52; see also E. Brems and L. Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35(1) *Human Rights Quarterly* 176 at 191-193.

48 See similarly the Committee on the Rights of the Child, *General Comment 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child,* CRC/GC/2003/4 (2003) §4, 8, 13, 18, 28, 38. Regarding HIV/AIDS and the rights of the Child, see similarly CRC *General Comment No. 3,* CRC/GC/2003/3 (March 17, 2003) §10.

49 E.g. ECtHR, *Drobnjak v. Serbia, app 36500/05* (2010) §143-144; ECtHR, *Shtukaturov. v. Russia, App. no. 44009/05,* (March 27, 2008).

50 See, e.g., ECtHR, *Turek v. Slovakia, app. 57986/00* (2006) §111.

51 E.g. in ECtHR, *Ciubotaru v. Moldova, App. no. 27138/*04 (2010) §51.

52 ECtHR, *Hatton v. United Kingdom, App. no. 36022/97* (2003) §99, 128-129; ECtHR, *Buckley v. United Kingdom, App. no. 20348/92* (1996); ECtHR, *Taşkin v. Turkey, app no 46117/99* (2005), §119; ECtHR, *Giacomelli v. Italy, app. no. 59909/00* (2007) §82-83; See also O. de Schutter, *International Human Rights Law* (Cambridge CUP, 2010), 316-322.

53 ECtHR, *R.R. v. Poland, app. no. 27617/04* (2011) §191.

54 The Inter-American Democratic Charter stipulates in article 6 that citizens have the right to participate in decisions relating to their own development. The Charter was adopted by the General Assembly of the Organization of American States. The Inter-American Court of Human Rights referred to the Charter to indicate the procedural standards recognized within the OAS in *Claude Reyes v. Chile,* §86; in the case of *the Saramaka People v. Suriname*, the Court extensively discussed the scope and content of the participatory rights of those affected by the decision-making regarding investment or development plans within traditional indigenous and tribal territories; public authorities have, for instance, a duty to actively consult with the communities according their custom and traditions (§113), IACtHR, *the Saramaka People v. Suriname* (November 28, 2007).

recognizes an obligation for authorities to provide "meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities."[55] The case law focuses particularly on the rights of groups or communities to participate in decision-making procedures that directly affect them.[56]

In conclusion, the right of affected persons to participate in the decision-making procedures has a firm legal basis in international law which has two elements. First, there is a strong procedural right to participation in the decision-making procedure as read into substantive rights. Whenever public authorities adopt decisions that affect individuals, these individuals should have a right to participate meaningfully in the decision-making procedure. Second, in particular contexts, when there is an explicit legal basis, there is a judiciable right to meaningful participation in the decision-making procedure. The following sections will discuss the scope and content of the right to meaningful participation in decision-making procedures.

2. The Scope of the Right

The general standard across various instruments is that participation in the decision-making procedure should be meaningful.[57] However, authorities are accorded wide discretion in fulfilling this obligation. This section will address the elements of the right to meaningful participation in the decision-making procedure.

In general, the participatory process contains four different phases; per phase, several criteria have been identified that set limits to the discretion of authorities and define the positive obligations of authorities. These criteria together ensure that the participation in the decision-making procedure is meaningful: the duty to inform affected individuals before and during a decision-making procedure (section 2.1), the design of the participatory process (section 2.2), the duty to duly consider the interests presented during the deliberation phase (section 2.3.) and the duty to provide a reasoned decision (section 2.4).

55 AfCommHPR, *Social and Economic Rights Action Centre* (*SERAC*) *v. Nigeria* (2001) AHRLR 60 (ACHPR 2001). Communication 155/96, §52 concludes by stating that government compliance in the spirit of article 16 and article 24 of the African Charter also has to include (…) "providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities".

56 See, e.g., African Commission for Human and Peoples Rights, *Case 276 /2003 Endorois Welfare Council v. Kenya* (2009) §291.

57 The exceptions to the rule are the procedural guarantees recognized for individuals facing expulsion. In these instances, the right is restricted to only the right to be heard, which may be limited for national security reasons; article 1 Prot. 7 to the ECHR, ECtHR, *B.H, T.H R.H and R.H v. Switzerland*, (May 11, 1994).

2.1. The Duty to Inform Individuals Potentially Affected by Decisions

The duty to inform serves as a pre-condition to meaningful participation of those potentially affected by the outcome of the decision-making procedure. Without information on the procedure, on the decision to be adopted and on the possibility to participate, the right to participation becomes a meaningless *pro forma* exercise.[58] This duty to inform has a strong legal basis in international law as a condition for meaningful participation in decision-making.

The most explicit basis, and most extensive duty, is found in article 6 of the Aarhus Convention in which an obligation is laid down for authorities to duly inform the public concerned.[59] The information to be provided includes information about the proposed activity, the timeframe of the decision-making procedure and the participatory procedure, information about the participatory procedure and how members of the public concerned may participate.[60] Similar obligations – although not always as extensive as in the context of the Aarhus Convention – are provided by other international instruments. The CESCR has recognized a duty to inform those potentially affected by decisions in those situations in which it similarly recognized a right to meaningful participation in the decision-making procedures.[61] In the same way, other UN treaty monitoring bodies recognize a duty for authorities to inform potentially affected individuals in four different situations: to inform indigenous communities and minorities potentially affected by decisions;[62] to inform those potentially affected by decisions that

58 As stated in a *communication concerning Kazakhstan*: "if a key group of members of the public most directly affected by the activity was not informed of the process and not invited to participate in it," it follows from it that they had not been informed in a timely fashion, they had not had opportunities to early and effective participation in the procedure nor had they been able to provide input. ACCC, *ACCC/C/2004/2* (*Kazakhstan)*, ECE/MP.PP/C.1/2005/2/add.2 (March 14, 2005), §24. See also J. Ebbesson, 'Public Participation' in: *The Oxford Handbook of International Environmental Law* (2012) at 686.

59 Article 6 Aarhus Convention. The obligation laid down in article 6 is closely connected to the duty to actively collect and disseminate information (article 5 of the Aarhus Convention) and the right to request public interest information (article 4 of the Aarhus Convention).

60 Article 6(2), (6) of the Aarhus Convention; see also, for instance, ACCC, *ACCC/C/2004/2* (*Kazakhstan)*, §23-25; ACCC, *ACCC/C/2006/16* (*Lithuania)*, §66-68, 78; ACCC, *ACCC/C/2006/17* (*European Community*) ECE/MP.PP/C.1/2008/5/Add.10 (May 2, 2008), §47-50, 59.

61 The obligation to inform is recognized for those affected by decisions relating to the right to water (*GC 15: the Right to Water* at 48, 56), the right to adequate housing (*GC 7: the Right to Adequate Housing - Forced Evictions* at 16), the right to social security benefits (*GC 19: the Right to Social Security* at §26, 35, 78), the right to health (CESCR *GC 22: the Right to Sexual and Reproductive Health*, §18-19, 49; *GC 14: the right to the highest attainable standard of health* at §37), the right to work (*GC 18: the right to work*, §12 (b), 42), and the right to take part in cultural life (*GC 21: the Right Everyone to Take Part in Cultural Life*, §36, 49(e), 55).

62 Regarding indigenous communities, see, for example, HRCee*, Concluding Observations on Suriname*, A/59/40 Vol. 1 (2004) 43, §69(21). CERD, *Concluding Observations on Lao People's Democratic Republic,* A/60/18 (2005) 35 at 170; CESCR, C*oncluding Observations on Brazil* (2003) UN Doc E/2004/22 28, §142-143, 165-166; CEDAW, *Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Honduras CEDAW/C/HND/CO/7-8,* (November 18, 2016), *§43; CEDAW, Concluding Observations on Argentina CEDAW*/C/ARG/CO/7, (November 18, 2016), §40-41. Regarding minorities,

have a strong impact on the lives of individuals, such as in the case of forced eviction;[63] to inform those potentially affected by decisions on environmental matters;[64] and lastly, various UN treaty bodies have recognized an obligation to inform those affected in the very specific situations of invasive health treatments, in particular, regarding practices of forced sterilization or abortion.[65]

Each regional instrument recognizes a duty to inform; however, the context in which the duty is recognized differs. Within the Organization of American States (OAS), a duty to inform those affected by decisions on environmental matters is recognized[66] and a duty to inform is recognized for whenever indigenous communities and minorities are affected by decisions.[67] The European Court of Human Rights identified a duty to inform those affected by decisions in the context of the right to family life and of the right to life (articles 2 and 8 ECHR); this includes, for instance, decisions on environmental matters and decisions on invasive heath

see, for example, CERD, *General Recommendation XXVII on Discrimination against Roma* (2000), §41-44; CEDAW, *Concluding Observations on Argentina CEDAW*/C/ARG/CO/7, (November 18, 2016), §38-39.

63 HRCee, *Concluding Observations concerning Kenya*, (2005) at §86(22).

64 It should be noted though that the obligation in this context – in comparison to the other contexts in which it has been acknowledged – is mainly recognized by UN Special Rapporteurs and less by the treaty monitoring bodies concerned. Human Rights and the Environment UN Special Rapporteur, 2008, §204, draft declaration of principles on human rights and the environment UN Doc, E/CN.4/sub.2/1994/9, Annex 1 (July 6, 1994); 2004 Joint Declaration by the UN Special Rapporteur, OSCE Representative and OAS Special Rapporteur on Freedom of Expression; Report of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on Enjoyment of Human Rights, UN Human Rights Council, UN Doc. A/HRC/7/21 (February 18, 2008), §64-67.

65 CRPD, *Concluding Observations on Spain,* UN Doc. CRPD/C/ESP/CO/1 (October 19, 2011); CRPD; *Concluding Observations on Peru,* UN Doc. No: CRPD/C/PER/CO/1 (May 9, 2012); CRPD, *Concluding observations on China*, UN Doc: CRPD/C/CHN/CO/1 (September 27, 2012); CRPD; *Concluding Observations on Hungary*, UN Doc.: CRPD/C/HUN/CO/1 (September 27, 2012); CEDAW, *Concluding Observations on the Fifth and Sixth Periodic Reports of Chile*, UN Doc. CEDAW/C/CHL/CO/5-6 (November 12, 2012); CEDAW, *Concluding Observations on Australia,* CEDAW/C/AUS/CO/7; CEDAW; *Concluding Observations on Czech Republic,* UN Doc. CEDAW/C/CZE/CO/5 (November 10, 2010); CEDAW, *Ms. Andrea Szijjarto v. Hungary,* Communication No. 4/2004, UN Doc. CEDAW/C/36/D/4/2004 (August 29, 2006); CESCR (1994) *General Comment 5: Persons with Disabilities*, (December 9, 1994); CESCR, *Concluding Observations on Brazil*. UN Doc. E/C.12/1/Add.87 (May 23, 2003); *CRC, Concluding Observations: Australia*, UN Doc. CRC/C/AUS/CO/4 (August 28, 2012).

66 Inter-American Juridical Committee, Principles on the Right to Access to Information, principle 4; 2009 Report of the OAS Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights 2009, §32-34; Inter-American Commission on Human Rights, *1997 Study on HR Protection in Ecuador* OEA/Ser.L/V/II.96 doc. 10, rev. 16-18, §50); IACHR, *Claude Reyes v. Chile*.

67 For instance, in the case of *the Saramaka People v. Suriname,* the IACtHR held that those affected have to be informed of "possible risks, including environmental and health risks" of proposed development or investment plans. The duty to inform involves an obligation to "accept and disseminate information" and has to include a "constant communication between the parties". IACtHR, *the Saramaka People v. Suriname,* (November 28, 2007), Series C No. 172, §133; IACHR, Report No. 75/02, *Case 11.140, Mary and Carrie Dann (United States),* (December 27, 2002), §140; IACommHR, *Case 12.053, Maya Indigenous Community of the Toledo District* (October 12, 2004), report 40/04, §132-135, 140-144.

treatments.[68] The African Commission on Human and Peoples' Rights has identified an obligation to inform those affected by decisions on environmental matters in the context of the substantive right to a healthy environment as stipulated in the African Charter.[69] Further, the African Charter on Values and Principles of Public Service and Administration stipulates in article 6 a right to access information, which includes a duty for authorities to inform individuals of the decisions adopted that affect them, the reasons behind the decisions, and the possibility to appeal these decisions.[70]

Overall, the decisive factor across each of the instruments and each of the categories is the (potential) *impact* of a decision on the life of an individual. Below the scope of the duty to inform is addressed: Who should be informed, about what, when, and how?

Who

Public authorities have a duty to inform those affected by decisions. Section 3 will discuss further who is considered to be the holder of the right to meaningful participation in the decision-making procedure. However, if those affected are not properly identified as rightsholders, they will not be properly informed of the upcoming decision and the participatory processes, which will have a detrimental effect on the participation in the procedure.[71]

68 See, e.g., ECtHR, *V.C. v. Slovakia* 18968/07 (November 8, 2011) §146. In regard to decisions on environmental matters, there is a normative overlap between the ECtHR's case law and the communications dealt with by the Aarhus Convention Compliance Committee. See, e.g., M. Schaap, 'Access to Environmental Justice for NGOs: Interplay between the Aarhus Convention, the EU Lisbon Treaty and the European Convention on Human Rights' in: A. Jakubowski and K. Wierczynska, *Fragmentation vs the Constitutionalization of International* Law (Routledge 2016) 244-264; E. Hey, 'The Interaction between Human Rights and the Environment in the European "Aarhus space" in: A. Grear and L.J. Kotz (eds.) *Research Handbook on Human Rights and the Environment* (Edward Elgar 2015), p. 353-362.

69 African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria,* communication 155/96 (October 27, 2001), §71, see also §1-9, 54-55.

70 African Charter on Values and Principles of Public Service and Administration (January 31, 2011) adopted at the 16th ordinary session of the assembly of the African Union, Addis Ababa (entry into force on July 23, 2016). So far, the Charter has 16 member states and 37 signatories. Article 6(1)(2) reads:

1. Public Service and Administration shall make available to users information on procedures and formalities pertaining to public service delivery.
2. Public Service and Administration shall inform users of all decisions made concerning them, the reasons behind those decisions, as well as the mechanisms available for appeal.

71 See, e.g., *ACCC/C/2004/2 (Kazakhstan)* in which the Aarhus Convention Compliance Committee explained this detrimental effect in §24:

> If a key group of members of the public most directly affected by the activity was not informed of the process and not invited to participate in it, it follows that they did not receive notice in "sufficient time" as required under Article 6, paragraph 3, and that in practice they did not have the opportunities for early and effective participation that should have been available in accordance with paragraph 4 or to provide input in accordance with paragraph 7. Similarly, if no public notice of the planned hearings

Inform about what

The information to be provided by authorities concerns the information about the procedure and the procedure to be followed, and the (more substantive) information required for individuals to participate in a meaningful way in the decision-making procedure. At a minimum, individuals should receive a sufficient amount of information to enable them to meaningfully participate in the decision-making procedure; however, some treaties specify further what information should be provided to those affected. For instance, the CESCR, in relation to forced evictions, stipulates that authorities have to (at a minimum) adequately and reasonably inform all those affected, prior to the impending decision of a scheduled eviction, of the opportunities for genuine consultation with the authorities in charge, and the procedure to be followed.[72] ILO Convention N° 169 stipulates that indigenous communities affected by investment or development plans in their traditional territories have to be fully briefed on the content and purpose of these plans, as well as of possible negative and positive impacts of such plans.[73]

The duty to inform may trigger further positive obligations: Authorities may have a duty to actively collect or produce information in certain situations and to disseminate it widely. This duty exists particularly in the context of decision-making on environmental matters,[74] in the context of decisions affecting indigenous communities[75] and in the context of decisions affecting children.[76]

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or other participation opportunities was given, and if affected local residents were not invited to the hearing, whatever views they might have had to offer could not have been taken into account as required by Article 6, paragraph 8.

72 CESCR, *General Comment 7*, §15; similarly, in the context of the right to water, the CESCR reminded parties that "individuals and groups should be given full and equal access to information concerning water, water services, and the environment, held by public authorities or third parties." CESCR, *GC 15: The Right to Water* (2002), 120 at 48. The information required includes, amongst others, timely and full disclosure of information on the proposed measures and reasonable notice about the plans to the persons concerned (at 56).

73 Article 7.1 of the Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No 169) 72 ILO Official Bull. 59; 28 ILM 1382 (1989) (entry into force on September 5, 1991); see similarly Report of the UN Special Rapporteur on the Situation of Human Rights and Fundamental Rights of Indigenous People, J. Anaya, report 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, (July 25, 2009) UN Doc., A/HRC/12/34, §53. For an extensive obligation to inform, see similarly article 6(2) of the Aarhus Convention.

74 ECtHR, *Giacomelli v. Italy, (application no. 59909/00)* (November 2, 2006), §93-96; article 5 of the Aarhus Convention.

75 UN Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya UN Doc. A/HRC/12/34, (2009), §53; Inter-American Commission on Human Rights, '1997 Study on HR Protection in Ecuador' OEA/Ser.L/V/II.96 doc. 10, rev. 16-18, §30.

76 CRC, *General Comment 14* (article 3), §99.

When to inform

All instruments stipulate that authorities have to inform those affected in an early stage of the decision-making procedure, when participation in the procedure is still meaningful. For instance, the Aarhus Convention speaks of informing those affected in a timely manner when all options are still open,[77] the ECtHR refers to the need of timely access to relevant information,[78] and the CESCR refers to a reasonable timeframe[79] and a timely disclosure of information.[80]

How to inform

The general standard across instruments is that authorities have to provide an "adequate and reasonable notice" and that authorities have wide discretion in determining how to inform those affected.[81] Only in the context of decisions on environmental matters, one finds further specification. For instance, the Aarhus Convention Compliance Committee has dealt in several communications with the question of how the public concerned[82] can be informed in an adequate and effective manner, which can be achieved by two methods of informing the public: by public notice[83] and by individual notice. The Committee examines in a given

77 Article 6(2) and (3) of the Aarhus Convention.

78 ECtHR, *R.R v. Poland,* §197; the case *R.R. v. Poland* concerned the right of a pregnant woman to receive information on her health in order to decide whether or not to perform an abortion. The Court reminded the authorities of the significance of timely access to this information, that the stipulation applies "with particular force to situations where rapid developments in the individual's condition occur," and that therefore her ability to take relevant decisions was reduced; see similarly *Lupsa v. Romania* where the Court held that those facing expulsion have to know the grounds for expulsion in time so that they have sufficient time to prepare themselves for providing reasons against their expulsion. ECtHR, *Lupsa v. Romania, 10337/04* (June 8, 2006).

79 CESCR, *GC 7,* §15 reads "adequate reasonable notice …. Prior to the scheduled date of eviction… information [has to] be made available in reasonable time to all those affected".

80 CESCR, *GC 15*, §56; see similarly CESCR, *GC 19*, §78 both *general comments* prescribe timely and full disclosure of information on the proposed measures and reasonable notice of the proposed action.

81 In the context of forced evictions, CESCR stipulates, for instance "[a]dequate and reasonable notice for all affected persons prior to the scheduled date of eviction" CESCR, *GC 7: the Right to Adequate Housing (Forced Evictions*), §15. See also HRCee, *CO on Kenya* (2005).

82 The public concerned is defined by the Aarhus Convention as the public affected or likely to be affected by environmental decision-making procedures or having an interest in those: article 2(5) Aarhus Convention; the interest to be stated seems comprise both legal interests as well as factual interests; the Aarhus Convention Compliance Committee defined public concerned as follows:

> While narrowed than the definition of the public, the definition of the public concerned under the convention is still very broad. Whether a member of the public is affected by a project depends on the nature and size of the activity. (…) also, whether members of the public have an interest in the decision-making depends on whether their property and other related rights (..), social rights or other rights or interests relating to the environment may be impaired by the proposed activity. (…) Article 3, paragraph 5, deems NGOs promoting environmental protection and meeting any requirements under national law to have such an interest; *ACCC/C/2010/50 (Czech Republic*), ECE/MP.PP/C.1/2012/11, §66.

83 See, e.g., ACCC, *ACCC/C/2009/37 (Belarus)*, ECE/MP.PP/2011/11/add.2, (May 12, 2011), §86; for instance, in one case the authorities complied with their obligations by informing the public by a public inquiry notice in two daily newspapers and by publishing the information on the Internet site of local

case whether all those who "could potentially be concerned have [had] a reasonable chance to learn about proposed activities and their possibility to participate,"[84] which can imply a combination of individual and public notice.[85]

In conclusion, the duty to inform is one of the four elements to ensure a meaningful participation of those affected in the decision-making procedure. In short, individuals have to be informed in a timely, adequate and effective manner about the decision-making procedure and the participatory processes, and that those affected have to receive all relevant (background) information necessary to be able to participate in a meaningful way in the decision-making procedure. If an individual is not sufficiently informed of the participatory process, and accordingly will not participate in the procedure, the individual has to have an opportunity to request a review of the decision as a way to enforce their right to participation. The content and scope of the right to a review will be further discussed in chapter 5. The next sections will discuss the other three elements required for a meaningful participatory procedure.

2.2. The Procedure

The instruments accord wide discretion to public authorities to design the participatory processes; however, there are certain parameters. The participation needs to be, at a minimum, meaningful, which implies that the participation has to take place early in the procedure and that those affected have to have a possibility to have their views heard.

Although the right to participation in the decision-making procedure has been recognized in all treaty regimes, the scope of the participation and thus the influence that those affected have in a decision-making procedure varies. Overall, the legal survey charts two different degrees of participation: the right to meaningful involvement and the right to prior informed consent. The former is the general standard across treaty instruments; only in limited circumstances, meaningful involvement is not sufficient and instead prior informed consent is required. The difference between these two degrees of participation will be further explained below.

In general, the right to meaningful involvement implies that affected individuals have a right to present their point of view or interest in the decision-making procedure and authorities

authorities, ACCC, *ACCC/C/2007/22 (France),* ECE/MP.PP/C.1/2009/4/add.1 (February 8, 2011), §41.

84 ACCC, *ACCC/2006/16 (Lithuania),* §67; see also ACCC, *ACCC/C/2007/22 (France),* §42.

85 See similarly the ECtHR's case law. See, e.g., ECtHR, *Hatton v. United Kingdom*, app. no. 36022/97 (2003) §128- 129. See also *Taskin v. Turkey*, where the authorities complied with the duty to inform as laid down in the ECHR and duly informed those affected properly (§119-120), but they failed to comply with national judicial proceedings ordering to the government to foreclose the goldmine. ECtHR, *Taskin v. Turkey,* app no 46117/99 (2005) §121-126.

have the obligation to duly take this into account.[86] The right is widely recognized across various international instruments. However, slightly different terminology is used in every treaty regime: Some treaties refer to the right to be heard, whereas others refer to the right to consultation. For instance, the Convention on the Rights of the Child accords children the right to be heard in relation to decisions that affect them.[87] Similarly, the ECHR recognizes a right to be heard for those affected by decisions, including decisions related to the right to family life,[88] and in particular, in relation to the deprivation of legal capacity decisions,[89] data registration,[90] registration of ethnic identity[91] and access to abortion cases.[92] For example, regarding an eviction notice, the Court concluded that affected individuals have to have:

> a full and fair opportunity to put before the planning inspectors any material which they regard as relevant to their case and in particular their personal, financial and other circumstances, their views as to the suitability of alternative sites and the length of time needed to find a suitable alternative site.[93]

Other instruments refer to a right to consultation in the decision-making procedure. This right is recognized for minorities,[94] indigenous peoples,[95] in the context of environmental decision-making,[96] decisions affecting the right to development,[97] and decisions interfering with an individual's right to water.[98]

86 It should be noted that the obligation to duly take into account the interests presented will be discussed in section 2.3.

87 Articles 12, 22 and 40 of the Convention on the Rights of the Child; CRC, *General Comment 4*, §4; CRC, *General Comment 14*, §53.

88 See similarly the Committee on the Rights of the Child, *General Comment 4: Adolescent health and development in the context of the convention on the rights of the child,* (2003) §4, 8, 13, 18, 28, 38. With regard to HIV/AIDS and the rights of the child, see similarly *CRC, General Comment no. 3,* (March 17, 2003) §10.

89 E.g., ECtHR, *Drobnjak v. Serbia, app. 36500/05* (2010) §143-144; ECtHR, S*htukaturov. v. Russia, App. no. 44009/05,* (March 27, 2008).

90 E.g., ECtHR, *Turek v. Slovakia, app. 57986/00* (2006) §111.

91 E.g., ECtHR, *Ciubotaru v. Moldova, App. no. 27138/*04 (2010) §51.

92 ECtHR, *R.R. v. Poland, app. no. 27617/04* (2011) §191.

93 ECtHR, *Chapman v. UK,* §106; on forced evictions, see similarly the HRCee and CESCR who speak however of genuine consultation: HRCee, *Concluding Observations on Kenya* (2004) A/60/40 44, §86(22) and CESCR, *General Comment 7,* §15.

94 See, e.g., HRCee, *Angela Poma Poma v. Peru*, §7.6; HRCee, *General Comment 23* (1994) §7; CESCR, *General Comment 21* (2009); CERD, *General Comment 23* (2000) §41-44.

95 Article 6 ILO Convention No 169; HRCee, *Lansmann et al v. Finland* §9.5-9.6; CERD, *General Comment 23,* §4(d); CEDAW, *CO on 7th periodic report of Argentina* (2016), §40 (a)(d), 41(b). CERD, *Concluding Observations on Saint Lucia,* CERD, A/59/18 (2004) 86 at §446, 447; For instance, the HRCee speaks of giving greater influence to the indigenous people affected by particular decisions, *Concluding Observations on Sweden*, A/57/40 vol. I (2002) 57 at §79(15).

96 Article 6 Aarhus Convention; IACtHR, *the Saramaka People v. Suriname.*

97 AfCPHR, *SERAC v. Nigeria.*

98 (emphasis added), CESCR, *General Comment 15: the Right to Water* (2002) 120, at §56. See also HRCee in relation to article 27 ICCPR (rights of minorities):

In some instances, when the rights of individuals are *adversely affected*, a more extensive form of participation is required: the right to prior informed consent.[99] In general, the obligation to prior informed consent has been recognized for indigenous communities[100] and minorities whenever measures are taken by public authorities that adversely affect their lives or livelihood.[101] For instance, the CERD stipulates a right to prior informed consent for indigenous or minority communities whenever decisions are adopted that directly relate to their rights or interests;[102] similarly, the IACtHR recognized the obligation in relation to decisions to extract natural resources that are necessary for the survival of indigenous communities and in the case of large scale investment or development projects with a major impact within the territory of the indigenous people.[103] Additionally, the obligation to obtain prior informed consent has been recognized across international human rights instruments for the specific situation of invasive health treatments.[104] The reasoning is that

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> …the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a monitory or indigenous community depends on whether the members of the community in question have had the opportunity to participate in decision-making process in relation to these measures.

HRCee, *Angela Poma Poma v. Peru*, §7.6; see also CESCR, *General Comment 21: Right of everyone to take part in cultural life,* UN Doc E/C.12/GC/21 (December 21, 2009).

99 See for an overview of the right to prior informed consent within international law, for example, T. Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law' (2011) 10(2) *Northwestern Journal of International Human Rights* 54-84.

100 Article 19 UN Declaration; see also the report by UN Special Rapporteur Anaya in which he discussed the normative relevance of the Declaration and the normative background of the duty to consult in international law; Special Rapporteur on the situation of human rights and fundamental rights of indigenous people, J. Anaya, Report 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights' (July 25, 2009) UN Doc., A/HRC/12/34, p 12, at 38-42; CESCR, Brazil, E/2004/22 (2003) 28 §165; similarly, CESCR, China, E/2006/22 (2005) 25 §190; in observations of Ecuador, the CERD recommends that the "*prior informed consent* of these communities be *sought*" (emphasis added) regarding the exploitation of subsoil resources of the traditional lands of indigenous communities; CERD, Ecuador, A/58/18 (2003) 22 §62; CERD, Ecuador, E/2005/22 (2004) 39, §301; CESCR, Colombia, E/2002/22 (2001) 110, §782; CERD, Bolivia CERD/C/BOL/CO/17-20 (April 8, 2011) §20; CERD, *Concluding Observations on Mexico*, (August 3, 2012) UN Doc. CERD/C/MEX/Q/16-17.

101 See, e.g., HRCee, *Ángela Poma Poma v. Peru* §7.6, see also §7.2, 7.4, 7.7; for instance, UN Special Rapporteur Anaya speaks of a right to prior informed consent in the context of major development projects that affect indigenous peoples (2009 report 'Promotion and Protection of all Human Rights, Civil, Political Economic, Social and Cultural Rights, UN Doc., A/HRC/12/34, §63).

102 CERD, *General Comment 23* §4(d).

103 IACtHR, *the Saramaka People v. Suriname* §134-135, and 145. See similarly the HRCee, which stated in *Lansmann et al v. Finland* that implementing a consultation procedure was sufficient for complying with the Convention's obligations considering that the minorities had not been adversely affected (§9.6). The CESCR, for example, recognizes a right to prior informed consent whenever a decision affects the preservation of the cultural resources of indigenous communities, minorities or other communities, and especially when those resources that are associated with their way of life and cultural expression are at risk (CESCR, *General Comment 21*, §55 (e)).

104 See, e.g., ECtHR, *V.C. v. Slovakia* 18968/07 §146; CRPD, *Concluding Observations on Spain,* UN Doc.: CRPD/C/ESP/CO/1 (October 19, 2011); CRPD; *Concluding Observations on Peru,* UN Doc. No.: CRPD/C/PER/CO/1 (May 9, 2012); CRPD, *Concluding Observations on China*, UN Doc: CRPD/C/CHN/CO/1 (September 27, 2012); CRPD; *Concluding Observations on Hungary*, UN Doc.: CRPD/C/HUN/CO/1 (September 27, 2012; CEDAW, *Concluding Observations on the Fifth and Sixth Periodic Reports*

those individuals and/or groups that are adversely affected in these situations are considered to be particularly vulnerable, and that therefore further procedural guarantees have to be realized by public authorities to ensure that their rights are guaranteed.

The difference between the right to meaningful involvement and the right to prior informed consent lies in the influence that affected individuals have in the decision-making procedure. Whenever meaningful participation is required of those affected, authorities have an obligation to consult with stakeholders and to duly consider their interests, but they are not required to obtain the consent of those affected before adopting a decision.[105] However, when indigenous communities or minorities are adversely affected by an adopted decision, public authorities are required to obtain their prior informed consent.[106] For instance, the IACtHR held in *the Saramaka People v. Suriname* case:

> Regarding large-scale development or investment projects that would have a major impact within Saramaka territory the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions.[107]

In general, the instruments accord wide discretion to authorities in determining how to achieve the result of meaningful participation.[108] Authorities have freedom to choose the way in which they want to organize the participatory processes, whether via public comments,

of Chile, UN Doc. CEDAW/C/CHL/CO/5-6 (November 12, 2012); CEDAW, *Concluding Observations on Australia,* CEDAW/C/AUS/CO/7; CEDAW; *Concluding Observations on Czech Republic,* (November 10, 2010); CEDAW, *Ms. Andrea Szijjarto v. Hungary,* Communication No. 4/2004, (August 29, 2006); CESCR (1994) *General Comment 5: Persons with Disabilities*, (December 9, 1994); CESCR, *Concluding Observations on Brazil*. UN Doc. E/C.12/1/Add.87 (May 23, 2003); *CRC, Concluding Observations: Australia*, UN Doc. CRC/C/AUS/CO/4 (August 28, 2012).

105 In some instances, however, authorities have a duty to obtain the consent of indigenous communities whereas in other situations authorities have a duty to consult to obtain the consent of indigenous communities. Nevertheless, this distinction in the context of decision-making procedures that affect indigenous communities or minorities goes beyond the scope of the research. It should be noted that the difference between the duty to consult to obtain the consent and the duty to obtain the consent only applies to the decision-making procedures that affect indigenous communities and minorities. Regarding invasive health treatments, there is only the right to prior informed consent. With respect to other situations in which the right to consultation exists, there is – currently – no duty to consult to obtain the consent.

106 See similarly above in the text in and around footnotes 99-102.

107 IACtHR*, Saramaka People v. Suriname,* Interpretation of the judgment on preliminary objections, merits, reparations and costs, IACHR Series C No. 185, IHRL 3058 (IACHR 2008), (August 12, 2008); see also *General Comment 23* of the CERD, which reasons along similar lines. CERD *GC 23*, § 4(d); in its *Concluding Observation on Ecuador*, the CERD stated that in the case of the exploitation of subsoil resources of the indigenous communities' traditional lands mere consultation is not sufficient; instead, prior informed consent has to be sought. CERD, A/58/18 (2003) 22 at §62; CESCR, *CO on Colombia*, E/2002/22 (2001) 110 at 782; CESCR, *Concluding Observations on Ecuador* , E/2005/22 (2004) 39 §278, 301.

108 See also, e.g., ECtHR, *Chapman v. UK*, §92, 106-116.

hearings, a written phase, one-on-one interaction, or another type of participation. However, at a minimum, the participation should take place early in the procedure in order to still be meaningful.[109] For instance, the Aarhus Convention Compliance Committee held in *ACCC/C/2009/43 (Armenia)* that since the public participation was organized only after a special mining license had been issued, it was in contravention with the requirement to provide participation at an early stage when all options are still open.[110]

When decision-making procedures are more complex, different terms may be required for participatory processes.[111] For instance, in regards to certain types of decisions, authorities may be required to conduct impact assessments to examine the impact that a certain project can have on the environment, on the society, or on children's rights and whether, and to what extent, considering the outcome of this assessment, it should influence the design of the decision-making procedure and the guarantees that have to be offered by authorities to those affected. For instance, in *SERAC v. Nigeria*, the ACHPR stated:

> government compliance … must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicizing environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.[112]

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109 Article 6(4) of the Aarhus Convention; the Aarhus Convention Compliance Committee emphasized that:
> Such participation does not only require formal participation. More importantly, participation is to include public debate and the opportunity for the public to participate in such debate at an early stage of the decision-making process, when all option are open and when due account can be taken of the outcome of the public participation.

ACCC, *ACCC/C/2008/26 (Austria)*, ECE/MP.PP/C.1/2009/6/Add.1 (February 8, 2011), §66; ACCC, *ACCC/C/2008/24 (Spain)*, §117(a)(iii); e.g., the ACCC argued in *ACCC/C/2009/37 (Belarus),* (§89):
> The Committee appreciates a flexible approach to setting the time frames aiming to allow the public to access the relevant documentation and to prepare itself, and considers that while a minimum of 30 days between the public notice and the start of public consultations is a reasonable time frame, the flexible approach allows to extend this minimum period as may be necessary taking into account, inter alia, the nature, complexity and size of the proposed activity.

110 ACCC, *ACCC/C/2009/43 (Armenia),* ECE/MP.PP/2011/11/add.1, (May 12, 2011), §76. As the ACCC explained in §76:
> In this case, a special mining licence was issued for the developer … in 2004, and the developer organized public participation in the framework of the [Environmental Impact Assessment] procedure in 2006. Providing for public participation *only after* the licence has been issued reduced the public's input to only commenting on how the environmental impact of the mining activity could be mitigated, but precluded the public from having input on the decision on whether the mining activity should be pursued in the first place, as that decision had already been taken. (emphasis added)

111 This automatically influences what has to be understood to be reasonable timeframes for participatory processes in a given context, see, for example, ACCC, *ACCC/C/2006/16 (Lithuania)*, §69-70.

112 ACHPR, *SERAC v. Nigeria*, §52-54; see further for the necessity to have access to information to participate meaningfully in the decision-making procedures of public authorities regarding

Although impact assessments constitute separate procedures[113] – with their own participatory processes – it is interlinked with the duty to inform those affected[114] and with the obligation to ensure meaningful participation in the decision-making procedures of those affected.[115]

2.3. The Duty to Duly Account for the Views Expressed

The duty for authorities to duly account for the views or interests presented by affected individuals is the third element to ensure that the participatory process is meaningful and not merely a formality.[116] The duty is widely recognized[117] within the various treaty regimes.[118] Authorities ought to give an appropriate weight in their deliberation to the interests presented by those affected and weigh them against other competing interests.[119] It can best

environmental matters, for example, the Aarhus Convention, and Principle 10 of the RIO declaration.

113 See, e.g., *General Comment 14* (§99) of the CRC, in which the Committee explained the need for an impact assessment in the context of the rights of children and the necessity for authorities to include such assessments in their decision-making procedures to ensure a proper regard of children's rights in their procedures. See further, *ACCC/C/2009/43 (Armenia)* in which the ACCC explains that the obligation to carry out impact assessments concerns a separate obligation from the obligation to provide for a meaningful participation in the decision-making procedure, at §76.

114 In *ACCC/C/2004/3 (Ukraine)*, however, the ACCC reminded the authorities that the information to be provided may not be limited to a mere publication of the conducted environmental impact assessment, ACCC *ACCC/C/2004/3, ACCC/S/2004/1 (Ukraine*), ECE/MP.PP/C.1/2005/2/Add.3 (March 14, 2005), §32.

115 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, (2009) §53; CRC, *General Comment 14*, §99. With respect to decisions on oil operations, see, for example, the Inter-American Commission on Human Rights, *1997 study on HR protection in Ecuador,* OEA/Ser.L/V/II.96 doc. 10, rev. 16-18, §30, 45-49; with regard to deforesting projects, see IACHR, *Claude Reyes v. Chile;* with respect to the need to inform and duty to collect information concerning the design and construction of nuclear reactor, see e.g. ECtHR, Sdruženi Jihoceské *Matky v. Czech Republic* (2006).

116 Article 6(8) Aarhus Convention.

117 Only in the limited context of decisions on expulsion, a lower bar is set. Those facing expulsion have only a right to be heard without a corresponding obligation for authorities to duly take into account any of the views expressed.

118 See, e.g., article 12 of the Convention on the Rights of the Child; CRC, *General Comment 4*, §4; CRC, *General Comment 3,* §10; CRC, *GC 14*, §53; HRCee, *Lansmann et al, v. Finland, communication no. 511/1992* (1992), §9.5-9.6; HRCee, *Apirana Mahuika et al v. New Zealand*, (2000), §9.5-9.6, 9.8; article 6(8) Aarhus Convention; ACCC/C/2004/3 and ACCC/S/200, ECE/MP/PP/C.1/2005/2/add.3 (March 14, 2005),§29; ECtHR, *McMichael v. United Kingdom, App. no. 16424/90* (1995) §87; see also ECtHR, *Buckley v. United Kingdom, App. no. 20348/92* (1996) §76; the CESCR speaks of "genuine consultation," see, e.g., CESCR, *General Comment* 7, §15, CRC, *General Comment 15*, §56; CESCR, *General Comment 19*, §42; IACtHR, *the Saramaka People v. Suriname,* §131-133; article 32 of the UN Declaration on the Rights of Indigenous Peoples.

119 In relation to article 8, for instance, the ECtHR has established that when a decision-making process leads to measures interfering with a right under the convention these processes "must be fair, and such as to afford *due respect for the interests safeguarded* to the individual by Article 8". (emphasis added) ECtHR, *McMichael v. United Kingdom, App. no. 16424/90* (1995)§87; see also ECtHR, *Buckley v. United Kingdom, App. no. 20348/92* (1996) §76; ECtHR in *Hatton v. UK* used similar language; see also A. Boyle, 'Human Rights and the Environment: Where Next' (2012) 23 *EJIL* 613 at 624; E. Brems and L. Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35*Human Rights Quarterly* 176 at 192.

be described as an obligation of effort. This obligation does not imply that authorities should adopt the decision in conformity with the view of the affected individual;[120] authorities have administrative discretion in the way they come to their decision, as long as they take the views into account when the decision is made.[121] Only the Aarhus Convention Compliance Committee further defines what factors play a role in the determination of whether due account has been given of the interests presented by those affected. For instance, it is of relevance whether authorities have had a sufficient amount of time to take the outcome of the public participatory processes into account.[122]

If, in a given case, prior informed consent is required, it implies that authorities have less discretion to come to their decision, and individuals thus have more influence in the decision-making procedure. Hence, the duty to consider the views expressed is closely connected to the modality of participation required in a decision-making procedure. The more influence an individual has in the decision-making procedure – depending on the participation modality – the less discretion authorities have in weighing the interests and coming to their decision.

2.4. Obligation to Provide Reasons for the Decision Reached

The duty for authorities to provide a written reason is widely recognized across the various instruments.[123] In essence, the obligation requires authorities to provide the legal basis

120 See, e.g., in the context of Aarhus, *ACCC/C/2008/24 (Spain),* §98. The Committee further explained that all comments have to be seriously considered, but that it is impossible to accept all comments. However, routinely disregarding or not accepting comments on their merits without an explanation may constitute violation of the Convention (§99-100).

121 Each treaty monitoring body defines *administrative discretion* differently. For instance, the ECtHR and the CERD refer to it as the margin of appreciation. This discretion accorded to authorities will be further discussed in chapter 6.

122 ACCC, *ACCC/C/2004/3 and ACCC/S/2004.1 (Ukraine)*, EC/MP.PP/C.1/2005/2/add.3 (March 14, 2005), §29.

123 In particular, see CRC, *General Comment 14 (concerning article 3 CRC)*, §97; see further CESCR, *General Comment 7*, §15; ECtHR, *Lombardi Vallauri v. Italy app. no. 39128/05* (2010), §45-49; the ECtHR held in several cases that the obligation to provide reasons applies to administrative and judicial proceedings. For instance, in *Suominen v. Finland* (July 1, 2003 app. 37801/97, §37), the Court held with regard to judicial proceedings that:

> The Court emphasises that a further function of a reasoned decision is to demonstrate to the parties that they have been heard. Moreover, a reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice.

Similarly, decisions adopted by administrative authorities on the non-disclosure of requested information have to include the reasons underlying the decision. HRCee, *GC 34*, §19; COE, Committee of Ministers, Recommendation No. (81) 19, Appendix 1, principle VII; Inter-American Juridical Committee, Principles on the Right to Access to Information, principle 5; Individual participation right (OECD Recommendation of the Council concerning Guidelines governing the protection of privacy and transborder flows of personal data (2013) C(80)58/FINAL, as amended on July 11, 2013 by C(2013)79, Annex, §13(b)(c); IACtHR, *Claude Reyes v. Chile*, §55.

for the decision and an explanation of the reasons underlying the decision. The ACCC,[124] the CRC, and the ECtHR gave further guidance as to how to interpret this obligation. For instance, the ECtHR emphasizes in its case law the importance of allocating due weight to the interests of those affected, and that this has to be reflected in the reasons for the decision.[125] The Aarhus Convention Compliance Committee explained that authorities do not need to react to every view expressed.[126] The CRC is most explicit in addressing what the duty to give reasons entails for public authorities. In *General Comment 14,* the Committee explains that, at a minimum, the decision has to be motivated, justified and explained,[127] the explanation has to include the relevant factual circumstances and the elements taken into account in the context of the best interest assessment, the interests at stake, and the relative weight allotted to the interests.[128]

It should be noted that the duty to provide reasons for a decision reached is not only an essential condition of the right to meaningful participation, the provision of reasons by authorities also affects the right to an effective remedy. The effectiveness of the remedy depends, amongst other things, on the knowledge of the reasons for the decision that one would like to have reviewed.[129]

3. Rightsholders

The right to participation in the decision-making procedure has a legal basis in the majority of the instruments; however, the type of decision-making procedure or to whom this right is accorded varies in each instrument. In this regard, this research signals two factors that are relevant in determining who has a right to participation in the decision-making procedure.

124 It should be noted that the Aarhus Convention is one of the few instruments that has an explicit provision stipulating the obligation to provide a written reasoned decision, article 6(9) Aarhus Convention. The other treaty monitoring bodies have read this obligation into the substantive rights.

125 ECtHR, *Kutzner v. Germany*, Application no. 46544/99 (February 26, 2002) §56; ECtHR, *McMichael v. United Kingdom*, (March 2, 1995), §87.

126 However, as stated by the Aarhus Convention Compliance Committee:

> the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account.

ACCC/2008/24 (*Spain),* ECE/MP.PP/C.1/2009/8/add.1 (September 30, 2010), §100.

127 CRC, *General Comment 14*, §97.

128 Idem; it should be noted that if a decision is made that differs from the child's point of view, public authorities have an extensive duty to explain why other interests outweighed the interests of the child in question.

129 Chapter 5 will further address this point. See, for instance, ECtHR *Al-Nashif v. Bulgaria (app. no. 50963/99* (2002) §123):

> …the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence.

In practice, these two trigger factors for participatory rights often overlap.

Firstly, the holders of the right can be determined by *who is affected* by the decision. Overall, vulnerable groups or individuals are accorded participatory rights. The right to participation has been recognized for minorities,[130] descent-based communities,[131] indigenous people,[132] children,[133] women,[134] migrant workers,[135] the poor,[136] the homeless,[137] elderly,[138] and for people with disabilities[139] in regards to all decisions affecting them.

Secondly, the holders of the right can be determined by *the kind of decisions* affecting individuals. In these situations, anyone affected by these types of decisions has a right to participate in the decision-making procedure. The right to participate in the decision-making has been recognized for those subjected to expulsion,[140] forced evictions,[141] those affected by decisions on adequate housing,[142] by decisions on water,[143] by decisions interfering with the right to cultural life,[144] by decisions relating to one's health,[145] by decisions relating to the right

130 HRCee, *Angela Poma Poma v. Peru*, §7.6; HRCee, *General Comment 23* (1994), §7; CESCR, *General Comment 21* (2009); CERD, *General Comment 23* (2000), §41-44.
131 CERD, *General Comment XXIX*, §6(aa).
132 HRCee, *Lansman et al v. Finland*, §9.5-9.6; HRCee, *Apirana Mahuika et al v. New Zealand*, §9.5; CERD, *General Comment 23*, §4(d); CEDAW, *CO on Seventh Periodic Report of Argentina* (2016), §40(a), (d), 41(b) and (e).
133 CRC, article 12; CRC *General Comment 14* (2013) §53.
134 CEDAW, *CO on Seventh Periodic Report of Argentina* (2016), §40(a), (d), 41(b) and (e).
135 Article 42(2) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
136 CESCR, Statement of the CESCR on Poverty and the ICESCR, (May 10, 2001) §12.
137 CESCR, *GC 7*, §16.
138 UN Committee on Economic, Social and Cultural Rights (CESCR*), General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons* (December 8, 1995), §5, 34, 38. The CESCR referred to the principles stipulated in the Vienna International Plan Of Action on Ageing adopted by the World Assembly (observations in the Report of the World Assembly on Ageing, Vienna, (UN Publications 1982) available via http://www.un.org/en/events/elderabuse/pdf/vipaa.pdf) and to the United Nations Principles for Older Persons adopted by the UN General Assembly (UN GA resolution 46/91 of December 16, 1991), 'Implementation of the International Plan of Action on Ageing and related activities', annex, principle 7.
139 For instance, article 3(c) of the UN Convention of Persons with Disabilities that stipulates as a third (and final) general principle of the Convention "full and effective participation and inclusion in society;" see also CESCR, *General Comment No. 5: Persons with Disabilities*, (December 9, 1994), §26, 31, 36-37.
140 Article 13 ICCPR, HRCee, *General Comment 15*, §9-10; HRCee, *Karker v. France,* §9.3; article 1 Add. Prot. 7 ECHR; article 32 of the 1951 Refugee Convention; article 22(5) and (6) American Convention on Human Rights; article 12(4) African Charter on Human and Peoples' Rights.
141 For example, individuals subjected to forced evictions from their homes have a right to genuine consultation within the decision-making procedure. See, e.g., CESCR, *GC 7*, §16.
142 CESCR*, General Comment 4*, §9.
143 CESCR, *General Comment 15,* §56.
144 CESCR, *General Comment 21*; HRCee, *General Comment 23*, §7.
145 CESCR, *General Comment 14*; CRC, *General Comment 4,* §4; CRC, *General Comment 3,* §10.

to development,[146] by decisions relating to one's right to family life, [147] and by decisions on environmental matters.[148]

The common denominator across each instrument and each category is the (potential) impact of the decision on the lives of affected individuals. Vulnerability[149] is a key trigger factor for participatory rights. Those affected by the decisions are presumed to be vulnerable, which triggers an obligation for authorities to provide participatory rights to those affected. The vulnerability is materialized in two different ways: on the basis of characteristics related to the person or on the basis of characteristics related to the type of decision. The participatory rights focus on empowering vulnerable individuals, or groups affected by administrative decisions.

In conclusion, there is a right to participate meaningfully in the decision-making procedure for all those affected – and thus considered vulnerable – by decisions adopted by public authorities. It is a decisive moment for the right to meaningful participation in the decision-making procedure and for the overall level of inclusionary governance when public authorities determine who they consider to be affected by the decision. After all, only those considered to be affected are duly informed of the upcoming decision and participatory

146 ACfPHR, *SERAC v. Nigeria*.

147 Regarding deprivation of legal capacity, see, e.g., ECtHR, *Drobnjak v. Serbia, app. 3650/05* (2010) §143-144; ECtHR, *Shtukaturov. v. Russia, App. no. 44009/05,* (2008); as regards access to abortion, see, e.g., ECtHR, *R.R. v. Poland, app. no. 27617/04* (2011) §191; see further E. Brems and L. Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35(1) *Human Rights Quarterly* 176 at §192. See similarly the Committee on the Rights of the Child, *GC 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child* (2003) §4, 8, 13, 18, 28, 38. With regard to HIV/AIDS and the rights of the child, see similarly CRC, *General Comment No. 3*, (2003), §10.

148 Article 6 Aarhus Convention; UN Special Rapporteur on Human Rights and the Environment (2008); Inter-American Commission on Human Rights, *Human Rights Protection in Ecuador* (1997); ECtHR, *Hatton v. United Kingdom, App. no. 36022/97* (2003) §99, 128-129; ECtHR, *Buckley v. United Kingdom, App. no. 20348/92* (1996); ECtHR *Taşkin v. Turkey, app. no. 46117/99* (2005) §119; ECtHR, *Giacomelli v. Italy, app. no. 59909/00* (2007) §82-83; ECtHR, *Chapman v. United Kingdom*, [GC], app. no. 27238/95, (January 18, 2001).

149 The concept of vulnerability is used throughout this research to refer to the approach of treaty monitoring bodies to accord procedural guarantees to those who are particularly affected by a decision. See chapter 6 in which this concept will be further discussed. It should be noted that the working definition upheld in this book is deduced from the work of the treaty monitoring bodies in which de iure and de facto factors of vulnerability seem to influence the norm setting and norm application in the context of inclusionary governance. The definition upheld in this research is broader than the concept of (group) vulnerability as used in scholarly work to refer to particular groups of individuals that, on the basis of characteristics of their identities, are considered to be extra vulnerable. For critical reflections on the usage of the concept of vulnerability by treaty monitoring bodies, see, for example, A.R. Chapman and B. Carbonetti 'Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights' (2011) 33 *Human Rights Quarterly* 682-732. L. Peroni and A. Timmer, 'Vulnerable Groups: the Promise of an Emergent Concept in European Human Rights Convention Law' (2013), 11 *International Journal of Constitutional Law* 1056-1085.

process and considered to have a right to participate in the procedure. Accordingly, when public authorities fail to recognize someone who may potentially be affected by the decision, this person will not be included in the decision-making procedure. It has a detrimental effect on the right to participation in the decision-making procedure and the overall level of inclusionary governance.

4. Limitations

This section discusses different ways in which the right to participation may be limited. The discussion that follows is broader than a stipulation of explicit limitations to the right, and focuses instead on different ways in which the right may be restricted by public authorities that can derive from (1) explicit limitations stipulated in various legal provisions, (2) conditions imposed on the exercise of the right, or (3) the implicit legal basis of the right (that is, the way the treaty monitoring bodies have read the procedural right into various legal provisions of certain substantive rights that impose constraints on its enforceability).

First, regarding the explicit limitations, each instrument that recognizes a right to meaningful participation in the decision-making procedure limits access to the right of those that are (potentially) affected by decisions. When someone is not considered to be affected by the decision, this person does not have a right to participation in said decision-making procedure. In other words, unlike the right to public interest information, the right to meaningful participation in the decision-making procedure is not a right for the general public. Beyond this general limitation, only the right to participation in expulsion cases contains a further explicit limitation ground. For instance, article 13 ICCPR (the right to submit reasons in the case of expulsion) may be limited when there are compelling reasons of national security. In *Karker v. France*, the Human Rights Committee held that although Mr. Karker was not allowed to submit reasons due to national security reasons, there was no violation in the given case.[150] Article 13 ICCPR permitted the limitation, and considering that Mr. Karker had the opportunity to have his case reviewed (at two instances) with counsel representation, it was in conformity with the provision.

Although the Aarhus Convention, the Convention on the Rights of the Child and ILO Convention Nº 169 contain an explicit legal basis for the right to participation, they do not provide for explicit limitation grounds. Nevertheless, these instruments permit public authorities to impose certain conditions on the exercise of the right, which may have a restricting effect on the exercise of the right to meaningful participation in the decision-

150 HRCee, *Karker v. France*, §9.3; See also HRCee, *GC 15: the Position of Aliens under the Covenant* (1986), §10.

making procedure. This is the second way in which the right may be limited. For instance, authorities may impose (reasonable) time frames during which the participation has to take place;[151] this restricts those affected to be able to exercise their right to participation within the allocated timeframe only. Similarly, public authorities may reasonably limit the format in which the participation takes places, as long as it remains meaningful.[152]

Other treaty monitoring bodies construed a right to participation in the decision-making procedures in the context of a substantive right, which has implications for the scope and the justiciability of the right. In these instances, treaty monitoring bodies have read a procedural right to participation into various substantive rights of the respective instruments. In these cases, the extent to which participation of those affected in the decision-making procedure can be considered meaningful is to be assessed taking all procedural safeguards required for the decision-making procedure into account. For example in its case law on article 8 ECHR, the ECtHR uses as a formula to describe the level of procedural guarantees required that: "the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests of the individual as safeguarded by Article 8."[153] The Court examined all relevant procedural aspects to assess whether authorities had used their administrative discretion properly,[154] including whether those affected had a right to meaningful participation in the decision-making procedure. In other words, in these cases, participation is not a right that may be limited; rather it is a procedural safeguard to ensure a certain quality of the decision-making procedure whenever the underlying substantive right is limited.

In general, regardless of the way in which the right to participation is limited, all instruments stipulate that a lack of (meaningful) participation in the decision-making procedure

151 For instance, the ACCC examined in *ACCC/C/2007/22 (France)* whether the time frame for the participatory processes were reasonable and provided those affected with a right to meaningful participation:

> The Committee notes that the announcement of the public inquiry, made on 3 August, provided a period of approximately six weeks for the public to inspect the documents and prepare itself for the public inquiry. Furthermore, the public inquiry held from 19 September to 3 November 2005 provided 45 days for public participation and for the public to submit comments, information, analyses or opinions relevant to the proposed activity. The Committee is convinced that the provision of approximately six weeks for the public concerned to exercise its rights under Article 6, paragraph 6, of the Convention and approximately the same time relating to the requirements of Article 6, paragraph 7, in this case meet the requirements of these provisions in connection with Article 6, paragraph 3, of the Convention.

ECE/MP.PP/C.1/2009/4/Add.1 (February 8, 2011), §44.

152 See, e.g., ECtHR, *Chapman v. UK*, §92, 106-116.

153 ECtHR, *Taskin v. Turkey*, at 118.

154 In the context of the ECtHR, it is referred to as the *margin of appreciation*. In its case law, the Court gives indicators to assess in which instances authorities have a wide or narrow margin of appreciation. For instance, in the context of environmental law cases authorities have in principle a wider margin of appreciation.

is subject to review. Although, the precise content and scope of such a review procedure will be discussed in chapter 5, it may be noted already that there is a difference depending on whether the request for review is triggered by the explicit legal basis of the right to meaningful participation in the decision-making procedure or by the procedural right read into a substantive provision. In short, the grounds for review might differ as well as the scope of the review.

As presented in this section, the limitations to the right to participation in the decision-making procedure are of a different nature than the limitations to the right to public interest or personal information as discussed in chapter 3. Whereas in the context of both informational rights there is a well-articulated set of limitations laid down in the instruments, in the context of the right to participation, the constraints on the right are rather of an indirect nature. These differences can be further explained by the more procedural nature of the right to participation in the decision-making procedure in comparison to the informational rights.

5. Conclusions: The Building Block of a Right to Meaningful Participation in the Decision-Making Procedure

The Conceptual Model includes a duty to provide for participation in the decision-making procedure of international institutions to those affected and a duty for decision-making bodies to provide reasons for the decisions reached. This chapter showed how the right to meaningful participation in the decision-making procedure has developed in international law. The legal survey charted that there are only a few conventions that contain an explicit legal basis for the right to participation, all of which are only applicable in a specific context. The right to meaningful participation in the decision-making procedure developed mainly through the work of treaty monitoring bodies. The majority of the treaty monitoring bodies have read a right to participation in the decision-making procedure into substantive rights of the respective instruments. As a result, a general procedural right to participation in the decision-making procedure can be identified, and only in certain situations does an explicit right to participation in the decision-making procedure exist.

Although, the right to meaningful participation in decision-making procedures has a more fragmented origin than the two informational rights, general benchmarks of such a right can be identified across the instruments, as illustrated in the building block below.

RIGHT TO MEANINGFUL PARTICIPATION IN THE DECISION-MAKING PROCEDURE	
Legal basis	Substantive right: CRC, ILO Convention No 169, Migrant Workers Convention, Aarhus Convention, 1951 Refugee Convention Recognition of a procedural (accessory) right: ICCPR, CESCR, CERD, CEDAW, ECHR, IACHR, ACPHR, albeit recognized in various context
Who is the duty bearer?	Public authorities: all branches of state government, all actors who exercise public (administrative) authority
Rights holder	Those affected by decisions Factors: belonging to a recognized vulnerable group and/or concerns a decision that is known to impact individuals
Scope of obligations	Duty to inform Spectrum of participation modalities: a right to meaningful involvement ➔ a right to prior informed consent (for those adversely affected by a decision, applicable in limited situations only) Obligation to duly take into account views expressed Obligation to provide a reasoned decision
Limitations	Conditions may be imposed on the exercise of the explicit right to participation as long as it does not render the right to participation in the decision-making procedure meaningless The procedural right to participation as part of substantive rights is to be assessed as part of the overall assessment of the procedural aspects of the substantive right limited by authorities

Table 5: Building block - right to meaningful participation in the decision-making procedure

In the interpretation of the treaty obligations, treaty monitoring bodies focus extensively on the need for procedural safeguards for groups and individuals and the duty of public authorities to prevent arbitrary decisions. The four benchmarks of the right to meaningful participation in the decision-making procedure (the duty to inform, the duty to ensure meaningful involvement, the duty to duly consider the interests presented, and the duty to provide reasons) are all a way to prevent an arbitrary use of public power by public authorities. Moreover, in the context of the permitted constraints on and limitations to the right to participation in the decision-making procedure, treaty monitoring bodies emphasize the need to ensure a certain quality of the decision-making procedure, which similarly aims to prevent an arbitrary use of power.

When comparing the content and scope of the right to meaningful participation in the decision-making procedure with the informational rights discussed in the previous chapter, certain commonalities come to the forefront. Particularly in the context of the right to personal information, and to a lesser extent in the context of the right to public interest information, treaty monitoring bodies emphasize that public authorities have the obligation

to ensure a certain quality of the decision-making procedure and to realize the procedural safeguards against arbitrary uses of power. An important factor is whether, and to what extent, authorities are accorded discretion in the exercise of certain public powers, and if so, whether the use of this discretion is sufficiently regulated to prevent an abuse thereof. Even more than in the contexts of the informational rights, authorities enjoy discretion to implement the obligations to realize a meaningful participatory process. Moreover, the same commonalities can be identified – although to a lesser extent – in relation to the Conceptual Model. In the exercise of their public power, international institutions have to act in accordance with the law, may not act in an arbitrary manner, and, in addition, decision-making procedures have to ensure a certain quality of the procedure. As the next chapter will further demonstrate, whereas there are various elements that contribute to a certain quality of the decision-making procedure, the lack of one of those elements in a given case, can have a detrimental effect on the rights enjoyed by those affected. Chapter 5 will further discuss the interlinkages between the dimensions and the way in which the informational rights and the right to meaningful participation in the decision-making procedure inform the right to an effective remedy.

5 Right to an Effective Remedy

This chapter will outline the building blocks of the third pillar of the Inclusionary Governance Model: the right to an effective remedy. The point of departure for the analysis is the Conceptual Model that recognizes a right to an adequate and effective remedy whenever third parties are affected by decisions of international institutions.[1]

The legal survey takes this right as a point of departure and develops the building blocks of the right to an effective remedy. This research adopts a broad approach to this right[2] and examines whether, and to what extent, the legal survey is able to identify standards for a review procedure (section 1) and for the outcome of a review procedure in relation to decisions that affect individuals (section 2). The review procedure refers to the processes by which "arguable claims"[3] of violations of international law are heard and decided on by a review body at the domestic level, which is discussed in this chapter under the right to a review. The outcome of the review proceedings refers to the potential relief awarded to a successful litigant, which the research discusses in the context of the right to reparation. In the conclusions of this chapter, the building blocks of the right to an effective remedy will be summarized and discussed as charted by the legal survey.

1. Right to a Review

This section will examine when and in which context a right to a review is recognized in the international instruments and the content and scope of the right to a review. Firstly, the different legal bases will be discussed (section 1.1), followed by a discussion of the holders of the right (section 1.2), the scope of the right to a review (section 1.3), and, lastly, the

1 Although the Conceptual Model also incorporates the term *right* in relation to an effective remedy in contrast to the Conceptual Model's other elements that refer to duties, the usage of this term has no normative implications. It is used in the ILA Report and in theoretical approaches to the accountability problem of international institutions seemingly without the normative connotation of referring to *a right enjoyed by individuals* (and groups) and owed by international institutions. Rather, it seems to refer to an international institution's duty to realize an effective remedy. As similarly raised in the previous chapters, there is therefore a difference in the language used in the Conceptual Model and in that used in this chapter. In Part II, the legal survey primarily charts the rights enjoyed by individuals (and groups) with the concomitant duties for public authorities. In contrast with the language used in the Conceptual Model, the emphasis in the language thus switches from duties to rights. Chapter 6 will address whether this switch influences the content of the elements of the Draft Inclusionary Governance Model, see also the Introduction to Part II, n. 5 to chapter 3, n. 1 to chapter 4, and chapter 6.

2 The terms *review*, *remedies*, and *access to justice* are used interchangeably by the various treaty monitoring bodies. In particular, the ECtHR uses the term a right to a review and a right to an effective remedy interchangeably. Moreover, the right to a review and the right to reparation are complementary to each other and often share the same legal basis in a convention's provision. Accordingly, this chapter will discuss the provisions of the right to an effective remedy both in section 1 in the context of the right to a review and in section 2 in the context of the right to reparation.

3 See also the approach of the ECtHR and HRCee in this regard; they too refer to arguable claims as a yardstick for a remedy, see below section 1.1.1.

limitations to a right to a review (section 1.4). The section will conclude with a schematic overview of the building blocks of the right to a review as recognized in international law (section 1.5).

1.1. The Different Legal Bases Compared

The right to a review is widely recognized in international law. Two broad categories of a right to a review can be identified:

- The decision affects substantive rights enjoyed under the respective instrument, which triggers a right to a review (section 1.1.1)
- The dispute qualifies as a suit at law or determination of certain rights and obligations, (i.e., fair trial provisions), which triggers a right to a review (section 1.1.2)

This section will therefore follow a different structure than the previous two chapters and will discuss the legal bases per category as identified above and will not discuss the legal bases on the basis of the distinction between whether there is an explicit legal basis or whether the right developed through the work of treaty monitoring bodies. In section 1.1.3, the different legal bases are summarized in a schematic overview.

1.1.1 Decision of Respective Instruments in regards to Affected Substantive Rights

This section will discuss the category of rights to review as recognized by the various treaty instruments that have the widest scope: whenever substantive rights are allegedly violated under a respective treaty instrument, the instruments accord a right to a review to those affected.

This type of review is generally construed as part of the right to an effective remedy. The right to a review in this context is defined as a right for individuals[4] to have an arguable claim[5] of a violation of a convention right heard by a review body at the domestic level.[6] For instance, the ECtHR referred to the meaning of article 13 ECHR (the right to an effective remedy) as to:

4 For the sake of simplicity, reference is made here to individuals; section 1.2. will further explain that others may also have a right to a review, including groups and NGOs.

5 See, e.g., ECtHR, *Shamayev and others v. Georgia and Russia*, §444; ECtHR, *Leander v. Sweden* (March 26, 1987) Series A No. 116, §77(a).

6 It should be noted that the right to an effective remedy in the respective instruments encompasses both the right to a review and the right to reparation. In this section, only that first component is discussed: the right to a review. The right to reparation will be discussed in section 2. However, as the right's two components are complementary to each other, the interactions between the two rights and the implications thereof for the overall interpretation of the right will be addressed where necessary. The other rights to review discussed in this section are similarly dependent on the right to reparation for the effectiveness of the remedy, as this chapter will demonstrate.

> …provide a means whereby individuals can obtain relief at the national level for violation of their Convention rights before having to set in motion the international machinery of complaint before the Court.[7]

This right can be found in the majority of the instruments, although the language and the scope may vary.[8] The necessity of an effective remedy, judicial or otherwise, to enforce the guaranteed protected rights is widely recognized in international law.[9] As described by the Human Rights Committee in *General Comment 31* regarding the ICCPR, states are under obligation to:

> ensure that individuals also have accessible and effective remedies to vindicate those rights... administrative mechanisms are particularly required to give effect to the general obligation to

7 ECtHR, *Kudla v. Poland*, §152; the right to an effective remedy is closely related to the admissibility criterion of having exhausted all domestic remedies before an applicant may submit a complaint to the international human rights machinery. (e.g., article 35 – 13 ECHR, article 2(3) ICCPR, article 2, 5(2)(b) of the Optional Protocol to the ICCPR); see also HRCee, *C.F. v. Canada Comm no 113/1981*, §6.2; HRCee, *Guillermo Ignacio Dermit Barbato et al. v. Uruguay*, (1990) at 9.4. Only those remedies that are effective have to be exhausted in order to meet the admissibility criterion; see, for instance, the *Salah Sheekh case (Salah Sheekh v. The Netherlands*, comm. no. 1948/04 (January 1, 2007)), in which the ECtHR reasoned that a Somalian asylum seeker had correctly not made use of the option of appeal to the Council of State (*Raad van State*) of the Netherlands as, in this particular case, it was clear in advance what the outcome of the proceedings would be. This was clear, amongst others things, due to the dual role of the Council of State in the Netherlands: it has an advisory role to the government as well as constitutes the highest judicial authority in administrative proceedings. Additionally, established case law of the Council of State dealing with similar cases of asylum seekers from the same region hinted at a non-favorable outcome for the applicant. See also ECtHR, *Akdivar v. Turkey,* (August 30, 1996) § 67. See for other examples of remedies that were not considered effective, for instance, HRCee, *Daniel Monguya Mbenge v. Zaire, Communication No. 16/1977 (1990), 76*.

8 For instance, article 8 of the Universal Declaration of Human Rights stipulates that:
> [e]veryone has the right to effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law.

article 13 ECHR; article 2(3) ICCPR, article 25 ACHR; article 8 UDHR; article 7 ACHPR; article 9(1),(2) of the Aarhus Convention; article 83(a)(b) Migrant Workers Convention, article 6 CERD; article 2 CEDAW; article 9(1) CRC (no child should be separated from his parents unless such is decided by competent authorities and subject to judicial review); 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, adopted and proclaimed by General Assembly resolution 60/147 (December 16, 2005). In addition, although article 13 CRPD does not provide for a right to an effective remedy, or other type of review procedure, it does stipulate wide ranging positive obligations for a state in order to ensure effective access to justice for those falling within the scope of the Convention; in essence, it concerns the right to equality of arms, fairness of the procedure and a right of access to the procedure.

9 Article 2(3) ICCPR; article 13 ECHR; article 25 ACHR; article 83(a)(b) Migrant Workers Convention; HRCee, *General Comment 31: The Nature of the General Legal Obligation imposed on state parties to the Covenant*, (2004), §15; See further, e.g., CERD, *General Comment XXVII on discrimination against Roma*, (2000) §7; CRC, *General Comment 14,* §98; CESCR, *General Comment 4: Right to adequate housing* (1991), §14-19; CESCR, *General Comment 7: Right to adequate housing – forced evictions* (1997), § 11-13; CESCR, *General Comment 12: Right to adequate food* (1999), §32; CESCR, *General Comment 14: Right to the highest attainable standard of health* (2000), §59; CESCR, *General Comment 15: Right to Water* (2002), § 55.

> investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.[10]

The requirement across all instruments is that the remedy has to be effective both in practice and in law, it has to be adequate, and it has to be accessible.[11] It may be noted that the provisions within the ICCPR, ACHR and the ACHPR do not constitute autonomous provisions; they may only be relied upon jointly with a substantive provision of the respective convention.[12] The right to an effective remedy as recognized in article 13 ECHR does constitute an autonomous provision that may be relied upon without an alleged violation of another article.[13] The ECtHR reasoned that:

> [t]he existence of an actual breach of another provision is not a prerequisite for the application of (…) Article [13] (…) it guarantees the availability at the national level of a remedy to enforce – and hence to allege non-compliance with – the substance of the Convention rights and freedoms in whatever form they might happen to be secured.[14]

Besides the right to an effective remedy of a general nature, various instruments also stipulate a right to an effective remedy for a particular situation. In other words, whereas the general provisions regarding the right to an effective remedy are applicable to all situations of alleged violations of rights within the scope of the respective instrument, the right to an effective remedy of a specific nature implies that in specific situations the instruments recognize a right to a review. The different contexts in which a right to a review exists when substantive rights are affected will be discussed below.

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10 HRCee, *General Comment 31* (2004) §15, 19, 20.

11 ECtHR, *Ilhan v. Turkey*, comm. no. 22277/93 (June 27, 2000) §97; ECtHR, *Gladkiy v. Russia*, (Application no. 3242/03), (December 21, 2010), §119; ECtHR, *Samayev and others v. Georgia and Russia* app. no. 36378/02 (April 12, 2005), §447. In *Shamayev v. Georgia and Russia*, the ECtHR stated that this implies that, for instance, the exercise of a remedy may not be unjustifiably hindered by acts or omission of state authorities.

12 See, for instance, the HRCee that confirmed in *R.E. v. Russian Federation communication* that:

> [t]he Committee recalls its jurisprudence, which indicates that the provisions of article 2 of the Covenant lay down general obligations for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol... The Committee thus considers that the author's claims under article 2 of the Covenant are inadmissible under article 3 of the Optional Protocol.

HRCee, *R.E. v. Russian Federation communication No. 2249/2013* (August 14, 2018) at 11.4; see also HRCee, *Kuvvatali Mudorov v. Tajikistan communication 2826/2016* (October 25, 2018), in which the complaint of an alleged violation of article 14(1) in conjunction with 2(3) ICCPR was considered admissible. For the IACHR, see, e.g., IACtHR, *Constitutional Court v. Peru*, §68-71.

13 ECtHR, *Klass and others*, §63.

14 ECtHR *Samayev and others v. Georgia and Russia* app. No. 36378/02 (April 12, 2005), § 444.

There is a right to a review for those whose right to information has been fully/partially denied. First, the instruments that stipulate a right to public interest information (as discussed in chapter 3), similarly recognize a right to a review for those whose request to public interest information has been (partially) denied.[15] For instance, article 9(1) of the Aarhus Convention and article 6 of the African Charter on Values and Principles of Public Service and Administration, contain a right to a review for those whose request to access public interest information has been (partially) denied by public authorities. Whereas the African Charter on Values and Principles of Public Service and Administration does not provide further definition of the content and scope of this review procedure,[16] the Aarhus Convention and its Aarhus Convention Compliance Committee do offer further details on the content and scope of article 9(1). Article 9(1) describes that such a procedure has to take place before a court of law or another independent and impartial body established by law. The content and scope of this right is comparable to that of the provisions of the general right to an effective remedy as described above. In the context of the other instruments, the criteria for the review procedure for recognizing a right to a review whenever the access to public interest information has been (partially) denied[17] are less defined.[18] Second, there is a right to a review for those whose request to access, rectify or remove personal information has been denied, for those whose personal information has been shared with third parties without their consent, and for those who wish to challenge the collection and storage of their personal information by authorities.[19]

Furthermore, there is a right to a review for those whose right to meaningful participation in the decision-making procedure has been limited, as discussed in chapter 4.[20] The grounds

15 Article 8 COE Convention on Access to Official Documents (June 19, 2009) CETS 205 has not yet entered into force; see also the individual participation right as stipulated in the OECD Recommendation of the Council concerning Guidelines governing the protection of privacy and transborder flows of personal data (2013) C(80)58/FINAL, as amended on July 11, 2013 by C(2013)79, Annex section 13(c); for example, some national systems have an obligatory internal review procedure proceeding or a court of appeal and/or independent complaint procedure in place for reviewing complaints related to the right to information. Explanatory Report to COE Convention on Access to Official Documents (June 19, 2009) CETS 205, has not yet entered into force, §66. See further chapter 3, section 1. IACtHR, *Claude Reyes v. Chile,* §86.

16 Article 6 of the African Charter on Values and Principles of Public Service and Administration. It should be noted that the Charter only recently entered into force (July 23, 2016); so far 17 states have ratified the Charter and 37 have signed it, see also https://au.int/en/treaties/african-charter-values-and-principles-public-service-and-administration. To the author's knowledge, neither the Commission nor the Court has given so far a (further) interpretation of the obligations ensuing from this Article.

17 See above, n. 15.

18 See, e.g., IACtHR, *Claude Reyes v. Chile*, §86.

19 See, e.g., HRCee, *GC 16,* §10; HRCee, *GC 34*, §18; ECtHR, *Gaskin v. UK* (1989), §49; ECtHR, *M.G v. United Kingdom*, judgment, (September 24, 2002) application no. 39393/98, §30: "Procedure to appeal denials of information must be in place in order to be 'in accordance with the law'" Article 8(a-d) COE Data Protection Convention; Principle 13 of the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.

20 The most explicit basis can be found in Article 9(2) Aarhus Convention. Treaty monitoring bodies have

for review on which someone can rely, and accordingly, what the scope of the review has to be, depend on the instrument, and on the legal basis.[21] The most explicit legal basis can be found in article 9(2) of the Aarhus Convention, which stipulates a right for those affected by decisions to access a review procedure to challenge the substantive and/or procedural legality of the decision adopted. Similarly, as required under article 9(1) of the Aarhus Convention (right to information), the review procedure required by article 9(2) has to involve a court of law or another independent and impartial body established by law;[22] however, a two-tier procedure is permitted. This implies that a decision has to be challenged first by a higher authority within the same administrative decision-making body that had adopted the decision before a review may be requested by an independent and impartial review body.[23]

At the international level, similarly a right to a review is recognized in those instances in which a right to meaningful participation is identified. The HRCee recognizes the right to a review for those affected by forced evictions.[24] The CESCR recognized a right to a review for those affected by forced evictions,[25] by decisions affecting the right to water,[26] by decisions related to social security,[27] and by actions related to the right to take part in cultural life.[28] The CRC recognizes a right to a review whenever a decision is made that is not in the best interest of the child, and/or lacks a proper procedure to come to such a decision.[29]

Similarly, at the regional level, treaty monitoring bodies have recognized a right to a review when certain substantive rights were affected. The African Court on Human and People's

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recognized this right to a review in the context of those decisions affecting individuals. For example, the CERD has recognized a right to a review for indigenous peoples affected by decisions that have a right to participate in the decision-making procedure (e.g., CERD, *CO on Suriname* (2004), §193). Another example is the *Suominen v. Finland* case in which the ECtHR reminded authorities of their obligation to provide reasons for a decision reached (in the context of participatory procedural guarantees) ECtHR, *Suominen v. Finland* (July 1, 2003), §37.

21 See chapter 4 section1.2.

22 See, e.g., ACCC, *ACCC/C/2011/57 (Denmark)*; ECE/MP.PP/C.1/2012/7 (July 16, 2012), §44.

23 Administrative review and the two-tier review procedure will be further discussed in section 1.3.2 below as to their content and the implications for the requirements of a right to a review.

24 HRCee, *CO on Kenya*, A/60/40 (2005) 44 86(22).

25 CESCR, *General Comment 7: the Right to Adequate Housing (Forced Evictions)* (1997), §15 (g)(h): legal remedies have to be provided to those affected by forced evictions, and legal aid has to be provided to those who need it in order to seek redress in court.

26 CESCR, *General Comment 15: The Right to Water* (2003) §56(d) (e): Legal recourse and remedies for those affected and legal assistance in obtaining legal remedies.

27 CESCR, *General Comment 19: Right to Social Security* (2008), §42(f): retrogressive measures are subject to independent review at the national level, §78(d): legal recourse and remedies for those affected and legal assistance.

28 CESCR, *General Comment 21: The Right to Take Part in Cultural Life (*2009), §54: States have an obligation to develop and create legislation and mechanisms required to allow individuals or groups to demand protection of their rights, and claim and receive compensation whenever these rights have been violated.

29 CRC, *General Comment 14* (2013), §98.

Rights recognizes a right to a review for communities whenever development decisions are adopted that affect their communities.[30] Furthermore, the American Court of Human Rights has read the procedural guarantees laid down in articles 8 and 25 of the ACHR into other substantive rights of the Convention including the right to a review, particularly in the context of environmental decision-making.[31] The ECtHR has recognized a right to a review whenever decisions adopted by public authorities affect the right to life (article 2 ECHR), whenever extradition would (allegedly) violate the prohibition of refoulement (article 3 ECHR)[32] and whenever decisions affect the right to property (article 1 Protocol 1 to the ECHR).[33] In the context of article 8 ECHR, the ECtHR has recognized a right to a review concerning cases on the right to family life,[34] deprivation of legal capacity,[35] data registration,[36] registration of ethnic identity,[37] issues of planning and environment,[38] and access to abortion.[39] For instance in regard to deportation decisions, article 13 ECHR in conjunction with article 8 ECHR requires:

> …that states must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality.[40]

30 AfCommHPR, *Social and Economic Rights Action Centre (SERAC) v. Nigeria* (2001) AHRLR 60 (ACHPR 2001), Communication 155/96, §52; AfCommHPR, *Endorois Welfare Council v. Kenya* Case 276 /2003 (2009) §291.

31 See, e.g., IACtHR, *Claude Reyes v. Chile*, §86.

32 ECtHR, *Jabari v. Turkey* §39; it requires independent scrutiny of the claim to assess whether substantial grounds exist for fearing a real risk of treatment contrary to article 3. Said scrutiny has to be carried out without regard to what the person concerned may have done to warrant expulsion or to any perceived threat to the expelling state's national security. (ECtHR, *Chahal v. United Kingdom* (November 11, 1996) §151.

33 ECtHR, *AGOSI v. UK,* §55.

34 See similarly the Committee on the Rights of the Child, *General Comment 4* (2003) §4, 8, 13, 18, 28, 38. See similarly with regard to HIV/AIDS and the rights of the child, *CRC, General Comment 3,* (March 17, 2003), §10.

35 E.g., ECtHR, *Drobnjak v. Serbia, app. 36500/05* (2010) §143-144; ECtHR, S*htukaturov. v. Russia, app. no. 44009/05,* (March 27, 2008).

36 See, e.g., ECtHR, *Turek v. Slovakia, app. 57986/00* (2006) §111.

37 E.g., ECtHR, *Ciubotaru v. Moldova, app. no. 27138*/04 (2010) §51.

38 E.g., ECtHR, *Taşkin v. Turkey (app. no. 46117/99* (2005), §119; see also ECtHR, *Hatton v. United Kingdom, app. no. 36022/97* (2003) §99, 128-129; ECtHR, *Buckley v. United Kingdom, app. no. 20348/92* (1996); ECtHR, *Giacomelli v. Italy, app. no. 59909/00* (2007) §82-83; See also p. 316-322, of O. de Schutter, *International Human Rights Law* (Cambridge: Cambridge University Press, 2010). J. Ebbesson, 'Transparency in Environmental Matters' in A. Bianchi and A. Peters (eds.) *Transparency in International Law* (OUP 2013), at 65.

39 ECtHR, *R.R. v. Poland, app. no. 27617/04* (2011) §191.

40 ECtHR, *Al-Nashif v. Bulgaria;* this judgment shows that although expulsion or deportation cases are excluded from the scope of applicability of article 6, similar procedural guarantees are still required albeit less stringent via article 8 in conjunction with article 13.

Furthermore, various treaty regimes -- whether explicitly or through authoritative interpretation by treaty monitoring bodies -- have recognized a right to a review for a particular subset of situations. The right to a review has been recognized for those (particularly) affected by decisions (i.e., those who are considered to be *vulnerable*) due to contextual factors related to the individual or group that renders them vulnerable.[41]

The HRCee recognizes a right to a review for minorities and indigenous people allegedly negatively affected by decisions.[42] The CRC recognizes a right to a review whenever a decision was allegedly not taken in the best interest of the child, and/or lacked a proper procedure to come to such a decision.[43] The CERD, for example, recommends that state parties adopt measures to ensure effective remedies for members of the Roma communities allegedly affected by decisions.[44] In all these instances, the right to an effective remedy was interpreted to encompass the right to a review and the right to reparation. The content and scope of the latter will be discussed in section 2.

A similar pattern can be identified at a regional level. The Inter-American Court of Human Rights has recognized a right to a review for minorities and indigenous people affected by decisions.[45] The African Court on Human and Peoples' Rights recognizes an obligation for authorities to provide individuals with a right to a review of development decisions that allegedly affect their communities.[46]

Lastly, several treaties stipulate a (limited) right to a review for those subjected to expulsion. The ICCPR,[47] the 1951 Refugee Convention,[48] Migrant Workers Convention,[49] and the

41 In chapter 4, section 2, the basis of the concept of vulnerability is explained. Chapter 6 will reflect further on this concept and its relevance for the Inclusionary Governance Model.

42 HRCee, *General Comment 23*: *article 27 (Rights of Minorities)*, (1994) §7; HRCee, *Lansman et al v. Finland,* communication 511/1992 (1994), §9.5-9.6; HRCee, *Apirana Mahuika et al v. New Zealand communication no 543/1993* (2000), §9.5; HRCee, *Angela Poma Poma v. Peru,* §7.6.

43 CRC, *General Comment 14* (2013), §98.

44 CERD, *General Comment 27*, §7; *CO on Iceland* (2005) §270.

45 IACtHR, *Saramaka v. Suriname* (November 28, 2007).

46 AfCommHPR, *Social and Economic Rights Action Centre (SERAC) v. Nigeria* (2001) AHRLR 60 (ACHPR 2001). Communication 155/96, §52 concludes by stating that government compliance in the spirit of Article 16 and Article 24 of the African Charter also has to include "(…) providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities." See, e.g., AfCommHPR, *Endorois Welfare Council v. Kenya* Case 276 /2003 (2009) §291.

47 Article 13 ICCPR; HRCee, *General Comment 15* (1986): The Position of Aliens under the Covenant, §9-11; HRCee, *Hammel v. Madagascar* (155/1983) (April 3, 1987), §19.1-19.3. In this particular case, there were no compelling reasons of national security to deny the applicant the right to submit reasons to his expulsion nor to justify the inability to have his expulsion reviewed by a competent authority within reasonable time (§20). HRCee, *Karker v. France*, §9.3; HRCee, *Garcia v. Ecuador,* §2.4, 5.2, 6.1; HRCee, *Ronald Everett v. Spain,* §6.11; HRCee, *Giry v. Dominican Republic,* §5.5. HRCee, *Alzery v. Sweden*, §11.10-11.11; HRCee, *Maroufidou v. Sweden* (1981) §8, 9.2-9.3, 10.1 10.2, 11.

48 Article 32 1951 Refugee Convention.

49 Article 22(4) Migrant Workers Convention.

ECHR[50] recognize a right for those facing expulsion to have one's expulsion decision reviewed, which, at a minimum, implies a right to submit evidence against one's expulsion.[51] However, the procedural guarantees recognized for this type of review are more limited than the procedural guarantees granted in the context of the right to an effective remedy or the right to a fair trial (which will be discussed in section 1.1.2). The right to submit evidence against an upcoming expulsion to a competent authority[52] may be limited for national security reasons.[53]

This section outlined that whenever substantive rights are allegedly violated under a respective treaty instrument, there is a right to a review in international law for those affected.

1.1.2. Right to Fair Trial

The right to fair trial recognizes a right to a review with extensive procedural guarantees for certain types of review proceedings.[54] The various instruments define for which type of review proceedings authorities have to provide the extensive procedural guarantees of a right to fair trial.[55] The ICCPR[56] and the Migrant Workers Convention[57] accord extensive procedural

50 Article 1 Additional Protocol 7 to the ECHR; Explanatory Report to Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 117), §12. ECtHR, *Al-Nashif v. Bulgaria* (2002), §123-128.

51 It should be noted that the treaty monitoring bodies of various instruments have also recognized a right to a review for those subjected to expulsion. See, e.g., CERD, *General Recommendation XXX* (2004), at preamble and §25-28.

52 See also CERD, *Concluding observations on Iceland*, A/60/18 (2005) 51 at §270:

> The Committee notes with concern that applicants whose asylum applications have been rejected or who are being expelled by the Directorate of Immigration can only appeal that decision to the Minister of Justice as the supervisory authority, whose decision is subject only to a limited court review on procedure rather than substance (art. 6). The Committee recommends that the State party consider introducing a full review by an independent judicial body of decisions of the Directorate of Immigration and/or the Minister of Justice concerning the rejection of asylum applications or expulsion of asylum seekers.

53 Article 13 ICCPR; ICCPR *General Comment 15* (1986), 117; HRCee, *Giry v. Dominican Republic* (193/1985) at §5.5; HRCee, *García v. Ecuador* (319/1988), (November 5, 1991), §2.4, 5.2, 6.1. ECtHR, *Vikulov. and others v. Latvia, decision 16870/*03 (March 25, 2004); ECtHR, *Lupsa v. Romania, 10337/04* (June 8, 2006), §60: "Individual must be genuinely able to have his case examined in the light of the reasons militating against his deportation."

54 The right to fair trial entails that individuals should have a right of access to a court (or tribunal), that there should be a fair hearing and that the review should be exercised by an independent and impartial tribunal or court, to name but a few. It should be noted, though, that the African Charter is less articulate about what fair trial guarantees individuals enjoy. The right to fair trial is laid down in article 14 ICCPR, article 18 Migrant Workers Convention, article 7 of the African Charter on Human and Peoples' Rights, article 8 ACHR, and article 6 ECHR.

55 This section only addresses the right to review decisions of a more administrative nature or civil nature, excluding review procedures concerning criminal matters, for which an extensive right to fair trial has been recognized.

56 Article 14 ICCPR.

57 In Article 18(1), the Migrant Workers Convention recognizes a right to a fair public hearing by a competent, independent and impartial tribunal established by law in the context of a determination

guarantees to review procedures that qualify as *suits at law*, the ECHR to *determinations of civil rights and obligations,* the ACHR to *determinations of the rights and obligations of an individual whether it is of a civil, labor, fiscal, or any other nature*, and the AfCHPR recognizes a broader right for every individual to *have his cause heard*.[58] Each treaty monitoring body has interpreted the scope of applicability further in its case law.[59] The differences and similarities in the scope of applicability between these treaty provisions stipulating a right to fair trial are summarized below.

Article 6 of the European Convention on Human Rights (ECHR) stipulates a right to a fair public hearing within a reasonable timeframe by an independent and impartial court or tribunal established by law, and a right of access to a court for determinations of civil rights and obligations.[60] Article 6(1) ECHR is the fair trial provision that generated the most case law.[61] The Court has stipulated three threshold criteria for the applicability of article 6 ECHR in a given case: (1) the existence of a dispute, (2) the dispute has to relate to rights/obligations that have some basis in domestic law,[62] and lastly, (3) the rights/obligations have to be of a civil nature. In general, the threshold for qualifying as a dispute is not considered to be high.[63]

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of rights and obligation in a suit at law. However, considering the individual complaint mechanism of the Migrant Workers Convention has not yet entered into force and the limited amount of concluding observations and *General Comments*, time will tell how this article will be further interpreted.

58 It should be noted that article 7 ACHPR falls both within the scope of a general right to a review (right to an effective remedy) as discussed in the previous section and of the right to fair trial as discussed in this section. Due to the phrasing used, it can fall under both categories of review. The legal basis will be discussed further in this section.

59 For the sake of comparability, this research refers to the general term *case law* when discussing the treaty monitoring bodies' output as part of their mandate to interpret the provisions of each respective instrument and when monitoring the compliance of states with their obligations under said instruments. It therefore includes general comments by UN treaty bodies, concluding observations on state compliance, and views of treaty monitoring bodies regarding alleged violations of treaty obligations originating from submitted individual petitions. All these different outputs are authoritative; however, most of these documents are not binding on a state. Only the ECtHR's judgments and the IACtHR's judgments are officially – and explicitly – binding, the others are, at minimum, (very) authoritative in the interpretation of the treaty obligations of member states.

60 The concept of *determination of civil rights and obligations* has an autonomous meaning under the Convention. The domestic classification of a proceeding is considered irrelevant; ECtHR, *Konig v. Germany* (1978), §88; see also Jacobs, White and Ovey, *The European Convention on Human Rights* (5th edition, OUP 2010), 247-253, see the similarity in reasoning by the HRCee in *General Comment 32*, §16.

61 Via the database of the European Court of Human Rights (HUDOC system), more than 17,000 results appear when searching for judgments addressing article 6(1) in English or French, http://hudoc.echr.coe.int.

62 ECtHR, *Roche v. UK*, §116-12.

63 In short, a dispute can both concern questions of facts and of law (ECtHR *Le Compte, van Leuven and de Meyere v. Belgium,* (1981), §45-51). It may relate to the existence of a right, its scope or the exercise thereof. The trigger is whether the outcome of the proceedings is decisive for private rights or obligations (see, e.g., ECtHR, *Balmer-Schafroth and Others v. Switzerland*, (August 26, 1997), §40 *Reports of Judgments and Decisions* 1997-IV; ECtHR, *Sdružení Jihočeské Matky v. the Czech Republic* (December)). In addition, a dispute should be of genuine and serious nature (see, e.g., ECtHR, *Sporrong*

More complicated is the question of which types of disputes are covered by article 6. Although the provision speaks of *civil* rights and obligations, the Court has included procedures of an administrative nature to be covered by article 6 ECHR.[64] For instance, disputes concerning social matters,[65] and disputes concerning public servants fall within the scope of article 6 ECHR. However, extradition or deportation procedures,[66] and minor disciplinary measures that are not punitive in nature, are explicitly excluded from the applicability of Article 6(1). Whenever an administrative measure is considered to be punitive, it will be considered a criminal charge and accordingly, the ECtHR will apply the higher review standard of criminal charges of Article 6(2) ECHR.[67] To determine whether an administrative measure should be deemed to be punitive, the Court does not only look at the label of the decision but takes into account the nature of the decision adopted and the impact thereof.[68] It should be noted that whenever a review procedure does not meet the threshold criteria of article 6(1) ECHR, it most likely does meet the threshold criteria of one of the other rights to review

v. Sweden (1982), §81). See also, e.g., Jacobs, White and Ovey, *The European Convention on Human Rights* (5th edition, OUP 2010), at 253-254.

64 ECtHR, *Werner v. Austria* §38.

65 ECtHR, *Feldbrugge v. the Netherlands,* §27-29 and *Salesi v. Italy*, (1993) §19.

66 It should be noted however that these proceedings are covered by art. 1 prot. 7 ECHR (and similarly covered by article 13 ICCPR); further, article 3 and 13 ECHR offer procedural guarantees in asylum procedures. See, e.g., ECtHR *Maaouia v. France* (2000) §38-39; ECtHR, *Salah Sheekh v. Netherlands* (2007) 1948/04, §136-141.

67 ECtHR reasoned that preventative or deterrent objectives "may be seen as constituent elements in the very notion of punishment" *Welch v. United Kingdom* (1995) 20 EHRR 247, §30.

68 The ECtHR has adopted an autonomous meaning of *criminal charge* (ECtHR, *Adolf v. Austria* (March 26, 1982) app. no. 8269/78 §30) and has recognized three criteria in the classification (ECtHR, *Engel and others v. the Netherlands,* (June 8, 1976) app. no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/73, §82 – 83): (1) domestic classification (point of departure); (2) nature of the offence – that is, does it, in general, apply to anyone or specific group of individuals (key criterion), (ECtHR, *Jussila v. Finland* [GC], no. 73053/01, ECHR 2006-XIV, §38); and (3) severity of the charge/sanction. It should be noted that in general at least two out of three steps should be met. If one of them is not satisfied, the offence can still be considered to have a criminal character. ECtHR, *Öztürk v. Germany (*Application no. 8544/79). The HRCee has adopted a similar approach reasoning in *General Comment 32* (§15) that:

> Criminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.

See also HRCee, *Perterer v. Austria* Communication No. 1015/2001*,* §9.2; The reasoning that a label should not be leading and that one needs to look at other factors too has also been applied in different contexts by different bodies when qualifying or classifying decisions/actions. For instance, when interpreting the notion of 'suit at law' in art. 14 ICCPR, the HRCee explained in its *General Comment* that:

> Concepts of a suit at law.… [are] based on the nature of the right in question rather on the status of one of the parties, or else on the particular forum in which individual legal system may provide that the right in question is to be adjudicated upon, especially in common law systems where there is no inherent difference between public law and private law

In the context of the Aarhus Convention, the Aarhus Convention Compliance Committee does consider the label given to a decision in domestic law to determine whether an activity should be regarded as an article 6 or 7 type decision, but states that one should determine this on a "contextual basis, taking into account the legal effects of each decision" *ACCC/C/2008/26 (Austria)*, (February 8, 2011) §50; ACCC, *ACCC/C/2005/11 (Belgium)* ECE/MP.PP/C.1/2006/4/Add.2, §29.

as recognized by the ECHR and/or as interpreted by the ECtHR.[69] The legal basis for the right to a review influences the scope of a right to a review, and accordingly, the scope of the required guarantees, as the following sections will demonstrate.

Article 14(1) ICCPR recognizes a right to access a court or a tribunal for suits at law, a right to a fair and public hearing by a competent, independent and impartial court or tribunal established by law and a right to equality before the courts and tribunals.[70] The HRCee interprets the term *suit at law* broadly and stipulates two criteria to determine whether a given procedure qualifies as a suit at law: (1) "the nature of the right in question" and (2) "the particular forum provided by domestic legal systems for the determination of particular rights."[71] The HRCee considers "judicial procedures aimed at determining rights and obligations," and "equivalent notions in the area of administrative law" such as disciplinary dismissals imposed by a judicial body,[72] dismissals from employment,[73] pension rights of soldiers,[74] the determination of social security benefits,[75] or the taking of private property[76] to be a suit at law. The Committee thus explicitly includes certain administrative procedures in the scope of applicability. However, some other administrative procedures do not constitute suits at law under article 14 ICCPR, like procedures related to the appointment of judges, and dismissals from public office.[77] Based on the current case law of the Committee, all other review procedures of an administrative nature seem to fall within the scope of applicability of article 14 ICCPR. The Migrant Workers Convention similarly recognizes a right to fair trial for suits at law: article 18 stipulates a right to a fair public hearing by a competent, independent and impartial tribunal established by law for determinations of rights and obligation in a suit at law. However, considering that the individual complaint mechanism of the Migrant Workers Convention has not entered into force, and in the limited amount of *Concluding Observations* and *General Comments* currently published, there is no further guidance on how to interpret this provision.[78]

69 For example, extradition or deportation procedures are covered by art. 1 Prot. 7 ECHR; further, articles 3 and 13 ECHR offer procedural guarantees in asylum procedures. See, e.g., ECtHR *Maaouia v. France* (2000) §38-39; ECtHR, *Salah Sheekh v. Netherlands* (2007) 1948/04, §136-141.

70 HRCee, *GC 32*, §9.

71 Similarly, as discussed in the context of the ECHR, the classification of the proceedings at a domestic level is considered irrelevant for the HRCee's assessment. HRCee, *GC 32*, §16.

72 HRCee, *Perterer v. Austria, Comm. no. 1015/2001*, (2004), §9.2.

73 HRCee, *Casanovas v. France Comm. no. 441/90*, (1990).

74 HRCee, *General Comment 32* (2007), under III; see also HRCee*, Y.L. v. Canada, Comm. no.* 112/1981, §9.2; HRCee, *Perterer v. Austria, Comm. no. 1015/2001,* (2004), § 9.2; HRCee, *Casanovas v. France, Comm. no. 441/90* (1990), §5.2.

75 HRCee *Garcia Pons v. Spain, Comm. no. 454/91*.

76 HRCee, *General comment 32 (2007),* under III.

77 HRCee, *Kazantis v. Cyprus* at §2.1-2.6, 3.1 and 6.3-6.5; for a further discussion of the legal basis for the right to fair trial and its applicability to administrative procedures, see, for example, J. Joseph, J. Schultz, M. Castan, *The International Convenant on Civil and Political Rights* (Oxford University Press 2004), 388-426; M. Nowak, *CCPR Commentary* (NP Engel 2005).

78 For more details, see https://www.ohchr.org/en/hrbodies/cmw/pages/cmwindex.aspx.

The right to fair trial laid down in the American Convention on Human Rights seems to have a broader scope than the previously discussed fair trial provisions. Article 8 ACHR guarantees a right to fair trial for determinations of rights and obligations of an individual, whether it is of a civil, labor, fiscal, or any other nature.[79] The Court has repeatedly affirmed the applicability of article 8 ACHR to administrative procedures.[80] Further, article 8 ACHR is not limited to judicial remedies; the requirements also apply to the procedural stages to enable "all persons (…) to defend their rights adequately vis-à-vis any State action that could affect them."[81] However, when it does not concern judicial proceedings, the procedural guarantees are of a different nature,[82] with the main requirement being that the procedure may not be arbitrary. This implies that, at a minimum, the decision has to be well-reasoned and parties have to have the opportunity to participate in the proceedings.[83] Hence, a wide range of review proceedings are covered by the procedural safeguards of Article 8 ACHR, albeit the scope of guarantees differs depending on the type of proceedings.

The African Charter on Human and Peoples' Rights recognizes a right to fair trial for those whose rights are allegedly violated. Although the procedural guarantees are less explicitly articulated in the Charter, the African Commission on Human and Peoples' Rights has laid down detailed principles of the right to fair trial in various resolutions:[84] a right to a review

79 See, for instance, IACtHR, *Genie Lacayo v. Nicaragua* at §77:
> Article 8 of the American Convention … establishes the main lines of what is known as "due process of law" or "the right to legal defense," which consist of the right of every person to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other measure; Article XVII American Declaration of the Rights and Duties of Man: Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

See also IACtHR, *Constitutional Court v. Peru* (January 31, 2001), Merits, reparation, and costs, §68-71.

80 For instance, in *Baena Ricardo et al v. Panama* the Court stated:
> The right to obtain all the guarantees through which it may be possible to arrive at fair decisions is a human right, and the administration is not exempt from its duty to comply with it. The minimum guarantees must be observed in the administrative process and in any other procedure *whose decisions may affect the rights of persons.* (emphasis added).

IACtHR, *Baena Ricardo et al. Case* (February 2, 2001), Series C No. 72, §127-129; the same quote can also be found in Advisory Opinion OC-18/03, cit., §125; the Inter-American Court cites the following precedents in the European system of human rights: "Cf., inter alia, ECtHR, *Campbell and Fell, (*June 28, 1984, Series A No. 80, §68; ECtHR, *Deweer,* (1980), Series A No. 35, §49; and ECtHR, *Engel and others*, (1976), Series A No. 22, §82."

81 IACtHR, *Baena Ricardo et al.* Case, Judgment (February 2, 2001) Series C No. 72, §124-125.

82 See, e.g., IACtHR, *Claude Reyes v. Chile,* §119-144, in which the scope of article 8 (in conjunction with article 25 ACHR) was discussed for administrative proceedings. Below in paragraph 1.3, the difference in scope of guarantees will be further discussed.

83 See, for instance, IACtHR, *Constitutional Court v. Peru*, §68-71.

84 See, e.g., the African Commission on Human and Peoples' Rights, Resolution on the Right to Recourse and Fair Trial (1992); the African Commission on Human and Peoples' Rights, Resolution on the Right to Fair Trial and Legal Aid in Africa (1999) the African Commission on Human and Peoples' Rights,

includes the right to a fair and public hearing by a legally constituted competent, independent and impartial judicial body,[85] the right to have the decision reviewed by a higher authority,[86] and the right to legal aid.[87] The African Commission has held that the fair hearing guarantees of article 7 ACHPR apply to all rights recognized under the Charter.[88] Accordingly, all review procedures fall within the ambit of Article 7. Although the precise guarantees may vary per procedure, at a minimum, the criterion of non-arbitrariness applies to all review proceedings, whether they are of an administrative nature or otherwise.[89]

Hence, in the context of the right to fair trial, there are two different approaches. The ECHR, the ICCPR and the Migrant Workers Convention clearly define which review procedures are included within the ambit of the right to fair trial and which are excluded from the scope of applicability. As a result, said scope in these conventions is rather limited. The right to fair trial operates as one of the rights to review as recognized in the respective conventions, where the other provisions provide for a right to a review in other contexts, which were discussed in the previous section. The rights to fair trial as laid down in the American Convention on Human Rights and African Charter on Human and Peoples' Rights have a wider scope of applicability and the respective treaty monitoring bodies interpret the right to fair trial to be applicable to all types of review procedures within the scope of the treaties. Thus, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights recognize a general right to a review and reason that the level of procedural guarantees that authorities have to ensure varies depending on the context.

1.1.3. Conclusion

In conclusion, there is a firm legal basis for the right to a review in both explicit legal provisions and through the works of treaty monitoring bodies. However, as illustrated in this section, the right is in essence more varied than the informational rights and the right to meaningful participation as discussed in the previous chapters. To summarize, a right to a review exists in the following instances:

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), Doc/Os (xxx) 247.

85 Principle 1 of the 2003 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

86 Article 7(1)(a) of the AfPHR.

87 Principle H(a)-(k) of the 2003 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

88 African Commission on Human and Peoples Rights, *Civil Liberties Organization and others v. Nigeria*, (2001), §12.

89 The importance of the criterion of non-arbitrariness will be further discussed in chapter 6; it is considered to be one of the minimum norms across the decision-making procedures and review proceedings.

Category of review procedures	Legal basis	Trigger for review
The dispute qualifies as a suit at law or as a determination of certain rights and obligations, which triggers a review	Art. 14 ICCPR, art. 18 Migrants Workers Convention	"Suits at law" "Determination of certain rights and obligations"
	Art. 6 ECHR (determination of civil rights and obligations), art. 8 ACHR (determination of rights and obligations, whether civil, labor, fiscal or of other nature)	
	Art. 7 AfCHPR	"whenever rights have allegedly been violated"
The decision affects substantive rights enjoyed under the respective instrument, which triggers a right to a review	Art. 13 ECHR, art. 2(3) ICCPR, art. 25 ACHR, art. 7 AfCHPR, art. 8 UDHR	"Arguable claim of a violation of a convention right, heard by a review body at the domestic level" (general nature)
	Art. 6 of the African Charter on Values and Principles of Public Service and Administration; art. 9(1) Aarhus Convention; IACtHR (*Claude Reyes v. Chile*); ECtHR (*Gaskin v.* UK)	Informational rights
	Art. 32 1951 Refugee Convention; art. 22(4) Migrant Workers Convention; art. 1 Add. Prot. 7 to the ECHR; HRCee (*GC 16*)	Expulsion decisions
	Art. 9(1) CRC (decision is not taken in best interest of the child; proper procedure is not followed); art. 2 (right to life) ECHR; art. 3 (non-refoulement ECHR; art. 8. (right to family life) ECHR; art. 1 Prot. 1 to the ECHR (right to property); CESCR, right to water (*GC 15*), social security (*GC 19*), right to take part in cultural life (*GC 21*), IACtHR (environmental decision-making), art. 8, 25 ACHR; AFCHPR (development decision-making, *SERAC v. Nigeria*); art. 9(2) Aarhus Convention (challenge procedural and substantive legality of decision); HRCee (forced eviction); CESCR (*GC 7*) (forced evictions)	Particular substantive rights
	Art. 83 (a)(b) Migrant Workers Convention; art. 6 CERD; art. 2 CEDAW; IACtHR (*Saramaka v. Suriname*); HRCee (*GC 23*) minorities and indigenous peoples); CERD (Roma); art. 9(1) CRC	Women, migrant workers, Roma, minorities, indigenous peoples, children

Table 6: Summary of legal bases of the right to a review

Although the different (types of review) procedures recognized may have a different scope of procedural guarantees, they demonstrate the broad legal basis for the right to a review. Regarding the difference in scope of the recognized procedural guarantees, this is expected to be dependent on the various rights to review recognized within a given instrument and on the various categories of rights to review across the instruments. To illustrate, the AfCHPR and the ACHR apply the guarantees of the right to fair trial and the right to an effective remedy to all substantive provisions and identify a graduation in the extent of guarantees recognized depending on the context, while the HRCee and the ECHR distinguish between different rights to review with distinctive legal bases per right to a review within the relevant convention. To give an example, the ECtHR addressed the interrelation and differences between the various rights to review recognized in the context of the ECHR.[90] To illustrate this point, article 13 grants individuals a right to an effective remedy before a national authority for an alleged violation of a criterion stipulated in, for instance, article 3 ECHR,[91] article 8 ECHR[92] and article 6(1) ECHR.[93] Further, the ECtHR determined that whenever the procedural safeguards of article 6 (right to fair trial) apply in a given case, which are "stricter than, and absorb, those of article 13," article 6 ECHR has to be seen as the *lex specialis* and article 13 (right to an effective remedy) as the *lex generalis*.[94]

Although the particulars may differ per treaty monitoring body and per instrument, the rationale and effect is rather similar. As the next section will show, there is a minimum set of procedural guarantees identified across the instruments for all review procedures, and in addition, certain types of review procedures require a higher set of procedural guarantees.

1.2. The Scope of the Right to a Review

The legal survey leads to three main elements of the right to a review, which will be further discussed in this section:

90 See similarly ECtHR, *McMichael v. United Kingdom*, no. 16424/90 (1995), in which the Court explained in §91 that the examination of the same set of facts may be warranted under both articles due to the different purposes of the procedural safeguards as laid down in article 6(1) and 8 ECHR. Thus, the articles both cover review procedures, but the purpose for which the articles covers these procedures differs.

91 See e.g. ECHR, *Peck v. UK* (2003); ECtHR, *Lyonova and Aliyeva v. Russia* §134; ECtHR, *Kudla v. Poland*, §157; ECtHR [GC] *Olhan v. Turkey*, 22277/93, §97.

92 Article 13 in conjunction with article 8 ECHR requires, for instance, of public authorities in regard to deportation decisions:

> …that states must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality. ECtHR, *Al-Nashif v. Bulgaria,* §136.

93 For instance, when a trial does not take place within a reasonable time, it constitutes a violation of article 6(1) ECHR, ECtHR, *Kudla v. Poland,* §147-149, 156, and 157-160.

94 ECtHR, *Kudla v. Poland*, 30210/96 (October 26, 2000), §146.

1. The right to access a review body
2. A competent, independent and impartial review body
3. A fair review procedure

In general, public authorities are accorded wide discretion in implementing their obligations to realize the right to a review. The various instruments set minimum standards for a review procedure and treaty monitoring bodies exercise a form of deferential review when they review the compliance of a party to the convention. Treaty monitoring bodies do not act as a fourth instance to those who initiated proceedings at a domestic level for non-compliance with the rights stipulated in the respective instrument.[95] For instance, the Human Rights Committee recalled:

> …it is generally for the courts of [s]tates' parties to the Covenant to review facts and evidence in a particular case, unless it can be shown that the evaluation of evidence was clearly arbitrary or amounted to a denial of justice, or that the Court otherwise violated its obligations of independence and impartiality.[96]

In other words, treaty monitoring bodies acknowledge the discretion of authorities to set procedures for a review request and that the burden and standard of proof and the evaluation of facts and evidence fall within the domain of those authorities.[97] In general,

95 This is further reflected in the admissibility criterion of *exhaustion of domestic remedies*, which is an admissibility criterion for each treaty regime that has an individual complaint procedure. Article 35 of the ECHR; ECtHR, *Akdivar and others v. Turkey* 1996-IV. Reports 23 EHRR 365, 65-76; IACtHR, *Velasquez-Rodriguez case* (preliminary objections) (1987) Series C no. 1; IACtHR *Advisory Opinion on Exceptions to the Exhaustion of Local Remedies* (1990) Series C no 11; AfCHPR, *Amnesty International v. Sudan*, §39; Aarhus Convention MoP Decision I/7 §21: "The Committee should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress." Article 5(2)(b) of Optional Protocol 1 to the ICCPR see, e.g., HRCee, *Karttunen v. Finland,* comm. no. 387/89, §7.3; HRCee, *Chira Vargas v. Peru* (906/2000) (July 22, 2002) at §7.3; article 4(1) of the Optional Protocol to the CEDAW; Article 7(5) of the OP-CRC-IC; article 77(b) of the ICMW.

96 HRCee, *Bondarenko v. Belarus*, 886/1999, (April 3, 2003) §9.3. This argument also ties in closely with the fact that the HRCee is not a fourth instance court. In R.*M. v. Finland* (301/1988, (March 23, 1989) 300 at §6.4, the Committee reasoned:

> it is not an appellate court and that allegations that a domestic court has committed errors of fact or law do not in themselves raise questions under the Covenant unless it also appears that some of the requirements of Article 14 may not have been complied with.

See also HRCee, *J. H. v. Finland* (300/1988), (March 23, 1989), §6.4; HRCee, *Van Meurs v. The Netherlands* (215/1986), (July 13, 1990), §7.1; *Z. P. v. Canada* (341/1988), (April 11, 1991) 297 at §5.2 and 5.5; *Bullock v. Trinidad and Tobago* (553/1993), (July 19, 1995) §7.4; *Blaine v. Jamaica* (696/1996), (July 17, 1997) §6.6; HRCee, *Perel v. Latvia* (650/1995), (March 30, 1998) §12.2; HRCee, *Chadee et al. v. Trinidad and Tobago* (813/1998), (July 29, 1998), §8.3; HRCee, *Bailey v. Jamaica* (709/1996) (July 21, 1999) §6.3. *Lyashkevich v. Belarus* (887/1999) (April 3, 2003) at §2.1-2.3 and 8.3; a similar reasoning can be seen at the CAT, *P. E. v. France* (193/2001), CAT, A/58/44 (November 21, 2002) 135 (CAT/C/29/D/193/2001) at § 6.2-6.7.

97 See, for example, HRCee, *J.K v. Canada*, Communication 174/84, §7.2:

treaty monitoring bodies do not review these elements of a given domestic review procedure, and thus leave it to public authorities to develop and set benchmarks for the burden of proof, standard of proof and rules of evidence in their domestic review procedures.

The survey shows that the precise content and scope of the right to a review is variable to an extent, dependent on the context and the nature of a complaint.[98] This section will start with a discussion of the content and scope of the right to access a review body (section 1.2.1), followed by a discussion of the various standards that a review body has to meet (section 1.2.2) and will conclude with a discussion of the standards for a fair review procedure (section 1.2.3).

1.2.1. Access to the Review Body

The right to access a review body is the first essential step for an effective right to a review. Each treaty monitoring body has read a right to access a review body into the right to a review.[99] As mentioned in section 1.2, authorities have an obligation to ensure that those affected have a right to a review before a review body, which may require authorities to develop review procedures or create legal standing for those affected by decisions.[100] Public authorities are accorded discretion regarding how they develop review procedures and to set rules guiding these procedures.[101] This section will discuss the most common conditions imposed by authorities to access review procedures as signalled by the legal survey.

> The Committee … observes that it is beyond its competence to review findings of fact made by national tribunals or to determine whether national tribunals properly evaluated new evidence submitted on appeal.

98 See, for instance, the ECtHR's case law in this regard; the Court held in *Al-Nashif v. Bulgaria,* that "the scope of the obligation under article 13 [right to an effective remedy] varies according to the nature of the applicant's complaint under the Convention." ECtHR, *Al-Nashif v. Bulgaria,* §136; ECtHR, *Kudła v. Poland*, §157. The Court has extensive case law on the relation and differences between the right to a review as recognized in article 6 ECHR and with said right set out in the articles 3, 8 and 13 ECHR. See, e.g., ECHR, *Peck v. UK* (2003); ECtHR, *Lyonova and Aliyeva v. Russia* § 134; ECtHR [GC] *Olhan v. Turkey*, 22277/93, §97.

99 For instance, the ECtHR read a right of access to a court into the right to a fair trial in the landmark case *Golder v. United Kingdom* (February 21, 1975), §38, Series A no. 18, §34-35*:*

> The principle whereby a civil claim must be capable of being submitted to judge ranks as one of the universally recognized fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6(1) must be read in light of these principles (….) It would be inconceivable, in the opinion of the Court, that Article [6(1)] should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.

Access to a court is also strongly protected under Article 14(1) ICCPR; HRCee, *GC 32,* §12; HRCee, *IP v. Finland Comm 450/991*, 6.2. HRCee, *Bahamonde v. Equatorial Guinea,* §9.4; HRCee, *Avellanal v. Peru Communication 202/86*.

100 See, e.g., Migrant Workers Committee, *CO on the Second Periodic Report of Sri Lanka* (October 11, 2016), CMW/C/LKA/CO/2, §29 (a).

101 The ultimate decision whether a review procedure is in accordance with the instrument in question rests with the treaty monitoring body. See, e.g., ECtHR, *Kruez v. Poland*, §53.

Across the various instruments, authorities are permitted to impose further conditions (beyond the legal standing criteria) that may limit the right to access a court, as long as these conditions do not impair the very essence of the right[102] and that it does not result in the discrimination of certain individuals or groups.[103] For instance, the HRCee held in *Avellanal v. Peru* that the Peruvian law prohibiting women from representing matrimonial property before a court violated the non-discrimination requirement. As a result, there was a violation of the right to access a court and of the equality of arms.[104] Overall, the permitted conditions can be divided into three categories: set timeframes to initiate proceedings, costs or fees to initiate proceedings and the requirement of legal representation. Below, each category will be further explained and references to case law of various treaty monitoring bodies will serve to illustrate how the treaty monitoring bodies interpret the right to access a review body within a given context. In general, each condition may constitute a limitation to the right to a review, which implies that the condition needs to meet the tripartite test of legality, necessity and legitimacy.[105]

First, stricter time frames for submitting a claim may be in accordance with the tripartite test.[106] However, particular circumstances may warrant a more lenient approach. For instance, in *Jabari v. Turkey*, the ECtHR concluded that a strict five-day registration requirement of the Asylum Regulation of 1994 denied the applicant in question any evaluation of her fears of facing maltreatment or torture if she were to be deported. In light of the circumstances, this strict timeframe for registration resulted in a violation of Article 3 ECHR.[107]

Second, most instruments stipulate that the review procedure may not be too costly,[108] but that the fair administration of justice may justify the imposition of a fee on the individual's

102 See, for instance, ECtHR, *Z and others v. United Kingdom* (2001), §93:
> where the individual's access is limited either by operation of law or in fact, the Court will examine whether the limitation imposed impaired the essence of the right and, in particular, whether it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

See similarly ECtHR, *Golder v. UK*; ECtHR, *Ashingdane v. UK* (1985), §57; HRCee, *Casanovas v. France communication 1514/2006,* §11.3.

103 HRCee, *GC 32*, §9; article 3(9) of the Aarhus Convention; Principle A.2(b)(c) of principles and guidelines on the right to a fair trial and legal assistance in Africa, 2003, DOC/OS(XXX)247; Migrant Workers Committee, *CO on the second periodic report of Sri Lanka* (October 11, 2016), CMW/C/LKA/CO/2, §33 (d).

104 HRCee, *Graciela Ato del Avellanal v. Peru communication 202/1986* (October 28, 1988), 10.1-10.3.

105 See, e.g., *ECtHR, Airey v. Ireland*, (October 9, 1979), Series A no 32, §24-26; ECtHR*, Kruez v. Poland,* 28249/05 (June 19, 2001), §60; HRCee, *Äärelä Näkkäläjärvi v. Finland* Communication 779/1997, §7.2; ACCC, *ACCC/C/2011/57 (Denmark)*, ECE/MP.PP/C.1/2012/7 (July 16, 2012), §45.

106 It should be noted that an expeditious review process and accordingly the length of the proceedings will be discussed in the context of the fairness of the proceeding, see below in section 1.3.4. For a general discussion of the scope of the tripartite test, see chapter 3, section 1.6.

107 ECtHR, *Jabari v. Turkey,* §39 and ff.

108 Aarhus Convention article 9(4); ACCC, *ACCC/C/2008/33 (United Kingdom)* ECE/MP.PP/2008/5/add.4 (August 24, 2011) §128-136; ACCC *ACCC/C/2011/57 (Denmark)*, §45.

access to a court. The determinative factor is whether the legal fees required result in effectively barring those affected from accessing the review procedure.[109] For example, a rigid duty under domestic law to award costs to a winning party may have a deterrent effect on the ability of persons to pursue a remedy before the courts. This would be the case particularly whenever courts are not given the discretion to take circumstances into account and to mitigate the effect of the award.[110] Various treaty monitoring bodies identified factors that are of relevance in the determination of whether legal fees restrict access to courts in a given case: the amount of the fees, the financial situation of the applicant, and the phase of the proceeding in which the fee is required.[111] In general, it concerns a contextual assessment, and treaty monitoring bodies assess – taking the review procedure as a whole – whether the interests of states to collect court fees was properly balanced against the interests of the applicant in vindicating its claim in court.[112] When in a given case the conclusion is that the procedure is prohibitively expensive, or too costly for those affected, the question arises whether those affected should have access to legal aid.[113] As stated by the HRCee, the "availability or absence of legal assistance often determines whether or not a person can

109 The ECtHR, for instance, has held that excessive costs and fees preventing individuals from pursuing litigation may constitute a violation of article 6(1); *ECtHR Airey v. Ireland*, (October 9, 1979), Series A no. 32, §24-26, and further ff; See particularly *Kreuz v. Poland* where the Court dealt in detail with the interests of a state to collect court fees versus the interest of an applicant in substantiating his claim in court, ECtHR, *Kreuz v. Poland*, app. no. 28249/05, (June 19, 2001), §58-67; *ECtHR*, *Jedamski and Jedamska v. Poland*, no. 73547/01, §66, (July 26, 2005); ECtHR, *Weissman and Others v. Romania*, no. 63945/00, §§38-40, ECHR 2006-VII (extracts), §40, 42; ECtHR *Ferenc Rózsa and István Rósza v. Hungary*, no. 30789/05, §§12, 20-24, (May 28, 2009); ECtHR, *Handölsdalen Sami Village and others v. Sweden no. 39013/04* (March 30, 2010), §§51-55, in which the Court concluded considering the proceedings as a whole that:

> the Court finds that the applicants were afforded a reasonable opportunity to present their case effectively before the national courts and that there was not such an inequality of arms vis-à-vis the landowners as to involve a violation of article 6(1) of the Convention.

See also in relation to ICCPR, M. Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary* (2005) at 312. See also HRCee, *Lindon v. Australia*, app. no. 646/1995 §6.4. ECtHR, *Steel Morris v. UK,* §72.

110 For instance, the HRCee held in one case that this situation led to a violation of article 14(1) in conjunction with article 2(3) ICCPR, HRCee, *Äärelä Näkkäläjärvi v. Finland* Communication 779/1997, §7.2.

111 ECtHR, *Kruez v. Poland,* above n. 110, §60; However, occasionally treaty monitoring bodies do not only examine whether the procedure was prohibitively expensive in a given, specific case but they also examine whether the procedure was prohibitively expensive considering the system as a whole and in any systemic manner. See, for instance, ACCC, *ACCC/C/2008/33 (United Kingdom)* ECE/MP.PP/2008/5/add.4 (August 24, 2011) §128-136.

112 ECtHR, *Kruez v. Poland,* above n. 110, §58-67; see also, ECtHR, J*edamski and Jedemska v. Poland* app. no. 73547/01 (July 26, 2005), §66; ECtHR, *Weissman and others v. Romania* app no 63945/00§38-40; ECtHR, *Ferenc Rozsa and Istvan Rosza v. Hungary* app. no. 30789/05 (May 28, 2009), §12, 20-24. For more details, see M. Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (2005), 312; HRCee, *Lindon v. Australia 646/1995*, §6.4.

113 See, for instance, ECtHR, *Steel Morris v. UK,* §72, in which case the denial of legal aid to the applicants deprived them of an opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms. Accordingly, the Court held that there was a violation of article 6(1).

access the relevant proceedings or participate in them in a meaningful way."[114] In order to decide whether legal aid services should be provided by authorities, it has to be determined on the basis of the circumstances and particular facts of each case.[115] Overall, the trigger factor is whether individuals are considered to be particularly vulnerable;[116] if so, authorities may have an obligation to provide legal aid.[117] This does not imply that in each instance the state has to provide legal aid.[118] For instance, if access can also be achieved by assisting in other ways, for instance by simplifying procedures, the obligation is complied with.[119] In conclusion, whether or not a procedure is prohibitively expensive is determined by treaty monitoring bodies on the basis of a contextual assessment that requires a proper balancing of the interests involved and an assessment of whether legal aid should have been provided.

Lastly, in certain judicial procedures, one may be required by the state to have legal representation, which may be perceived as an obstacle for some to initiate proceedings.[120] In these instances, if those affected cannot afford legal representation, public authorities may be required to provide legal aid or other legal assistance. In a given case, the denial of such aid or assistance may result in effectively barring access to the review procedure to those affected. As a related point, in the context of some review procedures, international law stipulates a right to legal representation for those affected. The procedures for which such right is stipulated are review procedures that have a high impact on those affected; considering that those affected are particularly vulnerable in these cases, it could negatively impact the effectiveness of their right to a review if they were not represented by counsel.[121] As examples,

114 HRCee, *GC 32,* §10.

115 See, for example, ECtHR, *Steel and Morris v. United Kingdom*, §61:

> the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.

In the *Airey* case, the ECtHR deemed legal assistance necessary to guarantee a fair trial as the proceedings were determinative of important family rights and relationships, ECtHR, *Airey v. Ireland*, (October 9, 1979), Series A no. 32, §26; see also ECtHR, *Munro v. United Kingdom, no. 10594/83*, (commission decision of July 14, 1987) decisions and reports 52 at 158.

116 See for a first discussion of the concept of vulnerability, for instance, chapter 4 section 2. For a more detailed discussion of the concept of vulnerability, see chapter 6, section 2.

117 CERD, *CO on Bahamas*, A/59/18 (2004), 10 at §35. In relation to various substantive rights, the CESCR held that authorities have to provide where possible legal aid to persons who need it in order for them to seek redress from the courts, see for instance *GC 7*, §15(h); CESCR, *GC 15* (2002), § 56(e); CESCR, *GC 19,* §78 (d); see also Council of Europe Committee of Ministers, Recommendation No. 93(1) of the Committee of Ministers to Member States on Effective Access to the Law and to Justice for the Very Poor (adopted by the Committee of Ministers on January 8, 1993).

118 ECtHR, *Airey v. Ireland*, §2.6.

119 HRCee, *GC 32*, § 16; ECtHR, *Steel and Morris v. United Kingdom* (2005), §60.

120 See, for instance, Principle 1 of the African Principles and Guidelines on the Right to a Fair Trial And Legal Assistance in Africa, 2003, DOC/OS(XXX)247.

121 This research identifies the concept of vulnerability as a trigger for further protection of certain individuals and/or groups of individuals particularly affected by decisions. When there are factors of vulnerability, public authorities have to do more to ensure the inclusion in the review procedure of those considered to be vulnerable. In chapter 6, section 2, the concept will be further analyzed in

the right to legal counsel is recognized by various treaty monitoring bodies in the context of expulsion decisions,[122] refugee status determination procedures[123] and in review procedures affecting children.[124]

In conclusion, although public authorities have discretion in developing the review procedures and in the imposition of conditions to access these procedures, there are certain constraints on this discretion. The conditions may not result in effectively impairing or making it impossible for those affected to access their right to a review. Whether a given condition or limitation to the right to access a review body is permissible is to be assessed by taking the circumstances of the case into account, taking the nature of the complaint into account, considering whether there are certain vulnerability factors, and lastly, considering whether and to what extent authorities have mitigated the effects of these conditions by, for instance, providing legal aid or legal assistance to those particularly affected.

1.2.2. Competent, Independent and Impartial Review Body

The general standard across the various instruments is that the review body has to be competent,[125] independent[126] and impartial.[127] What varies is the degree to which treaty monitoring bodies have provided benchmarks for these requirements.

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regards to its role within the Draft IGM.

122 Article 13 of the ICCPR; HRCee, *General Comment 15*, §10; HRCee, *Hammel v. Madagascar* (April 3, 1987), 19.2; HRCee, *Karker v. France*, §9.3; ECtHR, *Conka v. Belgium app. no. 51564/99* (May 5, 2002).

123 Article 32(2) of the Refugee Convention, see also Commentary on the Refugee Convention 1951, Articles 2-11 (1997), division of international protection of the UNHCR, available at http://www.unhcr.org/3d4ab5fb9.pdf, §9.

124 CRC, *GC 14*, §98.

125 Article 2(3)(b) ICCPR; article 25 ACHR; article 7(2) AfCHPR; article 8 UDHR; article 6 CERD; article 2 CEDAW; articles 18, 22(4) 83(a)(b) of the Migrant Workers Convention; article 9(2) Aarhus Convention; ECtHR, *Shamayev. v. Georgia and Russia*, §446; AfCommHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, DOC/OS(XXX)247, Principle 1.

126 AFCHPR, *Civil Liberties organizations and others v. Nigeria,* (2001) AHRLR 75, § 27 and 44; ECtHR, *Findlay v. UK*, §281; ECtHR, *Cirklar v. Turkey* (October 28, 1998) §120.

127 ECtHR, *Kudla v. Poland*, §157; ECtHR, *Micallef v. Malta* [GC], no. 17056/06, ECHR 2009 § 93; HRCee, *General Comment 13,* §3; see also HRCee, *Bahamonde v. Equatorial Guinea* (468/91), §9.4; HRCee, *Concluding Observations on Algeria,* (1998) UN Doc CCPR/C/79/add. 95, §14; HRCee, *Concluding Observations on Armenia*, (1998) UN Doc CCPR/C/79/add. 100, §8; HRCee, *Concluding Observations on Peru* (1996) UN Doc. CCPR/C/79/ add. 67, §14; see on impartiality also HRCee, *Karttunen v. Finland*, (387/89), §7.1-7.3; In *Karttunen* §7.2., the HRCee stated that impartiality implies:

> that judges must not harbor preconceptions about the matter put before them, and that the must not act in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider ex officio these grounds and to replace members of the court falling under the disqualification criteria.

See also HRCee, *Rogerson v. Australia* (802/1998), (2002), §7.4; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, DOC/OS(XXX)247; Principle 1: legally constituted competent, independent and impartial judicial body.

Competence

The criterion of competence refers to whether the review authority has jurisdiction to hear a complaint in a given case and has the mandate to provide an appropriate relief.[128] Thus, the requirement of competence is not only relevant in the context of the right to a review but also in the context of the right to reparation. Whether, for example, an ombudsperson procedure meets the conditions of competence depends on whether they are able to adopt a final decision and to provide the appropriate relief.[129] The appropriate relief that has to be provided in a given case depends on the type of review and the nature of a complaint.

Independence

The criterion of independence refers to the independence of the review body from the executive and legislative powers and vis-à-vis the parties involved.[130] The factors to determine the independence of the review body are, for example, the appointment procedure of the members of a review body, whether there are procedural guarantees against outside pressure and whether there is an appearance of independence. If, for instance, an executive has an ultimate say within a review procedure and has the power to overrule a decision, it poses a threat to the independence of the review body. Similarly, if an executive has the power to remove judges, it poses a comparable threat.[131]

128 ECtHR, *Shamayev. v. Georgia and Russia*, § 446:
> competent national authority should be able to deal with substance of relevant convention complaint and grant appropriate relief. However, it does not go so far as to require any particular form of remedy, Contracting States being afforded a margin of discretion in confirming to their obligations under this provision. Nor does the effectiveness of a remedy for the purpose of Article 13 depend on the certainty of a favourable outcome.

129 For instance, the ECtHR held in *Silver v. UK* (1983) that considering the ombudsperson lacked the power to issue binding decisions, it resulted in a violation of article 13 ECHR (the right to an effective remedy). See similarly *Chahal v. UK,* §154. In this case, however, more problems existed in regard to the available review procedure: neither the panel nor the courts had jurisdiction to review the decision to deport Mr. Chahal, the applicant was not entitled to legal presentation, he only received an outline of the grounds underlying the decision to deport, and the advice of the advisory panel to the Home Secretary was not disclosed to Mr. Chahal. The Court concluded that the remedies available to Mr. Chahal did not satisfy the requirements of article 13 ECHR; ECtHR, *Chahal v. UK*, (November 15, 1996). The Aarhus Convention stipulates in article 9(1) that the review body is able to provide a binding decision, and Article 9(4) requires that the review body can provide injunctive relief. See also J. Ebbesson and others (eds.) *The Aarhus Convention: an Implementation Guide* (2nd ed., 2014), at 192-193, 199-201.

130 HRCee, *General Comment 32,* §19; HRCee, *Bahamonde v. Equatorial Guinea* (October 20, 1993) CCPR/C/49/D/468/1991; HRCee, *Concluding Observations on Vietnam*, ICCPR, A/57/40 vol. I (2002) 67, §82(9) and 82(10); HRCee, *Concluding Observations on Romania*, (1999) UN Doc. CCPR/C/79/add. 111, §10; HRCee, *Concluding Observations on Azerbaijan*, ICCPR, A/57/40 vol. I (2002) 47 at §77(14); HRCee, *Concluding Observations on Sri Lanka*, ICCPR, A/59/40 vol. I (2003) 30 at §66(16); HRCee, *Concluding Observations on Finland*, ICCPR, A/60/40 vol. I (2004) 22 at §81(13); HRCee, *Concluding Observations on Tajikistan*, ICCPR, A/60/40 vol. I (2005) 70, §92(17); see also CAT, *Concluding Observations on Ukraine*, CAT, A/57/44 (2002) 31 at §57 and 58. IACtHR, *Chocrón Chocrón v. Venezuela* (July 1, 2011) Series C No. 227; AfcommHPR, *Lawyers for Human Rights v. Swaziland* (2005) communication 251/02, 18th activity report of the AfCommHPR.

131 See, e.g., HRCee, *Concluding observations on Zambia*, (1996) UN Doc. CCPR/C/79/add. 62, §16; see similarly HRCee, *Adrien Mundyo Buyso, Thomas Osthudi Wongodi, René Sibu Matubuka et al. v.*

Impartiality

The principle of independence is often discussed in the same breath as the principle of impartiality. The Aarhus Convention Compliance Committee defines the principle of impartiality to include that "the process, including the final ruling of the decision-making body, must be impartial and free from prejudice, [favoritism] or self-interest."[132] Other instruments define impartiality in a similar manner.[133] For example, when a member of the review body has previously been involved in a different phase of the procedure, it has a negative effect on the appearance of impartiality.[134]

The criteria for a review body discussed above are to be applied slightly differently whenever there is a two-tier review procedure required. A two-tier review procedure implies that those affected are obliged to first request an administrative review by a higher authority within the same decision-making body before they may appeal this decision and request a review by an independent and impartial review body. The ICCPR, ECHR, and the Aarhus Convention explicitly recognize the discretion of authorities to establish a two-tier procedure for administrative decisions.[135] Other instruments do not explicitly address the possibility but also do not seem to exclude this option. Reasons to choose a two-tier procedure are, for example, that these procedures are regarded as more flexible, cost-efficient and expeditious than other administrative or judicial procedures.[136] When assessing the compliance of authorities with these standards in a given case, treaty monitoring bodies assess whether a two-tier procedure provides due procedural safeguards as required by the right to a review.[137] The procedural guarantees may be provided by an accumulation of the review procedures

Democratic Republic of the Congo, (933/2000), ICCPR, A/58/40 vol. II (July 31, 2003) at §5.2, 6.1, 6.2; HRCee, *Pastukhov. v. Belarus* (814/1998), ICCPR, A/58/40 vol. II (August 5, 2003) §2.1-2.5, 7.2, 7.3, 9; see also CERD, *Concluding observation on Kazakhstan* in which the CERD noted with concern that "with the exception of the judges of the Supreme Court, all the judges are appointed by the President, who also determines the organization of the work of the courts" CERD, A/59/18 (2004) 54 at §295.

132 ACCC, *ACCC/C/2011/57 (Denmark)*, §44.

133 In *Karttunen v. Finland,* (comm. No. 387/89, §7.2.), the HRCee stated that impartiality implies:

> that judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider ex officio these grounds and to replace members of the court falling under the disqualification criteria.

See also HRCee, *Rogerson v. Australia* (802/1998) (April 3, 2002) at §7.4; ECtHR, *Wettstein v. Switzerland,* §43.

134 See, for instance, ECtHR, *Piersack v. Belgium* (1983) 5 EHRR 169, in which the presiding judge in the given case had served as the head of the public prosecutor's department during the investigation in the given case.

135 See, e.g., ECtHR, *Le Compte, Van Leuven and De Meyere v. Belgium*, §51; Article 9 (2) Aarhus Convention.

136 See, e.g., ECtHR, *Le Compte, Van Leuven and De Meyere v. Belgium*, §51; Aarhus Convention, Article 9(1) and (2) Aarhus Convention.

137 ECtHR, *Ortenberg v. Austria* (October 25, 1994), § 31, where the Court held that the Administrative Court that reviewed the complaint satisfied all the requirements of article 6(1) of the ECHR and accordingly that there was no violation of article 6(1) ECHR.

available to the holders of the right to a review.[138] At a minimum, an administrative review has to be exercised by an authority that is competent to conduct the review. For example, in *Bryan v. United Kingdom*, the ECtHR had to assess whether the two-tier review procedure open to Mr. Bryan provided due procedural safeguards as required by article 6 ECHR.[139] The decision in question concerned an environmental planning decision that required Mr. Bryan to demolish two buildings on his property. In this case, the Court reasoned that although the administrative review by the inspector was quasi-judicial and was exercised in an independent, impartial and fair manner, the fact that the Secretary of State had the discretion to revoke the power of an inspector had a negative effect on the appearance of independence.[140] Accordingly, the ECtHR held that the review by "the inspector does not *of itself* satisfy the requirements of article 6 [ECHR]."[141] The Court explained that:

> even where an adjudicatory body determining disputes over "civil right and obligations" does not comply with Article 6 para[graph] 1 *in some respect*, no violation of the Convention can be found if the proceedings before that body are "*subject to subsequent control* by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para[graph] 1".[142]

Thus, in all instances where authorities prescribe a two-tier procedure, as described by the ECtHR there are two options:

> either the jurisdictional organs themselves, [i.e. the administrative review authority] comply with the requirements of Article 6 para[graph] 1 (art. 6-1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para[graph] 1.[143]

Often in a two-tier procedure, the first tier does not meet the independence criterion as the administrative review is exercised by a higher authority within the same decision-making body, which, at a minimum, affects the requirement of independence.

Non-judicial nature of the review body

The instruments do not stipulate a general requirement for a review body to be judicial.[144] It

138 Sections 1.3.2-1.3.4 discuss the content and scope of the procedural safeguards required.
139 ECtHR, *Bryan v. United Kingdom* 19178/91 (November 22, 1995).
140 Idem, at §37.
141 Emphasis added; ECtHR, *Bryan v. United Kingdom,* §38.
142 Idem, emphasis added, §40, referencing to ECtHR *Albert and Le Compte v. Belgium* (February 10, 1983, Series A, no. 58, p. 16 §29).
143 *Albert and Le Compte v. Belgium* at §29.
144 For instance, the ECtHR states that if the review body is not of a judicial nature "powers and guarantees which it affords are relevant in determining whether the remedy before it is effective;" ECtHR, *Silver v. UK* (1983), §113; ECtHR, *Khan v. UK*, § 43-47; ECtHR, *Hatton v. UK,* §140; ECtHR *Al-Nashif v.*

is only required in specific situations that a review body is judicial.[145] In these instances, the requirements for independence and impartiality are more spelled out. For instance, in the African human rights system,[146] very elaborative principled guidelines[147] were adopted for review by judicial bodies, whether courts or tribunals, describing each element required for a judicial review body in order for it to be independent[148] and impartial.[149] One can find these requirements particularly in the context of the review procedures described in section 1.1.2., specifically those disputes that qualify as a suit at law or determination of certain rights and obligations (fair trial). For instance, the ECtHR in its extensive case law on the right to fair trial explained that the standard of independence and impartiality has both subjective and objective elements.[150] The subjective elements focus on the personal conviction of a judge, and the objective element concerns a determination of whether, in terms of structure or appearance, a party's doubts about a tribunal's independence or impartiality may be legitimate.[151] The HRCee clarified that the criteria for independence and impartiality of Article 14 ICCPR apply to all courts and tribunals, whether specialized or ordinary.[152]

Bulgaria, §137; ECtHR, *Kamasinka v. Austria,* §110. The right to an effective remedy under the ECHR does not require a judicial review body, see, for example, *Kudla v. Poland,* §157.

145 Article 2(3)(b) ICCPR stipulates a priority of judicial remedies:

> To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

See also Nowak, at 34; similar phrasing can be found in Article 25 IACHR.

146 For example, the African Court for Human and People's Rights determined that the competence of the organ is also dependent on the expertise of the judges and the inherent justice of laws under which they operate; AfCHPR, *Amnesty International v. Sudan* (2000) AHRLR 297, §69.

147 The African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), Doc/Os(Xxx) 247.

148 The African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), Doc./Os (Xxx) 247, Principle 4, point a to v.

149 Idem, Principle 5 a-e.

150 R.C.A. White and C. Ovey, *The European Convention on Human Rights* (Oxford University Press 2010) at 266.

151 Idem, at 266; see also *ECtHR Piersack v. Belgium*, App. 8692/79, (1983) Series A no. 53 5 EHRR 169.

152 HRCee, *General Comment 32*, §22. However, scricter scrutiny seems to be exercised by treaty monitoring bodies of specialized courts, such as anti-terrorism courts. For instance, courts using *faceless judges* cannot be deemed to be independent or impartial as their independence and impartiality cannot be verified (HRCee, *Gutierrez Vivanco v. Peru,* 678/1996 (March 26, 2002), §7.1; the concept of faceless judges is used in Peru, for example for terrorist related offences. See also HRCee, *Polay Campos v. Peru* (577/1994) (November 6, 1997); HRCee, *Concluding Observations on Egypt*, A/58/40 vol. I (2002) 31 at §77(16) and 77(17); HRCee, *Concluding Observations on Peru*, A/51/40 vol. I (1996) 48 at §350, 352 and 364; CAT, *Concluding Observations on Peru,* CAT, A/50/44 (1995) 11 at §73. Often, these courts do not meet the standard of independence and impartiality. HRCee, *General Comment* 13, §4; HRCee, *Concluding Observations on Chile*, (1999) UN Doc. CCPR/C/79/add. 104; HRCee, *Concluding Observations on Slovakia*, (2003) UN Doc. CCPR/CO/78/SVK, §14; HRCee, *Concluding Observations on Lebanon*, (1997) UN Doc. CCPR/C/79/add. 78; HRCee, *Concluding Observations on Cameroon*, (1999) UN Doc. CCPR/C/79/add. 116, §21; however, see also HRCee, *Fals Borda et al v. Colombia* Comm. no. 46/79, §1.5, 9.2, 13.3.

In conclusion, all instruments stipulate that review bodies, whether judicial or not, need to be competent, independent and impartial.

1.2.3. Fair Review Procedure

A general standard across the various instruments is that, at a minimum, a review procedure has to be fair.[153] This is an obligation of result; authorities are accorded wide discretion to design the proceedings to achieve a fair review procedure. However, most instruments do not further define the elements required for a fair review procedure; instead, it has to be deduced from the case law of the treaty monitoring bodies when a review procedure is deemed to be fair or unfair.[154] The elements of a fair review procedure are more explicitly and completely defined only in the context of certain review procedures.[155] For instance, the Aarhus Convention stipulates that review procedures as recognized by the Convention:

> shall provide adequate and effective remedies … and be fair, equitable, timely and not prohibitively expensive. Decisions under this Article shall be … in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.[156]

In general, across the various instruments similar elements can be identified that are considered essential for a fair review procedure: a duty to inform, a duty to provide reasons for a decision reached, equality of arms, and a timely procedure that is not prohibitively expensive.[157] Considering that the elements are derived from a small set of review cases, the case law serves primarily as an illustration of how the concept of fairness is interpreted by these treaty monitoring bodies and to understand the complexity of all factors influencing the fairness of a review proceeding. Whenever this research can identify a general benchmark across the instruments, it is mentioned accordingly.

153 Article 14(1) ICCPR; article 6(1) ECHR; African Commission on Human Rights and Peoples Rights, *Civil liberties organization and others v. Nigeria* (2001) AHRLR 75, §12, 27, 44; ACCC, *ACCC/C/2011/57 (Denmark),* ECE/MP.PP/C.1/2012/7 (July 16, 2012) at §44; ACCC, *ACCC/C/2004/6* (*Kazakhstan)*, ECE/MP.PP/C.1/2006/4/Add.1 (July 28, 2006) at §28-29; ECtHR, *Ciubotaru v. Moldova* (2010),§51; HRCee*, Everett v. Spain*, 961/2000 (July 9, 2004), §6.4; IACtHR, *Constitutional Court v. Peru;* CRC, *General Comment 14*, §98.

154 See, e.g., ECtHR, *Gorgulu v. Germany* (February 26, 2004), §53 (regarding compliance with article 8 ECHR). For the ECtHR, a decisive element is the quality of the decision-making procedure. If there are any structural or fundamental flaws in this procedure, the Court scrutinizes the procedure and the review process more strictly. See also ECtHR, *Drobnjak v. Serbia,* 36500/05, (October 13, 2009), §143.

155 In the context of administrative dismissals or administrative sanctioning, for instance, a higher level of review is required, similar to the fair trial guarantees expected in criminal proceedings. The IACtHR has held that in such cases article 8(1)(2) ACHR is applicable (*Baena and Ricardo*, §129).

156 Article 6(4) of the Aarhus Convention.

157 It should be noted that the latter (the element of the procedure not being prohibitively expensive) was discussed in the context of the right to access the review body in section 1.2.1 of this chapter.

Overall, the assessment of the fairness of a procedure is a contextual one, where all factors have to be taken into account. This implies that the lack of one of the elements does not have to result in an unfair review procedure. The concept of vulnerability seems to play a role in determining the fairness of the procedure, and accordingly, of the content and scope of the obligations of the authorities vis-à-vis those affected.

Duty to inform

Firstly, there is a duty to inform the holders of their right to a review.[158] The content and scope of this obligation is similar to the duty to inform recognized in the context of the right to meaningful participation in the decision-making procedure. Those affected have to be duly informed of the decision adopted, the possibilities for review, and the procedure to be followed.[159] If persons are particularly vulnerable, more effort may be required of authorities to duly inform those affected.[160] In *Čonka v. Belgium*, the Belgian authorities had made the information available only in tiny characters, not in the language of the asylum seekers, and there was only one interpreter available for all asylum seekers.[161] Accordingly, the asylum

158 For instance, the CRC imposes a duty to inform a child of the review procedure and ensure accessibility to the procedure, CRC, *GC 14,* §98. If trials are held in public, courts are required to make information on the time and venue of the oral hearing available to the public and to have adequate facilities for those attending, all within reasonable limits. HRCee, *Van Meurs v. The Netherlands*, 215/1986 (July 13, 1990) §6.1; CESCR, *General Comment 7* (1997), §15 (g)(h); CESCR, *General Comment 15: The Right to Water* (2003) §56(d) (e); CESCR, *General Comment 21: The Right to Take Part in Cultural Life (*2009), §54; CERD, *General Comment 27*, §7; *CO on Iceland* (2005) §270; ECtHR, *AGOSI v. UK,* §55; see, e.g., ECtHR, *Gaskin v. UK* (1989), §49; ECtHR, *M.G v. United Kingdom*, judgment, (September 24, 2002) application no. 39393/98, §30: "Procedure to appeal denials of information must be in place in order to be in accordance with the law"; IACtHR, *Case of the Constitutional Court v. Peru* (January 31, 2001),§83; Migrant Workers Committee, *CO on the Second Periodic Report of El Salvador* (May 2, 2014), CMW/C/SLV/CO/2, §25; Migrant Workers Committee, *CO on the Second Periodic Report of Sri Lanka* (October 11, 2016), CMW/C/LKA/CO/2, §29 (b).

159 For instance, the Aarhus Convention Compliance Committee held that a procedure that allowed for a court hearing to start without properly notifying the parties involved could not be considered to be a fair proceeding in the meaning of article 9(4) of the Convention. ACCC, *ACCC/C/2004/6 (Kazakhstan),* §28-29. On the basis of article 9(5), parties to the convention are required to facilitate effective access to justice by providing information on access to administrative and judicial review procedures. For instance, see in comparison section 3.1.2. of chapter 4 above in which the content of the obligation to duly inform those affected was discussed in the context of the right to meaningful participation in decision-making procedures.

160 This is particularly the case in the context of asylum seekers, ECtHR, *Čonka v. Belgium,* (May 5, 2002), §44.

161 The Court concluded:

> The Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective (…). As regards the accessibility of a remedy within the meaning of Article 35 §1 of the Convention, this implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy. That did not happen in the present case.

ECtHR, *Čonka v. Belgium,* (May 5, 2002), §44; similarly, the Committee against Torture has argued that states have the obligation to duly inform asylum seekers about all domestic remedies available to them, in particular the possibility of judicial review and whether domestic legal aid is available. CAT, *S.H. v. Norway no 121/1998*, (November 19, 1999), §7.4; CAT, *Z.T. v. Norway, no. 127/1999* (November 19,

seekers were not duly informed, the Court concluded that they did not have access to a fair review procedure, and as a result the asylum seekers did not have an effective legal remedy.

Equality of arms

The equality of arms refers to a certain balance between the parties in a review procedure that ensures, as described by the ECtHR, that "each party must be afforded a reasonable opportunity to present their case – including their evidence – under conditions that do not place them at a substantial disadvantage *vis-à-vis* their opponent".[162] The criterion is explicitly spelled out in the context of the right to fair trial,[163] the Aarhus Convention,[164] and article 13 ICCPR.[165] However, in the context of other instruments, one can find similar references to the balance between the parties and the extent to which a claimant receives a fair procedure taking into account the extent to which both parties had access to witnesses, evidence and the use of experts in a given proceedings.[166]

In general, three factors can be identified across the various instruments that may contribute to a violation of the criterion of equality of arms. Firstly, those affected may be at a disadvantaged position, which has a negative impact on the equality of arms.[167] For instance, those affected may not be able to afford to hire expert witnesses, which may have a negative effect on the equality of arms. As a result, in certain situations, legal assistance or financial aid may be required, not only to ensure access to a review body but also to ensure a certain equality of arms between the parties involved.[168] Secondly, a lack of access to information

1999), §7.4; see also M. Reneman, 'Access to an Effective Remedy in Asylum Procedures' (2008) 1(1) *Amsterdam law Forum* 65 at 87-88.

162 ECtHR, *Suominen v. Finland* application no. 37801/97 (July 1, 2003) §33-34; HRCee, *Dugin v. Russian Federation*, 815/1998, (July 4, 2004) §9.3; Article 14 ICCPR.

163 ECtHR, *Neumeister v. Austria, (app. 1936/63)* (June 27, 1969) Series A No. 8 (1979-1980) 1 EHRR 91. Access to the courts is closely related to the requirement of equality of arms. The HRCee argued in *Bahamonde v. Equatorial Guinea* No. 468/1991 §9.4 that:

> The notion of equality before the courts and tribunals encompasses the very access to the courts, and that a situation in which an individual's attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees of Article 14, section 1;

HRCee, *GC 32* (2007) §9; see similarly, ECtHR, *Case of Bulut v. Austria*, judgment (February 22, 1996) §47.

164 Article 9(4) of the Aarhus Convention stipulates that review procedures in the context of the Aarhus Convention should be fair, equitable, timely and not prohibitively expensive. See for instance, ACCC, *ACCC/C/2008/33* (UK) ECE/MP.PP/C.1/2010/6/Add.3, December 2010, §132.

165 HRCee, *Everett v. Spain, 961/2000* (July 9, 2004), §6.4.

166 See, for example, IACtHR, *Case of the Constitutional Court v. Peru* (January 31, 2001), §83; principle 2.A(a): (a) equality of arms between the parties to a proceeding, whether they be administrative, civil, criminal, or military; ECtHR, *De Haes and Gijssels v. Belgium* (February 24, 1997), §53, 58-59.

167 Section 1.2.1. of this chapter discussed the effects of court fees on the accessibility of a review procedure.

168 See, for instance, ECtHR, *Steel Morris v. UK,* §72, the denial of legal aid to the applicants deprived them of an opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms. Accordingly, the Court held that there was a violation of article 6(1). As stated by the ECtHR, the rationale is to provide each side with "a reasonable opportunity to present his or her case

places an individual in a disadvantaged position, which has a negative impact on the equality of arms.[169] The information required has to be interpreted in broad terms, including informing individuals of the evidence used in review proceedings, but also allowing equal access to (use) evidence, witnesses and experts to substantiate their case before a review body. Without this information the right to a review becomes futile for these individuals.[170] In *De Haes and Gijssels v. Belgium*, the ECtHR held that the outright rejection of a higher court to include evidence requested by the applicants constituted a violation of the principle of the equality of arms, as it placed the applicants in a disadvantaged position.[171] Lastly, if both parties to the review procedure do not have a similar opportunity to make certain procedural choices, it has a negative impact on the equality of arms. For instance, in *Weiss v. Austria*, the HRCee determined that there was a violation of the principle of equality of arms as only the prosecutor in the case had an opportunity to appeal the decision; the applicant could not appeal the decision to extradite.[172]

These three ways in which the equality of arms may be negatively impacted have to be placed in the context of the type of procedures that are of most interest to this research; that is, the administrative decision-making by public authorities that affect individuals. In these procedures, there are some inherent inequalities, considering that one party concerned is the public authority that may be presumed to have the financial and logistical support and the expertise and experience of state authorities, and the other party is, for example, the private individual, a group of individuals or companies whose support structure is very different or

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under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary," *Steel and Morris v. UK*, §62; see also ECtHR, *De Haes and Gijsels v. Belgium 19983/92* (February 24, 1997), §53; ECtHR, *McVicar v. United Kingdom, 46311/99* (May 7, 2002), §51, 62. It should be noted that the obligation to provide legal aid does not imply that authorities have to realize complete equality of arms, using public funds, between the assisted and the opposing party, ECtHR, *Steel and Morris v. United Kingdom* (2005), §62; see also ECtHR *De Haes and Gijsels v. Belgium,* §53; ECtHR, *McVicar v. United Kingdom,* §51, 62.

169 For example, ECtHR, *McGinley and Egan v. UK, case no.10/1997/794/995-996*, (June 9, 1998) §86, 91 cited in §19 of the revision of the judgment:

> The Court considers that, if it were the case that the respondent State had, without good cause, prevented the applicants from gaining access to, or falsely denied the existence of, documents in its possession which would have assisted them in establishing before the PAT that they had been exposed to dangerous levels of radiation, this would have been to deny them a fair hearing in violation of Article 6 §1.

In the given case however, a procedure was available for the disclosure of documents that the applicants failed to use; accordingly, there was no violation of the principle of a fair review procedure.

170 See, e.g., ECtHR, *McMichael v. United Kingdom,* (February 24, 1995), §80.

171 ECtHR, *De Haes and Gijssels v. Belgium* (February 24, 1997), §58-59; see also ECtHR, *Hentrich v. France* (13616/88, (September 24, 1994) §56, in which the Court held that it was quite difficult for the applicant to challenge this decision on the ground that the administrative body provided shallow reasons for the decision reached (a property's sales price was too low), but combined with the fact that the tribunals of fact did not allow the applicant to prove that the price agreed was in line with market conditions resulted in a violation of article 6(1) ECHR.

172 HRCee, *Weiss v. Austria communication* 1086/2002 (April 3, 2003), §9.6.

perhaps lacking. In this context, more may be required of public authorities to ensure that the private party finds himself/herself not at an unfavorable disadvantage in the review procedure.

Reasonable timeframes

Various instruments require the review procedure to have reasonable timeframes, which concerns two elements. Firstly, authorities are required to realize expeditious proceedings.[173] For instance, in *Gonzalez del Rio v. Peru*, the individual had been waiting for a decision in the first instance since 1985, and in the autumn of 1992, there was still no decision when the case was decided by the HRCee.[174] The Committee concluded that this delay in the proceedings constituted a violation of the principle of fairness. Secondly, it requires that individuals have a sufficient amount of time to participate properly in the review proceedings.[175] For example, several treaty monitoring bodies have warned authorities of the risk of using accelerated proceedings when it concerns irreversible actions.[176] Overall, the definition of a reasonable timeframe depends on the case at hand, taking the circumstances, the complexity, the type of complaint, and other elements of a fair procedure into account.[177]

Duty to provide reasons

Review bodies are required to provide reasons for a decision reached[178] and to communicate the decision to those affected. The review body's duty to provide reasons is quite similar to the one identified in the context of the right to meaningful participation in the decision-

173 The support for expeditious proceedings can be found in most instruments. See, e.g., ACCC, *ACCC/C/2008/33 (UK),* ECE/MP.PP/2008/5/Add. 4, (August 24, 2011), §30; HRCee, *Munoz v. Peru* "justice is rendered without undue delay" (203/86); HRCee, *Fei v. Colombia*, 514/1992 (April 4, 1995), §8.4.

174 HRCee, *Gonzalez del Rio v. Peru* 263/87 (October 28, 1992), §5.2; see similarly, HRCee, *Rubén Toribio Muñoz Hermoza v. Peru* 203/1986 (1988), §11.3.

175 See, e.g., IACtHR, *Case of the Constitutional Court v. Peru*, (January 31, 2001) §83

176 See, for example, CERD (*Concluding Observations on Finland*, (2003) A/58/18, 69 at §408:

> …such narrow time limits may not allow for the proper utilization of the appeal procedure available and may result in an irreversible situation even if the decision of the administrative authorities were overturned on appeal.

See similarly CAT, *concerning Finland* A/60/44 (2005) 32, §73(b).

177 The IACtHR (*Genie Lacayo v. Nicaragua*, §77) follows, for instance, the line of case law of the ECtHR (e.g., *Ruiz-Mateos v. Spain* (June 23, 1993), §30) and uses three criteria to determine what constitutes a reasonable timeframe for conducting a review procedure: the complexity of the matter, the judicial activity of the interested party, and the behavior of the judicial authorities concerned; in *Deisl v. Austria*, the HRCee determined that several criteria were of relevance to coming to the conclusion that this case's protracted proceedings did not result in a violation under the Convention: (a) the length of each individual stage of the proceedings, (b) the fact that the suspensive effect of the proceedings vis-à-vis the demolition orders was to the benefit of the applicant, (c) the applicants did not try to accelerate proceedings, (d) complexity of the matter at hand, HRCee, *Deisl v. Austria* 1060/2002 (July 27, 2004) §11.6.

178 ECtHR, *Lombardi Vallauri v. Italy,* app. no. 39128/05, (October 20, 2009); ECtHR, *Suominen v. Finland* (July, 20 2403), §34; ECtHR, *Geleri v. Romania,* app. no. 33118/05, (September 15, 2011); Article 9(4) Aarhus Convention.

making procedure.[179] The duty does not imply that a review body is required to give a detailed answer to every argument.[180] Instead, at a minimum, provision of the legal basis and main considerations for the decision is required;[181] whether or not the criterion is complied with in a given case is to be assessed on a case-by-case basis.[182] For example, in *Suominen v. Finland*, the ECtHR held that there was a violation of article 6(1) ECHR, as:

> the applicant did not have the benefit of fair proceedings in so far as the [domestic] Court's refusal to admit the evidence proposed by her was concerned. The lack of a reasoned decision also hindered the applicant from appealing in an effective way against that refusal.[183]

In this case, the Finnish Court refused to admit certain evidence and did not provide reasons for the refusal. As explained by the ECtHR, the duty to provide reasons plays a role at various levels: to demonstrate that the parties have been heard and to provide an opportunity to appeal the decision, as only through "giving a reasoned decision that there can be public scrutiny of the administration of justice."[184]

Factors for further scrutiny of the fairness of a procedure

In certain contexts, a higher scrutiny is exercised by treaty monitoring bodies of the level of fairness realized by a public authority. For instance, in *Mansour Ahani v. Canada*, the Human Rights Committee held that due to what was at stake – whether the affected individual was at risk of substantial harm if he would be expelled – "the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at a substantial risk of torture."[185] In addition, although the rules on evidence, the burden of proof and the standard of proof generally fall outside the scope of review by treaty monitoring bodies, sometimes matters of proof and evidence are taken into account in the assessment of fairness by a treaty monitoring body.[186] Whenever review procedures appear to have arbitrary features, and/or a review proceeding is tantamount to a denial of justice, and/or when there is a manifest violation of the obligations of impartiality and independence of the

179 See above, chapter 4, section 2.4. CRC, *General Comment 14 (concerning article 3 CRC)*, §97; see also CESCR, *General Comment 7*, §15; ECtHR, *Lombardi Vallauri v. Italy app no 39128/05* (2010), §45-49.

180 ECtHR, *Perez v. France*, §81-84. In this case, the domestic court had duly considered all of the applicant's grounds for appeal and addressed all these grounds effectively; therefore, there was no violation of article 6(1) ECHR; see also, ECtHR, *Ruiz Torija v. Spain,* (December 9, 1994), series A no. 303-A, 12, §29.

181 For instance, the IACtHR ruled in *Yatama v. Nicaragua* that the failure of the review body to provide reasons constituted a violation of article 8 ACHR: (June 23, 2005), IACtHR Series C no. 127.

182 See, e.g., ECtHR, *Ruiz Torija v. Spain* (December 9, 1994), §29; ECtHR, *Suominen v. Finland* application no. 37801/97 (July 1, 2003) §34.

183 ECtHR, *Suominen v. Finland* (July 1, 2003) §38.

184 Idem, §37.

185 HRCee, *Mansour Ahani v. Canada communication 1051/2002* (April 2, 2004), §10.6; see similarly, ECtHR, *Chahal v. United Kingdom*, (November 11, 1996) §151-152.

186 HRCee*, Everett v. Spain*, 961/2000 (July 9, 2004), §6.4.

review body, treaty monitoring bodies exercise a higher degree of scrutiny, which includes an evaluation of the burden and standard of proof.[187]

In conclusion, the fairness of a review procedure is a contextual assessment where, amongst others, four elements identified are evaluated: the duty to inform, the reasonableness of set timeframes, the equality of arms, and the duty to give reasons for the decision reached. If there were already certain procedural flaws in the decision-making procedure, this may have a negative effect on the fairness of the review procedure.

1.3. Rightsholders

The general standard across the various instruments is that those allegedly affected by a decision have a right to a review. The various treaty monitoring bodies give guidance as to when someone is considered to be affected and, thus, entitled to a right to a review. In general, addressees of a decision are *ipso facto* deemed to be affected by the decision, and accordingly they have a right to a review.[188]

The majority of the instruments define per right to a review (i.e., per legal basis per instrument) when someone, who is not the addressee of the decision, can be regarded as affected. This concerns a contextual assessment. For instance, the IACtHR establishes that authorities have to remedy the harm caused to those who suffer the "immediate effects" of its breaches of human rights guarantees, when those effects are sufficiently direct and proximate.[189] Further, various review bodies have accepted that parents may initiate a review procedure on behalf of their children, and in exceptional situations, children can initiate a procedure on behalf of their parents.[190]

In general, authorities have an obligation to ensure that there are review procedures in place for those affected. Public authorities are permitted to impose procedural bars – like legal standing criteria – to access these review procedures in accordance with the requirements of the respective instrument if it does not result in an impairment of the very essence of the

187 See, e.g., HRCee, *Z.P v. Canada* (341/1988) (April 11, 1991), §5.2; HRCee, *Blaine v. Jamaica* (969/1996) (July 17, 1997), §6.6.

188 Examples are forced eviction notices; decisions to expel a person; (partial) denial of a request for public interest information or a request to see, rectify, or remove personal data held by authorities. See also above in chapter 3, section 2.

189 D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2015), at 240; IACtHR, *Aloeboetoe v. Suriname* (1994) Series C no. 15 §49.

190 IACtHR, *Blake v. Guatemala* (1996) Series C no 27; IACtHR, *Loayza-Tamayo v. Peru* (Reparations) (1998) Series C no 42; see similarly, HRCee, *Quinterros v. Uruguay 107/1981* (1983) §3; *Bleier v. Uruguay 30/1978*, §7). See for the ECtHR, for instance, *Vallianatos and Others v. Greece* [GC], §§ 47; ECtHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], §101; ECtHR, *Klass and others v. Germany*; ECtHR, *Soering v. United Kingdom*.

right of access.[191] Although constraints on the exercise of the right to a review – such as legal standing criteria – do not limit who is the holder of a right to a review per se, it results in practice in limiting who may request for a review in a given case. The discretion accorded to authorities to impose such conditions depends on the type of review procedure. In general, authorities may impose legal standing criteria to bring claims to court at a domestic level[192] or requests for a proof of interest of the claimants. Legal standing criteria may make it difficult for groups[193] or NGOs[194] to initiate proceedings. It is the obligation of public authorities to ensure that these NGOs have legal standing to initiate a review procedure. Thus, when a treaty instrument stipulates a substantive right to, for example, minority protection, authorities are required to implement the treaty obligations, which may imply – if the procedure is not in place – that authorities have to develop review procedures and/or adapt the legal standing criteria so that the holders of the right are able to request a review of a decision that affects them.[195] The Aarhus Convention makes this obligation for authorities

191 See ECtHR, *Z and others v. United Kingdom* (2001), §93: ECtHR, *Golder v. UK*; ECtHR, *Ashingdane v. UK* (1985), §57; HRCee, *Casanovas v. France communication* 1514/2006, §11.3; see also section 1.3.2 of this chapter.

192 It should be noted that it is a separate issue whether, and to what extent, remedies at the level of treaty monitoring bodies are accessible. Each rights-based instrument adopts its own criteria for accessing review mechanisms and legal standing. For instance, the ICCPR upholds a strict victim requirement, which makes it challenging for NGOs or groups to bring a claim before the HRCee. See however the case law on article 27 ICCPR, which forms an exception in this respect as it is directed towards minorities. Nevertheless, the claim can only be successful if the claimant formulates it as an individual right (HRCee*, Ominayak and the Lubicon Lake Band v. Canada* 167/1984 (March 26, 1990), §27. The IACtHR is more lenient in this respect and has accepted group claims (IACtHR, *Aloeboetoe v. Suriname* (1994), §19 49-54; *Awas Tingri Mayagna Indigenous Community v. Nicaragua; Ioayza Tamayo v. Peru*). It has also accepted claims filed by persons who are not a victim (Case 11.625 *Maria Eugenia Morales de Sierra v. Guatemala* (1998) OEA/Ser.L/V/II.98 Doc 6, Rev), but a victim has to be identified. The AfCPHR has accepted *actio popularis* claims, *SERAC v. Nigeria Comm 300/05*, 25th Annual Activities report (2008). On the issue of legal standing in front of international human rights bodies, see also M. Scheinin, 'Access to Justice before International Human Rights Bodies: Reflections from the Practise of the UN Human Rights Committee and the European Court of Human Rights' in F. Francioni (ed.) *Access to Justice as a Human Rights* (OUP 2007) 135 at 142-147, and D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2015), at 241-256.

193 Although most instruments recognize that groups can be affected by certain decisions and have to be accorded a right to a review before an independent and impartial body, it is for domestic authorities to implement this right at the domestic level. See, e.g., CERD, *CO on Suriname* A/59/18 (2004) 36, §193

194 See on the issue of an NGO's right to a review in the context of environmental decision-making, for instance, M. Schaap-Rubio Imbers 'Access to Environmental Justice for NGOs: Interplay between the Aarhus Convention, EU Treaty of Lisbon and the European Convention on Human Rights' in: *Fragmentation vs. the Constitutionalization of International Law - A Practical Inquiry* (Routledge 2016) 244-264; for instance, the Aarhus Convention imposes an obligation on authorities to enable NGOs to pursue public interest litigation in the enforcement of Aarhus Convention obligations. See article 2(5) of the Aarhus Convention. See also ACCC, *ACCC/C/2006/18 (Denmark),* ECE/MP.PP/2008/5/Add. 4 (April 29, 2008), §28.

195 For example, in its Concluding Observations on Suriname, the CERD recommended Suriname to grant those affected a right to "appeal to the courts, or any independent body specially created for that purpose; in order to uphold their traditional rights and their right to be consulted before concessions are granted and to be fairly compensated for any damage." In this case, indigenous and tribal people were not able to initiate proceedings to enforce their traditional rights as they were not recognized as legal entities, and thus they did not have legal standing, CERD, *CO on Suriname* A/59/18 (2004) 36, §193.

more explicit by including a right to a review of the procedural or substantive legality of a decision for the public concerned with a sufficient interest. At a minimum, NGOs that promote environmental protection and meet any requirements under national law shall be deemed to have sufficient interest to challenge the procedural and/or substantive legality of a decision under Article 9(2) Aarhus Convention.[196]

Procedural bars, besides legal standing criteria, may be fees to initiate legal procedure and/or an obligation to be represented by legal counsel. These other conditions that may have a limiting effect on who is able to request a review will be discussed below in the context of permitted limitations to the right to a review.

1.4. Limitations

This section will discuss the different ways in which the right can be restricted by public authorities that can derive from (1) explicit limitations stipulated in the various legal provisions, (2) conditions imposed to the exercise of the right, or (3) from the implicit legal basis of the right; that is, the way in which treaty monitoring bodies have read a procedural right into the legal provisions of certain substantive rights that imposes constraints on its enforceability.

Only in the context of the right to a review in cases of expulsion decisions[197] explicit limitation grounds are recognized: the right to submit reasons and to have the case reviewed by a competent authority may be limited based on national security reasons, if the tripartite test is met.[198]

In the context of other review procedures, public authorities are permitted to impose certain conditions on the exercise of the right to a review if they do not result in an impairment of the very essence of the right and if it meets the tripartite test of legality, legitimacy and necessity. As demonstrated in the preceding sections (1.2.1 and 1.3), these conditions may have a limiting effect on who may exercise the right, and on who has access to the review procedure. The recognition of the discretion to impose these conditions can be found most explicitly in fair trial provisions,[199] and the Aarhus Convention review procedures under article 9(1) and 9(2).

196 See further C. Redgwell 'Access to Environmental Justice' in F. Francioni (ed.), *Access to Justice as a Human Right* (2007), 153 at 168-169.

197 Article 1 of Protocol 7 to the ECHR.

198 The tripartite test implies that restrictions have to be in accordance with the law, pursue a legitimate aim, be proportional and should not be so broad that they destroy the very essence of the right to a review. See, e.g., article 13 ICCPR; HRCee, *General Comment 15: the Position of Aliens under the Covenant* (1986), §9-11; HRCee, *Hammel v. Madagascar* communication no. 155/1983 (April 3, 1987), §19.1-19.3; Article 32 of the 1951 Refugee Convention.

199 Article 14(1) ICCPR, article 6(1) ECHR; e.g., ECtHR, *Ashingdane v. United Kingdom, app. no. 8225/78* (May 28, 1985) Series A no 93 (1985) 7 EHRR 528; ECtHR, *Z and others v. United Kingdom, Application no. 29392/95*, (May 10, 2001) (2001), §93; ECtHR, *Markovic and others v. Italy*, app. no. 1398/03, [GC] (2007) 44 EHRR 1045 ECHR 2006-XIV; *H. v. United Kingdom*, app. 11559/85 (December 2, 1985) 45 DR 281; *Stubbings and others v. United Kingdom,* app. nos. 22083/93 and 22095/93, (October 22,

They can also be identified in the works of treaty monitoring bodies interpreting a right to an effective remedy for those affected.[200] The different conditions can be summarized as follows:

Element of the right to a review	Condition/ limitation	What instruments	Criteria
Holder of the right	Imposition of legal standing criteria	All	- It may not result in impairment of the very essence of the right - No discrimination - When there are factors of vulnerability, positive measures may be required to ensure the access of these individuals or groups
Access to the review body	Court fees and other legal fees	All	- Not prohibitively expensive - Assessed in the context of the case at hand, and the system as a whole - It may not *de facto* block access to the review body for the individual - Vulnerability is a trigger factor for the provision of legal aid and assistance to mitigate negative effects
Access to review body, fairness of the procedure	Requirement of legal representation	In general, only for those decisions with high impact	- Discretion for authorities to impose the requirement, however might result in an obligation to provide legal aid and/or legal assistance to those (particularly) vulnerable
Access to review body	Timeframe for submitting review request	All instruments	- Strict timeframes are permitted, but particular circumstances, such as the vulnerability of the claimants or applicants, may warrant a more lenient approach

Table 7: Possible conditions to a right to a review

1996) (1997) 23 EHRR 213, ECHR 1996-IV; ECtHR, *Stagno v. Belgium,* app. no. 1062/07 (July 7, 2009); ECtHR, *Steel and Morris v. United Kingdom*, §62; ECtHR, *Acimovic v. Croatia*, 61237/00, (October 9, 2003), §29.

200 See, e.g., HRCee, *Graciela Ato del Avellanal v. Peru communication 202/1986* (October 28, 1988), 10.1-10.3; ECtHR, *Kreuz v. Poland*, app. no. 28249/05, (June 19, 2001), §58-67. See also above in section 1.3.1.

In the context of national security threats, treaty monitoring bodies appear to be more lenient, and allow for certain limitations. For instance, the ECtHR explained that in the case of national security considerations,[201] remedies have to be as effective as possible.[202] In other words, it is accepted that in situations of national security, access to certain information may be limited, for instance, by denying (partial) access to the underlying evidence or by only providing a summary of reasons. However, even more than in the context of other limitations, there have to be procedural guarantees in place to prevent arbitrary use.

The ECtHR addressed this question in *Kaushal and others v. Bulgaria*:

> However, even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.[203]

This case illustrates that authorities have to provide certain minimum guarantees, even when there is a situation of national security warranting a restriction of the rights of those affected.

Whenever the legal basis for the right to a review is not explicit, and instead, the treaty monitoring bodies have read the right into substantive provisions of the respective treaty instrument, the assessment of possible limitations or conditions to the right is slightly different.[204] In these cases, the extent to which the right to a review is realized is to be assessed taking all procedural safeguards required into account. Whenever the substantive right is limited by authorities, the instruments require that public authorities – in light of the legality

201 ECtHR, *al-Nashif v. Bulgaria*, 136.

202 Article 13 requires a remedy to be "as effective as it can be," having regard to the fact that it is inherent in any system of secret surveillance or secret checks that there is a restricted scope for recourse (see the *Klass and Others v. Germany* judgment (September 6, 1978), Series A no. 28, § 69).

203 ECtHR, *Kaushal and others v. Bulgaria, 1537/08*, judgment, (September 2, 2010), §29; see similarly ECtHR, *Al-Nashif v. Bulgaria,* §129-130, 137.

204 See, e.g., CESCR, *General Comment 7: Right to adequate housing – forced evictions* (1997), §11-13; CERD, *CO on Suriname* (2004), §193; ECtHR, *Leander v. Sweden,* §77(a).

and/or necessity principle – provide a right to a review for those affected.[205] Thus when no, or only a limited, right to a review is provided, treaty monitoring bodies assess this in consideration with the overall level of procedural guarantees offered in light of the limitation to the substantive right.[206]

Overall, there is little room to impose limitations on the right to a review, beyond the conditions discussed in the context of the right to access the review body. These conditions, if they meet the tripartite test of legality, legitimacy and necessity, are permitted if it does not result in an impairment of the very essence of the right to a review.

1.5. Conclusions: The Building Blocks of a Right to a Review

The Conceptual Model recognizes a right to an effective remedy, which includes a right to a review and to reparation. However, it does not further define the content and scope of these rights required to realize an effective remedy. This section will show that the right to a review within international law applicable to the domestic level has a strong legal basis.

The right to a review has very diverse substantive legal bases, which recognize different forms of review. Nevertheless, despite the different legal bases, this research identified general standards across the instruments for the content and scope of the right to a review; what differs, is the level of detail of the requirements for the review procedures and the extent to which further positive obligations are recognized for authorities to comply with.

205 See, e.g., CESCR, *General Comment 7*, §15; CESCR, *General Comment 15: the Right to Water*, (2002), §48; CESCR, *General Comment 19: the right to social security*, §8; CRC, *General Comment 14 (Article 3),* §98: ECtHR, *Hatton and others v. United Kingdom,* §127; ECtHR, *Taşkin v. Turkey*, §119.

206 See similarly the right to meaningful participation in the decision-making procedure (section 4 (limitations) of chapter 4). For the type of substantive rights into which a right to a review has been read see section 1.1.2. of this chapter.

The right to a review can be summarized as follows:

RIGHT TO A REVIEW	
Legal basis	All instruments recognize a form of a right to a review. Overall, there are two broad categories of legal bases: - The decision affects substantive rights enjoyed under the respective instrument - The dispute qualifies as a suit at law or determination of certain rights and obligations
Duty bearer	Public authorities: all branches of state, all actors who exercise public authority
Holder of the right	Those affected by (administrative) decisions Legal standing requirements may be posed
Type of obligations	A right to access a review body Competent, independent and impartial review body Fair review procedure which includes a duty to inform, a duty to provide reasons, equality of arms, and a reasonable timeframe
Limitations	Right to limit access to the review body Constraints may not lead to the impairment of the essence of the right The right to a review forms part of the procedural guarantees recognized in the context of substantive rights

Table 8: Building block - right to a review

The next section will discuss whether, and to what extent, a right to reparation can be identified in the international instruments for those affected by decisions.

2. The Right to Reparation

The right to an effective remedy has two components: the right to a review and the right to reparation. The previous section discussed the content and scope of the right to a review; this section will address the right to reparation. However, the right to reparation is a peculiar one in comparison to the other rights recognized in the context of the Draft Inclusionary Governance Model. Although the right to reparation has a firm legal basis in international law, its content and scope are relatively undefined. This section will set out the extent to which benchmarks can be identified for the right to reparation across the various treaty instruments.[207]

Each international instrument contains one or more references to the right to reparation. However, the nature of the right varies; whereas some instruments have a general treaty provision stipulating a need for remedies and reparation whenever there is a violation of

207 In general, see the UN General Assembly Resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law G.A. Res. 60/147, UN Doc. A/RES/60/147 (March 21, 2006).

a right of the respective instrument, in other instances, the right is mentioned in the same breath as the recognition of a right to a review in that particular case.[208] Overall, across the instruments, a right to reparation is recognized in all those instances where a right to a review was recognized.[209] This is not surprising, considering that the right to a review and the right to reparation are both required to ensure a right to an effective remedy. The reasoning of the various treaty monitoring bodies is similar, a review cannot constitute an effective remedy without reparation, and reparation is vital in the context of the enforcement of human rights. The IACtHR, for instance, in the case of *Montero Aranguren et al.* aptly described the fundamental role of the right to reparation in international law when explaining the meaning of Article 63 ACHR:

> Article 63(1) of the American Convention reflects a customary norm that constitutes one of the basic principles of contemporary international law on State responsibility. Thus, when an unlawful act occurs, which can be attributed to a State, this gives rise immediately to its international responsibility, with the consequent obligation to cause the consequences of the violation to cease and to repair the damage caused.[210]

The question of who is the holder of a right to reparation is therefore intrinsically linked to the question who may initiate a complaint of an alleged violation of a convention right. In other words, in general, the holders of the right are those who may initiate the legal proceedings as discussed in section 1.1 above. However, as highlighted in the previous section, this includes not only the addressees of decisions but also others that are affected by a decision. For instance, parents may claim remedies on behalf of their children,[211] and in very limited situations children may do so on behalf of their parents or siblings.[212]

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208 The recognition of the right can derive from an explicit legal basis for the right and/or it can be read into a substantive provision by a treaty monitoring body.

209 CESCR, *GC 21,* §54a: claim and receive compensation; CESCR *GC 19,* §78: remedies; CESCR 15, §56(d) legal remedies; ECtHR, *Taskin v. Turkey*, §124-125; African Commission on Human and Peoples' Rights, *Amnesty International and Others v. Sudan,* Comm. No. 48/90, 50/91, 52/91, 89/93 (1999), §37; article 9(4) of the Aarhus Convention reads:

> The procedures (…) shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Injunctive relief refers to a remedy designed to prevent or remedy injury. This is particularly relevant in environmental matters as many of the disputes concern future proposed activities or deal with ongoing activities which poses an imminent threat to the human health and the environment.

See also Ebbesson, and others, *The Aarhus Convention: An Implementation Guide* (2014), at 200.

210 IACtHR, *Case of Montero Aranguren et al. (Detention Center of Catia)* (July 5, 2006) Series C No. 150, §116; IACtHR, *Case of Ximenes Lopes*, §208; IACtHR, *Case of the Ituango Massacres*, §346.

211 IACtHR, *Blake v. Guatemala* (1996) Series C no. 27; IACtHR, *Loayza-Tamayo v. Peru* (Reparation) (1998) Series C no. 42; see similarly HRCee, *Quinterros v. Uruguay 107/1981* (1983) § 3; *Bleier v. Uruguay 30/1978*, §7). See for the ECtHR, for instance, *Vallianatos and Others v. Greece* [GC], §§ 47; ECtHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], § 101; ECtHR, *Klass and others v. Germany*; ECtHR, *Soering v. United Kingdom.*

212 In the situation of enforced disappearances, for instance, children may file these claims under Article 24

The general standard is that authorities have wide discretion in choosing the reparation, as long as the reparation contain a "determination of the claim, and some form of redress."[213] In general, an effective remedy has to be *effective, accessible* and *adequate* to repair the harm suffered. Compliance with this standard is reviewed by assessing both the review procedure available to those affected and the reparation provided. The *accessibility* requirement was discussed in the context of the right to a review in section 1 (section 1.3.1) and requires that the holders of the right have access to a review body to request a review and claim for reparation. The *effectiveness* of the remedy refers to the competence of the review body to provide suitable reparation required in a given case to remedy the harm suffered by those affected.[214] Accordingly, the principle is to be assessed both under the right to a review and the right to reparation. For a remedy to be effective, it has to be heard by a competent authority, which implies that the review body has to have the power to remedy the harm.[215] Depending on the (substantive) right at stake, a different remedy may be effective and adequate. At a minimum, the authority has to be able to adopt a final decision on the alleged violation and offer some form of redress for the harm suffered. The content of reparation required may vary depending on, for instance, the nature of an allegedly violated right and on the gravity of the violation suffered, and damage resulting from this violation. In general, the various instruments recognize a wide discretion for public authorities to determine which reparation are suitable in a given case. The reparation may entail restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. For instance, in *Wilson v. the Philippines*:

> …the Committee observes that the compensation provided by the State party under its domestic law was not directed at these violations, and that compensation due to the author should take due account both of the seriousness of the violations and the damage to the author caused.[216]

of the Convention against Enforced Disappearances.

213 ECtHR, *Silver v. UK*, (1983), §113.

214 For example, the ECtHR explained that effectiveness refers to "[e]ffective in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred," ECtHR, *Kudla v. Poland*, §159.

215 See above in section 1.2.2 of this chapter. For example, the ECtHR held in *Chahal v. UK* that the remedy provided was not effective as the advisory panel that acted as the review body was not able to make a binding decision. ECtHR, *Chahal v. UK* (November 15, 1996). It should be noted that in order to comply with this criterion, it is not sufficient to merely adopt a binding decision. As stated particularly by the ECtHR, the execution of a judgment is an integral part of the right to a review and thus of the right to an effective remedy, article 35(1) ECHR, ECtHR, *Zehentner v. Austria,* §43 (October 16, 2009); ECtHR, *Burdov. v. Russia* (2002), §34-35; ECtHR, *Jasiūnienė v. Lithuania* (2003), §27; ECtHR, *Sirbu v. Moldova*, §25-27). As stated in *Burdov. v. Russia*, §34-35, the right to an effective remedy becomes illusory if "a member state court system would allow a final binding judicial decision to remain inoperative to the detriment of one party".

216 HRCee, *Wilson v. The Philippines* (868/1999), (October 30, 2003), at §9; see also §2.3, 2.6-2.10, 8.

The requirement of *adequacy* of the remedy is closely related to the requirement of effectiveness, it requires that the reparation provided are capable in addressing the harm suffered. For instance, the Aarhus Convention refers to the obligation to fully compensate past damage and prevent future damage. Further, in a given case it may require restoration, or injunctive relief to remedy the harm done.[217] Overall, what reparation are required in a given case is a contextual assessment. Public authorities enjoy wide discretion in determining what type of reparation are effective, adequate and accessible to ensure an effective remedy. However, the legal survey charted a few situations in which further instructions are given as to the type of reparation required. For instance, in the case of expropriation, public authorities have to fairly compensate those affected for the harm suffered and damage caused.[218] In the context of decisions that adversely affect the lives of indigenous peoples, public authorities have to provide a remedy that is not only effective in remedying the harm but in particular, they have to offer compensation or restitution when prior informed consent was not given by those adversely affected.[219] Lastly, in the particular situation of alleged gross human rights violations, there is an obligation for authorities to conduct a full and impartial investigation of the such violations and an obligation to institute proceedings against the perpetrators.[220] None of the instruments recognizes a discretion for public authorities to limit the right to reparation.

217 Article 9(4) Aarhus Convention; see also footnote 207; *injunctive relief* refers to a remedy designed to prevent or remedy injury. This is particularly relevant in environmental matters as many of the disputes concern proposed future activities or deal with ongoing activities that pose an imminent threat to the human health and environment; Ebbesson and others, *The Aarhus Convention: An Implementation Guide* (2014), at 200.

218 For example, article 15 Migrant Workers Convention contains an explicit legal basis for the right to reparation, namely the right to fair and adequate compensation for those affected by expropriation.

219 For instance, the CERD states in its *General Comment 23* that when decisions are taken without the prior informed consent of those who have been adversely affected, restitution has to be offered to the indigenous peoples affected. CERD, *General Comment 23*, (1997) §5; CERD, *CO on Ecuador*, §16, UN Doc. CERD/C/ECU/CO/19 (September 22, 2008); CERD, *Concluding Observations on Namibia*, §18, UN. Doc. CERD/C/NAM/CO/12 (September 22, 2008); CERD, *CO on USA*, §29, UN Doc. CERD/C/USA/CO/6 (May 8, 2008).

220 CERD, *CO on Nigeria*, A/60/18 (2005) 54, §294.

In conclusion, the right to reparation has a firm legal basis in international law. The limited benchmarks of the building blocks of the right to reparation are summarized below:

RIGHT TO REPARATION	
Legal basis	Broad legal basis: all conventions recognize a form of a right to reparation
Duty bearer	Public authorities: all branches of state, all actors who exercise public (administrative) authority
Holder of the right	Those affected by (administrative) decisions, family members, next of kin
Type of obligations	The remedy provided has to be effective, accessible and adequate in addressing the harm
Limitations	No explicit or implicit limitations recognized

Table 9: Building block - right to reparation

3. Conclusions

Chapter 2 (the Conceptual Model) recognized an obligation for international institutions to provide an effective remedy. The legal survey conducted in this chapter of the international standards for the national level established that the right to an effective remedy has a firm legal basis in international law, and that the contours of the right can be further defined. The remedy provided has to be effective, adequate and accessible. The remedy has to be available to those affected by decisions[221] and to direct family members or next of kin. The right to a review implies a duty for public authorities to provide a fair review procedure by a competent, independent and impartial review body. However, a two-tier procedure is permitted, and public authorities may impose conditions to constrain access to the review body under circumstances if the requirements of the tripartite test are met. The right to reparation implies a duty for public authorities to provide effective and adequate reparation to those affected, their direct family members or next of kin. The right to a review and the right to reparation are complementary to each other and the lack of one of the two cannot be compensated by the other. Thus, even if there was a fair review procedure conducted by an independent, impartial and competent review body, if actual reparation is prevented by actions of state authorities, it results in a violation of the right to an effective remedy. This exact situation was reviewed by the ECtHR in *Taskin v. Turkey*, and the Court held that:

221 As explained in section 1.1 of this chapter, the right to a review is recognized in the context of two broad categories of legal bases: (1) the decision affects substantive rights enjoyed under the instrument in question, and (2) the dispute qualifies as a suit at law or determination of certain rights and obligations. Both categories trigger a right to a review.

> where administrative authorities refuse to fail to comply, or even delay doing so, the guarantees enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose (…) this finding appears all the more necessary in that the circumstances of the case clearly demonstrate that, notwithstanding the procedural guarantees offered by Turkish legislation and the implementation of those guarantees by judicial decisions, the council of ministers, [in not a public decision] authorized continuation of production at the gold mine, which had already begun to operate in April 2001. In so doing, the authorities deprived the procedural guarantees available of any useful effect.[222]

Although the two rights are two sides of the same coin, the extent to which international law regulates the content and scope of the rights is quite different. The right to a review is a more robust right, where international law gives more guidance as to what is required from public authorities. In contrast, with respect to the right to reparation, there is normative agreement in international law on the necessity of the norm and that the reparation has to be adequate and effective in remedying the harm, while public authorities are accorded wide discretion on how to achieve this.

Even more than in regard to the other two dimensions, in the context of the right to an effective remedy, the interaction between the norms within the dimension come to the fore. First, the two rights of an effective remedy are complementary to each other; both rights have to be provided in order for the remedy to be effective. Moreover, the right to information and the right to participation inform the right to an effective remedy, and the right to an effective remedy strengthens the other two dimensions. By now, recurring themes can be identified in the analyses of chapters 3, 4, and 5. Therefore, chapter 6 will discuss the Draft Inclusionary Governance Model as a whole and it will demonstrate the interaction between the dimensions and between the different legal norms. It will also explain how the Draft Model serves to analyze and address the accountability of public authorities adopting decisions affecting individuals.

222 The Court came to this conclusion in the context of Article 8 ECHR, *Taskin v. Turkey*, §124-125.

6 A Draft Inclusionary Governance Model

This chapter serves as the concluding chapter of Part II. The main aim of this chapter is to present a Draft Inclusionary Governance Model ('Draft IGM' or 'Draft Model') that serves as a yardstick for the analysis of the accountability of public authorities vis-à-vis those affected by their decisions. This chapter summarizes and demonstrates how the legal survey informed the Conceptual Model developed in Part I and how the various elements of the Draft Inclusionary Governance Model are further developed. As a recap, the Conceptual Model[1] can be summarized as follows:

CONCEPTUAL MODEL FOR INCLUSIONARY GOVERNANCE
International institutions exercising public power directly affecting individuals:
- have to provide access to information; - have to duly inform those affected; - have to provide participation in the decision-making procedure; - have to ensure an effective and adequate remedy; and - have to provide reasons for the decision reached.
In addition, any public power has to be exercised:
- in accordance with the law; - not in an arbitrary manner; - may not result into a violation of *ius cogens* norms. - In addition, decision-making procedures have to ensure a certain quality of the procedure.

Section 1 summarizes and illustrates the building blocks of the Draft IGM and its benchmarks. The focus in this section is on understanding how different elements of the Draft Model play a role in ensuring accountability for public authorities vis-à-vis those affected by their decisions and how the norms relate to each other. Section 2 will discuss how the concepts of non-arbitrariness and vulnerability influence the content and scope of inclusionary governance norms, contributing to a dynamic model. Section 3 will present a schematic overview of the Draft Model to analyze the accountability of public authorities exercising public power directly affecting individuals and explains the main elements of the Draft IGM. Section 4 will provide the conclusions of this chapter.

1. Building the Draft Inclusionary Governance Model

Section 1.1 will summarize the building blocks of the three dimensions of the Draft Inclusionary Governance Model, the informational rights, the right to participation in the decision-making procedure and the right to an effective remedy. Section 1.2 will discuss the interaction identified between the dimensions and will further explain the commonalities and differences between the various building blocks.

1 The Conceptual Model was developed in chapter 2, the schematic overview and its main characteristics were discussed in the concluding paragraph of that chapter.

1.1. The Building Blocks of the Three Dimensions

This section will discuss the main characteristics, similarities, and differences within and between the three dimensions (1.1.1-1.1.3). Considering that previous chapters identified, demonstrated, and justified the various benchmarks of each building block as charted by the legal survey, this chapter only summarizes and demonstrates the function and content of these building blocks. Those interested in the background and details of the various benchmarks per building block of the Draft Inclusionary Governance Model are referred to the distinct sections in the preceding chapters.

1.1.1. Two Informational Rights

The Draft Inclusionary Governance Model contains two informational rights: the right to public interest information and the right to personal information. The building blocks of these two rights can be summarized as follows:

	INFORMATIONAL RIGHTS	
	Public interest information	**Personal information**
Duty bearer	Public authorities	Public authorities
Holders of the right	General public: no interest to be stated	Those with proof of identity (no interest to be stated), family members with genuine link to information (and subject)
Scope of the right	Right to access information of public interest (corresponding duty to disclose information upon request) Duty to provide reasons for a refusal to disclose information	Right to access, modify and remove personal information Duty to provide an opportunity to challenge the legality of the information stored Duty to protect information in possession of the authorities from unauthorized access and usage by third parties
Conditions	Fair, timely, low-cost procedure Duty to provide information on the procedure to request information	Fair, timely, low-cost procedure Duty to duly inform of personal information held and how to access this information
Limitations	Exhaustive list of limitations Tripartite test: legality, legitimacy, necessity Provide procedural safeguards (including right to a review) and limit the discretion of authorities	Exhaustive list of limitations Tripartite test: legality, legitimacy, necessity Avoid arbitrariness: provide procedural safeguards (including right to a review) and limit the discretion of authorities

Table 10: Building blocks of the informational rights (summary)

As the table shows, both informational rights encompass a strong access right with no requirement to state an interest in order to gain access to the information. Public authorities have to disclose the information upon request,[2] unless the right is limited in accordance with the requirements of legality, necessity and legitimacy (i.e., the tripartite test). Overall, authorities have to ensure a fair, low-cost and timely procedure to request information and a possibility to challenge a denial of (partial) access to information. Moreover, any decision made has to be duly reasoned and communicated to those initiating the procedure.

The right to personal information, however, differs from the right to public interest information not only in the nature of the information held but also in the scope of the right. The duties for public authorities are far more encompassing, the potential interferences with the substantive rights of those affected are also more extensive when public authorities collect, store and/or share personal information. Accordingly, those individuals whose personal information is held by public authorities have a right to challenge the legality of the collection and storage and/or sharing of their information. Furthermore, authorities have a duty to protect personal information in their possession from unauthorized access and/usage by third parties.

1.1.2. The Right to Meaningful Participation in the Decision-Making Procedure

The right to meaningful participation in the decision-making procedure provides a right for those affected by (administrative) decisions to participate in the procedure. The building block can be summarized as follows:

RIGHT TO MEANINGFUL PARTICIPATION IN THE DECISION-MAKING PROCEDURE	
Duty bearer	Public authorities
Holders of the right	Those affected by decisions
Scope of obligations	Duty to duly inform (substance & procedure) Duty to ensure meaningful involvement in the procedure ➔ if individuals are adversely affected, prior informed consent is required Duty to duly account for views expressed Duty to provide a reasoned decision
Procedure (=design participatory process)	Fair, timely, low-cost procedure
Limitations	No explicit limitations, but a general obligation to avoid arbitrariness

Table 11: Building block of the right to meaningful participation (summary)

2 It should be noted that in the context of personal information, an individual may not be aware of the information held by public authorities and accordingly will most likely not ask for access to the information held. See further chapter 3, section 2.

Those affected by decisions have a right to participate in a meaningful manner in the decision-making procedure. Authorities are required to duly inform those affected, ensure a meaningful involvement of those affected, duly consider the views expressed by those affected and justify the decision reached by providing reasons for the decision. In general, authorities enjoy wide discretion in determining how to organize these participatory processes – the format, duration, and the timeframe – as long as the participation of those affected in the decision-making procedure remains meaningful.[3]

The benchmarks of the building block incorporate a differentiation in the minimum standards to be provided; under particular circumstances, a higher substantive standard has to be met by public authorities. A right to prior informed consent exists whenever authorities make decisions that *adversely* affect the lives or livelihood of indigenous communities or minorities.[4] In these situations, it is not enough for authorities to arrange for meaningful involvement of those affected, but instead, they are required to realize the prior informed consent of those adversely affected by the upcoming decision. Thus, the views of those affected are accorded more weight (veto right) in the decision-making procedure that diminishes the discretion of authorities in this regard.

There is a duty to inform those affected of the participatory processes in the decision-making procedure and to provide them with enough information to enable them to participate in the procedure in a meaningful manner. This duty to inform is distinct from the informational rights as summarized in the previous section. However, the informational rights can strengthen the right to participation in the decision-making procedure, as those interested can file for a request to access public interest information to receive further (background) information related to the decision that affects them.

Similarly, as identified in the context of the informational rights, the various instruments recognize procedural guarantees that have to be provided by public authorities in the context of the right to meaningful participation in the decision-making procedure. In general, there is an obligation to prevent arbitrary decision-making processes. The participatory procedure has to be fair and timely to ensure that the involvement is meaningful and those affected have to have a right to challenge the decision reached. Moreover, in contrast to the informational rights, no explicit limitations have been recognized to the right to participation in the decision-making procedure.

3 It should be noted that sections 3, 4 and 5 will address how the authorities' discretion should be understood in terms of the general yardstick for accountability.

4 This right also exists for the particular situation of invasive health treatments. See further chapter 4, sections 3.2-3.3.

1.1.3. The Right to an Effective Remedy

The right to an effective remedy contains two components: the right to a review and the right to reparation. The two rights are complementary to each other, and thus authorities need to provide both in order to comply with the requirements of the right to an effective remedy. Accordingly, even when a review body was impartial, independent and/or when they provided a fair hearing to those affected, if the review body did not provide for adequate and effective reparation, it will result in a violation of the right to an effective remedy. The building blocks of the right to an effective remedy can be summarized as follows:

RIGHT TO AN EFFECTIVE REMEDY		
	Right to a review	**Right to reparation**
Duty bearer	Public authorities	Public authorities
Holders of the right	Those affected by (administrative) decisions, family members, next of kin	Those whose rights have allegedly been violated, family members, next of kin
Scope of the right	Right of access to the review body Competent, independent, impartial review body Fair review procedure: duty to inform, duty to provide a reasoned decision, equality of arms, timely and not prohibitively expensive procedure	The remedy provided has to be effective and adequate in addressing the harm
Conditions	Conditions permitted to the access to a review body Constraints may not lead to an impairment of the very essence of the right	No explicit or implicit limitations recognized

Table 12: Building block of the right to an effective remedy (summary)

The right to a review contains several elements: a right to access a review body, a right to a fair review by a competent, impartial and independent review body, a duty to notify those affected of the review possibilities and the procedural requirements, and a duty to provide a reasoned written decision. Authorities may require those affected to follow a two-tier review procedure, which includes a first obligatory step of administrative review. At a minimum, an administrative review has to be conducted by competent authorities, those affected have to be notified of the procedure, they have to have a right to be heard in the review procedure, and there has to be a possibility to request a review of the decision by an independent, impartial and competent review body.

With respect to the right to reparation, the guidance of international law is more limited. Reparation provided has to be effective and adequate in addressing the harm impaired; how this is achieved – that is, with what reparation – falls within the discretion of authorities.

If those affected are considered to be *particularly* vulnerable, authorities may however be required to do *more* to ensure the effectiveness of a remedy. For example, public authorities may be required to provide legal aid or render other forms of assistance to empower those who wish to access a review procedure to ensure that they are able to successfully access the review procedure. In addition, in the context of certain violations of international law affecting particular individuals or groups of individuals, the type of reparation required is more spelled out.[5]

As noted in the previous two sections, informational rights and the right to participation in the decision-making procedure inform the right to an effective remedy. The table below[6] provides insight into what type of claims for review may derive from the rights previously discussed but also into what is expected from the reparation for the remedy to effectively repair the harm suffered.

5 This is the case, for example, in regards to expropriation decisions affecting indigenous peoples, see above chapter 5 section 2.

6 The overview given in the table is not exhaustive but instead serves as an illustration of how the dimensions influence and inform each other.

POTENTIAL GROUNDS FOR REVIEW TRIGGERED BY THE OTHER TWO DIMENSIONS		
Right to information	**Right to participation in the decision-making procedure**	**Right to an effective remedy**
Those whose request for public interest information has been fully or partially denied		Right to challenge the decision made
Those whose personal information is stored and collected		Right to challenge the legality of storage or collection of the information (i.e., legality/accuracy evidence)
Those whose personal information is published		Right to rectification and removal if the information is not accurate and a right to challenge the legality of the publication of the information
Those whose personal information is accessed by third parties without consent of the data subject and without authorization by the public authority in possession of the information		Right to question authorities' compliance with the duty to protect personal information
	Those who were not able to participate in a meaningful manner in the decision-making procedure	Right to challenge a lack of participation, right to challenge substance of the decision

Table 13: Informational and participatory rights that trigger a right to a review

It should be noted that these grounds for review are in addition to the other legal bases recognized for the right to a review.[7]

Overall, this section showed that the norms interact with each other: they do not operate in a vacuum; instead, they act to some extent as communicating vessels. Therefore, the realization of the recognized inclusionary governance norms should not be assessed per dimension, or per norm, but instead, it is necessary to look at the decision-making and review procedure as a whole.

7 The following two main categories of right to a review were identified in chapter 5: (1) the decision affects substantive rights enjoyed under the respective instrument, and (2) the dispute qualifies as a suit at law or determination of certain rights and obligations.

The next section will demonstrate that a *contextual* assessment is warranted when analyzing the accountability of public authorities making decisions directly affecting individuals. When conducting a contextual assessment, certain dynamics between and within the dimensions come to the forefront. In short, the next section will address the interaction and normative overlap between the dimensions within the Draft Inclusionary Governance Model.

1.2. Mapping Interactions within and between the Dimensions: Contextual Assessment is Warranted

The previous section showed that the three dimensions, the two informational rights – the right to meaningful participation in decision-making procedures and the right to an effective remedy – influence each other. This section will further map the different ways in which the identified norms interact with each other and the implications thereof for the Draft Model. First, the rights influence each other and aim to strengthen each other. For instance, the two informational rights strengthen the right to participation and the right to an effective remedy. These informational rights enable one to be (further) informed; the possibility to request public interest information and/or personal information of public authorities can strengthen participatory processes and review procedures. The informational rights are distinctive from, but complementary to, the duty to inform that exists in the context of the right to meaningful participation in the decision-making procedure and the right to an effective remedy. Those individuals (or groups) whose informational rights and/or participatory rights have been partially or fully denied have a right to an effective remedy. Thus, said right enables those affected to enforce their informational rights and their right to meaningful participation in the decision-making procedure.

Second, commonalities across the dimensions are identified in the recognition of procedural requirements that play a role in the realization of inclusionary governance protected for those affected. The legal survey established that similar procedural requirements can be identified across the various decision-making and review procedures: a common core of guarantees.

All these criteria aim to ensure a certain quality[8] of the procedures:

COMMON CORE PROCEDURAL GUARANTEES	
Decision-making procedure	**Review procedure**
Duty to inform	Duty to inform
Right to be heard in the participatory process of the decision-making procedure	Right to be heard by a competent, independent, impartial review body
Duty to duly consider input	Duty to duly consider views presented
Duty to provide a written reasoned decision	Duty to provide a written reasoned decision
Duty to publish or notify of decision reached	Duty to publish the decision reached

Table 14: Common core procedural guarantees

Authorities are required to ensure these common core guarantees in all their decision-making procedures that affect individuals and in the respective review procedures in place. Thus, the guarantees are required for procedures to request access, modification or removal of personal information and for the decisions to challenge the legality to store or share personal information. Similarly, public authorities have to realize these guarantees for procedures to request access to public interest information and for the related review procedure, as well as for each participatory and review procedure.

Certain dynamics were detected during the legal survey in relation to these common core guarantees. In short, when all common core guarantees are realized in a given decision-making or review procedure, the argument is that it leads to better decisions, decisions that are fair and in which the interest of those affected are duly taken into account. Realizing the common core guarantees does not imply *per se* that those affected are sufficiently included in the decision-making procedure of public authorities; a lack of one of the other benchmarks of the Draft Model may still lead to a violation of (one of) the identified rights and obligations. However, *not meeting* one of the common core guarantees is expected to have a detrimental effect on the overall level of realized inclusionary governance. For example, there is extensive case law that shows that whenever decision-making authorities fail to provide reasons for the decision reached (e.g., in the participatory phase), it has a negative effect on the effectiveness of a legal remedy in the review procedure.[9]

8 The notion of *quality of a procedure* is also discussed in section 2.2 when the concept of non-arbitrariness will be discussed. In short, when the procedure is of a certain quality the majority of the common core procedural guarantees are realized and as a result the chance of an arbitrary procedure is mitigated.

9 See, e.g., CRC, *General Comment 14 (concerning article 3 CRC)*, §97; see further CESCR, *General Comment 7*, §15; ECtHR, *Suominen v. Finland application no. 37801/97* (July 1, 2003) §38. ECtHR, *Lombardi Vallauri v. Italy application no. (*) 39128/05* (2010), §45-49.

Further, the common core guarantees serve as a way to prevent arbitrary decisions. Section 2 will address how the concept of arbitrariness influences the Draft Model. In short, an arbitrary decision is a decision that is not (sufficiently) guided by rules or laws but is rather decided within the full discretion of public authorities without procedural guarantees in place to prevent a misuse of public powers.

In conclusion, the normative interaction identified in this section further shows the merits and the necessity of a contextual assessment of the accountability of authorities exercising public power affecting individuals. The common core guarantees provide insights into the functioning of the Draft Model and its dynamics. The following section will address how contextual factors influence the content and scope of the benchmarks of the Draft Model.

2. Minimum Standards and Discretionary Powers: Understanding the Dynamics of the Draft Inclusionary Governance Model

This section will discuss the dynamic aspect of the Draft Model and will illustrate how the concepts of non-arbitrariness and vulnerability influence the content and scope of the benchmarks of the Draft IGM. The legal survey charted how these notions influence the amount of discretion enjoyed by authorities. In short, discretion refers to the administrative leeway authorities enjoy in implementing their legal obligations and decisions in a case at hand.[10] Section 2.1 will discuss the different discretionary norms recognized within this research.

As a result of the discretion conferred upon public authorities, treaty monitoring bodies exercise a form of deferential review.[11] Said deferential review is reflected in the various concepts and notions used in international (human rights) law: the level of scrutiny exercised by monitoring bodies, exhaustion of local/domestic remedies, margin of appreciation for member states, and/or deference. The legal survey shows that the amount of discretion in a given case and the deferential review exercised by treaty monitoring bodies relate to each other.

10 Y. Shany, 'Towards a General Margin of Appreciation Doctrine in International Law' (2005) 16 *European Journal of International Law* at 910.

11 Deference, as defined in the online Merriam-Webster dictionary, refers to "respect and esteem due a superior or an elder", deferential review in this regard refers, according to the dictionary, to "showing or expressing respect and high regard due a superior or an elder **:** showing or expressing deference". In the context of review by treaty monitoring bodies of the review conducted by domestic courts, it means that such monitoring bodies exercise a form of restraint, and do not conduct a de novo review. Instead, they evaluate the compliance of the member state, including the domestic court's judgements, with the treaty obligations laid down in the respective treaty and exercise a form of judicial constraint in their evaluation.

There is a presumption that public authorities are in the best position to decide in individual cases as they have the facts at hand. Therefore, public authorities enjoy discretion to evaluate the evidence and facts in a given case; in principle, international law does not regulate the evaluation of evidence and facts in a domestic review procedure. Accordingly, treaty monitoring bodies exercise a form of deferential review in their assessment of individual complaints submitted to them. They do not re-evaluate facts and evidence presented in domestic court cases, nor do they act as a fourth instance court; instead, treaty monitoring bodies seem to exercise a form of judicial constraint when reviewing compliance of a state party with the treaty obligations.[12] Only the European Court of Human Rights has defined its approach to deferential review explicitly, by developing the doctrine of the margin of appreciation in its case law. In the context of other treaty monitoring bodies, the approach is deduced from the case law examined in the legal survey.[13]

The following sections aim to further define and map this interaction. Section 2.1 will define how the notion of discretion is understood. Sections 2.2 and 2.3 will discuss how the concepts of non-arbitrariness and vulnerability influence the discretion enjoyed by authorities and, consequently, the scope of review exercised by treaty monitoring bodies.

2.1. Discretionary Norms

Authorities enjoy administrative discretion in the implementation of their obligations to realize inclusionary governance of those affected by their decisions. In order to understand the role of this discretion of public authorities in the Draft Model, further distinction is required between two types of discretionary norms: 'standard type norms' and 'result norms'.[14]

Standard type norms refer to norms that have an inherent uncertainty in the norm: either they are inevitably dependent on circumstances or purposefully non-uniform,[15] which implies a level of discretion for authorities when they apply these norms. Shany defined them as norms that "mediate between law and reality and inject considerable flexibility into the law."[16] For

12 See, e.g., HRCee, *R.M. v. Finland* (301/1988, (March 23, 1989) 300 at §6.4; HRCee, *J. H. v. Finland* (300/1988), (March 23, 1989), §6.4.

13 It should be noted that, in this research, the focus lies on the role of public authorities and the extent to which international law imposes constraints on the exercise of public power, and thus also whether certain discretion is recognized for public authorities in the exercise of their powers. The discussion of the recognized discretion and the exercised deferential review that follows is based on the results of the legal survey.

14 For a broader discussion of the different discretionary norms, see Shany at 910 and further. In this book, a slightly different categorization is used for the research's scope and angle. Officially, there are three categories with the third consisting of discretionary norms, which imply that authorities are accorded a discretion within the legal instrument, (for example, "a state may consider…"), but this research only uses the two categories mentioned in the text. The result-based norms referred to in this research are a hybrid form as a certain normative standard is inherent in the result they aim to achieve.

15 Shany, 914.

16 Shany, 915.

instance, limitations to various rights as recognized in the Draft Inclusionary Governance Model are permitted when these restrictions meet the tripartite test of legality, necessity and legitimacy. The principle of necessity is an example of a standard type norm. Although the principle has been interpreted as requiring the installation of certain procedural safeguards into the procedure, the principle is meant to allocate freedom to authorities to balance the interests in a given case, which is inherently dependent on the facts of the case at hand. Even though different treaty monitoring bodies may accord authorities less or more discretion in this regard, the final decision and the balancing of the interests at stake fall within the discretion of authorities.

Result norms are norms that are indifferent to how a result is attained.[17] Accordingly, authorities enjoy broad discretion in the choice of means and manner in which, for example, meaningful participation or an effective remedy is achieved. Similarly, authorities have a duty to duly inform those affected and prevent arbitrary procedures, while the instruments currently do not dictate how to achieve this. The discretion accorded to authorities in these result norms may change over time. Instruments and/or treaty monitoring bodies may limit the accorded discretion by stipulating benchmarks – that is, elements that, at a minimum, should be provided by authorities when realizing the particular norm – but at the end, authorities retain the freedom to choose the means and manner in which the result is achieved within set parameters.

Both types of norms allow for a form of norm flexibility, and accord public authorities a degree of discretion. It should be noted however that the fact that authorities have discretion does not preclude review of their conduct; it only limits its scope of operation. Treaty monitoring bodies will not re-do a decision; instead they will assess whether, in the given context, public authorities stayed within the given discretion and whether the result is achieved and/or whether the standard is properly applied in light of the parameters set by the respective instrument. In the following sections, two factors that influence the discretion enjoyed by public authorities, and accordingly the deferential review exercised by treaty monitoring bodies, will be discussed: the concept of non-arbitrariness and the concept of vulnerability.

2.2. Non-Arbitrariness as a Substantive Limitation to the Exercise of Public Power

This section will discuss the concept of non-arbitrariness and how it serves as a substantive limitation to the exercise of public power by public authorities. The legal survey charts how both within the instruments and in the works of the treaty monitoring bodies the concept of non-arbitrariness plays a pivotal role. Although there are some differences in the way various treaty monitoring bodies refer to the concept, two ways can in general be identified in which the concept of non-arbitrariness informs the recognized inclusionary governance standards.

17 Idem.

First, the concept of non-arbitrariness is used in the interpretation of the criterion of legality, one of the three criteria of the tripartite test. Overall, treaty monitoring bodies have interpreted the term rather similarly and require a certain *quality* of the law that, at a minimum, constitutes a way to prevent an arbitrary use of powers. This implies, for instance, that a law has to define who may exercise discretionary powers under what circumstances. For example, whenever public authorities store personal information for national security reasons, there should be a law regulating who may store personal information and under what circumstances, who may access this information and under what circumstances, and what rights are held by those who may be affected; in other words, there should be a law protecting the rights of those affected to access, modify or rectify information, and ensuring a possibility to challenge the storage of the personal information.[18] If authorities enjoy unfettered discretion and/or there are no procedural guarantees in place, it paves the way for an arbitrary use of powers. As a result, treaty monitoring bodies assess whether the discretion enjoyed by public authorities is properly regulated to prevent an arbitrary use of powers.

Secondly, the various instruments stipulate that all decision-making and review procedures have to be of a certain quality, which is a way to prevent an arbitrary use of powers. For instance, in the context of the right to meaningful participation in the decision-making procedure, public authorities are obliged to duly inform those affected, to realize meaningful involvement of those affected, to duly account for the interests presented and to duly reason the decision made. All these steps may prove that a decision was not taken arbitrarily, and that it was made *through a fair* decision-making procedure. Similar reasoning can be found in the context of the right to a review; for instance, those affected should have a fair review procedure, which implies that at the very minimum the procedures cannot be arbitrary. Public authorities enjoy wide discretion in meeting these quality criteria, they are free to choose the means and methods to meet the criteria. As a result, treaty monitoring bodies exercise a form of deferential review when they assess the compliance of public authorities with these discretionary norms. Only when there is an arguable claim that a decision has arbitrary features are the procedures and the realized guarantees scrutinized in greater detail.[19] Whenever a decision appears to be taken arbitrarily, the whole decision-making and review procedure is further scrutinized, including issues of evidence, standard and burden of proof, which normally fall outside the scope for review of treaty monitoring bodies.

18 See, e.g., section 2.6 of chapter 3 in which the limitations to the right to personal information were discussed.

19 See further below, section 2.3, where other factors will be discussed that require strict scrutiny of any case at hand.

In conclusion, the concept of non-arbitrariness serves as a substantive limitation to the exercise of public power by authorities to ensure a certain quality of the procedure. Public authorities enjoy, in general, wide discretion in realizing this quality of the procedure.

2.3. Vulnerability as a Trigger Factor for Further Positive Obligations

Vulnerability is broadly defined in this research[20] and refers to both the personal factors that qualify someone to be considered vulnerable and/or to the circumstances surrounding the decision that renders someone vulnerable.[21] In the work of various treaty monitoring bodies, one finds explicit and implicit references (disadvantaged, marginalized, adversely affected, empowering individuals) to the concept of vulnerability. Overall, the concept of vulnerability plays a role at two different levels: in the context of the recognition of a norm and in the interpretation of a norm. The former was addressed in the context of the various legal bases of the right to meaningful participation in the decision-making procedure and the right to an effective remedy in chapters 4 and 5.[22] For instance, treaty monitoring bodies have recognized a right to participation and/or an effective remedy for those considered to be vulnerable.[23] The latter is considered to be most relevant for the purpose of this section.

20 This broad definition is deduced from the work of the treaty monitoring bodies and refers to situations in which individuals or groups of individuals *de iure* or *de facto* are considered to be (particularly) vulnerable, and accordingly, further procedural guarantees are warranted as explained in this section. See further the text in and around note 149 of chapter 4.

21 It should be noted that the concept is increasingly addressed in the literature, with some trying to map how the concept is used, see, for instance, Icelandic Human Rights Centre, *the Human Rights Protection of Vulnerable Groups* (2009) available at http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/the-human-rights-protection-of-vulnerable-groups; others aim to review more critically the use and usefulness of the concept of vulnerability as it is applied by the various treaty monitoring bodies, see, e.g., A.R. Chapman and B. Carbonetti 'Human Rights Protections for Vulnerable and Disadvantaged Groups: the Contributions of the UN Committee on Economic, Social and Cultural Rights' (2011) 33 *Human Rights Quarterly* 682-732. L. Peroni and A. Timmer, 'Vulnerable Groups: the Promise of an Emergent Concept in European Human Rights Convention Law' (2013), 11 *International Journal of Constitutional Law* 1056-1085.

22 This is particularly visible with the (fragmented) development of the right to meaningful participation in decision-making procedures. As discussed in chapter 4, treaty monitoring bodies increasingly read a right to participation in the decision-making procedure for those considered to be (particular) vulnerable into various substantive rights; similarly, the UN's specialized human rights treaties often start from the premise that those individuals who are the subject of the instruments are considered to be vulnerable and therefore warrant further protection. For instance, the preamble of the Migrant Workers Convention states:

> Considering the situation of vulnerability in which migrant workers and members of their family members frequently find themselves, owing, amongst other things, to their absence from their state of origin and to the difficulties they may encounter arising from their presence in the state of employment (…) Convinced therefore of the need to bring about the international protection of the rights of migrant workers and members of their families.

23 For instance, chapter 4, section 1.2, discussed how the various treaty monitoring bodies have recognized a right to participation for minorities, descent-based communities, indigenous people, children, women, migrant workers, the poor, the homeless, the elderly, and people with disabilities in regard to any decisions affecting them.

When there are factors of vulnerability in a given case, it diminishes the amount of discretion enjoyed by public authorities. In other words, the concept of vulnerability functions as a trigger factor: it influences the scope and content of obligations of public authorities, and it limits the discretion of public authorities in implementing these obligations. Broadly speaking, there are three different ways in which the concept of vulnerability influences the Draft Model:

a) Factors of vulnerability affect the result-based discretionary norms
b) Factors of vulnerability affect the standard-type discretionary norms
c) Discretion is diminished by the imposition of a higher substantive norm due to factors of vulnerability

Ad a) Result-based norms imply a discretion for authorities to choose the means to achieve the result. One finds result-based norms within each of the dimensions; for instance, the duty to duly inform those affected provides authorities with the freedom to choose the means by which those affected are duly informed.[24] If persons are deemed particularly vulnerable, more efforts are required of public authorities. For example, authorities have an obligation to ensure that asylum seekers, who are generally considered to be in a particularly vulnerable situation, are properly informed of the remedies available to them.[25] This may require making an interpreter available, publishing information in the native language(s) of the asylum seekers, and to further assist them in understanding the process or procedures. Similarly, in the context of the right of access to a review body, authorities may be required to adopt measures to empower those considered to be vulnerable and to remove factual, monetary, or physical barriers to access the review body. This may include the necessity to provide legal aid or to provide interpreters in a given case. In other words, in a given case, treaty monitoring bodies assess whether there were factors of vulnerability, and if so, whether authorities are required to adopt further measures to ensure that the result is achieved.[26] Thus, in these instances, authorities enjoy less discretion.

Ad b) Standard-based discretionary norms are those norms that are inherently circumstantial, dependent on the facts of the case. For instance, the requirement of expeditious or inexpensive review procedures is a standard-based discretionary norm. Public authorities enjoy discretion to impose legal fees to initiate court proceedings – and thus impose conditions

24 It should be noted that any duty or obligation needs to be assessed in the context of the whole decision-making procedure and the rights it aims to realize. For instance, in the context of the right to meaningful participation in decision-making procedures, the duty to duly inform those affected has to be assessed in combination with the other duties relevant to such procedures: the duty to ensure meaningful involvement and the duty to ensure timely and accessible participatory processes.

25 See, e.g., ECtHR, *Čonka v. Belgium,* (May 5, 2002), §44; CAT, *S.H. v. Norway no. 121/1998*, (November 19, 1999), §7.4; CAT, *Z.T. v. Norway, no. 127/1999* (November 19, 1999), §7.4; see further the text in and around footnote 163 of chapter 5 (right to an effective remedy).

26 For instance, see above in section 1.2.1. of chapter 5, in which the obligation of public authorities to prevent a legal procedure becoming too expensive for those affected was discussed.

on the right to access a review body – if it does not result in an impairment of the right. Treaty monitoring bodies assess in a given case whether the fees imposed were necessary and proportionate to the legitimate aim to be achieved.[27] This assessment considers the inherent norm flexibility and the related discretion enjoyed by authorities. Whenever there are factors of vulnerability, authorities have further positive obligations to ensure that the conditions imposed do not effectively bar access to a review procedure for vulnerable individuals. Thus, treaty monitoring bodies review whether the procedure became prohibitively expensive for those affected in a given case, and if so, whether there was (free) legal aid/assistance available to those affected. Hence, factors of vulnerability diminish the discretion of authorities to determine how to achieve inclusionary governance. Amongst other things, authorities may be required to further explain how the measures adopted ensure that those considered to be vulnerable are included in the decision-making procedure and review procedure.

Ad c) There is a third way in which the concept of vulnerability plays a role. In some exceptional situations, the impact of an upcoming decision is considered to be so significant for those affected that it renders them *particularly* vulnerable and therefore warrants (even) further protection. In these cases, public authorities have to guarantee a higher substantive norm that diminishes the level of discretion enjoyed by authorities. This is visible both in the context of the right to meaningful participation in decision-making procedures and in the context of the right to an effective remedy. Regarding the former, in certain situations, meaningful involvement in decision-making procedures is not sufficient, and instead, public authorities are required to obtain the informed consent of those affected.[28] This right to prior informed consent has been recognized for indigenous communities and minorities whenever measures are taken by public authorities that *adversely* affect their lives or livelihood.[29] In this instance, the vulnerability of those affected – created both by the fact that they are indigenous peoples or minorities and that it concerns a decision with a significant impact on the daily lives of those affected – triggers a demand for further protection. Accordingly, authorities have less discretion to determine how to achieve the participation of those adversely affected and treaty monitoring bodies exercise closer scrutiny in determining whether, and to what extent, prior informed consent is achieved. Regarding the latter, in the context of the right

27 It should be noted that the argument is not that there is a general right to legal aid, but instead, whether legal aid should be or should have been provided by public authorities in a given context, which is a contextual assessment. An important factor is whether individuals are particularly vulnerable, and if so, what authorities have done to ensure a right to access for those affected. See further section 1.2.1. of chapter 5.

28 Article 19 UN Declaration; CESCR, *CO on Brazil*, (2003) 28 §165; CERD, *GC 23*, 4(d); HRCee, *Ángela Poma Poma v. Peru*.

29 For instance, the IACtHR held in the *Saramaka v. Suriname* case:

> Regarding large-scale development or investment projects that would have a major impact within Saramaka territory the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions.

See further the text in and around footnotes 99-104 of chapter 4.

to an effective remedy, treaty monitoring bodies hold that when decisions have a significant impact on those affected and render those affected particularly vulnerable, their further protection is warranted. International law provides further guidance as to the standard of review and procedural guarantees required to comply with the respective right in question. As a result, public authorities enjoy less discretion in realizing the right to an effective remedy. Accordingly, treaty monitoring bodies exercise closer scrutiny of the compliance by authorities with the international norms. For instance, all treaty monitoring bodies hold that whenever public authorities are to review an alleged refoulement claim, authorities are obliged to exercise rigorous scrutiny of the claims presented by those facing expulsion and are at the risk of being tortured when they are sent back to their country of nationality.[30] Treaty monitoring bodies provide guidance as to the appropriate standard of review to be exercised by domestic authorities in this context. Normally, the burden and standard of proof applied by public authorities do not fall within the scope of review by treaty monitoring bodies; however, when there are arbitrary features or factors of vulnerability, treaty monitoring bodies may review these issues and give further guidance to parties and how to comply with their treaty obligations. For example, whenever public authorities adopt administrative sanctions that have a punitive character – which renders an individual particularly vulnerable, authorities are required to offer further protection to those affected and the domestic review bodies have to exercise a higher form of scrutiny of the decision-making procedure in its review procedure.

In conclusion, the concept of non-arbitrariness and the concept of vulnerability influence the content and scope of the inclusionary governance norms. This section provided insight into the dynamics of the Draft Model. It showed the relevance of a contextual assessment, not only to identify whether public authorities provided informational rights, a right to meaningful participation in the decision-making procedure and a right to an effective remedy to those affected, but also to assess the overall level of inclusionary governance realized. The next section will address how – taking these identified dynamics into account – the Draft Model functions as a yardstick.

3. The Draft Inclusionary Governance Model: A Yardstick to Analyze the Accountability of Public Authorities vis-à-vis those Affected

This section will provide a schematic overview of the Draft Inclusionary Governance Model. In addition, it provides a step-by-step explanation of how the Draft Model can be applied to public authorities exercising public power directly affecting individuals; in other words, how the Draft Model serves as a yardstick to analyze the accountability of public authorities vis-à-vis those affected by their decisions.

30 See, e.g., ECtHR, *Al-Nashif v. Bulgaria* (2002), §123-128.

However, before discussing the different elements of the Draft Model, a general remark is in order. In the Conceptual Model the focus lies on the duties that international institutions have whenever they exercise public power that directly affects individuals. As the previous three chapters of Part II have shown, the legal survey primarily charted *the rights* enjoyed by individuals (and groups) with the concomitant duties for public authorities in this context.

Therefore, in contrast with the language used in the Conceptual Model, the emphasis in the language of the building blocks developed in chapters 3-5 switched from *duties* to *rights*. This is a logical consequence considering that the survey focused on those international instruments that constrain the exercise of public power by public authorities; these primarily concern rights-oriented instruments. These instruments aim to confer rights upon individuals and establish the responsibility of the state to comply with these international obligations laid down in the treaties. However, the overall objective of this research is to develop a framework to address the accountability deficit of international institutions vis-à-vis those affected by their decisions. Accordingly, the yardstick will have as a view point the duties owed by public authorities regardless of the question of whether those affected enjoy rights in the relevant context. Therefore, the building blocks of the Draft Model as described in section 1 are amended so that the Draft Model can better serve as a yardstick to analyze the accountability of public authorities vis-à-vis those affected by their decisions. This adjustment is more than merely a tweaking of the language used, and instead concerns a more fundamental adjustment necessary to take the context for which the Model is developed into account. A legal framework to analyze the accountability of public authorities vis-à-vis those affected by their decisions has to address with sufficient clarity the duties owed by those exercising public power. The Draft Inclusionary Governance Model contains several elements:

- The *building blocks* (information entitlements, duty to realize meaningful participation in the decision-making procedure, duty to realize an effective remedy) constitute the core elements of the Draft Model, and correspond with the initial three identified dimensions of inclusionary governance.
- The *benchmarks* are the minimum standards identified for each building block, against which the exercise of public powers by international institutions is to be evaluated.
- The c*onstraints* are those limitations identified for the exercise of public powers by public authorities, regardless of what type of public power they exercise.

The Draft IGM can be summarized as follows:

DRAFT INCLUSIONARY GOVERNANCE MODEL FOR PUBLIC AUTHORITIES		
Public authorities shall exercise their public powers:		CONTEXT
in accordance with the law;		
not in an arbitrary manner; and		
it may not constitute a violation of an *ius cogens* norm.		
Limitations are only permitted if the tripartite test of legality, necessity and legitimacy are met; and		
the decision-making procedures followed have to be low-cost, timely and fair.		
Dynamic aspects of the Draft Model:		
Factors of vulnerability result in more positive obligations for public authorities, less discretion and more scrutiny		
When arbitrary features are present, higher scrutiny should be exercised of the inclusionary governance realized		
INFORMATION ENTITLEMENTS: INFORMATION OF A PUBLIC INTEREST NATURE AND INFORMATION OF A PERSONAL NATURE		THREE DIMENSIONS OF INCLUSIONARY GOVERNANCE
Public interest information	Duty to provide access to information	
	Duty to provide reasons for a refusal to disclose information	
	Duty to provide information on a procedure to request information and to review the refusal	
	Duty to realize a review procedure to challenge a refusal to disclose information	
Personal information	Duty to realize a procedure through which individuals can request access to, or modification or removal of personal information held by public authorities	
	Duty to duly inform those affected of the information held and how to access it	
	Duty to protect information held by public authorities from unauthorized access or usage by third parties	
	Duty to realize a review procedure to challenge the legality of information stored	
DUTY TO REALIZE MEANINGFUL PARTICIPATION IN THE DECISION-MAKING PROCEDURE		
Duty to ensure meaningful participation in the decision-making procedure	Duty to duly inform those affected	
	Duty to ensure meaningful involvement in the decision-making procedure	
	Duty to duly take into account the views expressed	
	Duty to provide a reasoned decision	
DUTY TO REALIZE AN EFFECTIVE REMEDY: ENTITLEMENT TO REVIEW AND TO REPARATION		
Entitlement to review	Duty to ensure access to the review procedure	
	Duty to establish a competent, independent and impartial review body	
	Duty to realize a fair review procedure	
Entitlement to reparation	Reparation provided has to be adequate and effective in addressing the harm suffered	

Table 15: Draft Inclusionary Governance Model

The Draft Model suggests that the decision-making and review procedure have to be assessed as a whole and that the context should be taken into account in order to evaluate the level of aaccountability realized. The Draft Model is dynamic in nature:

- The inclusionary governance norms influence each other: there is interaction within and between the dimensions.
- There is a common core of guarantees required across the building blocks to ensure a certain quality of the decision-making and/or review procedure. When certain inclusionary governance norms are not provided for, it can have a crippling effect on the overall level of inclusionary governance realized.

In the Draft Model, it is acknowledged that authorities enjoy discretion in fulfilling and realizing their obligations. However, a number of factors determine the extent of this discretion, and accordingly, influence the scope of the inclusionary governance norms to be realized:

- There is a substantive limitation to the exercise of public power by public authorities that also limits the discretion enjoyed: public power may not be exercised in an arbitrary manner. In general, public authorities have to show that they exercised their public powers in a fair and not in an arbitrary manner. The common core guarantees identified serve as the main benchmarks to prevent an arbitrary exercise of public power. Whenever the exercise of discretionary powers is not sufficiently regulated, there is a higher risk of arbitrary decisions being made. If there are arbitrary features present in a decision-making or review procedure, the Model suggests that the exercise of public power by public authorities should be further scrutinized by whoever applies the Draft Model. Accordingly, the rules of evidence, standard and burden of proof upheld by authorities are also taken into account to assess whether there is a fair decision-making procedure. It should be noted that it normally falls within the discretion of public authorities to set the rules of evidence, standard and burden of proof.
- Vulnerability: whenever a person affected by a decision (to be) made is considered to be vulnerable on the basis of characteristics related to the person or on the basis of characteristics related to the type of decision, authorities enjoy less discretion in fulfilling their obligations under the Draft Model, and, in certain situations, a higher substantive inclusionary governance norm may be required.

In order to apply the Draft Model in practice, further guidance is required. Therefore, several steps are identified below that have to be taken to properly analyze the level of inclusionary governance realized by public authorities in a given case:

Steps in applying the Draft Inclusionary Governance Model

1. In what context does the public authority operate? What does the decision-making procedure and review procedure look like?
2. Can factors of vulnerability of those affected by the decisions be identified? If factors of vulnerability exist, it influences the Draft Model for steps 4-6.
3. Does the initial screening of the quality of the procedure reveal arbitrary features in the procedure? If there are arbitrary features, it influences the Draft Model for steps 4-6.
4. Does the public authority hold information of a public interest and/or personal nature, and if so, to what extent?
    i. If the authority holds information of a public interest nature, are individuals entitled to have access to this information?
    ii. If the authority holds information of a personal nature, are individuals entitled to have access to, or to request modification or removal of the personal information in its possession?
5. Does the public authority provide for meaningful participation in the decision-making procedure, and if so, to what extent?
6. Does the public authority provide for one or more effective legal remedies, and if so, to what extent?
    i. Is there an entitlement to review, and if so, to what extent?
    ii. Is there entitlement to reparation, and if so, to what extent?
7. What conclusions can be drawn from the assessment of the level of inclusionary governance realized vis-à-vis those affected? To what extent is the public authority accountable towards those affected by its decisions?
8. What recommendations for improvement can be identified?

Each step will be further explained below, taking into account the ways the Draft Model can be used. In general, there are two different uses for the Draft Model: (1) to analyze and assess the inclusionary governance standards adopted to ensure the accountability of a public authority vis-à-vis those affected by its decisions (2) to analyze these inclusionary governance standards and the application thereof in practice by the public authority in question.

In the first step of the application of the Draft Model, the context is set in which a public authority operates (the type of public power exercised, who exercises it, and the institutional setting in which it is exercised) and descriptions of its decision-making procedure(s) and review procedure(s) are given. This descriptive overview forms the basis for the analysis in the following steps.

The second step is to examine whether there are factors of vulnerability present in a given case, which would warrant further scrutiny. Vulnerability is broadly defined, and it

materializes in two ways: on the basis of characteristics related to the individual (or group of individuals) concerned and/or on the basis of circumstances surrounding the decision that renders an individual (or group of individuals) (particularly) vulnerable. In order to examine the potential vulnerability of those affected, an assessment is required of who is affected and whether the type of decision and the impact of the decision points to certain vulnerabilities. As a result, a variety of vulnerability factors can be identified in this step. Whenever factors of vulnerability are identified, it influences the assessment to be conducted in steps 4-6. In this assessment, it is examined whether the authorities have criteria to identify vulnerability factors, and if so, whether these are formulated too narrowly. In addition, it is assessed whether they are applied correctly in practice. If one identifies factors of vulnerability, one should verify whether the public authority has adopted all necessary measures to ensure that those considered vulnerable are included in the procedure. For instance, when decisions are made that affect migrant children, public authorities may have to adopt further positive measures to ensure that these migrant children – a group of individuals considered to be vulnerable – have access to a review body. In other words, were they duly informed of the procedure and their rights? Were they in need of legal assistance, and if so, did they receive legal assistance to ensure equality of arms?

If authorities make decisions that have a significant impact on the livelihood of minorities or indigenous peoples, those *adversely* affected are considered to be *particularly* vulnerable. In these instances, the Draft Model suggests that there is less discretion for public authorities and that public authorities have to acquire prior informed consent of those particularly affected instead of meaningful participation in the decision-making procedure. In other words, there is a higher substantive norm to be complied with by authorities, and thus to be evaluated when applying the Draft Model.

In step 3, one conducts an initial screening of the decision-making and review procedure of the public authority in question to assess whether there are certain inherent features in the procedure that increase the chance of arbitrary decisions being made. Whenever public authorities enjoy discretion in the exercise of their public power, there has to be a framework regulating this exercise of discretion. Accordingly, one evaluates whether this framework exists, and whether it addresses who may exercise what discretion and under which circumstances, and whether there is a procedure in place to challenge this exercise of public power. This initial screening implies an evaluation of the realization of common core guarantees in the decision-making and review procedure. The common core guarantees reflect a general requirement that procedures have to have a certain quality; the guarantees that have been identified are the duty to duly inform, the opportunity to present one's views, to have these views duly taken into account, and that those affected enjoy an entitlement to review. If the conclusion is that there are certain inherent arbitrary features,

it has an impact on the assessment to be conducted in steps 4-6. Accordingly, one has to further scrutinize the level of inclusionary governance realized. In this assessment, one has to assess the rules of evidence and burden/standard of proof used by public authorities and the extent to which these contribute to a fair procedure. Further, sufficient procedural safeguards should be offered in the procedure to 'compensate' for the arbitrary features in the procedure to ensure that inclusionary governance is still realized for those affected. If there are no apparent arbitrary features, steps 4-6 are conducted without exercising higher scrutiny. In this situation, the rules of evidence, burden and standard of proof applied by the public authorities are, in principle, not reviewed as part of the inclusionary governance assessment.

In steps 4-6, one examines whether, and to what extent, public authorities ensured the entitlement to information, to meaningful participation in the decision-making procedure and to an effective remedy. The identified benchmarks of the building blocks of the Draft Model are applied to evaluate on the basis of the facts of the case whether, and to what extent, public authorities realized inclusionary governance. For example, do the authorities hold, collect and/or use personal information? If so, how is this realized, what type of information does it concern, and what is the legal framework in place to handle this personal information held by public authorities? In addition, the examination should address whether, and to what extent, the public authority exercised its public power in accordance with the identified constraints to the exercise of public power as stipulated in the Draft Model. Moreover, if in steps 2 and/or 3 the answer was that there were arbitrary features and/or factors of vulnerability, it influences the draft IGM as explained above. Accordingly, public authorities will enjoy less discretion, and thus, closer scrutiny should be conducted of the extent to which public authorities provide inclusionary governance to those affected. In each step, the dynamic aspects of the Draft Model are constantly re-evaluated: Can interactions between the norms be identified? What is the (potential) effect of a lack of a certain benchmark in one of the building blocks for the overall analysis of the accountability of the public authority vis-à-vis those affected by its decisions? In the evaluation, one should examine whether, and to what extent, the accountability framework in place sufficiently includes individuals in the decision-making procedure. If factors of vulnerability are identified, the policy should set out the type of measures taken to ensure that those considered to be vulnerable are included in the decision-making procedure. For each step, the discretion enjoyed by public authorities is scrutinized in light of the above.

In step 7, considering the decision-making and review procedure as a whole, the overall level of inclusionary governance realized by the public authorities in question is evaluated. This contextual assessment allows for a proper understanding of how certain procedural guarantees may strengthen other norms and how the lack of certain procedural guarantees

or non-recognition of those affected can have a crippling effect on the overall level of inclusionary governance realized. In other words, besides the conclusion of whether or not inclusionary governance was realized by public authorities, the assessment in this step will allow for an identification of potential strengths and weaknesses in the given design of the decision-making and review procedure. Considering that the Draft Model's aim is to address and analyze the accountability of public authorities vis-à-vis those affected by their decisions in a systematic manner, identifying weaknesses and strengths in the design of the procedures allows for the Draft IGM to be forward-looking. Accordingly, in step 8, recommendations are formulated for how to improve and strengthen the accountability of the public authority vis-à-vis those affected.

4. Conclusion

In conclusion, Part II of this book developed a Draft Inclusionary Governance Model to analyze the accountability of public authorities vis-à-vis those affected by their decisions based on an extensive legal survey of the international standards constraining the exercise of public powers of domestic authorities. The instruments, and their respective treaty monitoring bodies, regulate this exercise of public power, define the responsibility of states vis-à-vis individuals and identify the duties for public authorities. This dynamic yardstick that has been developed thus far enables one to examine in a systematic manner whether public authorities are accountable towards those affected by their decisions. The identified minimum norms – the building blocks with their benchmarks – seek to attain that a minimum level of inclusion is realized by public authorities, while the dynamic component of the Draft Model ensures that the contexts in which public authorities operate are taken into account. As a result, the accountability analysis conducted through the Draft IGM is nuanced and is capable of identifying the strengths and weaknesses in the design of the inclusionary governance processes realized by public authorities for those affected by their decisions. Thus, the Draft Model as it stands offers an answer to the criticism voiced in the introduction of this book to other existing accountability frameworks. The draft yardstick explicates its benchmarks and building blocks, and at the same time, incorporates a form of norm flexibility that enables one to take into account the context in which public authorities exercise public power. The draft yardstick allows one to thoroughly examine whether, and to what extent, public authorities are accountable towards those affected by their decisions.

However, the draft yardstick was developed on the basis of a legal survey of international standards applicable to the national level, whereas the main aim of this research is to develop a yardstick that will be able to analyze and address the accountability of international institutions vis-à-vis those affected by their decisions. Therefore, in Part III, the suitability

of the Draft Inclusionary Governance Model to analyze and address the accountability of international institutions will be tested. The hypothesis is that some adjustments need to be made to take into account the context in which international institutions operate.

PART

III

Testing the Functionality of the Draft Inclusionary Governance Model

> The evolution of international law has led to more and more rights being divested directly in the individual. Yet the Organization has not evolved at the same pace. Time has come to align the applicable law to the United Nations with the developments in international human rights law.[1]

In Part II, the Draft Inclusionary Governance Model (Draft IGM or Draft Model) was developed based on a legal survey of international standards that regulate the public power exercised by domestic public authorities. For a summary of Part II, see chapter 6.

In Part III, the functionality of the Draft IGM will be tested in relation to the decision-making procedure of the UN Sanctions Committee to designate individuals and/or entities. Chapter 7 will accordingly serve two purposes. The first purpose is to demonstrate how the draft yardstick functions in practice by applying the Draft Model to the decision-making and review procedure of an international institution. The second purpose is to test the Draft IGM to examine whether the draft yardstick can analyze in a systematic manner the accountability of international institutions vis-à-vis those affected by their decisions, or if it requires adaptations to be able to do so. The following questions guide the testing of the functioning Draft IGM in chapter 7:

1. Is the formulation of the benchmarks of the different building blocks of the Draft Model sufficiently clear to be applied to international institutions?
2. Does the Draft IGM and its identified dynamics sufficiently capture the context in which an international institution operates?
3. Is the Draft Model complete and sophisticated enough to deal with the everyday reality of international institutions, or are there other issues that the Draft Model does not yet sufficiently capture?

1 Report of the UN Secretary General, 'Strengthening and Coordinating United Nations Rule of Law Activities', UN Doc. A/65/318, (August 20, 2010), §94.

7 Listing by the UN Security Council Sanctions Committee

The UN Security Council is one of the principal organs of the United Nations[1] and its primary responsibility is to maintain international peace and security.[2] The Security Council has the power to adopt binding decisions to "maintain or restore international peace and security under Chapter VII of the United Nations Charter."[3] In this context, the UN Security Council adopts sanctions measures under article 41 UN Charter that focus, amongst others, on supporting the political settlement of conflicts, on nuclear non-proliferation, and/or counter-terrorism.[4] The UN Security Council currently has over 15 sanctions committees,[5] each designed for one particular situation or country. This research focuses on the designation by the UN Security Council Sanctions Committees as a means of countering terrorism. The sanctions imposed by the Sanctions Committees may entail arms embargos, asset freezing, travel bans or a combination of the three.[6] Individuals may be targeted personally, or their company may be listed.[7] In practical terms, the sanctions result in:

> a denial of access by listed individuals to their own property, a refusal of social security benefits, limitations on their ability to work and restrictions on their ability to travel domestically and internationally.[8]

This chapter will examine only the ISIL (Da'esh) and Al-Qaida Sanctions Committee as established by UN Security Council Resolution 1267;[9] this Sanctions Committee has the

1 The United Nations has 193 member states, its constituent document is the UN Charter in which the institutional structure, the organs of the UN and the main powers of these organs are laid down.

2 Article 7 UN Charter.

3 The authority to adopt binding decisions under Chapter VII of the UN Charter derives from article 25 in conjunction with article 39 UN Charter; article 104 UN Charter stipulates that member states are obliged to follow these decisions.

4 Other sanctions regimes focus, for instance, on supporting political settlement of conflicts and/or nuclear non-proliferation. See further https://www.un.org/securitycouncil/sanctions/information

5 See for an overview of the different Sanctions Committees, https://www.un.org/securitycouncil/sanctions/information.

6 It differs per sanctions committee what sanctions may be imposed and their conditions. See further http://www.un.org/sc/committees/index.shtml.

7 This chapter chooses to focus primarily on the listing of individuals, but the majority of the analysis is equally applicable to any listed entities. Where there is a difference in the procedural guarantees offered to individuals and to entities, the distinction will be made, otherwise, the term (listing of) individuals should be read as to include the listing of entities by Sanctions Committees (i.e. those designated).

8 See §13 of the UN Special Rapporteur on counter-terrorism and human rights (Emmerson) report, second annual report (September 26, 2012), UN Doc. A/67/396.

9 The UN Security Council established the Sanctions Committee in accordance with article 29 UN Charter, and the Sanctions Committee is a subsidiary organ of the UN SC Council. Sanctions Committee Guidelines (amended version of September 5, 2018) are available at https://www.un.org/securitycouncil/sanctions/1267/committee-guidelines, para 1(a)-(b). It should be noted that the Sanctions Committee's official name is the 'Security Council Committee pursuant to resolutions 1267 (1999) 1989 (2011) and 2253 (2015) concerning ISIL (Da'esh) and Al-Qaida and associated individuals groups undertakings and entities'. ISIL and other related terrorist organizations, such as Al Nusra, are all considered to be associated with Al-Qaida by the Sanctions Committee.

most advanced procedural guarantees available to target perpetrators of terrorism in comparison to the guarantees offered by other Sanctions Committees. Most importantly, since 2009 the ISIL (Da'esh) and Al-Qaida Sanctions Committee has had an Office of the Ombudsperson[10] that handles requests to delist[11] those who have been targeted by its sanctions. The Ombudsperson procedure gives those designated direct access to a review body. In contrast, other Sanctions Committees work with an inter-state review procedure facilitated by the Focal Point;[12] designated individuals have to ask a state to file a delisting request on their behalf, they play no role within the inter-state procedure.

This chapter will apply the Draft Inclusionary Governance Model to the designation procedure of the ISIL (Da'esh) and Al-Qaida Sanctions Committee ('ISIL (Da'esh) and Al-Qaida Sanctions Committee' or 'Sanctions Committee') to demonstrate how the Draft Model functions in practice and to test whether the formulation of its building blocks is sufficiently clear to be applied to analyze the accountability of an international institution (i.e., *in casu* the Sanctions Committee) vis-à-vis those affected by their decisions. Accordingly, the Draft Model will be applied to the Sanctions Committee decision-making procedure and its review procedure following the steps identified in chapter 6 (section 3):

1. In what context does the public authority operate? What does the decision-making procedure and review procedure look like?
2. Can factors of vulnerability of those affected by the decisions be identified? If factors of vulnerability exist, it influences steps 4-6 of the application of the Draft Model.
3. Does the initial screening of the quality of the procedure reveal arbitrary features in the procedure? If arbitrary features exist, it influences steps 4-6 of the application of the Draft Model.
4. Does the public authority hold information of a public interest and/or personal nature? And if so, to what extent?
    i. If the authority holds information that is of a public interest nature, are individuals entitled to request access to this information?

10 UN Security Council resolution 1904 (2009). The mandate of the Ombudsperson was extended by UN SC Res. 1989 (2011), UN SC Res. 2083 (2012), UN SC Res. 2161 (2014), UN SC Res. 2253 (2015) and UN SC Res. 2368 (2017).

11 See further, the website of the Office of the Ombudsperson for the criteria to submit a request, https://www.un.org/securitycouncil/ombudsperson/application.

12 The Focal Point for delisting was established in 2006 (UN SC Res. 1730); the Focal Point is used, for instance, for the Sanctions Committees pursuant to UN SC Res. 1718 (2006), concerning the Democratic People's Republic Korea, for the one pursuant to UN SC Res 1636 (2005) concerning Lebanon, and for the one pursuant to UN SC Res. 1518 (2003), concerning Iraq/Kuwait. The Focal Point is merely an administrative secretariat registering the request, but the actual review is undertaken by the reviewing states – that is, any designated state(s) and the state of citizenship and residence. Individuals are dependent on the willingness of reviewing states to submit their delisting request on their behalf. See also L. van den Herik, 'The Security Council's targeted sanctions regimes' (2007) 20 *Leiden Journal of International Law* at 799.

   ii. If the authority holds information that is of a personal nature, are individuals entitled to request access to, modification or removal of the personal information in their possession?
5. To what extent does the public authority provide for meaningful participation in the decision-making procedure?
6. To what extent does the public authority provide for one or more effective legal remedies?
   i. To what extent is there entitlement to a review?
   ii. To what extent is there entitlement to reparation?
7. What conclusions can be drawn from the assessment of the level of inclusionary governance realized vis-à-vis those affected? To what extent is the public authority accountable to those affected by its decisions?
8. What recommendations for improvement can be identified?

The discussion in the subsequent eight sections correspond with the eight identified steps of the application of the Draft Model. Each step will be discussed in a separate section; there is, however, one adjustment for the purpose of this chapter. Step 8 is adjusted, as the aim of this chapter is to reflect on the functionality of the Draft Model as a yardstick to analyze the accountability of international institutions vis-à-vis those affected by their decisions, and not only to assess the process of the international institution in question. Thus, the purpose is to demonstrate how the Draft Model functions: What does the Draft IGM show and tell about the accountability framework? What are its potential strengths and weaknesses? Is the Model in its current form capable of systematically analyzing the accountability of an international institution vis-à-vis those affected by its decisions, and to what extent? And are there certain nuances or controversies that were not captured in the development of the Draft Model that prove to be relevant in the context of international institutions? Accordingly, section 8 will have two parts. First, section 8.1 will discuss the conclusions of the demonstration of the Draft IGM functioning in practice, or in other words, the level of inclusionary governance realized vis-à-vis those affected and what it means for the Draft Model. Second, section 8.2 will discuss the conclusions of the testing phase, or in other words, the recommendations for improving the Draft Model.

The discussion in the subsequent eight sections correspond with the eight identified steps of the application of the Draft Model.

1. Setting the Context: The Designation of Individuals and Entities by the ISIL (Da'esh) and Al-Qaida Sanctions Committee

This section will describe the context in which the international institution, the ISIL (Da'esh) and Al-Qaida Sanctions Committee, makes its decisions. The Sanctions Committee is composed of diplomats representing all 15 UN Security Council members; amongst them, a Chair and two Vice Chairs are appointed.[13] The designation procedure (or listing procedure) can be divided into three phases: the suggestion of designation by a state or group of states, the decision to designate, and the procedure to notify those designated. The review process concerns a separate procedure, which will be discussed in section 6 in the context of the right to an effective remedy.

1.1. The Suggestion for Designation

Each UN member state may propose names of individuals or entities to be designated and put on the ISIL (Da'esh) and Al-Qaida Sanctions List.[14] The state suggesting a name or entity for listing has to submit a detailed statement of case accompanied by a cover sheet to the Sanctions Committee.[15] The statement of case should contain as much detail as possible regarding the individual or entity to ensure an accurate identification of the individual and/or entity to be designated.[16] Furthermore, it should contain all evidence relied upon by a designating state to demonstrate that the individual or entity meets the listing criteria.[17] An individual or entity may be listed if they are associated with ISIL and Al-Qaida or related organizations.

This includes the following activities:

(a) Participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;
(b) Supplying, selling or transferring arms and related material to;
(c) Recruiting for, or otherwise supporting acts or activities of Al-Qaida, ISIL, or any cell, affiliate, splinter group or derivative thereof.[18]

13 Sanctions Committee Guidelines, (amended version of September 5, 2018) available at https://www.un.org/securitycouncil/sanctions/1267/committee-guidelines, para 1(b)-(d), all the sanctions committees have a similar composition.
14 Committee Guidelines (amended version of September 5, 2018) at §6(a) and (d).
15 See, e.g., UN SC Res 1735 (December 22, 2006) Annex 1.
16 Committee Guidelines (amended version of September 5, 2018), at §6(e), (h). See, for instance, the list of individuals designated by the ISIL (Da'esh) and Al-Qaida Sanctions Committee, https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/summaries. Not every entry of every individual has been filled in.
17 Committee Guidelines, (amended version of September 5, 2018) §6(d).
18 UN SC Res. 2368 (2017).

The Sanctions Committee notes that those individuals, groups or entities that are owned, controlled, or otherwise supporting "any individual, group, undertaking or entity associated with ISIL or Al-Qaida" can also be listed.[19] In other words, individuals that are associated with someone or a group that is listed on the ISIL (Da'esh) and Al-Qaida Sanctions List are subject to designation. The Sanctions Committee uses a wide definition of the type of funds, financial assets and economic resources that are considered to be in support of Al-Qaida, related groups and/or listed individuals, including "those used for the provision of Internet hosting and related services,"[20] travel-related funds,[21] and "financial transactions involving any funds, economic resources or income-generating activities" including trade in petroleum products, and a variety of crimes, including kidnapping for ransom.[22] One may also be listed when paying ransom to "individuals, groups, undertakings or entities on the ISIL (Da'esh) and Al-Qaida Sanctions List, regardless of how or by whom the ransom is paid."[23] Hence, there is a low substantive threshold for designations.

States have to specify the nature of evidence (intelligence, law enforcement, judicial open source information, or testimonies by subject) supporting the listing.[24] However, the designating state has unfettered discretion to determine what evidence is of a confidential nature, and accordingly, what information will be withheld from the Sanctions Committee. Whenever evidence is declared to be confidential, the designating state has to include its conclusions drawn from the evidence in the statements, but it does not have to include the actual evidence.[25] Designating states are not required to include any exculpatory evidence in a statement of case.[26]

1.2. Decision-Making by the Sanctions Committee

The Sanctions Committee discusses the statement of case submitted by the designating state(s); however, it does not provide an in-depth examination of the evidence provided to them by which to justify the designation, nor is there a standard of proof that should be

19 UN SC Res. 2368 (2017), §4.
20 UN SC Res. 2368 (2017), §5.
21 UN SC Res. 2368 (2017), §6. An exception exists however if an explicit exemption has been made for accessing funds for travel purposes, which follows from a successful request to the Focal Point.
22 UN SC Res. 2368 (2017), §7.
23 UN SC Res. 2368 (2017), §8 .
24 §6(h) Committee Guidelines, (amended version of April 15, 2013).
25 See, e.g., UN SC Res. 1989 (2011) §13 in the context of the proceedings for the Al-Qaida Sanctions Committee. It should be noted that in UN SC Resolution 2253 (2015), the UN Security Council determined to expand the listing criteria to include individuals and entities supporting the Islamic State in Iraq and the Levant (ISIL). As a result, the Al-Qaida Sanctions Committee was renamed to be called the ISIL (Da'esh) and Al-Qaida Sanctions Committee.
26 UN Special Rapporteur report (Scheinin 2010), A/65/258, §54; see also UN Special Rapporteur on Counter-Terrorism and Human Rights (Emmerson) Report, second annual report (2012), UN Doc. A/67/396, §26.

met.[27] The Sanctions Committee considers "proposed listings on the basis of the 'associated with' standard"[28] and decides by consensus whether the individual or entity should indeed be listed. If consensus cannot be reached – even after consultations[29] – it may be submitted to the UN Security Council by the designating state.[30]

1.3. Notification

Notification of the sanction adopted takes place in three different steps. Firstly, all UN member states are notified. UN member states are obliged based on article 25 of the UN Charter to execute a sanction imposed, and thus, implement the sanction measures as stipulated in the UN SC Resolution, including the freezing of assets, the implementation of a travel ban and/or a weapons embargo.

Immediately thereafter, a narrative summary of reasons[31] is published on the Sanctions Committee website; this website is publicly accessible.[32] The last step of notification concerns a notification of the designated individual targeted by the adopted sanction.[33] This notification takes place in two separate steps. Firstly, the Secretariat informs, within three working days after publishing the narrative, the Permanent Mission of the state or states of residence and/or nationality of the designated individual. These states have an obligation to:

> take all possible measures, in accordance with their domestic laws and practices, to notify or inform in a timely manner the listed individual or entity of the designation and to include with this notification the narrative summary of reasons for listing, a description of the effects of designation, (...) the Committee's procedures for considering delisting requests, including the possibility of submitting such a request to the Ombudsperson,(…) and the provisions of resolution 1452 (2002) regarding available exemptions.[34]

27 See further sections 4.1, 4.2 and 6.2.6 below, where the (lack of) disclosure of evidence to the Sanctions Committee, Ombudsperson and affected individual will be discussed.

28 UN SC Res. 2368 (2017), §6(e).

29 A designating state is encouraged to seek information/guidance from other states, including the state of nationality/residence. This practice should contribute to consensus on the issue; if doubt arises whether to designate, extra time should be reserved to gather further information instead of proceeding with the decision regardless. Sanctions Committee Guidelines (amended version of February 12, 2007).

30 Sanctions Committee Guidelines (amended version of February 12, 2007), § 4(a).

31 For an example of a narrative summary and the information to be included, see https://www.un.org/securitycouncil/content/mohammed-masood-azhar-alvi, see for all the narrative summaries adopted, https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/summaries.

32 UN SC Res. 2083 (2012), §17; Sanctions Committee Guidelines (amended version of April 15, 2013), §6(q).

33 Paragraph 6(v) Sanctions Committee Guidelines (amended version of February 12, 2007); UN SC Res. 2083 (2012) §17.

34 UN SC Res. 2083 (2012), §18.

Secondly, the Ombudsperson has an obligation to inform directly – when the address is known – the listed individual/entity of the sanctions imposed and of the possibility to petition for delisting.[35] However, when the address is not known or when the Permanent Mission has not been able to reach those affected for other reasons, a designated individual will find out about the designation when he or she is confronted with the day-to-day consequences of the imposed sanction. In other words, when they are unable to engage in bank transactions,[36] unable to withdraw money, and/or unable to leave the country, they find out that they are designated. At each step of the notification, a summary of reasons is provided. Once an individual is listed, he/she can only be removed from the list after a decision of the Sanctions Committee to delist; this can be achieved through the Sanctions Committee's periodic review or after a successful delisting request to the Ombudsperson. Otherwise, an individual is listed indefinitely. The next sections will take this descriptive overview as the point of departure for the analysis of the accountability of the Sanctions Committee vis-à-vis those affected.

2. Identifying Factors of Vulnerability: The Qualification of the Decision

As explained in chapter 6, the concept of vulnerability influences the amount of discretion enjoyed by authorities and, as a result, the scope of the norms of the Draft IGM. The Draft Model suggests that vulnerability can be determined on the basis of the impact of the adopted decision (in other words, anyone affected by such a decision is considered vulnerable) and/or characteristics related to the person who is affected by the decision (in other words, these individuals or groups are considered vulnerable in relation to whatever decision affects them).[37] This section will examine whether one or more of such vulnerabilities can be identified in the context of the Sanctions Committee, and if so, how it influences the analysis in the remainder of the chapter.

The designation of individuals constitutes an administrative action.[38] It has been argued however that these administrative sanctions should be deemed to have a punitive character.[39] Such characterization of the decision would *automatically* deem those affected

35 UN SC Res. 1989 (2011), annex II, §16(b); UN SC Res. 2083 (2012) Annex II, §18(b); 6th Report of the Office of the Ombudsperson pursuant to Security Council Resolution 2083 (2012), UN Doc. S/2013/452, §24-25; 7th report of the Office of the Ombudsperson pursuant to Security Council Resolution 2083 (2012), UN Doc. S/2014/73 (2014), §24-25.

36 This also refers to automatic transfers, for instance, to pay a mortgage or other outstanding debt. In the context of entities, examples are money transfers being cancelled, as well as the inability to pay for goods, pay salaries and production costs, and large transactions with suppliers being cancelled.

37 See above in and around n. 146 of chapter 4 and section 2.3 of chapter 6 for a further discussion of how the concept of vulnerability plays a role in the Draft Model.

38 E.g., §6(d) of the Al-Qaida Sanctions Committee Guidelines, (2013).

39 The High Commissioner for Human Rights has qualified these sanctions as "clearly punitive," although they may also be of a preventive nature (High Commissioner for Human Rights UN Doc. A/HRC/16/50,

by the decision to be *particularly vulnerable*.[40] The ISIL (Da'esh) and Al-Qaida Sanctions Committee's position is that the designation is preventive in nature, and it does therefore not have a punitive character.[41]

However, the sanction imposed can arguably be considered to have a punitive nature due to the severity of the sanction, as these sanctions limit the freedoms enjoyed by those designated, and it has an adverse effect on the lives of those designated. As noted in chapter 5, the label given by the decision-making body is indicative but not decisive; what is conclusive is the effect of the adopted decision. The designations have a significant impact on the daily lives of the individuals. The individuals listed are often unable to access their property, pay their mortgage, or receive social security benefits. They may also face problems getting a job and are restricted in their ability to travel. The sanctions do not only affect those designated but also their direct relatives, who are similarly affected by the sanctions. The sanctions have no limitations in space or in time.[42] A sanction can only be ended with a successful delisting request to the Ombudsperson or when the internal review by the Sanctions Committee of the designation results in delisting; otherwise, the designation is indefinite.[43] Considering that all UN member states are obliged to implement the sanctions, the assets of the person or entity listed shall be frozen wherever they are located and the imposed travel ban results in the individual being unable to leave the country in which he/she resides. There is no discretion accorded to member states to only partially implement the sanctions, or to mitigate the consequences due to, for instance, particularly harsh circumstances in a given case.

The consequences can only be mitigated via a successful plea for an exemption of the travel and/or assets ban, and this has to be submitted to the Sanctions Committee by a state *on behalf of an individual or entity*. In other words, individuals need to find a state (for instance, the designating state, state of nationality or state of residence) willing to submit this request to the Committee's Chairman. The Sanctions Committee examines whether – in case of an exemption from the assets freeze – the daily life of the individual concerned would be at

§17); the UN Special Rapporteur (Scheinin) determined that they were a "criminal punishment" (UN Doc. A/62/223, §16).

40 In international law, it is recognized that punitive decisions or decisions of a criminal nature – considering their enormous impact on those affected – render those affected by these decisions particularly vulnerable. See further, e.g., ECtHR, *Engel and others v. The Netherlands*, 5100/71 (November 23, 1976); *Ozturk v. Germany,* 8544/79, *ECtHR* (Plenary), Judgment (Merits) (February 21, 1984), §54.

41 E.g., paragraph 6(d) of the ISIL (Da'esh) and Al-Qaida Sanctions Committee Guidelines (2013); UN SC 1989 (2011) 14th preambular paragraph; see further, e.g., UN Special Rapporteur Emmerson, Report 2012, §54-56.

42 Report of the UN Special Rapporteur on counter-terrorism and human rights, (Scheinin) UN GA Doc. A/65/258 (August 6, 2010), §52.

43 The chances of success of these review procedures will be discussed in section 6 together with the procedural guarantees offered in these review processes.

stake, for example the inability to pay for basic expenses, if the exemption is not granted. Basic expenses include:

> … payments for … rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources.[44]

This reference further demonstrates the impact of a sanction on the daily lives of the individuals concerned and their families. If an exemption is not granted – this will be the case for most requests for exemptions – the individual will not be able to access any of their bank accounts or other financial means to pay these expenses. Thus, although there is a system to mitigate part of the consequences of the sanctions, its procedure is cumbersome; individuals cannot file the request themselves, there is a high threshold imposed to file a request, and there is no independent assessment of the request. The effectiveness of the exemption procedure to mitigate the consequences for those affected is therefore highly questionable.[45]

In conclusion, those affected by a designation can be deemed to be particularly vulnerable. The Draft Model suggests that these factors of vulnerability, at a minimum, diminish the discretion enjoyed by authorities to realize inclusionary governance and increase the level of scrutiny to be exercised when reviewing the conduct of the ISIL (Da'esh) and Al-Qaida Sanctions Committee. Thus, in the analysis of the inclusionary governance realized by the Sanctions Committee in steps 4-6 of the application of the Draft Model (sections 4-6 of this chapter), a more in-depth assessment of the level of inclusionary governance is conducted, including the question of whether further measures should be adopted by the Sanctions Committee and the Ombudsperson to ensure inclusion of those who are particularly vulnerable. Throughout the chapter reference is made to these factors of vulnerability and whether they may influence benchmarks discussed.

44 See, e.g., §11 (a) and (b) of the Committee Guidelines of the ISIL (Da'esh) and Al-Qaida Sanctions Committee.

45 For problems with the exemption procedure and why it may be practically impossible for certain individuals to find a state willing to support their request, see, e.g., L. van den Herik, 'Peripheral Hegemony in the Quest to Ensure Security Council Accountability for its Individualized UN Sanctions Regime' (2014) *Grotius Centre Working Paper 2014/026-PSL*, at 8.

3. Preliminary Assessment: Do Arbitrary Features Exist in the Decision-Making and Review Procedure

Vulnerability is not the only factor influencing the level of discretion accorded and the level of scrutiny to be exercised in the Draft Inclusionary Governance Model. In general, the Draft Model recognizes that the criterion of non-arbitrariness functions to constrain public authorities from abusing their public power. Moreover, whenever a decision-making procedure and/or review procedure has arbitrary features, increased scrutiny should be exercised of the overall level of inclusionary governance realized by public authorities. This section will examine, therefore, whether the decision-making procedure of the ISIL (Da'esh) and Al-Qaida Sanctions Committee has such arbitrary features.

An arbitrary decision is one that is not sufficiently guided by procedural rules and guarantees but is rather a decision reached by one or a small number of people and adopted within the public authorities' full discretion.[46] The Draft Model suggests that an initial screening of arbitrary features within the decision-making and/or review procedure entails an assessment of whether authorities provided common core guarantees to those affected. This includes, amongst others, a duty to inform, an entitlement to those affected to be heard, a duty to provide a reasoned decision and a duty to realize an effective review of the decision made. Furthermore, when public authorities enjoy unfettered discretion in the exercise of their powers, it is a signal of a potential arbitrary use of powers. Whenever the decision-making procedure is considered to have arbitrary features, further scrutiny (that is, in-depth analysis) of the entire decision-making procedure is required, including rules of evidence, standard of proof and burden of proof.

Applying this framework to the Sanctions Committee shows that the decision-making procedure has certain arbitrary features. Although it will be discussed in detail in the various sections below, it may now already be pointed out that:

- those designated have very limited access to the evidence underlying their designation;
- states enjoy unfettered discretion to qualify information (evidence) as confidential in the decision-making procedure and withhold this information from the Sanctions Committee, those affected and the review body;
- there is no opportunity to participate in the designation procedure; and
- there is only a limited right to a remedy.

Hence, the procedure of the Sanctions Committee has some inherent arbitrary features. Accordingly, stricter scrutiny is required of the decision-making and review procedure of the ISIL (Da'esh) and Al-Qaida Sanctions Committee, and, for instance, review of the burden

46 For a further explanation and justification of the notion of arbitrariness and its function as a trigger factor, see chapter 6 section 2.2.

of proof and standard of proof requirements is also necessary to assess the fairness of the review procedure.

In the remainder of this chapter, these dynamics, the apparent arbitrary features and the factors of vulnerability will be taken into account: the Sanctions Committee's decision-making and review procedure is assessed through the lens of the dynamic Draft IGM, in which less discretion is accorded to authorities. Accordingly, stricter scrutiny is exercised for an in-depth assessment of the inclusionary governance realized, including the burden and standard of proof within the procedure. The analysis will be structured along the lines of the three dimensions of the Draft Model: the entitlement to information, the entitlement to meaningful participation in the decision-making procedure and the entitlement to an effective remedy (sections 4-6).

4. Informational Entitlements

The Draft Model for Inclusionary Governance encompasses two distinctive entitlements to information: an entitlement to public interest information and an entitlement to personal information. The Sanctions Committee holds information that is both of a public interest nature and of a personal nature. In the two sections below, it will be assessed whether, and to what extent, the Sanctions Committee fulfills its duties in relation to these two entitlements.

The analysis in this section will follow the building blocks of the informational entitlements as identified in the Draft Model: what constitutes public interest information or personal information in the context of designation procedures, who holds the information, who is entitled to access to this information and under what conditions, and whether and to what extent further obligations or duties can be identified for the handling of the information. The conclusion to this section will address the strengths and weaknesses in the way the Sanctions Committee handles information that is of public interest or of a personal nature. In addition, the functionality of the Draft Model as a yardstick to identify and analyze the information held by the Sanctions Committee will be evaluated.

4.1. Public Interest Information

The definition of public interest information has two components: (1) the information is in the possession of public authorities, and (2) the information is of public interest. When applying this definition to the Sanctions Committee procedure, the rules for procedure, the (de)listing criteria, and the rules for the review procedure meet these criteria. This information is produced by the decision-making body (i.e., the UN Sanctions Committee) and by the review body (that is, the Ombudsperson) and is of relevance to everyone who

wants to be informed about the decision-making procedure, the review procedure and what the (substantive) standards for listing or delisting are.

The Draft Model suggests that public interest information should be available upon request without requiring an interest to be stated; in other words, everyone is entitled to this information. The public interest information identified in this section is published on the website of the Sanctions Committee. Accordingly, everyone with access to the Internet can access this information.[47] However, one needs to be aware that the information is available online only; someone needs to have knowledge of the existence of the UN Sanctions Committee to be able to access the information. In addition, UN member states are informed of these procedures via the UN Security Council resolutions.[48] It should be noted that those designated are (also) informed of the possibility of a review and the listing criteria when they are informed via the Ombudsperson or the Permanent Mission of the country of which they are a resident or national. Accordingly, there is not a set standard for how member states of the United Nations are informed of the public interest information and how individuals are informed of this information. In the Draft Model, there is no distinction in the type of obligations that public authorities owe towards different parties. However, the question of whether public authorities have, for instance, a duty to inform those affected will be dealt with in the context of the entitlement to meaningful participation in the decision-making procedure in section 5.

In the ISIL (Da'esh) and Al-Qaida Sanctions Committee, there is no procedure to request access to public interest information that has not yet been published online by the Sanctions Committee. Moreover, as will be further addressed in section 6, there is no legal avenue available to address this potential lack of access to information. Even though a procedure to request access to public interest information is lacking, there is currently access to information of a public interest nature via the website of the Sanctions Committee; in addition, those designated have to be informed about this public interest information by the Ombudsperson or the Permanent Mission of the country of which they are a resident or national, and member states are informed of this information via UN Security Council Resolutions.

Hence, the application of the Draft Model's building block of the entitlement to public interest information to the Sanctions Committee procedure demonstrates that the Draft IGM in general works; the benchmarks of the building block are sufficiently defined to identify the

47 One can question whether those interested have access to the Internet to access this information. Although everyone may access the information, it is assumed that it is of particular relevance to those designated and their family members, as well as to researchers and practitioners.

48 Sanctions Committee Guidelines (amended version of September 5, 2018), para 6(q)-(r).

strengths and weaknesses in the approach of the Sanctions Committee to sharing information of public interest in their possession. However, the application of the Draft Model does show that the role of other actors, such as the UN member states, in the sharing of public interest information is not fully captured by the Draft Model.

4.2. Personal Information

The Draft Model defines personal information as all information that relates to an individual. This section will analyze whether the Sanctions Committee in their decision-making procedure stores, collects or shares personal information in conformity with the Draft Inclusionary Governance Model. This research identifies two types of personal information in the decision-making procedure of the ISIL (Da'esh) and Al-Qaida Sanctions Committee that meet this definition: evidence used to support listing and information used to identify those designated. Each type of personal information will be discussed in a separate section.

The analysis follows the building blocks of the entitlement to personal information of the Draft Model: what constitutes personal information in the context of designation procedures; who holds the information; who may access the information; and whether, and to what extent, can obligations or duties be identified for the collection, storage and sharing of personal information.

4.2.1. Evidence Supporting Listing

This section will discuss the evidence supporting the listing of an individual or entity in the context of the Draft Model. This type of personal information can be of a diverse nature and includes information derived from intelligence agencies (national or otherwise), law enforcement, court orders and judgments relevant to the case at hand, and confessions or admissions by the individual in question, or when it concerns a designation of an entity, by one of its representatives.[49]

The Draft Model suggests that, at a minimum, individuals who are the subject of the information have to be given access to this information, and if they are not, the restriction to access this information has to be in accordance with the principles of legality, legitimacy, and necessity. Moreover, public authorities have to inform the data subjects that their information is being collected or stored, unless reasons of necessity require otherwise. Furthermore, authorities have a duty to realize a review procedure to challenge the legality of the storage, collection and/or sharing of the personal information.

49 §6(h) Sanctions Committee Guidelines (amended version of April 15, 2013).

When applying this framework to the Sanctions Committee, it shows that the Sanctions Committee only partially complies with its duties as required by the Draft Model. Individuals are not informed by the Sanctions Committee – nor by other actors as is shown below – of the storage and/or collection of their personal information. There is no procedure in place to request access to this information. Those designated will gain partial access to their personal information once they are notified (by the Ombudsperson and/or the Permanent Mission of the country of residence or nationality) of the decision. The notification of the decision is accompanied by a summary of reasons for the designation. This summary of reasons has to include references to the evidence supporting the listing. Practice shows that this summary of reasons is quite brief, and it typically does not contain a "detailed explanation of the evidential basis on which the assertion [to designate] is made."[50] Moreover, the designating state, which is the state that suggested listing and provided the evidence supporting the listing, has the discretion to decide what portions of the statement of case are to be publicly released and what parts are deemed confidential and thus excluded.[51] Thus, there is no guarantee that those designated will gain access to the evidence used to designate him/her.

The Draft Model suggests that when public authorities limit the extent to which individuals are entitled to personal information, the principles of legality, necessity and legitimacy (tripartite test) should be met. Whether a potential limitation can be deemed to be in accordance with the tripartite test has to be deduced from the reports, statements, and resolutions of the Sanctions Committee. The lack of access is generally explained by the Sanctions Committee, or by other actors on their behalf, by reference to international security reasons requiring confidentiality.[52] At the national level, national security reasons are considered to be a legitimate ground for limiting the right to personal information. Therefore, reasons of international security may similarly be regarded as a legitimate ground for limiting the entitlement to personal information.

The principle of legality requires that any potential limitation has to be in accordance with the law. Thus, when applying this to the designation procedure, it implies that the UN Security Council or the Sanctions Committee has to stipulate under what circumstances personal information can be held, stored or shared. Often, designating states are the ones who hold information of a personal nature – that is, the evidence underlying the designation. The Sanctions Committee guidelines indicate that it falls within the discretion of those states holding the personal information whether, and to what extent, they disclose this information to other Sanctions Committee members, to the Ombudsperson, and ultimately to those

50 UN Special Rapporteur on counter-terrorism and human rights (Emmerson) report, second annual report (2012), UN Doc. A/67/396, §25.
51 Sanctions Committee Guidelines, (amended version of February 12, 2007) § 6(g), (h).
52 See, e.g., Sanctions Committee Guidelines, 6(h)(5).

designated.[53] The principle of legality encompasses more than a written ground to limit an entitlement; legality also requires a certain quality of the law regulating the exercise of public power.[54] The Draft IGM defines this quality to include, amongst other things, that the discretion enjoyed by authorities may not be unfettered, that there should be a possibility to request a review and individuals have to be duly informed of the procedure and their possibilities. In the given case, states holding confidential information have unfettered discretion in determining whether and to what extent information is disclosed to those affected, and in addition, whether and to what extent information is disclosed to the (other members of the) Sanctions Committee and/or to the Ombudsperson. Although the extent to which designated persons have a right to a review will be discussed in section 6, those who feel that a public authority did not comply with its duties have no legal avenue available to them to challenge such an exercise of public power.

In the context of the Draft Model, the principle of necessity implies that there should be a pressing social need to impose the limitation, where the interests of the individual to obtain the information have to be balanced against the international institution's interest (i.e., the legitimate aim) protected by the restriction. In relation to the evidence used to justify the listing, there is an abstract discussion on whether a pressing social need exists and whether the interests of the decision-making body outweigh those of the individual. The decision to withhold information rests with each state that relies on and/or submits evidence for a designation; the decision does not rest with the Sanctions Committee. The Sanctions Committee can only vote whether an individual should indeed be designated after a designated state requests an individual to be listed. In this process, there is no room to take the interests of the individual into account, and therefore interests of the state and those of the individual cannot be balanced. In the context of the principle of necessity, the quality of the decision-making procedure similarly matters. As already shown in the context of the principle of legality, there are serious shortcomings in the quality of the Sanctions Committee's decision-making procedure. The principle of proportionality is often discussed

53 See, for instance, the Sanctions Committee Guidelines, 6(h) (4-5) regarding the statement of case:
The statement of case should provide as much detail as possible on the basis(es) for listing, including but not limited to: (…)
(4) the nature of the supporting evidence (e.g. intelligence, law enforcement, judicial, open source information, admissions by subject, etc.);
(5) additional information or documents supporting the submission as well as information about relevant court cases and proceedings. The statement of case shall be releasable, upon request, except for the parts the designating State identifies as being confidential to the Committee, and may be used to develop the narrative summary of reasons for listing (...).

54 Compliance with the requirement of necessity and legality is difficult to assess as the Sanctions Committee has not referred to the need to limit access to personal information. No insight is therefore provided into the policy considerations for this decision. It should be noted though that, in the context of the Ombudsperson procedure, the Ombudsperson has addressed the necessity of confidentiality of information on the one side and the need to balance such confidentiality with fair trial rights and due procedure safeguards on the other side. See further section 6.2 below.

together with the principle of necessity. The former principle refers to the need to choose the least restrictive means to achieve the legitimate aim whenever an entitlement is limited. In other words, instead of denying all access to the information, the same legitimate aim may be obtained when the information is redacted. In practice, however, the access to documents is completely refused. In principle, those states classifying evidence are advised to include in the summary of reasons the conclusions drawn from the personal information withheld from the designated individual. In addition to the redaction of classified parts in the documents, the inclusion of the conclusions drawn from the evidence may also constitute a less restrictive measure. However, in practice, the summary of reasons is too general and no reference to the evidence underlying the designation can be deduced from this summary.

Therefore, affected individuals enjoy only limited access to their personal information, and this limitation does not meet the tripartite test as stipulated in the Draft Model. It should be noted that the Draft Model suggests that public authorities are required to ensure an effective remedy whenever access to personal information is partially or fully denied, and whenever personal information is stored and collected by public authorities. Whether the Sanctions Committee complies with this duty will be discussed in section 6. When assessing the procedure as a whole, certain interactions come to the forefront. Limiting access to personal information may have a crippling effect on two different levels. Firstly, this lack of access to personal information increases the likeliness that arbitrary decisions are adopted,[55] as no other party can assess the accuracy of the information underlying the designation once a state qualifies it as confidential. There is no obligation to share such information with other parties (states, Sanctions Committee and/or Ombudsperson). Moreover, there is practice of states relying on evidence obtained through torture;[56] a practice that is permitted by the Sanctions Committee. The Sanctions Committee does not uphold rules of evidence, nor does it maintain a standard of proof to come to its decision to designate beyond the substantive norm of "associated with ISIL and Al-Qaida."[57] Considering that there is a proven

55 The danger of arbitrariness was already addressed in section 3, but the concept will resurface in each section.

56 There is proof of designations that were made solely on the basis of evidence derived from torture. See, for example, G. Sullivan & M. de Goede, 'Between Law and the Exception: the UN 1267 Ombudsperson as a Hybrid Model of Legal Expertise' (2015) *Leiden Journal of International Law* 833-854, at 840; referencing to a letter from the Like-minded Lawyers to UN Special Rapporteur on Countering Terrorism (August 13, 2013), 'Questions concerning the 1268/1989 Al-Qaida Sanctions Committee, the Ombudsperson, and the Delisting Process'. Sullivan was one of the six authors of the letter. See, e.g., HRCee, *General Comment 32*, §33; see also the discussion of the Ombudsperson procedure and the standard of proof used by the Ombudsperson (section 6.2.5), which shows that the Ombudsperson has instead adopted the premise that if there is enough information to come to the credible and reliable conclusion that information was obtained through torture, it should not be relied upon.

57 It should be noted that the Draft Model acknowledges that, in principle, public authorities enjoy discretion in setting the rules of evidence and burden/standard of proof. However, if the procedure has inherent arbitrary features, the rules of evidence and standard/burden of proof used by the review body become relevant in the assessment whether a *fair* review procedure was provided by public authorities,

lack of reliability of confessions derived from torture or maltreatment in interrogations, the permissibility of such evidence may further lead to arbitrary decisions. Although the Draft Model does not stipulate rules on the permissibility of evidence, it does stipulate that any exercise of public power may not violate *ius cogens* norms. The prohibition of torture constitutes an *ius cogens* norm, and therefore the permissibility of evidence that is allegedly derived from interrogations in which torture was used will violate this norm. Secondly, the lack of access to the evidence that formed the basis for the designation is presumed to negatively affect the designated individual's entitlement to an effective remedy. Moreover, the fact that those responsible for carrying out the review also cannot access the information further impacts the fairness of the review procedure. The last point will be evaluated in section 6.

In conclusion, the application of the Draft Model to the Sanctions Committee shows that individuals have only a limited entitlement to access the evidence underlying the designation. Moreover, personal information is not held exclusively by the Sanctions Committee; on the contrary, designating states are often the ones in possession of the evidence. As a result, it is not only individuals who lack access to the information, often others, including the Sanctions Committee members and the Ombudsperson, similarly lack access to this evidence. Thus, the (benchmarks of the) building blocks of the Draft IGM function well, they are capable of identifying this lack of access to the information. However, the multiple-actor aspect is not sufficiently captured by the Draft Model. The Draft IGM assumes that the public authority taking the decision holds the information (in this case, the Sanctions Committee), and it does not include or exclude others who may be in possession of the evidence. In the remainder of the chapter, it will be further assessed whether this multiple-actor aspect is sufficiently captured by the Draft Model, and whether, and to what extent, it should influence the overall level of inclusionary governance realized by an international institution.

4.2.2. The Information that Serves to Identify an Individual in order to Implement the Sanction

The second type of personal information identified in the context of the Sanctions Committee is the information provided by a designating state to identify the individual and ensure that the correct person is being sanctioned. Once an individual is designated via a decision by the Sanctions Committee and affirmed in a UN Security Council resolution,[58] the information is published online at the website of the Sanctions Committee and communicated to all UN member states. The individual or entity to be designated is identified using indicators. For individuals, the following entries are used to the extent available:

see further section 6.2.6.

58 See, e.g., Annex III of UN SC Res 2368 (2017) in which 6 individuals/entities were listed. The narrative summary of reasons and further information per entry can be accessed through the website of the Sanctions Committee: https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/summaries.

> family name/surname, given names, other relevant names, date of birth, place of birth, nationality/citizenship, gender, aliases, employment/occupation, State(s) of residence, passport or travel document and national identification number, current and previous addresses, current status before law enforcement authorities (e.g. wanted, detained, convicted), location.[59]

This information is included in the narrative summary of reasons and published online, provided to all states and sent to the Permanent Mission of the country of residence and/or nationality.[60] Thus, everyone can access this information and see who is listed by the Sanctions Committee. The Model suggests that authorities should protect personal information that they hold and should prevent unauthorized access to it by third parties. Personal information may only be shared with third parties with the consent of the individual and/or whenever the tripartite test of legality, legitimacy and necessity is met. Considering the type of decision-making procedure and the type of personal information being published, it is safe to conclude that the individuals did not consent to their information being published online. As argued in the previous section, the Sanctions Committee could explain that for the legitimate reasons of protecting (inter)national peace and security, the publication of this information is warranted. Legality requires that the limitation, and thus the sharing of personal information with third parties, should be laid down in a law and that this law should be of a certain quality. UN SC Resolution 2368 and the Sanctions Committee Guidelines recommend that the Sanctions Committee, when it lists a person to be sanctioned, also publishes this information online; moreover, it urges states to – in the implementation of the designations – inform custom agencies, banks etc. to freeze the assets and enforce the travel ban, and when it exists, to place these persons on a domestic sanctions list. The quality requirement of the Draft Model implies that, at a minimum, whenever personal information of individuals is published, the individuals affected should have a right to rectification and removal of said information if the information is not accurate. The extent to which these affected individuals are entitled to such effective remedy will be discussed in section 6.

The principle of necessity requires that there has to be a pressing social need to publish the information without the consent of the individual concerned. The interests of the authorities in publishing this information have to be balanced against the interests of the individuals in protecting their privacy. In this case, the argument can be made that there is a pressing social need to publish this information online without the consent of the individuals designated.

59 Sanctions Committee Guidelines, (amended version of September 5, 2018), principle 6(g). Similar entries exist for designating entities, see further the Sanctions Committee Guidelines.

60 The information is sent along with the summary of case. The Permanent Mission of the country of residence and/or nationality has the obligation to inform those designated. The entries should enable the Permanent Missions to contact those designated and inform them accordingly.

The prevention of terrorism constitutes a pressing social need. As stated by the UN Security Council:

> *Reaffirming* that terrorism in all forms and manifestations constitutes one of the most serious threats to peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever, wherever, and by whomsoever committed, and *reiterating* its unequivocal condemnation of the Islamic State in Iraq and the Levant (ISIL, also known as Da'esh), Al-Qaida, and associated individuals, groups, undertakings, and entities for ongoing and multiple criminal terrorist acts aimed at causing the deaths of innocent civilians and other victims, destruction of property, and greatly undermining stability,
>
> *Recognizing* that terrorism poses a threat to international peace and security and that countering this threat requires collective efforts on national, regional and international levels on the basis of respect for international law and the Charter of the United Nations.[61]

The information is published online to inform everyone that these individuals are being sanctioned because of their association with ISIL (Da'esh) and Al-Qaida.

The Draft Model suggests that a crucial factor in the tripartite test is whether those affected are entitled to an effective remedy. This factor will be examined in section 6. It is not only those persons designated by the Sanctions Committee who may face the consequences of published information; other individuals may also face the consequences of sanctions. This can happen, amongst other reasons, when there is no requirement of a standard of proof for listings, and when no minimum number of entries is required to correctly identify individuals. When the designation is based on only a few entries, the wrong person can be identified as the person to be designated and can face the consequences of the sanction then imposed. In general, public authorities enjoy full discretion when setting the standard of proof for a decision. Nevertheless, the Draft IGM does suggest that any exercise of public power may not be arbitrary, and when listings are based on a low number of entries, it may lead to arbitrary decisions. Accordingly, the lack of guiding rules on the proper identification of those to be designated constitutes a risk factor for arbitrary decisions. Considering this risk factor and the apparent arbitrary features already signaled in section 3, the remainder of the assessment conducted in this chapter will be focused on this risk of arbitrariness when evaluating whether, and to what extent, the Sanctions Committee provides inclusionary governance towards those affected. In particular, further risk factors for arbitrariness will be examined, and whether the Sanctions Committee has adopted any procedural guarantees to prevent arbitrary decisions from being made. Further, those who may face consequences of

61 UN SC Res. 2368 (2017), the preamble's first two paragraphs.

a listing due to a mistaken identity should be considered to be affected by the decision, and should therefore similarly be entitled to an effective legal remedy.

4.3. Conclusions

This section illustrated how the Draft Model can serve as a yardstick to analyze whether and to what extent the Sanctions Committee holds information, what the nature of this information is, and whether and to what extent the guarantees recognized within the Draft Model are provided to those affected by the designations. The application of the Draft IGM to the ISIL (Da'esh) and Al-Qaida Sanctions Committee's decision-making procedure reveals that the Sanctions Committee holds both public and personal interest information. The public interest information concerns the listing criteria and the rules of the decision-making and review procedure. Although there is no possibility to request access to information of public interest, the information identified to be of a public interest nature is accessible online to everyone. In other words, although de iure there is no entitlement to access public interest information as defined by the Draft Model, de facto individuals can have access to the information. However, the lack of knowledge of the existence of the Sanctions Committee, as well as whether people have access to the website of the Sanctions Committee, limits the extent to which individuals have access to the public interest information.

In the context of the entitlement to personal information, the situation is more complex; a variety of actors hold and store personal information that is used for the designation and identification of individuals. The Draft Model identifies public authorities as the principal duty bearers. Thus, in this case, the Sanctions Committee is the duty bearer. However, the practices of the Sanctions Committee demonstrate that information is held by designating states, who have unfettered discretion to determine whether to disclose this information to the Sanctions Committee whenever they suggest someone for designation. As a result, the Sanctions Committee often does not have access to the evidence underlying a suggestion to list, nor does the Ombudsperson or the petitioner have such access. Consequently, the Sanctions Committee only partially complies with its duties under the Draft Model as those designated only receive a summary of reasons for their designation. Moreover, the information is withheld indefinitely. There is no entitlement to access this information and no procedure to request access; the individual is dependent on the willingness of a designating state to disclose parts of the evidence underlying a designation decision in the summary of case. Practice shows that the summary of case often only contains generic reasons. As section 6 will further address, there is no legal remedy available to those designated to request access to this information. Instead, the petitioner is completely dependent on the assessment of the available evidence by the Ombudsperson, who, in some instances, may gain access to the evidence underlying a designating decision. Nevertheless, even if the Ombudsperson can receive access to the evidence, this information will not be shared with the petitioner.

The application of the Draft Model to ISIL (Da'esh) and Al-Qaida Sanctions Committee shows that a contextual assessment is warranted as the inclusionary governance norms interact with each other. First, as signaled throughout this section, the entitlement to information influences the entitlement to an effective remedy. For instance, those individuals whose personal information has been stored, collected and/or published should be entitled to access their personal information and ask modification or rectification whenever the personal information stored and/or used is not accurate. Further, when information is stored without a legal ground, they should be allowed to ask the removal of the information. Second, the lack of access to personal information (i.e., the evidence) is expected to have a crippling effect on other elements of the Draft Inclusionary Governance Model. For instance, the entitlement to personal information is closely related to, and interlinked with, other obligations of authorities under the Draft Model. Think here of the duty to provide reasons for any decisions made,[62] the duty to duly inform those affected to ensure a meaningful participation in the decision-making procedure, and the duty to duly inform those affected to ensure an effective remedy. Overall, the lack of access to personal information is presumed to negatively affect the fairness and thus the effectiveness of a legal remedy (section 6). This second argument ties in with the problem already flagged in section 3: the decision-making procedure of the Sanctions Committee has inherent arbitrary features. The remainder of this chapter will further evaluate whether the application of the Draft Model to the designation procedure reveals signs of norm interacting and whether, and to what extent, it influences the overall level of inclusionary governance realized by the Sanctions Committee.

The next section will evaluate whether, and to what extent, the ISIL (Da'esh) and Al-Qaida Sanctions Committee ensures meaningful participation in the decision-making procedure for those who may be designated.

5. The Entitlement to Meaningful Participation in the Decision-Making Procedure

The Draft Inclusionary Governance Model recognizes a duty for public authorities to ensure that those who will be affected by a decision participate in a meaningful manner in the decision-making procedure *before* a decision is made. There are several elements that serve

62 It should be noted that an overlap is expected between the assessment of the duty to give reasons and the analysis conducted in this section on the entitlement to personal information. The evidence underlying the designation, which is of a personal nature, constitutes the reasons for the designation procedure. Therefore, the entitlement of those designated to access this evidence is examined in section 4. However, as section 5 will show, the duty to give reasons – and thus, the duty of the Sanctions Committee to explain the evidence substantiating the reason for listing – is assessed in the context of the entitlement to meaningful participation in the decision-making procedure.

to ensure that the participation is meaningful, and not merely pro forma: those affected have to be duly informed of the upcoming decision and the possibility to be heard, those affected have to be heard, these views have to be duly taken into account, and authorities have to provide a reasoned decision. Authorities have wide discretion in organizing the participatory processes as long as the result is meaningful participation in the decision-making for those affected.

In the context of the ISIL (Da'esh) and Al-Qaida Sanctions Committee, those affected are not able to participate meaningfully in the decision-making procedure. No participatory processes are realized by the Sanctions Committee. Thus, designated individuals are not properly informed of the upcoming decision and its procedure, there is no opportunity to present one's views, and accordingly, there is no participatory process before the designation takes place.

Those designated are informed once the decision has been made.[63] They have to be informed about the decision made, its consequences, the reasons underlying the decision, and the possibility of review by the Ombudsperson procedure. In general, the Draft Model suggests that the duty to provide reasons requires authorities to provide the legal basis for the decision and an explanation of the reasons underlying the decision. In particular, the reasons have to address the views presented and how they were taken into account. In the situation of the Sanctions Committee, there is no participatory process; reasons are however provided for the designation. Nevertheless, as the previous section showed, the reasons provided are limited and often do not contain references to the evidence underlying the decision.

The benchmarks of the building blocks of the entitlement to meaningful participation in the decision-making do not encompass limitation grounds.[64] In principle, the argument can be made that the lack of participation in the decision-making procedure may be justified for (inter)national security reasons. After all, when someone is considered to be associated with a terrorist organization by, for instance, offering financial support, informing them beforehand may be counterproductive as assets can be moved before the sanction is adopted. This would nullify the effect of the sanction. However, the Draft Model does suggest that the permissibility of a limitation is dependent on the overall quality of the decision-making procedure. As shown, the decision-making procedure has inherent arbitrary features and thus lacks a certain quality in the procedure. Considering that *in casu,* since participation is

63 The notification procedure has some flaws that concern the way in which individuals are actually reached. See 1.3 above.

64 Across the international instruments, no general approach to limitations to the right to participation could be detected, which can partly be explained by the right's procedural nature. See further chapter 4.

not provided under any circumstances there is a complete denial of the right to participation. In its resolutions and guidelines, the ISIL (Da'esh) and Al-Qaida Sanctions Committee does not justify the denial of participation in the designation procedure. However, in the UN SC Resolutions, references are made to the "need to combat by all means (…) threats to international peace and security caused by terrorist acts" while doing so "in accordance with the Charter of the United Nations and international law, including applicable international human rights, refugee and humanitarian law."[65] The lack of a possibility to participate in the decision-making procedure, combined with limited access to personal information and the limited reasoning for the listing, constitutes risk factors for arbitrary decisions and thus negatively influences the overall quality of the procedure. Hence, the complete lack of participation in the decision-making procedure is not in accordance with the benchmarks of the Draft Model.

In conclusion, the building blocks of the entitlement to meaningful participation in the decision-making procedure of the Draft Model is sufficiently clear to be applied to the practice of international institutions. The application of the Model reveals that the ISIL (Da'esh) and Al-Qaida Sanctions Committee has completely denied those affected a possibility to participate in the decision-making procedure.

The next section will examine whether, and to what extent, those designated enjoy an effective remedy, and accordingly, whether there is an entitlement to challenge a decision made and the lack of participation in the decision-making procedure.

6. The Entitlement to an Effective Remedy

The entitlement to an effective remedy has two components: an entitlement to a review and an entitlement to reparation. The components are intrinsically linked to each other; both need to be provided to those affected to ensure an effective remedy. The Draft Model suggests that any remedy has to be adequate, accessible and effective in repairing the harm suffered. This section will analyze whether, and to what extent, the ISIL (Da'esh) and Al-Qaida Sanctions Committee provides for an effective remedy to those affected in the context of the Draft Inclusionary Governance Model. The previous sections demonstrated already the dynamic nature of the Draft Model. This dynamic nature is further visible in the context of the entitlement to an effective remedy[66] and manifests itself in two different ways. Firstly, considering the particularly vulnerable situation of those designated and given the apparent

65 See, e.g., UN SC Res. 1989 (2011), 5th paragraph of the preamble.
66 See for a more elaborate discussion of these interactions and how they influence the Draft Model chapter 6, sections 1.2 and 2.

arbitrary nature of the decision-making procedure, the content and scope of the entitlement to an effective remedy has been influenced as follows:

- Authorities enjoy less discretion in implementing their obligations as formulated in the Draft IGM; in particular, further positive obligations may be required to ensure that those particularly vulnerable have access to the review procedure.
- More strict scrutiny of compliance by authorities is to be exercised. Moreover, rules of evidence and the burden and standard of proof are taken into account in the assessment of whether those affected have (had) a fair review procedure.

Secondly, the outcome of the assessment conducted in the previous sections further influences the content and scope of an effective remedy. In other words, the analysis of whether the ISIL (Da'esh) and Al-Qaida Sanctions Committee realized the entitlement to information and to meaningful participation for those affected aided in identifying the grounds and demands for an effective remedy, as summarized below:

Entitlement to information	Entitlement to participation in the decision-making	Decision to designate	Entitlement to an effective remedy
Those whose personal information is stored and collected	→	→	Entitlement to challenge the legality of the storage or collection of the information (i.e., legality/accuracy evidence)
Those whose personal information is published	→	→	Entitlement to a rectification and removal of information published, if it is not accurate (mistaken identity)
			Entitlement to challenge the legality of the publication of the information
	Those who were not able to participate in a meaningful manner in the decision-making procedure	→	Entitlement to challenge the lack of meaningful participation
		Those designated →	Entitlement to a review decision (a delisting request)
		Those who face the consequences of → designation (mistaken identity, direct family)	Entitlement to challenge the implementation of a decision, to receive compensation (mistaken identity)

Table 16: Grounds for review

In other words, the Draft Model gives indications[67] of the type of legal remedies that should be available for those affected in the context of the Sanctions Committee's designations. Taking these dynamics into account, the following sections will evaluate whether, and to what extent, the ISIL (Da'esh) and Al-Qaida Sanctions Committee guarantees an effective remedy to those affected. The entitlement to review in the context of the Sanctions Committee contains

67 It should be noted that this list is not meant to be exhaustive. The analysis conducted in this section examines further whether there are (other) grounds for a review, who may request a review, and the extent to which legal remedies are realized for those entitled to these remedies.

three elements: the internal review procedure of the Sanctions Committee, its delisting procedure and the review procedure of the Ombudsperson.[68] In section 6.1, the internal review procedure and the delisting procedure of the Sanctions Committee will be analyzed. Section 6.2 will discuss the Ombudsperson procedure. The entitlement to reparation will be discussed in section 6.3. In section 6.4, the overall conclusions will be presented as to whether, and to what extent, the Sanctions Committee provided for an effective remedy to those affected.

6.1. Internal Review Procedure by the Sanctions Committee

This section will discuss the review procedures of the Sanctions Committee in the context of the entitlement to a review as part of the entitlement to an effective remedy. The section will have a two-fold purpose. First, the Sanctions Committee refers to these procedures as forming part of the way in which the Committee provides an effective remedy to those affected. Accordingly, it is examined whether, and to what extent, these procedures fall within the ambit of the benchmarks identified for the entitlement to a review of the Draft Model. Second, this section will assess whether, and to what extent, these procedures contribute to providing inclusionary governance for those affected, and accordingly, how they should be regarded from the perspective of the Draft Model.

There are two related review procedures of the Sanctions Committee discussed here: the internal review procedure, which (re)examines on a triennial basis[69] the list of designated individuals and entities,[70] and the internal review procedure triggered by a request for delisting by a member state.[71] The Draft IGM defines the entitlement to a review as encompassing a review by an independent and impartial review body *for those affected* by decisions.[72] However, a two-tier procedure is also permitted; this implies that review by an independent and impartial review body is preceded by a review by *a higher authority* within the same decision-making body.

68 The other sanctions committees work with the Focal Point and not with an Ombudsperson procedure. The Focal Point procedure is a bilateral procedure in nature and offers a lower standard of procedural guarantees than the Ombudsperson procedure.

69 In UN SC Res. 2083 (2012), it was decided that the review will be annual, §48-51; see also §10(d)-(h) of the Sanctions Committee Guidelines (amended version of April 15, 2013).

70 See particularly UN SC Res. 2083 §39-42 (2012); §10 (a-k) of the Sanctions Committee Guidelines (2013).

71 See further the Sanctions Committee's website, and section 7 of the Sanctions Committee Guidelines (2013).

72 The Draft Model suggests that a right to a review can be either two-tier or one-tier. A two-tier procedure implies that authorities prescribe that individuals first need to request an administrative review within the same decision-making body, which is to be conducted by a higher authority than the authority that made the decision. Only if this administrative review is not to the satisfaction of those affected, may they request a review by an independent and impartial review body established by law. A one-tier procedure implies that individuals can directly request this independent and impartial review body to review the decision.

Although the procedures are discussed more at length below, both review procedures of the Sanctions Committee have an inter-state nature, with a key role given to the reviewing states, which are the designating states[73] and the states of residence or nationality. The two procedures can be summarized as follows:

Procedure	How initiated	Review body	Characterization review process	Role for individual affected
Triennial review	Every entry is reassessed every 3 years (min.)	Sanctions Committee	Inter-state procedure: the reviewing states decide whether to suggest delisting; If the reviewing states suggest delisting a five-day no-objection period is followed; States may also provide additional information to enhance the indicators (entries for identifications)	No, they are not informed of the procedure, there is no participation in the procedure, they are only informed if delisted
Delisting requested by a member State	Request submitted to the Sanctions Committee	Sanctions Committee	Inter-state procedure: if requested by designating state, a name is removed unless all Sanctions Committee members vote for listing or if the matter is submitted to UN SC; If the request comes from another state, consensus must be reached in the Sanctions Committee to delist	No, they are not informed of the procedure, there is no participation in the procedure, they are only informed if delisted

Table 17: Internal review procedures of the Sanctions Committee

Regardless of the procedural guarantees offered by a review body, the essence of the entitlement to a review as recognized in the Draft Model is that a review can be requested by those affected by the decision. However, as the table shows, neither review procedure can be triggered by a request from a listed individual or entity; in contrast, those designated play no role within these procedures and are only informed if the procedures result in delisting. Moreover, the review is not conducted by a different body or by a higher authority within the same decision-making body. There will be no independent review of the original listing. Thus, the conclusion is that the internal review procedure and the delisting procedure of the

73 It should be noted that the members of the Sanctions Committee were the (co)designating states in over eighty percent of the names reviewed. UN SC Res. 2083 (2012).

Sanctions Committee do not meet the definition of a review procedure within the framework of the Draft Model.

Although the internal review procedures do not qualify as a review procedure within the context of the Draft Model's right to a review, both review procedures have been characterized by the Sanctions Committee as contributing to the level of procedural guarantees offered for review procedures within the context of the designation decisions and are therefore worth discussing further.

Triennial review procedure

From 2008-2010, the first large (internal) review of individuals and entities designated by the Sanctions Committee was conducted.[74] In 2012, the UN Security Council decided that a triennial review of all entries will be conducted by the Sanctions Committee with the assistance of the Analytical Support and Sanctions Monitoring Team pursuant to resolutions 1526 (2004) and 2253 (2015) concerning ISIL (Da'esh), Al-Qaida and the Taliban and associated individuals and entities ('the Monitoring Team' or 'MT').[75] As the table indicates, the triennial review procedure is an inter-state procedure. Designated individuals are not informed when this review of their designation takes places, nor are they involved in the procedure. The actors involved are the Sanctions Committee, the reviewing states and the Monitoring Team; their respective roles in this procedure are discussed below.

The reviewing states and the Sanctions Committee members decide whether an individual is eligible for delisting. The reviewing states are the designating state(s) and the states of nationality or residence of the listed person or entity. The reviewing states can be part of the Sanctions Committee if they are at that moment a member of the UN Security Council. When an entry (in other words, individual or entity designated) is up for review, the Monitoring Team[76] sends the designating state(s) copies of the documents they had

74 Directed by UN Security Council Res. 1822 (2008), §25.

75 UN SC Res. 2083 (2012), §48-51; see similarly §10(d)-(h) of the Sanctions Committee Guidelines (amended version of September 5, 2018).

76 The Analytical Support and Sanctions Monitoring Team support the Sanctions Committee in the internal review procedure. The MT currently consists of 10 experts who have been chosen for their specialism; the UN Security Council Resolution 1526 (2004), establishing the Monitoring Team in 2004, listed that its members should:

> demonstrate one or more of the following areas of expertise related to activities of the Al-Qaida organization and/or the Taliban, including: counter-terrorism and related legislation; financing of terrorism and international financial transactions, including technical banking expertise; alternative remittance systems, charities, and use of couriers; border enforcement, including port security; arms embargoes and export controls; and drug trafficking.

UN SC Res. 1526 (2004) at 7. The team is based in New York. Its mandate is quite extensive and includes: assistance to the UN Sanctions Committee in the triennial review of those listed, identify those designations that lack sufficient identification indicators to ensure an effective implementation of the measures, review whoever has been reported as deceased, review whatever listing (individual or

submitted and the original listing proposals. The states of residence or nationality receive the narrative as published online, the evidence as made available upon the designation and any other information to which designating states consented to disclose.[77] Within a three-month timeframe, the reviewing states have to respond to the review request and send any additional information they would like to share with the Sanctions Committee. Thereafter, the Monitoring Team and the Sanctions Committee members may submit any additional information within a one-month timeframe. The Sanctions Committee will discuss the information collected and the case files of those individuals under review to determine whether an individual should be delisted.[78] Similarly, as in the designation procedure, only the designating state has access to the reasons and evidence underlying an original decision to designate, which makes a thorough review by other states difficult. A simple objection by a member state of the UN Sanctions Committee and/or by a reviewing state is sufficient for retaining the designation. The statistics demonstrate that the persons delisted were removed from the list due to a mistaken identity or because they had died;[79] no one has been delisted as the result of a review of substantive grounds for listing or a (re)assessment of the evidence used.[80]

Review procedure triggered by delisting requests made by member states

This review procedure is triggered by a delisting request by a UN member state to the Sanctions Committee.[81] The procedure is quite similar to that of the triennial review procedure of the Sanctions Committee with regard to the key role accorded to the designating state(s).

In general, the procedure differs when the designating state requests delisting from when any other state does so. If the designating state submits a name for delisting, the person designated will be delisted unless reverse consensus is reached within the Sanctions Committee to retain a listing.[82] If any other member (i.e., another Sanctions Committee member, the state of nationality or another UN member state) suggests delisting, the Sanctions Committee must

entity) has not been reviewed in the last three years, and assist the Ombudsperson in the information gathering phase. See, for example, Annex 1 to UN SC Res. 2368 (2017); further, for an example of the work of the MT, see Report UN Doc. S/2018/14 (January 26, 2018.

77 Sanctions Committee Guidelines (amended version of September 5, 2018), paragraph 10.

78 10(f)(iv) of the Sanctions Committee Guidelines (amended version of September 5, 2018).

79 For example, the first large review (2008-2010) examined 488 names. The review was directed by the UN Security Council Res. 1822 (2008), §25, to ensure that the list of designated individuals and entities was up-to-date and as accurate as possible, thus confirming that the listing was still appropriate. The Sanctions Committee decided that 45 of the 161 delisting proposals would be approved, thus resulting in a delisting, and 39 were to be rejected. It postponed a decision on 63 proposals, and 14 proposals were withdrawn by the proposing state. 217 narrative summaries of reasons for listing (including information on the identification of the individuals) were amended. The 45 designations that were approved were either delisted because they had died or because it concerned a wrong identity.

80 Idem, UN SC Res. 1822 (2008).

81 Sanctions Committee Guidelines (amended version of September 5, 2018), 7(a).

82 Idem, 7(q)-(s).

reach consensus to delist. The state suggesting delisting has to support its request with new evidence that challenges the evidence underlying the original listing.[83] In most cases, only the designating state has access to all evidence underlying the decision; other states have only access to the summary of reasons for the listing. Hence, regardless of whether states are willing to submit a delisting request of an individual or entity, its success rate is questionable due to the lack of access to the relevant information. As opposed to the triennial procedure, this review can only result in retention of a listing or in delisting; neither the accuracy of the information (and the indicators) nor the completeness of the evidence is reviewed in the procedure. There are no statistics available for the requests of member states to delist someone.[84]

In both review procedures, there is no independent review body in charge of the assessment. The same UN Sanctions Committee members decide whether a person should be delisted, with a vital role recognized for the designating state. The procedures do not meet the benchmarks of the Draft Model's entitlement to a review, and accordingly are not considered an effective remedy.

Nevertheless, the delisting procedure initiated by a member state can aid individuals in getting delisted. However, its success is completely dependent upon the willingness of member states to file a request and on the willingness of the Sanctions Committee members to cooperate. However, considering the inherent arbitrary features of the procedure, extra – although imperfect – review procedures may be a positive influence. The triennial review procedure may enhance the quality and accuracy of the identification indicators, and accordingly, ensure that the proper person is identified to be listed. When the accuracy of the listing is improved by including further indicators, there is a smaller chance that others will face the consequences of a listing due to a mistaken identity. Further, as noted in section 2, not only those designated face the consequences of the sanctions; direct family members may also be affected. When someone designated dies, the sanctions will remain in place and impact the lives of their relatives until the Sanctions Committee decides to delist someone upon receiving evidence of their death.

83 Sanctions Committee Guidelines (amended version of September 5, 2018), 7(d).

84 Although statistics are not available, the annual reports of the Sanctions Committee suggest that individuals may be delisted without a petition filed through the Ombudsperson procedure, which suggests that it is the result from one of the two internal review procedures. See, for example, the 2016 Annual Report:

> 34. Both the Committee and the Ombudsperson can receive delisting requests. During the reporting period, 20 individuals and one entity were listed. Six individuals were delisted, of whom three were delisted following the submission of a petition through the Office of the Ombudsperson. In addition, one entity was delisted. The Committee approved amendments to the existing entries of 23 individuals and one entity on its sanctions list.

ISIL (Da'esh) and Al-Qaida Sanctions Committee, Annual Report, UN SC Res. S/2016/115 (December 30, 2016).

In conclusion, the analysis shows that the benchmarks of the right to a review are sufficiently clear to determine that the internal review procedures cannot be qualified as a review procedure within the scope of the Draft IGM. Thus, on the basis of the existing elements of the Draft Model, the role of the internal review procedures within the accountability framework of the Sanctions Committee cannot sufficiently be captured. This shortcoming will be further discussed in the concluding sections of this chapter.

The next section will examine whether the Ombudsperson procedure complies with the benchmarks of the entitlement to a review as defined within the Draft Model.

6.2. The Entitlement to a Review Provided by the Ombudsperson Procedure

The Office of the Ombudsperson was established in 2009 to receive delisting requests submitted by "or on behalf of, an individual, group, undertaking, or entity" on the ISIL (Da'esh) and Al-Qaida Sanctions List.[85] This section will discuss whether, and to what extent, the Ombudsperson procedure provides a review procedure meeting the standards of the Draft Inclusionary Governance Model. The Draft Model includes the following benchmarks for the entitlement to a review:

- Those affected are duly informed about the review procedure.
- They are entitled to access the review body.
- There is a procedure in place to request a review of the decision .
- The review is conducted by an independent, impartial review body that has been established by law.
- The review procedure is fair.
- The decision is duly reasoned.

85 UN SC Res. 1904 (2009), Annex II. The Ombudsperson procedure was created to address the criticism raised against the Sanctions Committee's procedures and their lack of fairness and due process. See, e.g., UN SC Res. 2161 (2014) "welcoming the establishment of the office of the Ombudsmen…. Noting the Office of the Ombudsperson's significant contribution in providing additional fairness and transparency...." at p. 2. As stated by the Ombudsperson:

> It resulted from the fair process problems related to the use of targeted sanctions, particularly with respect to the Al-Qaida regime and was driven in no small part by litigation here in Europe

(Remarks by Prost, Ombudsperson, Security Council Al-Qaida Sanctions Committee, to the 49th meeting of the Committee of Legal Advisors on Public International Law of the Council of Europe (Strasbourg, March 20, 2015). See also the remarks made by various members of the UN Security Council at the 5474th meeting of the UNSC. During this meeting, the effectiveness of the sanctions regime was discussed. See, for example, the speech of the delegation of the United Kingdom under 10, of the delegation of Japan under 13, of the delegation of the Russian Federation under 17, and of the delegation of France under 18 at the UN SC 5474th meeting, (June 22, 2006), UN Doc. S/PV.5474; see also the Report of the informal working group on the general issues of sanctions, as annexed to UN SC Res. S/2006/997 (December 22, 2006), §3, 14-16.

The sections 6.2.2-6.2.8 will apply these benchmarks to the Ombudsperson procedure. First, however, an overview will be given of the review procedure (section 6.2.1).[86]

6.2.1. The Review Procedure

The review procedure has three phases: the information gathering phase, the dialogue phase and the decision-making phase, as summarized in this diagram developed by the Ombudsperson Office[87] below.

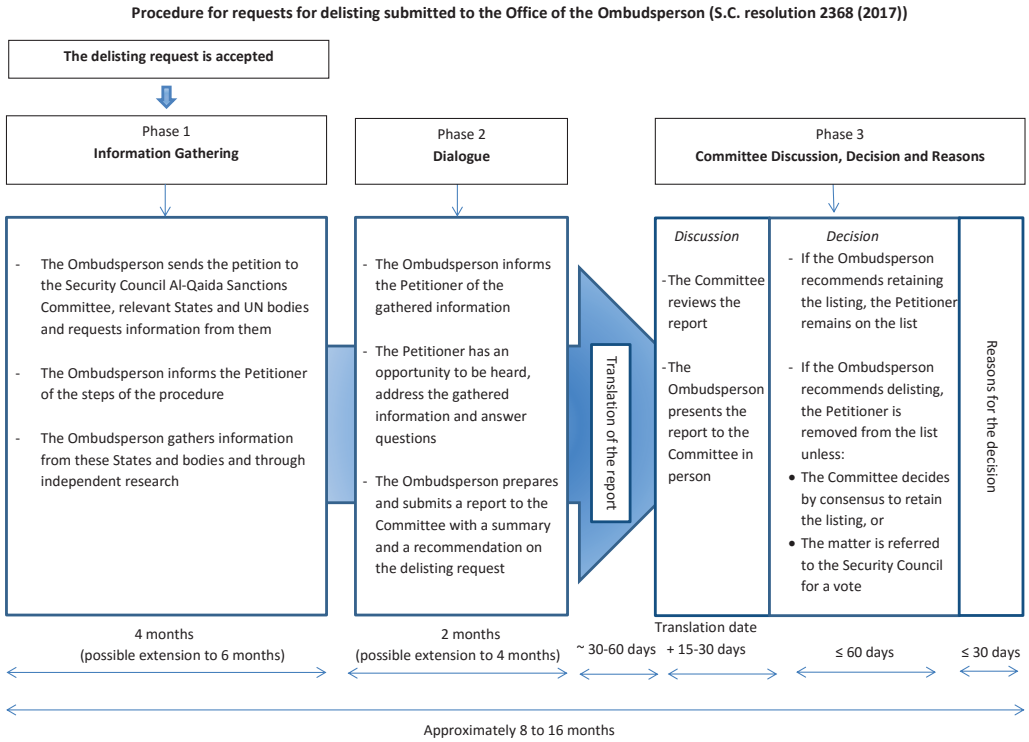

Figure 1: Flowchart of the Ombudsperson procedure

This section sets out the main characteristics of the procedure. The subsequent sections will examine whether, and to what extent, this review procedure meets the conditions of the entitlement to a review as defined within the Draft Model.

86 Section 6.2.1 corresponds with step 1 of the Draft Model as identified in chapter 6, section 4. In this chapter, step 1 of the Draft Model was split into two parts. The descriptive overview and context of the designation procedure is discussed in section 1 and the review procedure in section 6.2.1.

87 https://www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/procedure_chart.pdf

Information gathering phase

The procedure starts with the issuance of a receipt of the delisting request submitted by the petitioner. In this phase, information on the petitioner will be gathered from relevant states, the Sanctions Committee and other UN bodies, and further research will be conducted to obtain all reliable and relevant information on the case. The main body responsible for further investigation is the Monitoring Team.[88] It collects all relevant information, including news articles, court decisions and information from states or international organizations. Furthermore, the Monitoring Team conducts a "fact-based assessment of the information provided by the petitioner"[89] and may also ask the Ombudsperson to ask certain questions on their behalf to the petitioner in the dialogue phase. At the end of this phase, the Ombudsperson provides a written update of the information gathered to the Sanctions Committee. There is no contact with the petitioner.

Dialogue phase

In the dialogue phase, the Ombudsperson contacts the petitioner. The Ombudsperson poses questions that were put forward by the Monitoring Team or relevant states. Furthermore, the Ombudsperson may request further information on his/her own initiative.[90] Each petitioner is asked to sign a written statement to testify that they are not associated with ISIL (Da'esh) and Al-Qaida or that they will undertake actions in that direction in the future.[91] Thereafter, the Ombudsperson, if possible, meets with the petitioner and hears their point of view.[92] This is the first moment that the petitioner will be heard in the procedure. The petitioner has the right to submit written reasons to substantiate the delisting request. The replies of the petitioner to the questions asked are forwarded to the relevant states, the Monitoring Team and the Sanctions Committee.[93] At the end of the dialogue phase, the Ombudsperson submits a report to the Sanctions Committee with a recommendation on the delisting request, including a summary of the findings in support of this recommendation. In coming to a recommendation, the Ombudsperson should give *serious consideration* to the opinions of designating states and other states coming forward with relevant information.[94] The Sanctions Committee has no obligation to publish this report or to make it available to the petitioner.[95]

88 See below in the conclusions of section 6.2.8, where the role of the MT will be further explained.
89 UN SC Res. 2161 (2014) Annex II, §4(b).
90 §7 of Annex II to UN SC Res 2161 (2014).
91 UN SC Res. 2368 (2017), Annex II, 7(b)
92 Dialogue takes place via email exchanges, telephone discussions, and if possible, in face-to-face interviews. See, e.g., the Report of the Office of the Ombudsperson pursuant to Security Council Resolution 2083 (2012), 6th report, UN Doc. S/2013/452, §10.
93 §7(d) of Annex II to UN SC Res. 2161 (2014).
94 §7(h) of Annex II to UN SC Res. 2161 (2014).
95 Ombudsperson report to the UN SC, UN Doc. S/2012/590, §38-43; see similarly the UN Special Rapporteur on counter-terrorism and human rights (Scheinin) Report 2010, at 56, UN Special Rapporteur on counter-terrorism and human rights (Emmerson), report 2012, §50.

Committee deliberation and decision phase[96]
When the Ombudsperson recommends to retain an individual on the list, the petitioner remains designated unless a Sanctions Committee member submits a delisting request.[97] If the Ombudsperson recommends delisting, the petitioner is removed from the list unless the Sanctions Committee decides by reverse consensus to retain a listing or if the matter is referred to the UN Security Council for a vote.[98] After a decision has been reached regarding delisting or retaining the listing, the petitioner is informed by the Ombudsperson of the decision, including of the "publicly releasable factual information gathered by the Ombudsperson."[99]

In the subsequent sections, this review procedure is analyzed through the lens of the Draft Model. The following benchmarks will be addressed in the subsequent sections 6.2.2-6.2.7: the qualities of the review body, who is entitled to a review, the grounds for review, the standard of review, the fairness of the procedure, and the duty to provide reasons. Section 6.2.8 will provide the conclusions on whether, and to what extent, the review procedure of the Ombudsperson meets the benchmarks of the Draft Inclusionary Governance Model.

6.2.2. The Requirements for a Review Body

The Draft Model suggests that those affected are entitled to a review by an independent, impartial, competent review body established by law. This section will assess whether the Ombudsperson procedure meets these criteria. In general, authorities enjoy wide discretion in setting up the review body according to these qualities.

The competence requirement in the Draft IGM implies that a review authority should be sufficiently competent to hear a complaint in a given case and possess the mandate to provide an effective remedy. In the review procedure, the Ombudsperson adopts a recommendation to retain the listing or to delist the petitioner on the basis of the submission. This

96 Annex II, §19-9 UN SC Res. 2161 (2014).
97 In these cases, the consensus procedure will be followed: all Sanctions Committee members have to consent to delisting the individual. This is the procedure discussed in section 1. See further §14 of Annex II to UN SC Res. 2161 (2014).
98 It should be noted that, initially, this procedure was different. It was amended to ensure further independence of the Ombudsperson. Under the old procedure, whenever the Ombudsperson recommended delisting, consensus was still required from the members of the Sanctions Committee. In SC Res. 1989 (2011), the Ombudsperson procedure was adjusted, further strengthening the role of the Ombudsperson by adopting of a no-objection procedure instead of the consensus procedure when a recommendation for delisting is submitted. See also §15 of Annex II to UN SC Res. 2161 (2014); see further the Address by Prost, Ombudsperson, CADHI, Council of Europe, (March 20, 2015), at 3; for a critical review of the old procedure, see, e.g., UN Special Rapporteur on counter-terrorism and human rights (Scheinin) Report 2010, §56.
99 §17 (b) of Annex II to UN SC Res. 2161 (2014). It is questionable, however, to what extent any received evidence falls under this category. Furthermore, it does not include the information received from states.

recommendation can be overturned by the UN Sanctions Committee by reverse consensus,[100] or the issue can be referred to the UN Security Council.[101] The reverse consensus procedure implies that only by agreement of all Sanctions Committee members can a decision of the Ombudsperson be overturned. Thus, the ultimate authority to decide to retain a listing or to delist an individual or entity[102] stays with the UN Security Council and the Sanctions Committee. The Ombudsperson does not have the final say.[103] So far, however, the Sanctions Committee has not yet *overruled* a delisting recommendation by the Ombudsperson.

The UN Security Council stipulates that the Ombudsperson should be:

> an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields (…) and that the Ombudsperson shall perform these tasks in an independent and impartial manner and shall neither seek nor receive instructions from any government.[104]

Thus, the regulatory framework stipulated by the UN Security Council recognizes that the Ombudsperson should be impartial, of high integrity and that he/she carries out his/her functions in an independent and impartial manner. Till this day, there have been no complaints about the impartiality of the Ombudsperson in the exercise of their functions nor about their personal independence.

So far, there have been three Ombudspersons: Kimberly Prost (2010-2015), Catherine Marchi-Uhel (2015-2017), and Daniel Kipfer Fasciati (2018-2021). Ombudsperson Fasciati was appointed on May 24, 2018.[105]

However, the analysis of the institutional structure of the Ombudsperson shows that there are some structural flaws in the institutional setting that may affect the Ombudsperson's

100 UN SC Res 1989 (2011); UN SC Res 2161 (2014), §15.

101 It should be noted that if the issue is voted upon in the UN Security Council, the official voting procedure applies (article 27 of the UN Charter, Rule 40 of the Provisional Rules of Procedure): a decision is adopted by a majority vote of 9 out of 15 members, but the permanent five members of the UN Security Council have a veto right. See articles 25, 39 and 41 of the UN Charter.

102 As explained in the beginning of this Chapter, this chapter focuses primarily on the listing of individuals, but the majority of the analysis is equally applicable to any listed entities. Where there is a difference in the procedural guarantees offered to individuals and to entities, the distinction will be made, otherwise, the term (listing of) individuals should be read as to include the listing of entities by Sanctions Committees (i.e. those designated).

103 For instance, the website of the Ombudsperson indicates that the Ombudsperson is mandated by the UN SC to *assist* the Sanctions Committee in delisting requests. https://www.un.org/securitycouncil/ombudsperson/approach-and-standard.

104 UN SC Res. 1904 (2009), §20.

105 Letter dated May 24, 2018 from the Secretary-General addressed to the President of the Security Council (May 31, 2018) UN SC Doc. S/2018/514.

independence and impartiality. The Draft Model suggests that the independence is, for instance, ensured through an institutional setting that is indicative of the independence enjoyed by the review body. At a minimum, this implies that there has to be a form of separation of powers between the administrative and/or executive branch and the review branch. As the discussion above revealed, the Office of the Ombudsperson is dependent on the Sanctions Committee and/or the Security Council in the effective carrying out of its tasks. Aware of the flaws that may affect the impartiality and/or independence of the Ombudsperson, the Office of the Ombudsperson requested the Sanctions Committee to adopt informal arrangements in an attempt to strengthen the independence and impartiality of the Office. In 2017, the following arrangements were adopted:

- The performance evaluations of staff supporting the Office should reflect the input of the Ombudsperson;
- Involvement of the Ombudsperson in the recruitment process of staff for the Ombudsperson Office and the views of the Ombudsperson shall be taken into account in this process;
- The Ombudsperson is allowed full access to all material relevant for the works of the Office;
- The Ombudsperson gains full editorial control of the website of the Ombudsperson Office.[106]

Thus, although there are still some inherent weaknesses in the institutional design of the Office of the Ombudsperson, the independence and impartiality of the Ombudsperson has strengthened over the years. These improvements show that the position of the Ombudsperson is being strengthened; the Ombudsperson is increasingly independent and impartial from the UN Security Council and the Sanctions Committee. Furthermore, it shows that achieving accountability is a continuous dynamic process, where contestation from within the international institution of practices that have a negative effect on the overall level of accountability is a good step in the right direction to ensure more inclusion. Nevertheless, the fact that the Ombudsperson's recommendation is not automatically accepted may have a negative effect on the independence of the review mechanism and the effectiveness of the remedy.[107]

The following sections will further analyze the Ombudsperson review procedure through the lens of the Draft Inclusionary Governance Model.

106 Statement of Ombudsperson Marchi-Uhel made during the open briefing for member states (May 8, 2017), available at https://www.un.org/securitycouncil/ombudsperson/selected-presentations.

107 As also highlighted by the HRCee, when an executive or political body has the power to control or direct a (quasi) judicial body, it "is incompatible with the notion of an independent tribunal". See, e.g., UN Special Rapporteur Emmerson, Report 2012 §33, 32-35; HRCee, *General Comment 32*, §19.

6.2.3. Who is Entitled to Review and on What Grounds?

Based on the Draft Model, individuals are entitled to a review whenever his/her substantive rights are allegedly violated. Those affected by decisions and in certain circumstances their direct family members and/or next of kin[108] are entitled to a review. In regards to the ISIL (Da'esh) and Al-Qaida designations, three different categories of affected individuals can be identified based on the reports of the UN Sanctions Committee, the Ombudsperson and the Monitoring Team supporting the Sanctions Committee: those (incorrectly) designated, those who face the consequences of the listing due to a mistaken identity, and those who face the consequences as direct family of a person listed.

The review procedure of the Ombudsperson is only open to those designated by the Sanctions Committee. Family members of those designated (whether deceased, or (in)correctly listed) and those who face the consequences of the sanctions due to a mistaken identity cannot request a review by the Ombudsperson; their limited possibilities to a remedy will be discussed in section 6.3.

The Draft Model suggests that the grounds for review may be procedural and/or substantive in nature, depending on the alleged violation. For instance, the analysis of whether the ISIL (Da'esh) and Al-Qaida Sanctions Committee complied with its duties under the first two dimensions of the Draft Inclusionary Governance Model (informational entitlements and entitlement to meaningful participation) brought certain grounds for review to the forefront. *In casu*, however, those designated do not have the possibility to challenge the decision-making procedure, the legality of the storage or collection of their personal information or their lack of ability to participate in the procedure. When taking the table as discussed in the introduction of section 6 as a point of departure, it shows that the Ombudsperson procedure only provides a ground for review for one particular situation. Those designated can file a delisting request to challenge the designation as follows:

108 Whether direct family members and/or next of kin are entitled to a review depends on the reparation claimed and the substantive right that was allegedly violated.

Right to information	Right to participation in the decision-making	Decision to designate	Right to an effective remedy
Those whose personal information is stored and collected			Right to challenge legality of storage or collection (i.e. legality/ accuracy evidence)
Those whose personal information is published			Right to rectification and removal if not accurate (mistaken identity)
			Right to challenge the legality of information publication
	Those who were not able to participate in a meaningful manner in the decision-making procedure		Right to challenge lack of participation
		Those designated	Right to challenge the decision (request delisting)
		Those who face the consequences of designation (mistaken identity, direct family)	Right to challenge implementation of decision, compensation (mistaken identity)

Table 18: Summary of all the grounds for review, including that of the Ombudsperson procedure

The other possible grounds for review mentioned in the table do not fall within the ambit of the Ombudsperson procedure. Section 6.3 will address how the lack of inclusion of these other grounds for review in the scope of the Ombudsperson procedure influences the overall level of inclusionary governance realized.

6.2.4. Access to the Review Procedure

The previous sections addressed who may request a review and on what grounds and assessed the first benchmark of the entitlement to a review: the requirements for a review body. This section will discuss whether, and to what extent, access to the review procedure is realized, which constitutes the second benchmark. The Draft IGM suggests that those designated should be able to access the review procedure and request delisting. Concretely, this requires the Sanctions Committee and/or the Ombudsperson: (i) to duly inform those affected of the review procedure; (ii) to explain how to file a delisting request and its conditions; and (iii) when the circumstances so require, assist those affected in gaining access to the review body. Each of the elements will be discussed below.

Individuals designated by the Sanctions Committee have to be informed of the delisting procedure by the Ombudsperson or via the Permanent Mission of the country of residence or nationality.[109] As explained in section 1.3 of this chapter, not everyone designated is notified in practice. If they are not notified, those designated will realize that they are listed when they are confronted with the effects of the designation in their daily lives, for instance, when they cannot access their assets or cannot travel.

Individuals listed may submit a delisting request to the Ombudsperson. In the request, petitioners have to prove their identity and that they are currently designated by the ISIL (Da'esh) and Al-Qaida Sanctions Committee. Other persons may submit a delisting request on behalf of the listed individual if it is accompanied with authorization to act on behalf of the designated person.[110] Public authorities enjoy discretion in realizing the review procedure; authorities may impose admissibility criteria and/or format requirements as long as the procedure remains accessible for those affected and the conditions imposed do not impair the essence of the right. The delisting request to the Ombudsperson has as its only format requirement that it has to be submitted in writing. Petitioners may submit the request in any language; however, preference is given to one of the six official UN languages.[111] Petitioners who send a delisting request have to explain in their request the reasons/justifications for delisting and have to address the acts/activities[112] referred to in the narrative summary of the reasons for listing that indicate why an individual is considered to be associated with ISIL (Da'esh) and/or Al-Qaida. Where possible, petitioners have to support their arguments with evidence. Only new requests or old requests with additional information will be taken into consideration.[113] However, if a request for delisting was previously submitted to the Focal Point,[114] the request to the Ombudsperson will be seen as a first submission.

Whenever individuals affected by a decision are considered particularly vulnerable, the Draft Model suggests that authorities may be required to adopt positive measures to enable them to access the review procedure. Measures may include a legal aid scheme, legal assistance and/or the use of interpreters. The current UN sanctions regime includes

109 It should be noted that when individuals are not notified of the decision and only discover that they have been designated when they face the consequences of the listing, they will only then have to access the website of the Ombudsperson to find out how to file a delisting request. See section 1.1 for an explanation of how an individual is notified of the decision.

110 See further https://www.un.org/securitycouncil/ombudsperson/application.

111 idem.

112 See section 1.1 above, where the listing criteria were addressed.

113 UN SC Res. 2161 (2014), Annex II, §1.

114 The Focal Point procedure was the previous review procedure in place, which applied to those designated by the ISIL (Da'esh) and Al-Qaida Sanctions Committee, before the Ombudsperson procedure was created. In short, it is an inter-state procedure with no or a limited role for those affected and did not constitute an independent or impartial review of the designation. See further footnote 11 to this chapter.

the possibility for petitioners to be represented by a lawyer.[115] In practice, however, one of the problems is that lawyers representing the petitioners do so pro bono.[116] To date, there is no legal aid scheme available for petitioners to be represented in the Ombudsperson procedure.[117] It should be noted that petitioners are only able to pay the legal fees after a successful plea for a humanitarian exemption (basic need exemption).[118] This combined with the fact that most petitioners are poor,[119] the lack of access to legal aid may negatively affect who is able to access the Ombudsperson procedure, and moreover, it may affect the fairness of the procedure.[120]

The application of the Draft Model to the Ombudsperson procedure shows that – once those affected are informed and aware of the review procedure – there is a relatively low threshold to submit a delisting request. There are no hard deadlines for the submission of such a request, no fees to initiate procedures, and very few format requirements. Thus, those designated have access to the review procedure of the Ombudsperson. The lack of legal aid does not impair the right to access the review procedure as the Ombudsperson procedure does not impose any court or procedural fees to initiate a procedure. However, as will be assessed in section 6.2.6, the lack of legal aid may have a detrimental effect on the overall level of fairness of the procedure. In conclusion, the benchmark of the entitlement to access the review procedure as the building block of the entitlement to a review is formulated in such a way that it is sufficiently clear to be applied in practice.

6.2.5. Standard of Review

As discussed in section 3, considering the inherent arbitrary features of the procedure, the burden and standard of proof upheld by the review body are also of relevance in assessing the extent to which the review procedure can be considered fair, effective and not arbitrary.[121] The Ombudsperson categorizes the review of the designation as a de novo review. The review considers "whether today the continued listing of the individual or entity is justified based

115 UN SC Res. 2368, (2017) Annex II.

116 See, e.g., UN Special Rapporteur on counter-terrorism and human rights Emmerson, Report (2012), §52.

117 Sullivan lecture (2014). Sullivan explained in this lecture hat he was part of lobby group that discussed the possibility of legal aid scheme with the UN Security Council members. Most UN SC members – particularly permanent members – clearly stated to be opposed to such a scheme.

118 See above in section 2 where the criteria for a successful exemption were discussed.

119 It should be noted that a distinction can be made between those that are de facto poor as all their assets have been frozen as a result of the designation, and those individuals that were already poor before the imposition of the sanctions. It is the latter category that is disproportionally affected by a designation. See, e.g., Sullivan who explains that the majority of petitioners he has represented before the Ombudsperson did not have sufficient means.

120 Report of the UN Special Rapporteur on Counter-Terrorism and Human Rights, Emmerson, (2012), §52.

121 See above where it was argued that, considering the arbitrary features inherent to the decision-making procedure, authorities enjoy less discretion, and accordingly, issues such as rules of evidence, standard of proof and burden of proof become relevant.

on all the information now available."[122] The Ombudsperson assesses whether – at the time of the review – the petitioner can be considered to be "associated with" ISIL and Al-Qaida or related organizations.[123] The Ombudsperson does not assess the substantive or procedural legality of the original listing.[124] As will be shown in section 6.3, this fact strongly limits the possible reparation that may be offered, and accordingly, it has a detrimental effect on the effectiveness of the remedy in repairing the harm. The Ombudsperson developed its own standard to review whether the criteria are met – that is, whether there is "sufficient information to provide a reasonable and credible basis for listing".[125] According to the Ombudsperson, the sanctions are not intended to punish criminal conduct; they are preventive and intended to:

> hamper access to resources in order to impede, impair, isolate, and incapacitate the terrorist threat from Al Qaida and to encourage a change of conduct on the part of those who are members of this group or 'associated with' it.[126]

In other words, as explained by the Ombudsperson, the standard of review is of "adequate substance"[127] and takes into account the "direct and considerable impact"[128] of the sanctions on the lives of individuals and the indeterminate length of the sanctions in light of the preventive nature of the sanctions.[129] It should be noted that the Sanctions Committee has

122 Website of the Ombudsperson, https://www.un.org/securitycouncil/ombudsperson.

123 This includes the following activities:
"(a) Participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;
(b) Supplying, selling or transferring arms and related materiel to; or
(c) Recruiting for; or otherwise supporting acts or activities of Al-Qaida, ISIL, or any cell, affiliate, splinter group or derivative thereof."
UN SC Res. 2368 (2017).

124 For a discussion of this point, see also the address by the Ombudsperson Prost to the CADHI of the Council of Europe (March 20, 2015), at 3.

125 The Ombudsperson developed this standard after studying the various national standards for review procedures, and she (Ombudsperson Prost, and others it confirmed after her) explained why, taking the context of the UN Sanctions regime into account, a different approach was warranted than that applied at a national level. The approaches studied at the national level included: reasonable grounds for suspicion, reasonable grounds for belief, and proof on the balance of probabilities. See for a discussion thereof the report of UN Special Rapporteur Emmerson, report (2012), §56.

126 Idem; see also the discussion above in section 2 in the context of qualifying the sanctions as preventive in nature and how this qualification influenced the level of procedural guarantees to be provided thus the discussion what procedural guarantees should be in place.

127 See further https://www.un.org/securitycouncil/ombudsperson/approach-and-standard

128 Idem.

129 See further https://www.un.org/securitycouncil/ombudsperson/approach-and-standard:
The standard must also reflect the express intent of the Security Council with regard to the purpose of the sanctions namely "that the measures…are preventative in nature and are not reliant upon criminal standards set out under national law"… At the same time, it must be a measure of adequate substance to sustain the serious restrictions imposed on individuals and entities through the application of the sanctions.

not adopted a standard of proof for its decision-making procedure to consider the listing of individuals. Thus, this is the first moment in the decision-making and review procedure in which a standard of proof is used to assess whether someone should be listed.

The Draft Model provides no benchmark for the appropriateness of a standard of review. However, when there are inherent arbitrary features in the procedure, the standard of review should also be taken into account when assessing the level of inclusionary governance realized by the public authority. In other words, the standard of review is to be assessed in the context of the whole review procedure, and whether, and to what extent, the different benchmarks together enable a fair review procedure and an effective remedy to those designated. Therefore, the next section will analyze the different factors that (further) contribute to the fairness of the review procedure.

6.2.6. Fairness of the Procedure

The Draft Model suggests that a review procedure should be fair, and it acknowledges the wide discretion of public authorities to organize such a procedure. The fairness of the procedure is assessed by several benchmarks: whether those entitled to a review were duly informed, whether there was equality of arms between the parties, whether there was a timely procedure that is not prohibitively expensive and whether the authorities provided reasons for the decision reached. In general, the benchmarks are to be considered together and one has to assess whether, when considering the procedure as a whole, there was a fair review procedure. The assessment conducted in the previous sections informs the analysis of the fairness of the review procedure:

- Considering the arbitrary features, the standard and burden of proof, and the rules of evidence are to be taken into account when assessing the overall fairness of the review procedure.
- The analysis conducted in section 4 demonstrates that those designated do not have access to the evidence relied upon in the original listing.
- The analysis conducted in section 5 shows that there is no opportunity to participate in the decision-making procedure for those affected. Thus, the first time they will interact with the international institution is in the dialogue phase of the Ombudsperson review procedure.
- Section 6.2.4 revealed that although access to the review body is realized for those designated, there is no legal assistance or legal aid available to them.

The lack of access to information results in a situation in which designated individuals are required to submit a petition for delisting, to sustain his/her claim with evidence, without knowing the exact evidence on which the designation was based. Even though the UN Security Council *recommends* that designating states reveal their identities to the petitioners,

it does not *require* them to do so.[130] Ombudsperson Prost already recommended in 2012 that the Ombudsperson should be in the position to disclose the identity of the designating state(s) to the petitioner if fairness requires so; however, until now the UN Security Council has not supported this recommendation.[131] As a result, the petitioner often does not know who the designating state is. This makes it difficult to properly rebut the arguments for listing, considering that the petitioner has no access to the evidence either.[132] The set-up of the Ombudsperson procedure, and the standard of review of "whether there is sufficient information to provide reasonable and credible basis for listing" has the effect in practice that the burden of proof rests on the petitioner to demonstrate that he/she does not meet the listing criteria (anymore). Considering the lack of access to relevant information, those designated start the review procedure in a disadvantaged position.

In the review procedure, there is a similar lack of access to information. In the information gathering phase,[133] the Ombudsperson collects information (evidence) from the Sanctions Committee and its Monitoring Team, states, the petitioner, other individuals, and international organizations. At the end of this phase, a written update is given to the UN Sanctions Committee; however, the information gathered is not necessarily shared with the petitioner.[134]

In the dialogue phase,[135] the Ombudsperson hears the views of the petitioner. It should be noted that this phase is the only moment of interaction that a designated individual has with the public authorities involved. As the previous section showed, there is no possibility to participate in the designation procedure. One can therefore only present his/her views on the designation in the review procedure with the Ombudsperson. However, this opportunity is similarly constrained by a lack of access to information. The petitioner will not gain access to the full report, which contains the evidence, the analysis of the Ombudsperson, and the opinions of the relevant states in regards to the delisting request. This lack of access further negatively impacts the fairness of the procedure, particularly considering the current practice in the dialogue phase. The Ombudsperson engages in a practice that has been termed by lawyers as "speculative lawyering."[136] The Ombudsperson may refer to information collected to ask the petitioner's view on it, without providing a copy of the evidence to the petitioner

130 UN SC Res. 1989 (2011) §14.
131 Report of the Ombudsperson to the UN SC, UN Doc. S/2012/590, §45; see similarly UN Special Rapporteur on Counter-Terrorism and Human Rights, Emmerson, Report (2012), §44.
132 Report of UN Special Rapporteur on Counter-Terrorism and Human Rights (Emmerson)(2012), §44.
133 The information gathering phase is the first phase; it is followed by the dialogue phase and the decision phase. See for a brief overview section 6.2.1; UN SC Res. 2161 (2014) Annex II, §4.
134 UN SC Res. 2161 (2014) Annex II, §4.
135 See for a brief overview section 6.2.1.
136 Idem.

as the information is deemed classified.[137] For instance, a lawyer may be informed by the Ombudsperson that a petitioner was seen in country A with a person of interest based on intelligence information, without disclosing who that person is or giving the specifics of the information gathered.[138] The petitioner is then asked who they met in that country, and the petitioner would most likely list all persons they met within the timeframe. If a petitioner stays listed, all those persons that the petitioner has met may then be listed by the Sanctions Committee under the "associated with someone associated with Al-Qaida" criterion. Accordingly, it becomes very difficult for a petitioner to rebut these allegations if no precise information is provided by the Ombudsperson as to who the petitioner allegedly met and when and where this meeting allegedly took place.[139]

In regards to the lack of access to confidential information, the Ombudsperson also concludes that "the reality remains that the Ombudsperson process is not a transparent one."[140] Further, the lack of access to information has a similar negative impact on the equality of arms within the review procedure. To put it more strongly, there is no equality of arms within the review procedure as a petitioner not only lacks access to the evidence, he/she has no possibility to question the evidence used, cross-examine witnesses, or question the motives of designating states (if they know which state designated at all), or the motives of other states or actors who have an interest in the procedure and asked the Ombudsperson to ask questions on their behalf.

Those designated can be represented by legal counsel in this procedure; however, there is no access to legal assistance for those designated. Considering that most designated persons are poor, they depend completely on the willingness of lawyers to represent them pro bono.[141] However, the situation is even more complex considering that the Ombudsperson does not always have access to all the information either. As of 2011, the Ombudsperson has

137 Lecture by Gavin Sullivan on the practice of listing by the UN SC and the Ombudsperson procedure. He has been one of the lawyers representing individuals designated by the Sanctions Committee in the review procedure with the Ombudsperson. See further G. Sullivan and M. de Goede, 'Between Law and the Exception' (2013) *Leiden International Law Journal* 833-854.

138 Idem.

139 Lecture by Gavin Sullivan (Free University of Amsterdam, 2015); see further Sullivan and De Goede, 'Between Law and the Exception' (2013) 833-854.

140 Briefing by the Ombudsperson at the Security Council's Open Debate on "Working methods of the Security Council" ((s/2014/725): 'Enhancing Due Process in Sanctions Regimes' (October 23, 2014), available at https://www.un.org/securitycouncil/ombudsperson/selected-presentations at 3. See also the Ombudsperson Prost's address to the CADHI of the Council of Europe (2015), at 5.

141 Sullivan and De Goede, 'Between Law and the Exception' (2013) 833-854; lecture by Sullivan.

started to conclude bilateral arrangements[142] and agreements[143] with states in which the state consents to share confidential information with the Ombudsperson. This information will not be shared with the petitioner. So far, only 20 countries have arranged to share their intelligence information.[144] With regard to other states holding relevant (confidential) information, the Ombudsperson is dependent on ad hoc agreements. The UN Security Council has urged states to share confidential information with the Ombudsperson, but does not impose a duty to do so.[145] Thus, in practice, whenever a state decides not to disclose its confidential information to the Ombudsperson, the Ombudsperson has to come to his/her finding without this information.[146] It should be noted, however, that this concerns purely the access to the information by the Ombudsperson; each state may conclude their separate arrangements with other state(s) with whom they wish to share their information.[147] The situation may occur that all Sanctions Committee members have access to the information while the Ombudsperson and the petitioner do not have access to this information. As the Ombudsperson stated in an interview:

> A state can choose whatever information they want to give me. I know states are choosing not to give me certain pieces of information and that's fine. It might not even be classified information. …. Some states have just decided: 'Well we had this information way back then, but we don't want to bother [because] we are not opposed to delisting'. So, they just don't give me information and that's also perfectly fine. … Can I do a proper review? I can do a proper review of the decision I have to make … because it will be based solely on what they give me.[148]

142 The first arrangements were with Switzerland (February 25, 2011), Belgium (April 19, 2011), United Kingdom (October 7, 2011), Costa Rica (November 10, 2011) and New Zealand (November 23, 2011). Thereafter followed Germany, Australia, Portugal, Liechtenstein, France, the Netherlands, Finland, Luxembourg, Ireland and Denmark. See further https://www.un.org/securitycouncil/ombudsperson/assessment-information.

143 The website of the Office of the Ombudsperson distinguishes between arrangements and agreements. The first agreement of the Ombudsperson on the sharing of confidential information was with Austria (July 27, 2011). Recently the Ombudsperson concluded an agreement with Romania (June 15, 2017), both are available at https://www.un.org/securitycouncil/ombudsperson/classified_information.

144 See for criticism e.g., UN Special Rapporteur on counter-terrorism and human rights report 2010, at §56; the Ombudsperson also admitted that this is some yet not sufficient progress, see, for example, the address by the Ombudsperson Prost to the CADHI of the Council of Europe (Strasbourg March 20, 2015), at 5. Furthermore, it is not clear of the 20 arrangements what was actually arranged and thus what reservations to disclose information were agreed upon as they were not made public. Only the agreements with Austria and Romania are made public. See further https://www.un.org/securitycouncil/ombudsperson/classified_information.

145 UN SC Res. 1989 (2011), §25.

146 See for a critical discussion of this practice, e.g., UN Special Rapporteur Emmerson, 2012 report, §38-44.

147 Only certain states have agreements to share intelligence reports with each other. This often concerns like-minded states – for instance the co-sponsors of designation, etc.

148 Interview with the Ombudsperson conducted by Sullivan in New York in 2012. Parts of the transcript were published in G. Sullivan and M. de Goede, 'Between Law and the Exception' (2013) 833 at 844.

The Office of the Ombudsperson considers access to confidential information to be "essential for a proper consideration and understanding of the delisting petition" as noted on the Ombudsperson website.[149] The position of the Ombudsperson is that the procedure can still be fair if there is an "independent and objective review of the classified/confidential material even if it cannot be shared further by the Ombudsperson."[150] Ombudsperson Marchi-Uhel explained:

> Now I would like to explain the type of fairness issues which may arise from my access to and reliance on classified information to reach my recommendation. Other practitioners than me, generally judges dealing with challenges related to the imposition of sanctions, operate in legal frameworks allowing them to access classified material ex parte. Under certain conditions, they may even rely on it without disclosing it to the party concerned. Like them, I must strike a balance between the security interests at stake and the human rights of the persons or entities seeking their delisting from the ISIL and Al-Qaida Sanctions List. [151]

This Ombudsperson's rationale has some merits, including at the national level. Due to security reasons, denying access to classified information may be justified.[152] However, in these cases, when there is little or no access to information for those affected, the benchmarks of the Draft Model stipulate that a more critical review should be conducted of the overall level of fairness. The problem is that the Ombudsperson is dependent on the consent of a state holding this information to be able to access it. Thus, an independent review of the classified material cannot be guaranteed by the Ombudsperson as he/she is dependent on the willingness of states to share this information.

As to the independent review to be conducted by the Ombudsperson, the rules of evidence followed by him/her are indicative of how the Ombudsperson would evaluate the material. As stated, considering the inherent arbitrary features of the decision-making procedure, the rules of evidence should be taken into account when assessing the fairness of the review procedure. Within the review procedure, the Ombudsperson collects information from the Sanctions Committee and its Monitoring Team, states, the petitioner, and international organizations.[153] In analyzing this information, the Ombudsperson adopts a methodology

149 See further https://www.un.org/securitycouncil/ombudsperson/classified_information.
150 Idem.
151 Statement of Ombudsperson Marchi-Uhel, Open Briefing to Member States – 22 November 2016, available at https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/20161107_open_briefing_to_ms_22_november_2016_check_against_delivery.pdf.
152 See, e.g., chapter 3, section 2.4, where the scope of the right to personal information was discussed, and section 2.6, where the recognized limitations to that right were discussed.
153 As explained in section 6.2.1, the Monitoring Team is the actor responsible for the active collection and gathering of information in the information gathering phase of the Ombudsperson review procedure, and it will forward this information to the Ombudsperson.

that is appropriate to the international context and he/she does not "admit or exclude" information in his/her review, nor does he/she apply rules of evidence "of any one legal systems."[154] The Ombudsperson reasons that "the method is consistent with the preventive nature of the sanction measures and the applicable criteria and standards."[155] Although all evidence is assessed by the Ombudsperson, the information will be evaluated in regards to their relevance, specificity and credibility. It is then within the discretion of the Ombudsperson to decide on whether to rely on certain information.[156] For information that has allegedly been obtained by torture, the Ombudsperson should give such allegations "careful and serious consideration."[157] In practice, this means that the Ombudsperson will examine whether there is "sufficient information to provide a reasonable and credible basis for the allegation of torture"[158] whenever a petitioner voices allegations of information obtained by torture that was subsequently used as evidence for the designation. If the Ombudsperson concludes that the information was obtained through torture, it will be deemed "inherently unreliable."[159] The Ombudsperson is dependent however on the input of the states and other UN bodies to determine whether the information was indeed obtained through torture. Practice shows – as states are not required to submit exculpatory evidence – that some states may withhold information that would indicate that a confession was obtained by torture or maltreatment.[160]

Another element of a fair review procedure is that the procedure has to be conducted expeditiously, and thus within a reasonable timeframe. In general, the review procedure by the Ombudsperson complies with this benchmark. As stated by Ombudsperson Prost, "the [Sanctions] regime is subject to strict timelines and, as a result, the cases are dealt with efficiently and there is no backlog."[161] The procedure takes approximately 8 to 16 months; in each phase it is clearly defined what the time frame is and whether, and to what extent, this period may be extended. Only in the exceptional case, where there was a vacant

154 https://www.un.org/securitycouncil/ombudsperson/assessment-information.
155 https://www.un.org/securitycouncil/ombudsperson/assessment-information.
156 Idem.
157 See further https://www.un.org/securitycouncil/ombudsperson/assessment-information; the approach of the Ombudsperson differs in this regard with the listing procedure. In the decision-making procedure, no rules of evidence apply, and the usage of evidence obtained through torture is permitted.
158 See further https://www.un.org/securitycouncil/ombudsperson/assessment-information. See particularly note 5 in the document.
159 Idem; for a critical review of this approach, see the UN Special Rapporteur (Emmerson) Report 2012, §46-49.
160 It should be noted that there were several cases in the past where a designation was based on torture-induced evidence, in one case, such material seemed to have been the sole reason for listing. UN Special Rapporteur on Counter-Terrorism and Human Rights (Emmerson) Report 2012, §45. Sullivan & De Goede, (2013), at 849. HRCee, *General Comment 32*, §14.
161 Office of the Ombudsperson, 6th Report of the Office of the Ombudsperson pursuant to Security Council Resolution 2083 (2012), UN Doc. S/2013/452, § 28. In §32, the Ombudsperson concludes "the ombudsperson process operates in compliance with the fundamental principles of fairness"; see also 1st Report of the Office of the Ombudsperson pursuant to Security Council Resolution 1904 (2009), UN Doc S/2011/29 (January 24, 2011), §22-25.

Ombudsperson position (2017-2018), was it questioned whether the time frame was still reasonable. Within this transition period, the dialogue phase was not conducted for those petitions under consideration, and in one case, the period had already been extended twice, which was beyond the standard limit.[162] In general, the Draft Model is not intended to analyze whether inclusionary governance was provided in one particular instance, but rather the focus is on a systematic analysis of an international institution's accountability vis-à-vis those affected by the decisions. So, if there is a small period in which the reasonable timeframes cannot not be realized, it does not have to affect the overall findings on the level of inclusionary governance realized. Instead, it is flagged as a potential weakness in the procedure if there is no back-up solution for this type of problem. Hence, overall, the Ombudsperson Office provides a review procedure within a reasonable timeframe.

Although the Draft IGM does not prescribe a format or procedure for hearings, it does prescribe that the procedure has to be fair. Considering the inherent arbitrary features within the decision-making procedure, stricter scrutiny is exercised of the fairness of the review procedure. As the application of the Draft Model to the Ombudsperson procedure has revealed, although the individuals are heard during the review procedure in a timely manner, the petitioner finds himself/herself at a substantial disadvantaged position within the review procedure due to the lack of access to information, the fact that the burden of proof seems to rest with the petitioner, combined with speculative lawyering and the fact that the Ombudsperson often does not have access to all information. All these factors have a negative effect on the fairness of the procedure. When considering the low substantive and evidentiary threshold for designations, combined with the review procedure offered by the Ombudsperson, the review offered falls short of meeting the standards of fairness as imposed by the Draft Model.

The procedural framework for the Ombudsperson as stipulated by the UN Security Council and the ISIL (Da'esh) and Al-Qaida Sanctions Committee has structural flaws that have detrimental effect on the fairness of the procedure. Moreover, the fact that states often do not share (intelligence) information with the Ombudsperson and never share this information with the petitioner has a further negative effect on the level of fairness of the procedure. Within this institutional setting, the Office of the Ombudsperson pushes for further procedural guarantees within the review procedure. The role of the Ombudsperson in realizing a review procedure that is "as fair as possible" within the given legal framework and context should be acknowledged when evaluating the inclusionary governance realized for those affected. The development of a standard of proof, rules of evidence, and, when possible, conducting an independent review of the classified material are all factors that

162 See the letter of the Legal Officer supporting the Office of the Ombudsperson (February 14, 2018) UN Doc. S/2018/120.

contribute positively to the fairness of the review procedure and were all developed on the initiative of the Ombudsperson. Although there is improvement in the level of fairness of the review procedure of the Ombudsperson, the procedure therefore currently falls short of meeting the standards of fairness due to the structural flaws in the procedure.

Hence, the application of the benchmark of a fair review procedure as the building block of the entitlement to review of the Draft IGM to the Ombudsperson review procedure reveals that the benchmark is sufficiently clearly defined to identify whether and to what extent the Ombudsperson procedure constitutes a fair review procedure for the petitioner.

6.2.7. Duty to Provide Reasons

The duty to provide reasons refers to the obligations of authorities to provide reasons for the decision reached at the end of the review procedure. UN SC Res. 2083 (2012) stipulates the obligation of the ISIL (Da'esh) and Al-Qaida Sanctions Committee to provide reasons for the decisions on delisting requests. It should be noted that the obligation to provide reasons rests with the UN Sanctions Committee and not with the Ombudsperson. Moreover, if a delisting decision is referred to the UN Security Council, the Security Council does not have an obligation to provide reasons.[163] The practice until recently was that the written reasons for the decisions were brief, often excluding factual details or reference to the evidence supporting the decision. Further, as noted by Ombudsperson Prost in 2013, there were significant delays in the decisions on delisting requests and in the provision of reasons.[164] Ombudsperson Prost advocated for the need to inform those affected of the reasons underlying the decision: the reasons should "be reflective of the analysis and conclusions of the independent mechanism."[165] The reasons letter is based on a summary of the Ombudsperson's analysis contained in the comprehensive report, which must be approved by consensus by the Sanctions Committee.[166]

163 The latter may occur when there is no consensus in retaining a listing and a Sanctions Committee member requests the issue to be brought before the UN Security Council.

164 §36-41, 6th report, UN SC Res. S/2013/452. The Ombudsperson noted with concern that "while delivering reasons, even at a later stage, remains beneficial for the fairness of the process, such delays obviously reduce the effectiveness of such a practice in demonstrating the transparency and reasonableness of the process," §38.

165 §40, 6th report, the Ombudsperson. UN SC Res. S/2013/452; See similarly the briefing by the Ombudsperson at the Security Council's Open Debate on "Working methods of the Security Council" (s/2014/725): 'Enhancing Due Process in Sanctions Regimes' (2014), at 3. See also the address by the Ombudsperson Prost to the CADHI of the Council of Europe (2015), at 5.

166 See, for instance, the statement made by former Ombudsperson Marchi-Uhel during the open briefing for member states on May 8, 2017. Further, see UN SC Res. 2368 (2017), Annex II (Ombudsperson procedure):

"13. Upon the request of a designating State, State of nationality, residence, or incorporation, and with the approval of the Committee, the Ombudsperson may provide a copy of the Comprehensive Report, with any redactions deemed necessary by the Committee, to such States, along with a notification to such States confirming that:

(a) All decisions to release information from the Ombudsperson's Comprehensive Reports, including the scope of information, are made by the Committee at its discretion and on a case-by-case basis;

In late 2016, Ombudsperson Marchi-Uhel informed the Security Council of a set-back in the content of the reasons letter to be provided to the petitioner. The Sanctions Committee got increasingly involved in the drafting of the summary reasons; as a result, the Sanctions Committee would suggest that the Ombudsperson make major redactions in order to get the consent of all Committee members. At a minimum, according to Ombudsperson Marchi-Uhel, this practice was very time-consuming; at worst, it would lead to omitting responses of the Ombudsperson to key arguments of the petitioner.[167] This practice encroached on the independence of the Office of the Ombudsperson.[168] In UN Security Council Res. 2368 (2017), the procedure was adapted. The summary must now accurately describe the principal reasons for the recommendation of the Ombudsperson as reflected in the analysis of the Ombudsperson.[169] Thus, as required by the Draft Model, the petitioner should receive the reasons underlying the adopted decision.

The reasons should be provided to the petitioner when the petitioner is informed of the decision on the delisting request. The Ombudsperson notifies the petitioner immediately if the Sanctions Committee follows the recommendation of the Ombudsperson, regardless of whether the decision is to delist or to retain the listing.[170] If the Sanctions Committee does not follow the recommendation, the petitioner is only informed if the decision was adopted by the Sanctions Committee; if the decision is adopted by the UN Security Council there is no obligation to provide the reasons underlying the decision to the designated individual.

In conclusion, the practice of the Ombudsperson/Sanctions Committee is in accordance with the requirements of the Draft Model. Although it did not yet happen that a case is referred to the UN Security Council or that the Sanctions Committee overrules the Ombudsperson's recommendation, there is however no obligation to provide reasons for the decision reached in these instances.

(b) The Comprehensive Report reflects the basis for the Ombudsperson's recommendation and is not attributable to any individual Committee member; and

(c) The Comprehensive Report, and any information contained therein, should be treated as strictly confidential and not shared with the petitioner or any other Member State without the approval of the Committee."

167 See the statement made by former Ombudsperson Marchi-Uhel during the open briefing for member states on May 8, 2017, report S/2017/685, §30.

168 Idem.

169 UN SC Res. 2368, Annex II, §16.

170 See, e.g., report S/2017/685, §30. In this report Ombudsperson Marchi-Uhel speaks of this positive change. Before, the Ombudsperson had to wait with notifying the petitioner in case of a decision to retain the listing. This practice already existed informally for decisions to delist. UN SC Resolution 2368 (2017) formalized the notification practice that the Ombudsperson can notify the petitioner immediately if the Sanctions Committee agrees with the Ombudsperson's recommendation irrespective of it being a decision to retain the listing or to delist.

6.2.8. Conclusion

Section 6.2 analyzed the content and scope of the review procedure by the Ombudsperson through the lens of the Draft Model. The application of the Draft Inclusionary Governance Model to the review procedure of the Ombudsperson shows that there are some inherent weaknesses in the procedure.

First, the Ombudsperson procedure is not available for all those affected by the designations. Those affected by a designation due to a mistaken identity and the direct family members and next of kin of those designated cannot request a review of the decision, or for reparation via the Ombudsperson procedure. The next section (6.3) will address whether and to what extent reparation is available to these affected individuals to repair their harm, and accordingly, whether there is an effective legal remedy available to them. In short, other affected individuals can, at most, receive a form of reparation via the Sanctions Committee, whether it is through the Focal Point or via the internal review procedures of the Sanctions Committee.

Second, the lack of access to information has a detrimental effect on the overall fairness of the review procedure. Those designated receive only a summary of reasons when they are notified of the designation; they are not aware of the evidence against them, and they often do not know who the designating state(s) may be. Therefore, the petitioners start the review procedure in a disadvantaged position, and the lack of access to (confidential) information is not remedied in the procedure. The review procedure is similarly characterized by a lack of access to information deemed confidential, which puts the petitioner in a disadvantaged position. There is no equality of arms between the Ombudsperson and the petitioner, as the petitioner cannot question or cross-examine witnesses, and has only limited access to evidence. Furthermore, the petitioner's interaction with the Ombudsperson can be characterized as the petitioner responding to questions of the Ombudsperson (and others), rather than a more adversarial procedure. The lack of access to information can only partially be remedied by the Ombudsperson. An independent review of the confidential information by the Ombudsperson, may guarantee that the standard of proof is upheld and that the decision is not made on arbitrary grounds; however, it does not provide the petitioner with access to the information, nor is an independent review guaranteed. After all, the Ombudsperson is dependent on the willingness of states to share confidential information with him/her.

Third, the fact that the Ombudsperson does not review the original listing negatively impacts the adequacy and effectiveness of the legal remedy as will be further discussed in 6.3. More specifically, it prevents the Ombudsperson from reviewing both the procedure and the standard of proof used in the designation procedure.

Overall, the application of the Draft Model to the Ombudsperson review procedure shows that those designated have access to a review procedure that, when successful, results in delisting. As noted by Ombudsperson Kipfer Fasciati, almost 85 percent of the petitions filed resulted in delisting.[171] Although there are certain structural and institutional weaknesses in the procedure, it is important to note that accountability is a continuous and dynamic process, and the review procedure has improved since its establishment in 2009. This is particularly visible in the stronger mandate of the Ombudsperson and the expanding procedural guarantees offered. The application of the Draft Model mapped this interaction between the Sanctions Committee and the Ombudsperson, which can be seen as a contestation by the Ombudsperson of the lack of safeguards in the procedure and a demand by the Ombudsperson for further safeguards. The contextual assessment showed the strengths and weaknesses in the current institutional setting of the review procedure, and the attempts of the Ombudsperson to realize an "as fair as possible"[172] review procedure for the petitioners. The major factor that has a negative effect on the overall review procedure is the lack of access to confidential information, which is something that the Ombudsperson addresses by concluding bilateral agreements and arrangements with states to share the information with the Office of the Ombudsperson. Combined with the fact that the burden of proof seems to rest with the petitioner, it places the petitioner in a difficult situation to have an adequate and effective remedy.

The application of the Draft Model to the review procedure further shows that a variety of actors are involved in the review procedure besides the Sanctions Committee and the Ombudsperson. Designating states, reviewing states, other states, the Monitoring Team, the Focal Point and the UN Security Council all play a role in the procedure as well. The yardstick was able to capture the roles of most of these actors. However, the Draft Model does not encompass benchmarks for internal review procedures; the building block of the entitlement to review and its benchmarks focus on the (role of the) review body, and it therefore does not address potential review roles by other actors. Accordingly, the peculiar role of the Monitoring Team in the review procedure (and in the decision-making procedure) was not fully captured by the Draft Model.

171 Ombudsperson Kipfer Fasciati, Open briefing to Member States (August 2, 2018), available at https://www.un.org/securitycouncil/ombudsperson/selected-presentations.

172 This argument is based on an analysis of the various public speeches and official reports of the Ombudsperson to the Sanctions Committee and the UN Security Council. See, e.g., https://www.un.org/securitycouncil/ombudsperson/classified_information, and the statement of Ombudsperson Marchi-Uhel, Open Briefing to Member States – November 22, 2016, available at https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/20161107_open_briefing_to_ms_22_november_2016_check_against_delivery.pdf.

The Monitoring Team is composed of a small group of experts, each with a relevant expertise related to activities of the Al-Qaida and/or ISIL organization.[173] The Monitoring Team plays a limited explicit role within the designation procedure;[174] however, its role within the review procedures and as a support for the day-to-day functioning of the Sanctions Committee is larger. The MT has an extensive supportive mandate to, amongst other things,

> … assist the Ombudsperson in carrying out his or her mandate… to assist the Committees in the consideration of listing proposals, to assist the Sanctions Committee in regularly reviewing names on the Sanctions Lists; to gather information on behalf of the Committee … and to provide cases of non-compliance and recommendations to the Committee on actions to respond to such cases of non-compliance for its review; to consult with the Committees, the Government of Afghanistan, or any relevant Member States, as appropriate, when identifying individuals or entities that could be added to, or removed from, the Lists; to consult, in confidence, with Member States' intelligence and security services, including through regional forums; to make recommendations to assist Member States to implement the measures.[175]

Moreover, the Monitoring Team has extensive investigate tasks to gather and collect information on a wide variety of topics related to the designation procedures. The recommendations and reports of the MT to the Sanctions Committee are publicly accessible, and provide a glimpse into the debate within the UN sanctions framework in regards to the level of inclusion to be realized for those affected. For example, in regards to the first annual review conducted, the Monitoring Team notes:

> [a]lthough the measures are preventive many states regard their effect as punitive and therefore requiring basic legal protection for the listed parties. The sanctions measures also have no expiry date, which some states see as compounding their lack of fairness.[176]

The Monitoring Team facilitates the internal review procedure, and the MT can also, on its own initiative, provide further information and suggest amendments to the entries on the

173 See, e.g., the resolution that established the Monitoring Team, UN SC Res. 1526 (2004), §7: the following potential expertise was listed, including:
> counter-terrorism and related legislation; financing of terrorism and international financial transactions, including technical banking expertise; alternative remittance systems, charities, and use of couriers; border enforcement, including port security; arms embargoes and export controls; and drug trafficking.

174 See sections 1 and 1.2 above.

175 UN SC Res. 2368 (2017), Annex 1.

176 Report of the Analytical Support and Sanctions Monitoring Team on the outcome of the review described in paragraph 25 of Resolution 1822 (2008), submitted pursuant to paragraph 30 of resolution 1904 (2009), UN Doc. S/2010/497, §11.

sanctions list. Their role within the Ombudsperson review procedure is similar; it is primarily responsible for the collection and sharing of information. Thus, although the benchmarks of the Draft Model were not fully able to capture the role of the Monitoring Team, the functioning of this actor should be considered as part of the accountability framework of the Sanctions Committee vis-à-vis those affected by their decisions.

The next section will assess whether the Ombudsperson, under the circumstances, can provide for reparation that is effective in addressing the harm caused. Moreover, it will discuss whether those affected who cannot initiate a procedure with the Ombudsperson have another avenue available to them to request reparation effective in remedying their harm.

6.3. The Entitlement to Reparation

The entitlement to reparation is the second component of the entitlement to an effective remedy of the Draft Inclusionary Governance Model. The Draft Model suggests that authorities have to provide reparation that is effective and adequate in repairing harm; how this is achieved is left to the discretion of authorities. However, the effectiveness of a remedy does not have to be determined by a single remedy. The criteria can similarly be met by a combination of remedies. Moreover, the effectiveness of the remedy is assessed both based on the entitlement to a review that is available to those affected and on whether the competent review body can provide reparation that can remedy the harm suffered by those affected. Thus, the analysis conducted in this section builds on the conclusions drawn in the previous sections and will cross-reference where necessary.

The Draft Model recognizes an entitlement to reparation for those affected by decisions and, in some circumstances, for their direct family members and/or next of kin, depending on the reparation claimed and the alleged violation. In regards to the ISIL (Da'esh) and Al-Qaida Sanctions Committee's designations, three different groups of affected individuals may be identified based on the reports of the Sanctions Committee, the Ombudsperson and the Monitoring Team supporting the Sanctions Committee.

The table below provides an overview of those affected and what is to be expected of reparation. The three groups are summed up in the first column of the table. The second column represents the harm identified and what may represent an adequate and effective reparation to remedy the harm caused. The third column describes which (review) authority is competent in determining whether, and to what extent, reparation is provided in a given case. The last column describes the actual reparation provided. Each category will be further discussed and illustrated below.

Who	How to remedy the harm done	The competent review authority	What reparation provided
Those (incorrectly) designated	Get delisted, establish wrongdoing, perhaps compensation	Ombudsperson and Sanctions Committee	Delisting, no establishment of any wrongdoing as no review of original listing, no compensation
Those who face the consequences of the listing due to mistaken identity	Establish wrongdoing, remove the connection in the implementation orders, compensation	Sanctions Committee, Focal Point	Delisting or improved identification indicators. No compensation. All state parties are informed and required to implement the enhanced indicators
Those who face the consequences as direct family of a (deceased) listed person	Get the person delisted, undo sanctions	Sanctions Committee, or Ombudsperson (if a legal beneficiary initiated the procedure)	Delisting, undo sanctions, no compensation.

Table 19: Overview of reparation provided in relation to designation procedure

Regarding the first category, those designated can file a delisting request with the Ombudsperson and/or their designation may be reviewed by the Sanctions Committee as part of an internal review procedure. The determinative factor for the type of reparation offered is that the designations are qualified as a preventive measure. This qualification negatively influences the possible reparation. The Ombudsperson's official position is that the review is a de novo examination of the listing on the *current* conditions, and accordingly, the original listing is not assessed. Consequently, the outcome can be the retention of a listing or a delisting, but there is no acknowledgement of any wrongdoing as there is no review of the substantive and procedural legality of the original listing. Automatically, when there is no decision as to whether the original listing was valid, there is no avenue for designated individuals to claim damages. It should be noted that there can be quite some time between the decision to delist and the implementation of that decision by the member states. Although the remedy should be effective in regaining access to assets, regaining the ability to travel and removal from the list when a petition results in delisting is, in practice, often more complicated. In some cases, delisting by the Ombudsperson has resulted in listing of the same individual by another Sanctions Committee,[177] which implies that this individual needs to go through the Focal

177 Example mentioned by the Ombudsperson Prost, Briefing by the Ombudsperson at the Security Council's Open Debate on "Working methods of the Security Council" (s/2014/725): 'Enhancing Due Process in Sanctions Regimes' (23 October 2014), at 1.

Point[178] procedure, which does not offer an independent review mechanism. Petitioners can submit a request for delisting directly to the Focal Point or through their state of residence or citizenship. However, the Focal Point is merely an administrative secretariat registering the request. The actual review is conducted by the reviewing states; that is, the designated state(s) (state who listed the individual) and the state of citizenship and residence. There are still major procedural flaws in the Focal Point procedure as it is an inter-state procedure in which the individual has no right to be heard, no independent review of the listing will take place, and no access to information or to the reasons for retaining the listing is provided.[179]

Furthermore, even if a person is successfully delisted, the extent to which one can access their assets and travel without restrictions is questionable. The designation decisions by the UN Sanctions Committee require a member state to implement the sanctions[180] and "to circulate it widely, such as to banks and other financial institutions, border points, airports, seaports, consulates, customs agents, intelligence agencies, alternative remittance systems and charities."[181] As a result, in order to implement the measures, states often develop national sanctions lists; for instance, the EU maintains its own, similar sanctions list.[182] Moreover, as stated on the EU website:

> The application of financial sanctions and more precisely the freezing of assets constitutes an obligation for both the public and private sector. In this regard, a particular responsibility falls on credit and financial institutions, since they are involved in the bulk of financial transfers.[183]

178 The Focal Point for delisting was established in 2006, and part of its mandate is: "to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions" UN SC Res. 1730 (2006), preamble, (December 19, 2006); UN SC Res. 1730 (2006) is applicable to the sanctions committees pursuant to UN SC Res. 1718 (2006) concerning the Democratic People's Republic Korea; UN SC Res 1636 (2005) concerning Lebanon; UN SC Res. 1591 (2005) concerning Sudan; UN SC Res. 1572 (2004) concerning Cote D'Ivoire; UN SC Res. 1533 (2004) concerning DRC; UN SC Res. 1521 (2005) concerning Liberia; UN SC Res. 1518 (2003) concerning Iraq/Kuwait; UN SC Res. 1267 (1999) Al-Qaida; UN SC Res. 1132 (1997); UN SC Res. 918 (1994), and UN SC Res. 751 (1992) concerning Somalia.

179 For instance, the representative of Qatar concluded in a UN SC meeting discussing the establishment of the Focal Point that:

> [t]he Council established a focal point that lacks independence, neutrality, standards or controls for delisting. Therefore, this point of contact does not at all constitute an effective means of fairness.

(Record of the text of speeches delivered at the 5599th meeting of the UN SC discussing UN SC Res. 1730 (2006), UN Doc S/PV.5599 (December 19, 2006) p. 3-4.

180 Member States are obliged to implement those measures adopted by the UN Security Council under Chapter VII of the UN Charter, article 25 UN Charter, article 103 UN Charter. The designations are measures adopted under Chapter VII of the UN Charter.

181 See, e.g., Sanctions Committee guidelines, 5(c).

182 See, e.g., http://data.europa.eu/euodp/data/dataset/consolidated-list-of-persons-groups-and-entities-subject-to-eu-financial-sanctions.

183 Idem.

Accordingly, the private sector often maintains its own sanctions lists. When an individual is delisted by the UN Sanctions Committee, the ISIL (Da'esh) and Al-Qaida Sanctions Committee sends out a press release that explains that an individual is removed from the list, and that the sanctions no longer apply to the name set out below.[184] Member states are informed of the delisting, and although the sanctions should be removed, often it is required that an individual has to petition delisting from each separate list. The private or national/regional lists can use the same criteria but may also have wider criteria for designations. For example, the US sanctions list requires one to be present in a US territory in order to file for a delisting request. Accordingly, these circumstances complicate the extent to which individuals have access to the actual reparation (that is, the ability to move freely and use the assets previously frozen).

The situation is even more complicated for the other two categories of affected people, who are not the addressee of the decision but are similarly impacted by it. The second category concerns those affected by the designation due to a mistaken identity. These are persons whose assets may be frozen or whose right to travel may be denied by authorities as they share some of the identification entries used as indicators to identify the people targeted by the sanction. UN member states receive a list of those designated by the Sanctions Committee and the relevant indicators and are required to implement the sanctions by – based on these indicators – assessing whether these persons have assets within their countries, and if so, freeze the assets, and monitor whether they may want to enter or leave their country, and if so, deny the travel. These persons are therefore incorrectly identified, and they are similarly affected by the sanctions, as well as their families and direct relatives. The chance of a mistaken identity can be diminished if a certain number of entries would be required. This enhances the accuracy of the identification and thus the accuracy of the implementation measures. The persons who have been targeted due to a mistaken identity cannot file a request to the UN Sanctions Committee. They are dependent on the internal review procedure of the UN Sanctions Committee. Through the internal review procedure, the Monitoring Team and the Sanctions Committee have to gain more information on those designated and should thereby be able to fill in more entries, which as a result would ensure higher accuracy of

184 For example, a press release (SC/13787, https://www.un.org/press/en/2019/sc13787.doc.htm) of April 22, 2019 reads as follows:

> On 22 April 2019, the Security Council Committee pursuant to resolutions 267 (1999), 1989 (2011) and 2253 (2015) concerning ISIL (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities removed the entry below from its ISIL (Da'esh) and Al-Qaida Sanctions List. The entry was deleted after the Committee concluded its consideration of the delisting request for this name submitted by the designating State following the 2017 Annual Review conducted in accordance with paragraphs 80 and 81 of resolution 2253 (2015).
>
> Therefore, the assets freeze, travel ban and arms embargo set out in paragraph 1 of Security Council resolution 2368 (2017), and adopted under Chapter VII of the Charter of the United Nations, no longer apply to the name set out below.

the designations. At most, those affected due to a mistaken identity will no longer suffer the consequences of the listing. If the Sanctions Committee concludes that there was a mistaken identity, member states are informed thereof and should accordingly adapt their implementation measures (i.e., inform banks, airports etc.) of the correct indicators and remove the erroneous ones. However, there is no establishment of any wrongdoing, nor is there a possibility to request damages.

The third category concerns the direct relatives of those designated who similarly face the consequences of any sanctions. Here a distinction needs to be made between those who are family members of someone correctly listed and those who are family members of someone incorrectly listed. Regarding the former, it is only possible to not face the consequences of the sanction if the relative of the person designated is able to show or testify that he/she is not (or no longer) associated with the listed person. However, there is no clear procedure available, nor is it clear to which review authority they have to direct their request. Regarding the latter, if someone is incorrectly listed and their relatives face the consequence as well, those affected have as their only option that the designated person petitions for delisting with the Ombudsperson.[185] If successful, the person will be delisted, and the relatives should no longer face the consequences of the listing. However, there is no possibility to request damages or acknowledgement of any wrongdoing.

The relatives of a deceased person can inform, with the proper documentation, the Permanent Mission of the country of residence or nationality of the death of the person designated. The Permanent Mission or the country of residence or nationality should then inform the Sanctions Committee and/or Monitoring Team to remove that person from the list. It should be noted that this procedure is cumbersome, and its success is dependent on the ability and willingness of a state to speak on behalf of the family. The available remedy is the delisting and the fact that the relatives will no longer suffer the consequences of the listing; there is no possibility to request damages.

In conclusion, the reparation is not effective in repairing the harm suffered by those designated. At most, a request to remedy any harm suffered results in a delisting; however, there is no declaration of wrongdoing and no possibility of being awarded any damages.

6.4. Conclusions

The entitlement to an effective remedy has several benchmarks; overall, the Draft Model suggests that the remedy should be accessible to those affected, adequate in addressing the harm and effective in remedying the harm suffered. The application of the yardstick to

185 See further the website of the Office of the Ombudsperson https://www.un.org/securitycouncil/ombudsperson/application.

the review procedures of the Sanctions Committee served two purposes. The first purpose was to assess whether, and to what extent, those affected by the designations are entitled to an effective remedy. The second purpose was to assess whether, and to what extent, the benchmarks of the entitlement to an effective remedy of the Draft Model are sufficiently defined to capture the context in which the review procedures are provided and to determine whether, and to what extent, inclusionary governance is provided to those affected.

Regarding the former, the analysis showed that although the Ombudsperson procedure may be accessible to those designated, there are some structural flaws in regard to the fairness of the review procedure and the effectiveness of the reparation offered. Several of the flaws derive from the institutional set-up by the Sanctions Committee, the mandate given to the Ombudsperson, and constraints imposed on the (functioning of the) Ombudsperson by the Security Council and by the UN member states. The lack of access to confidential information – not only for the petitioner but also for the Ombudsperson and the Sanctions Committee members – has a crippling effect on the overall level of inclusion that can be realized. However, the application of the Draft IGM also shows the improvements made over the years and how, through advocacy by the Ombudsperson, amongst others, the position of the Office of the Ombudsperson is strengthened. Furthermore, the application of the Draft Model to the ISIL (Da'esh) and Al-Qaida Sanctions Committee demonstrates how the different building blocks influence each other and how the Draft Model is capable of identifying these interactions. As signaled at the beginning of section 6, the lack of access to personal information (section 4.2) was expected to have a crippling effect on the (overall level of) fairness of the review procedure. The analysis conducted in section 6.2.6 confirmed this crippling effect, and showed the existence of inequality of arms between the petitioner and the Ombudsperson, which negatively impacts on the opportunity for one to present their views in the review procedure.

Regarding the latter – whether or not the building blocks are formulated sufficiently clearly – the quick answer is that the Draft Model works. The application of the Draft Model to the review procedure of the Sanctions Committee resulted in a systematic analysis of the inclusionary governance realized vis-à-vis those affected by the decisions of the Sanctions Committee. The benchmarks of the building blocks of the entitlement to an effective remedy are sufficiently defined to assess the extent to which those affected by the designations are entitled to an effective legal remedy, to identify the strengths and weaknesses in the review procedure, and to take the context in which the international institution operates into account. Moreover, it demonstrated how certain external factors have a decisive effect on the level of inclusionary governance realized within a review procedure. For example, the qualification of the designation decision as preventive in nature without recognizing its punitive nature has influenced the standard of review and the standard of proof upheld by the Ombudsperson.

However, the analysis also demonstrated that there are multiple actors involved in the review procedures, and the review procedures offered in the context of the ISIL (Da'esh) and Al-Qaida Sanctions Committee not only include the *official* independent review mechanism by the Ombudsperson, but they also include internal review mechanisms and other similar mechanisms that aim primarily to enhance the quality of the review procedure. Although the Draft Model recognizes that other actors can be involved and play a role in the exercise of public power and in the realization of the inclusionary governance norms, the question is whether the descriptive-analytical questions guiding the first step of the Draft Model sufficiently embrace this complexity of multiple actors and multilevel decision-making procedures. For instance, the analysis conducted in this section following the steps of the Draft IGM did not sufficiently grasp the role of the Monitoring Team in the realization of inclusionary governance vis-à-vis those affected by the decisions of international institutions.

Thus, the question has to be asked whether the content of the (building blocks of the) draft yardstick should be adjusted to accommodate the circumstances in which international institutions exercise public power. Sections 7 and 8 will address this aspect and provide for the overall conclusions of the application of the Draft IGM to the Sanctions Committee designation procedure.

7. Conclusions: Outcome of the Demonstration of the Functioning of the Draft IGM

This chapter intended to serve a dual purpose: to demonstrate the functioning of the Draft Model and to test whether the formulation of the building blocks of the three dimensions of the Draft Model is sufficiently clear and accurate to analyze the extent to which the ISIL (Da'esh) and Al-Qaida Sanctions Committee is accountable towards those it has designated. In the conclusions, the accuracy of the yardstick will be analyzed in light of the three questions that were formulated to guide the testing of the functionality of the Draft IGM:

1. whether the formulation of the different building blocks is sufficiently clear to be applied as a yardstick to international institutions;
2. whether the identified dynamics and contextual factors of the Draft IGM sufficiently capture the context in which each international institution operates; and
3. whether the Draft Model is complete and sufficiently sophisticated to deal with the everyday reality of international institutions, or whether there are other issues that the Draft Model does not yet sufficiently capture.

This chapter applied the Draft Inclusionary Governance Model to the ISIL (Da'esh) and Al-Qaida Sanctions Committee to demonstrate its functioning. The analysis showed how the Draft Model allows for an in-depth assessment of the accountability framework

of an international institution while taking the context in which an institution operates into account. The application of the yardstick showed the extent to which the Sanctions Committee is accountable towards those affected by its decisions. Furthermore, this chapter identified potential shortcomings and weaknesses in the procedure as will be discussed in this and the next section.

The Draft Model is dynamic in nature. The concepts of vulnerability and of arbitrariness serve as trigger factors for these dynamics. The preliminary review of the level of inclusionary governance realized by the Sanctions Committee shows that the decision-making procedure has certain inherent arbitrary features. This determination triggered stricter scrutiny of the procedure. In this more detailed scrutiny, authorities enjoy less discretion and the issues of burden and standard of proof are taken into account in the assessment of the fairness of the review procedure. Furthermore, considering that those designated are regarded as particularly vulnerable, the level of discretion enjoyed by authorities decreased. The outcome of this analysis can be summarized as follows:

DRAFT INCLUSIONARY GOVERNANCE MODEL	
The ISIL (Da'esh) and Al-Qaida Sanctions Committee designation procedure	
INFORMATIONAL ENTITLEMENTS: ENTITLEMENT TO PUBLIC INTEREST INFORMATION AND TO PERSONAL INFORMATION	
Entitlement to public interest information	The Sanctions Committee holds information of a public interest nature (rules of procedure, (de)listing criteria, and the rules for the review procedure) and publishes this information online on its website.
	Individuals can access this information, if they have access to the Internet and if they are aware of the information published. There is no possibility to request access to (other) public interest information, nor is there a procedure to request access or appeal a lack of access.
Entitlement to personal information	The Sanctions Committee holds two types of personal information: evidence used to support (de)listing and information used to identify those designated
	Evidence: limited access to the evidence for those designated, no procedure to request access to the information, no procedure to challenge the legality of the storage/collection of the information. Further, in practice, the designating states have unfettered discretion to determine whether or not to qualify evidence as classified. The Sanctions Committee does not always have access to the information either.
	Identification indicators: The Sanctions Committee publishes the information that serves to identify those to be designated online on the Sanctions Committee's website. There is no minimum number of indicators required to identify those to be designated, which may lead to mistaken identification and others may be affected by the decisions. There is no right to rectification or removal of the information published.
ENTITLEMENT TO MEANINGFUL PARTICIPATION IN THE DECISION-MAKING PROCEDURE	
Entitlement to meaningful participation in the decision-making procedure	The Sanctions Committee has not developed a participatory procedure. There is no opportunity to participate in the decision-making procedure for those designated. Those affected are informed of the decision once it is adopted.
	The Sanctions Committee provides a summary of reasons to those designated by the Sanctions Committee.
ENTITLEMENT TO AN EFFECTIVE REMEDY: REVIEW AND REPARATION	
Entitlement to a review	There are three types of review procedures: the triennial internal review procedure, the delisting procedure triggered by a request from a (designating) state, and the review procedure by the Ombudsperson. Only the last one can be triggered by a request of the designated individual. Only the review procedure by the Ombudsperson meets the majority of the elements of an entitlement to review as described below. The triennial internal review procedure and the delisting procedure triggered by request from a state constitute inter-state procedures with no further procedural guarantees recognized.
	Individuals are informed of the possibility of review when they are notified of the designation by the Permanent Mission of the country of nationality and/or residence, or by the Ombudsperson.

	An individual may file a delisting request with the Ombudsperson whenever he/she is listed by the Sanctions Committee. There are few format requirements.
	The Ombudsperson is, in principle, independent and impartial; however, the recommendation to delist or retain the listing may be overruled by the Sanctions Committee by reverse consensus.
	Standard of review upheld by the Ombudsperson: "whether there is sufficient information to provide reasonable and credible basis for listing."
	Fairness of the procedure: there are various factors that play a role. In general, reasonable timeframes are upheld by the Office of the Ombudsperson. However, the lack of access to information (the evidence and reasons underlying the original listing decision, and the identity of the designating state(s)) negatively affects the fairness of the procedure and puts the designated individual in a disadvantaged position. Thus, there is no equality of arms between the Ombudsperson and the petitioner. Furthermore, the interaction or dialogue between the petitioner and the Ombudsperson may result in speculative lawyering and does not give the petitioner a fair chance to present his/her views when he/she does not have access to the information underlying the decision. Combined with the fact that the burden of proof rests on the petitioner, that he/she does not have access to the evidence underlying the original decision and without knowing who were the designating states, the fairness of the procedure becomes questionable. An independent review executed by the Ombudsperson of the evidential information (when states consent to disclose) may mitigate to some extent the lack of access.
Entitlement to reparation	There are different groups of affected individuals: (1) those (incorrectly) designated (2) those affected by the designation due to a mistaken identity (3) those who face the consequences as a family member and/or next of kin of (deceased) designated individuals.
	Ad 1) those designated can – at most – get delisted. As the measures are deemed preventive in nature, there is no establishment of wrongdoing and accordingly no compensation.
	Ad 2) those affected have to ask the Sanctions Committee or the Focal Point to be 'delisted' (that is, to enhance the indicators preventing a mistaken identity); there is no establishment of wrongdoing and no damages.
	Ad 3) Those affected have to ask the Sanctions Committee or Ombudsperson to have a deceased person delisted; a death certificate is required. Further family members have to attest non-association with ISIL (Da'esh) and Al-Qaida, in order to be no longer considered to be associated with someone originally designated. There is no establishment of wrongdoing, no possibility to receive damages.

Table 20: Application of Draft IGM to designation procedure of the Sanctions Committee

In addition, as the Draft Model stipulates, there are certain constraints on the exercise of public power by public authorities, regardless of the context in which the power is exercised. A brief summary of the findings in this regard is summarized below:

PUBLIC POWER IS TO BE EXERCISED BY PUBLIC AUTHORITIES:	
In accordance with the law	The powers of the Sanctions Committee and of the Ombudsperson are, in general, regulated and stipulated in the corresponding UN Security Council resolutions and/or accompanying Sanctions Committee Guidelines. However, there are problems with the quality of law: the discretion accorded is not clearly defined, there are no procedural safeguards in place to prevent arbitrary decisions, and there is only a limited right to a review.
Not in an arbitrary manner	The application of the Draft Model shows that there are inherent arbitrary features in the procedure; for instance, there is only limited access to the evidence underlying the decision, there is no possibility to participate in the decision-making procedure and only limited reasons are provided for the decision.
May not constitute a violation of ius cogens norms	The practice indicates that there is a risk that evidence is used that was obtained through torture. The Sanctions Committee has no substantive or procedural safeguards to prevent designations to be made relying on evidence obtained through torture. The Ombudsperson does not accept evidence obtained through torture. Allegations thereof will be scrutinized strictly. In the review of the allegations, however, the Ombudsperson is dependent on the willingness of states to cooperate and inform the Ombudsperson in this regard.
Limitations are only permitted if the conditions of the tripartite test of legality, necessity and legitimacy are met	In regards to each of the situations identified as falling short of the minimum level of guarantees required and although the principle of legality in sensu stricto is often met, the corresponding requirement of the quality of the procedure is more problematic.
Any decision-making procedure has to be low-cost, timely and fair	Considering the lack of a participatory procedure and the lack of a procedure to request access to information, only the review procedure of the Ombudsperson is assessed under this heading. This review procedure is, in general, low-cost and timely. However, considering the lack of access to financial means and the fact that the majority of the petitioners are poor, the lack of legal aid may have a negative effect on the fairness of the procedure.

Table 21: Application of the requirements for exercise of public power of the Draft Model to the designation procedure

Furthermore, as was also demonstrated above, the dynamic nature of the yardstick enables one to map interactions between the norms, to identify whether a lack of certain norms has a crippling effect on the overall level of inclusionary governance (to be) realized by the international institution in relation to those affected, and to identify strengths and weaknesses in the procedure as a whole. Moreover, the analysis demonstrated why inclusionary governance norms should not be assessed in isolation, and why instead the decision-making and review procedure should be assessed as a whole. For instance, the withholding of evidence from the designated individual was identified as having a crippling effect on the level of inclusionary governance that can be realized throughout the decision-making and review procedure. In other words, the building blocks of the three dimensions of the Draft Model and their benchmarks operate as communicating vessels.

8. Conclusions: Assessing the Accuracy and Clarity of the Yardstick

Although the Draft Model is capable of assessing the accountability of international institutions vis-à-vis those affected, the testing of the Draft Model has shown that the Draft IGM in certain situations is not able to sufficiently grasp the practice of the Sanctions Committee and thus the context in which the international institution operates.

The Draft Model is designed to focus on the relationship between the domestic authorities adopting an administrative decision and the individual affected by the decision. Public authorities are the primary duty bearers to ensure inclusionary governance to those affected by the decisions. The application of the Draft Model to the designation procedure of the ISIL (Da'esh) and Al-Qaida Sanctions Committee demonstrates that the practice is more complex, as there is a variety of actors involved. Although the Draft Model enabled the identification of the different actors involved, the current benchmarks do not sufficiently grasp this complexity. The relevance of the *bigger picture*, taking the multiple actors into account, is particularly visible in the analysis of the discretion enjoyed by public authorities in the fulfillment of their obligations. Whereas this discretion is sensu stricto enjoyed by the Sanctions Committee, the designating states are the ones who actually exercise the discretion (they hold the information and decide whether or not to classify it). Furthermore, in the internal review procedure, the reviewing states (the designating state, the state of nationality and state of residence) play a key role in determining whether an individual should be listed. The multiple actors involved create a form of a multilevel governance. The way in which such a multilevel governance structure can influence the procedure and what this may mean for the level of inclusionary governance is not sufficiently grasped by the Draft Model.

Moreover, the benchmarks of the right to a review as incorporated in the Draft Model are not sufficiently precise to analyze in a systematic manner the type of review procedures

realized by international institutions. The building blocks of the right to a review and its benchmarks focus on the role of the review body and therefore do not address potential review roles by other actors. Accordingly, the role played by the Monitoring Team in the Sanctions Committee's review procedure (and in the decision-making procedure) was not fully captured by the Draft Model.[186]

The following Part IV will discuss the way in which the Draft Model can be fine-tuned taking these observations into account. The result will be an Inclusionary Governance Model for International Institutions.

186 See further section 6.2.8 of this chapter where this argument was first introduced.

PART

IV

Fine-Tuning the Draft Inclusionary Governance Model

Part III tested the functionality of the Draft Model as a yardstick to analyze the accountability of international institutions by applying it to the designation procedure of the ISIL (Da'esh) and Al-Qaida Sanctions Committee. In Part IV, the Draft Inclusionary Governance Model will be fine-tuned in light of the shortcomings identified in the previous chapter. Chapter 8 will present the dynamic Inclusionary Governance Model for International Institutions. In chapter 9, some final remarks of this research will be presented.

8

A Dynamic Model for Inclusionary Governance for International Institutions

This chapter will present the fine-tuned Inclusionary Governance Model ('Model' or 'IGM'). The Model serves as a yardstick to analyze and address the accountability of international institutions vis-à-vis those affected by their decisions. Section 1 will discuss how the Draft Model will be adjusted to better accommodate the context in which international institutions operate. Section 2 will provide a schematic overview of the IGM and present in a step-by-step scheme how the yardstick is to be applied in practice. Furthermore, section 2 will illustrate how the Model meets the two underlying criteria that are required for a yardstick to be considered capable of systematically analyzing the accountability of international institutions vis-à-vis those affected by their decisions, as formulated in chapter 1.[1] The general relevance of the Model will be demonstrated by making references to the practices of other international institutions adopting decisions directly affecting individuals in the elaboration of the steps of the Model.

1. Accommodating the Context in which International Institutions Operate: A Fine-Tuned Inclusionary Governance Model

The testing conducted in chapter 7 showed that the Draft Model developed in Part III required some fine-tuning. The Draft Model in its current form is not able to sufficiently grasp the complexity of multilevel governance structures of international institutions and, thus, how a variety of actors may influence the procedure and the impact thereof on the level of inclusionary governance realized. Related to this point, the benchmarks of the entitlement to a review are not sufficiently defined to capture review procedures other than those initiated by affected individuals. Therefore, the first step of the application of the Draft Model – the descriptive overview of the decision-making procedure – should be expanded to better capture this complexity of multilevel governance by multiple actors.

Multilevel and multiple-actor governance structures of international institutions

Step 1 of the application of the yardstick[2] requires one to describe the circumstances in which a public authority operates (for instance, the type of public power exercised and the institutional setting of the public authority concerned) and to provide a description of this public authority's decision-making and review procedure(s). In order to better grasp the complexity of the context and the institutional setting of the international institution, this research suggests to also include in the first step a description of the governance structure in relation to this exercise of public power and to map how various other actors are involved in

1 The two criteria as set out in chapter 1 are:
1. The yardstick identifies the procedural arrangements necessary to decrease the accountability deficit;
2. In the identification of the elements of the yardstick, a proper balance is to be struck between the general nature of the accountability problem and each institution's specific circumstances.

The criteria are further explained in section 3, chapter 1.

2 See chapter 6, section 4.

the decision-making and review procedure. Moreover, a description of the relations between an international institution and its member states, as well as third states, would also be a beneficial addition to the first step. By expanding this step, the respective role of each actor within the decision-making and/or review process can be further analyzed in light of the accountability framework. The content and scope of the benchmarks of the inclusionary governance framework do not change with this expansion of step 1; instead, it contributes to an enhanced understanding of the context in which a particular international institution operates, and it will allow for a better understanding of the complexities and reality of the practice of the respective institution.

Accordingly, by expanding this first step in the application of the yardstick, it becomes easier to detect weaknesses in the procedures; one is better able to identify why there is a (certain) lack of inclusionary governance for those affected by the decisions of an international institution. Does the lack of inclusion derive from a failure by an international institution to provide a legal framework to realize inclusion for those affected? Does it derive from a failure of a decision-making body to ensure these guarantees? Does the legal framework accord too much discretion to authorities to exercise their public power vis-à-vis those affected by their decisions? And/or does it derive from a lack of compliance by other organs of the international institution? When one takes this type of question into account in the assessment, the systematic analysis of the accountability of an international institution vis-à-vis those affected by their decisions will become more nuanced.

The fine-tuning of the Draft Model constitutes the last step of model-building conducted in this book. The outcome is an Inclusionary Governance Model for International Institutions. The following section will discuss the content and scope of this Model and will show the relevance of a general yardstick to analyze the accountability of international institutions vis-à-vis those affected

2. An Inclusionary Governance Model for International Institutions

The fine-tuned Inclusionary Governance Model for International Institutions serves as a yardstick to analyze and address in a systematic manner the accountability of international institutions vis-à-vis those affected by their decisions. In short, the developed yardstick identifies the procedural arrangements that are needed to decrease the accountability deficit, and the elements needed to strike a proper balance between the general nature of the accountability problem and the specific context of each institution.[3] In other words, the two criteria identified in chapter 1 of this book for an accountability framework for international institutions have been met. The Inclusionary Governance Model can be summarized as follows:

3 See further chapter 1, section 3, in which the research question and research design is further explained.

INCLUSIONARY GOVERNANCE MODEL FOR INTERNATIONAL INSTITUTIONS		
International institutions, possibly multilevel and/or multiple actor, shall exercise their public power:		CONTEXT
in accordance with the law;		
not in an arbitrary manner; and		
it may not constitute a violation of an *ius cogens* norm.		
Limitations are only permitted if the tripartite test of legality, necessity and legitimacy are met		
The decision-making procedures followed have to be low-cost, timely and fair.		
Dynamic aspects of the Model:		
Factors of vulnerability result in more positive obligations for international institutions, less discretion and more scrutiny		
When arbitrary features are present, higher scrutiny should be exercised of the inclusionary governance realized		
INFORMATION ENTITLEMENTS: INFORMATION OF A PUBLIC INTEREST NATURE AND INFORMATION OF A PERSONAL NATURE		THREE DIMENSIONS OF INCLUSIONARY GOVERNANCE
Public interest information	Duty to provide access to information	
	Duty to provide reasons for a refusal to disclose information	
	Duty to provide information on a procedure to request information and to review the refusal	
	Duty to realize a review procedure to challenge a refusal to disclose information	
Personal information	Duty to realize a procedure through which individuals can request access to, or modification or removal of personal information held by international institutions	
	Duty to duly inform those affected of the information held and how to access it	
	Duty to protect information held by international institutions from unauthorized access or usage by third parties	
	Duty to realize a review procedure to challenge the legality of information stored	
DUTY TO REALIZE MEANINGFUL PARTICIPATION IN THE DECISION-MAKING PROCEDURE		
Duty to ensure meaningful participation in the decision-making procedure	Duty to duly inform those affected	
	Duty to ensure meaningful involvement in the decision-making procedure	
	Duty to duly take into account the views expressed	
	Duty to provide a reasoned decision	
DUTY TO REALIZE AN EFFECTIVE REMEDY: ENTITLEMENT TO REVIEW AND TO REPARATION		
Entitlement to review	Duty to ensure access to the review procedure	
	Duty to establish a competent, independent and impartial review body	
	Duty to realize a fair review procedure	
Entitlement to reparation	Reparation provided has to be adequate and effective in addressing the harm suffered	

Table 22: Inclusionary Governance Model (schematic overview)

The different elements of the Inclusionary Governance Model can be summarized as follows:

- The building blocks (information entitlement, entitlement to meaningful participation in the decision-making procedure, entitlement to an effective remedy) constitute the core elements of the Model and correspond with the initial three identified dimensions of inclusionary governance.
- The benchmarks are the minimum standards identified for each building block, against which the exercise of public power by international institutions is evaluated.
- The constraints are those limitations identified for the exercise of public power by international institutions, regardless of what type of public power they exercise.
- The trigger factors of non-arbitrariness and vulnerability influence the content and scope of inclusionary governance in a given context.

The Inclusionary Governance Model for international institutions enables one to analyze and address – in a systematic manner – whether and to what extent a particular international institution is accountable to those affected. The analysis of the accountability of international institutions is a contextual one; the decision-making and review procedure should be assessed in their entirety. Moreover, the Model is dynamic in nature: the minimum standards set out here are to a certain extent dependent on the context, and authorities are given discretion in the fulfillment of these benchmarks for entitlement to information, for meaningful participation in the decision-making procedure and for an effective remedy. Factors of vulnerability and the substantive limitation of non-arbitrariness may limit this discretion. Thus, depending on the circumstances, the scope of obligations for international institutions may vary, which makes the Model dynamic. As explained, potential multilevel and multiple-actor governance structures are taken into account in the accountability assessment. The incorporation of this multilevel aspect allows one to determine the strengths and weaknesses of the decision-making and review procedure and how the various actors that play a role in the procedure influence this assessment. The analysis of the Sanctions Committee and the contestation by the Ombudsperson of the relatively weak procedural guarantees in place are a case in point.[4]

To demonstrate how the Model functions as a yardstick to analyze the accountability of international institutions vis-à-vis those affected by their decisions, the remainder of this section will discuss the steps of the Model and illustrate them by referring to the practice of other international institutions that exercise public power directly affecting individuals. References to such practice are illustrative in demonstrating how one, through the application of the Model, is able to grasp the different contexts in which various institutions operate while simultaneously analyzing the accountability of a specific international institution vis-à-vis those affected. Thus, the discussion of the practice in this section is not meant to serve

4 For an illustration of this point, see, for instance, chapter 7, sections 6.2.6 and 6.2.8.

as an in-depth analysis of the accountability of the respective international institution vis-à-vis those affected. These non-exhaustive functional studies will be engaged in to demonstrate the suitability of the yardstick and to illustrate how the various circumstances of each international institution are taken into consideration in the application of the Model.

The functional studies are chosen on the basis of two criteria: (i) it concerns international institutions that make decisions directly affecting individuals, and (ii) these international institutions have been facing criticism for the lack of accountability vis-à-vis those affected by their decisions.

The steps that guide the application are those steps that were developed in different phases of the model-building as set out in chapter 6, section 4 of this book. However, the fine-tuning of the Model in section 1 of this chapter resulted in an adjustment of the first step of the application. As a result, one also assesses in step 1 whether there are multilevel and multiple-actor aspects in the decision-making procedure and how this influences the accountability framework set out by a given institution. Per step, various guiding questions have been identified. Below, a description of the steps and further elaboration and illustration of the function of each step is given via references to the various practices of international institutions.

1. A descriptive overview of the institutional setting of the decision-making procedure
Who exercises public power? Who exercises a form of supervision or monitoring over whom? Can an organogram be drafted that incorporates the potential multilevel and multiple-actor institutional structures? If multilevel governance or different actors are in the picture, further questions are required per respective step. For instance, who holds information? Who has access to the information? Who enjoys a form of (decisional) discretion? Who exercises supervision over what and over whom?

Knowing the differences in institutional settings between the various international institutions under assessment, and being able to identify the various actors involved, enables one to ask more detailed questions in order to understand whether, and to what extent, inclusionary governance is realized in practice. In other words, it leads to a better understanding of the context of a given case, and it therefore enables an in-depth analysis of the different push and pull factors of inclusionary governance. For instance, when applying the Model to the UN High Commissioner for Refugees (UNHCR), differences surface in regards to the setting and realizing of inclusionary governance standards. The UNHCR Headquarters sets the procedural and substantive standards for refugee status determination procedures and, additionally, decides where and under what circumstances Mandate RSD procedures take place and who falls within the RSD mandate.[5] The actual Mandate RSD is however executed

5 UNHCR, 'Note on Determination of Refugee Status under International Instruments' (August 24,

in its field offices. Field offices are accorded a significant amount of discretion by UNHCR Headquarters to further develop RSD procedures and to further define corresponding procedural guarantees to be provided.[6] In the Procedural Standards Manual for UNHCR RSD procedures, three different types of discretion can be identified when examining the language used: field offices *have to do something*, field offices are *advised to do something*, and field offices are informed of *the best practices* in regard to a certain procedural element. As a result, field offices have administrative leeway to provide further or less protection with regard to some of these discretionary standards.[7] Understanding these dynamics within an institution, and with other actors involved in the decision-making procedure, enables one to better map and identify whether and to what extent inclusionary governance is realized within the institution and within a particular level of governance (such as a particular field office).

2. Assessment of vulnerability factors

Can factors of vulnerability be identified in the context of the decision-making procedure under assessment? If so, does the international institution recognize the vulnerability factors of those affected? Does it recognize various categories of vulnerability? If so, does the institution provide further procedural guarantees for those considered to be vulnerable as required by the Model?

When applying the Model in practice, it shows that the majority of international institutions making decisions directly affecting individuals recognize that those affected are to a certain extent vulnerable and that further procedural safeguards should be provided for these individuals. For instance, both the UNHCR and the World Bank recognize that their decisions on, respectively, the recognition of refugee status and the financing of development projects, respectively, have a certain impact on the daily lives of individuals, which therefore renders those affected vulnerable. The UNHCR holds that the impact of RSD decision cannot be understated – a "wrong decision can cost the person's life or liberty"[8] – which

1977), EC/SCP/5, available at http://www.unhcr.org/excom/EXCOM/3ae68cc04.html.

6 For example, the 2005 Manual for UNHCR RSD procedures emphasizes that due to the "very diverse and challenging operational environments" in which UNHCR field offices carry out RSD, each field office is responsible for (further) developing and implementing the RSD procedures as stipulated in the UNHCR's Procedural Standards for Refugee Status Determination Under UNHCR's Mandate (Procedural Standards Handbook), at 1-2, Unit 1, available at https://www.unhcr.org/4317223c9.pdf.

7 The Lebanon field office, for instance, provides access to the RSD documents and to evidence for those affected, whereas the procedural safeguards of 2016 does not oblige field offices to do so. Instead, the Procedural Standards Handbook stipulate that legal representatives of asylum seekers *may consult* the relevant RSD form at the UNHCR premises and gain access to all expert reports. Thus, the Handbook, advises that field offices should accord access to the legal representatives of asylum seekers only and does not stipulate an obligation to provide access to asylum seekers. The majority of asylum seekers however does not have a legal representative and will thus not have access rights to this information. It should be noted that before the 2016 change, no one (that is, no lawyer and no asylum seeker) had access to the RSD report nor to the export reports. See the 2003 procedural safeguards.

8 UNHCR, *Determination of Refugee Status*, RLD 2 (1989), Chapter 2, available at http://www.unhcr.org/

triggers the necessity for certain procedural safeguards. Moreover, there are certain (groups of) individuals that are particularly vulnerable[9] and that warrant the need for further safeguards. For example, unaccompanied minors, the elderly, disabled asylum seekers, and persons manifestly in need of protective intervention are considered to be particularly vulnerable, which implies that the UNHCR RSD officers have to take this into account by, for example, giving them priority in registration procedures, identifying whether there are immediate protection needs, and creating the correct conditions for their RSD interview.[10] Moreover, when an asylum seeker's case is assessed in light of the exclusion clause of *Article 1F*,[11] the UNHCR imposes extra procedural guarantees for the exclusion examination.[12] The vulnerability of these affected individuals originates from the serious implications of the *Article 1F* decision-making procedure: part of the assessment concerns the question whether the respective asylum seeker has allegedly committed an international crime. As a result, the UNHCR upholds a higher standard of proof than the one applicable to normal asylum procedures. Furthermore, in the context of an exclusion examination, the burden of proof shifts to the UNHCR, whereas in the standard RSD procedures the applicant and the UNHCR share the burden.[13]

Within the policies and procedures of the World Bank, references to the concept of vulnerability can similarly be found. For instance, the World Bank (WB) acknowledges that the enormous impact of involuntary resettlements on individuals and/or groups of individuals renders them particularly vulnerable. Amongst others, involuntary resettlement imposes "economic, social and environmental risks,"[14] which may result in a weakening of community institutions and social networks, which in turn may result in cultural identity

refworld/pdfid/3ae6b35c0.pdf; See also Kagan who describes the role of the UNHCR as *gatekeeper*:

> The [UNHCR] effectively decides among asylum seekers who can be saved from deportation and in some cases released from detention, who can get humanitarian assistance, and often who can apply to resettle to third countries.

M. Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination' (2006) 18 *International Journal on Refugee Law*, 1 at 2.

9 The UNHCR deems asylum seekers who may have special needs to be particularly vulnerable (stated in the Procedural standards Handbook, unit 3.4.1) Although the special needs of asylum seekers may sometimes be evident, UNHCR staff often only discovers the existence of special needs during the registration interview or at a later time.

10 Unit 3.4 of the UNHCR Procedural standards Handbook.

11 In the context of article 1F of the 1951 Refugee Convention, RSD officers of the UNHCR examine whether one of the exclusion grounds apply and thus whether the asylum seeker is *undeserving of protection*.

12 Unit 4.8.1 of the UNHCR Procedural standards Handbook. See further UNHCR, *Guidelines of International Protection No. 5: Application of the Exclusion Clauses Article 1F of the 1951 Convention Relating to the Status of Refugee*s (September 4, 2003) UNHCR Doc. HCR/GIP/03/05.

13 See UNHCR Background note, at 105. However, as explained in the Background Note, the burden of proof may be reversed leading to a "rebuttable presumption of excludability."

14 World Bank, OP 4.12 – Involuntary Resettlement (December 2001; revised in April 2013), at 1.

and traditional authority becoming diminished or completely lost.[15] In practice, it results in "project affected people"[16] being forced to leave their homes, their land being taken and/or their livelihood being damaged. The World Bank policies are intended to mitigate these risks and thereby encompass further procedural safeguards in cases of involuntary resettlement.[17] Furthermore, the WB has developed a policy with additional procedural safeguards whenever indigenous peoples may be affected by its decisions to finance development projects.[18] The World Bank acknowledges that indigenous peoples often constitute one of the most marginalized and vulnerable segments of a population and that extra protection is therefore warranted.[19] This implies that when the World Bank finances a development project that affects indigenous peoples, free prior and informed consultation should take place with the affected communities before decisions are made.[20] The ultimate goal of this participatory procedure is to ensure that "broad support from representatives of major sections of the community,"[21] and thus the affected indigenous peoples, is obtained.[22]

Hence, one identifies in this step whether there are factors of vulnerability and whether the international institution concerned recognized this and acted accordingly by providing further safeguards. As the Model suggests, when there are factors of vulnerability, it influences the analysis conducted in steps 4-6. This determination, or lack thereof, constitutes a key moment in the procedure. When authorities do not recognize or identify the vulnerability of those affected, less inclusion will, in all probability, be realized than the Model requires. Moreover, in the context of the WB, there is not only a problem with the lack of recognition of a factor of vulnerability, but often there is already a problem with the assessment of who is considered to be affected by the project, whether vulnerable or not.[23] If someone is not recognized as being affected by a particular decision, individuals and/or groups will not be informed about the upcoming decision nor of their entitlement to be included in the decision-making procedure. As a result, these people are often excluded from that procedure.

15 Idem, at 1.
16 Project affected people, or PAPs, is a term used by the WB to refer to those individuals, groups, communities and companies that are affected by the World Bank's exercise of public power.
17 OP 4.12, at 1.
18 BP 4.10 (indigenous peoples) (July 2005, revised in April 2013).
19 OP 4.10, last sentence paragraph 2.
20 BP 4.10 (indigenous peoples) (July 2005, revised in April 2013), at 2.
21 BP 4.10, at 7, and OP 4.10 (indigenous peoples) (July 2005, revised in April 2013), at 1.
22 Idem.
23 The World Bank Inspection Panel, *Nepal: Arun III* (1994), IR §19. The Inspection Panel referred to the recurring occurrence across the World Bank's development operations of underestimating the number of project-affected people. In Nepal-Arun III, for instance, only those who lost land were considered to be project affected people while others were similarly affected and their rights and interests should also have been taken into consideration.

3. Preliminary assessment of arbitrary factors

Do actors enjoy unfettered discretion in their exercise of power? Is there a lack of access to information, for instance, about the reasons for a decision? If there are arbitrary factors, stricter scrutiny should be exercised. In particular, when assessing the fairness of the procedure, issues such as rules of evidence and the burden and standard of proof should be considered.

The analysis that is to be conducted in this step requires an assessment of the common core guarantees realized by an international institution. For instance, a quick assessment of the decision-making procedures of international territorial administrations[24] shows that these procedures have inherent arbitrary features. To give an example, the Office of the High Representative in Bosnia-Herzegovina[25] enjoyed unfettered discretion in determining who acted in contravention of the Dayton Peace Agreement and, accordingly, who should be removed from holding public office.[26] Those who were to be removed from office had no opportunity to participate in the procedure leading to that decision, nor did they have an opportunity to request its review.[27] Although, such a decision was often based on serious

24 A temporary international administration of territory (ITA) can be defined as the temporary governance of a territory by an international organization or group of states in a post-conflict situation. Examples thereof are the United Nations Interim Administration Mission in Kosovo (UNMIK) in Kosovo, the United Nations Transitional Administration in East Timor (UNTAET) in East-Timor, and the Office of the High Representative of the international community, Bosnia and Herzegovina (OHR) in Bosnia and Herzegovina (BiH). ITAs exercise extensive public power, and such missions are argued to:

> …assume all-encompassing authority to exercise public power within a given territory for a temporary period of time and…this authority is ultimate in nature: that is, it supersedes all governing institutions possibly existing at the local – that is, the national – level.

A. Momirov, *Accountability of International Territorial Administrations – a Public Law Approach*, (Utrecht: Eleven Publishing, (2011), 49; for the lack of inclusionary governance, see further the argument presented in M. Schaap, 'Evaluating a demand for inclusionary governance in post-conflict situations' (2011) 2 *International Journal of Rule of Law, Transitional Justice and Human Rights* 107-120, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2004250.

25 Since 1997, the Office of the High Representative (OHR) has the power to adopt binding decisions. This means, amongst other ramifications, that the OHR has the power to dismiss or remove persons from holding public office when they work against the spirit of the Dayton Peace Agreement:

> …persons holding public office or officials who are absent from meetings without good cause or who *are found by the High Representative* to be in violation of legal commitments made under the Peace Agreement or the terms for its implementation.

Emphasis added, Peace Implementation Council. *PIC Bonn Conclusions* (8/12/1997), §XI, available at http://www.ohr.int/. The Security Council endorsed this reinterpretation in UN SC Res. 1144 (1997).

26 As summarized in a Report of the European Commission for Democracy through Law of the Council of Europe:

> The majority of [these] removals concerned persons not cooperating with the International Criminal Tribunal for the former Yugoslavia. Others removals were the result of corruption, mismanagement of public assets or other offences including interference with the judiciary.

(European Commission for Democracy through Law of the Council of Europe (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative* (Venice, March 11, 2005) CDL-AD (2005)004 at §92.

27 See, for instance, the resolution of the Parliamentary Assembly of the Council of Europe, Resolution 1384 (2004) available at http://assembly.coe.int, §13; the Parliamentary Assembly considered it:

> irreconcilable with democratic principles that the High Representative should be able to take

grounds, no standard of proof was upheld, and often no evidence was submitted to support the claim.[28] As a result, the chance of decisions made on arbitrary grounds significantly increased. Thus, whenever there are arbitrary features in the decision-making procedure, one should examine more critically the inclusionary governance realized by the international institution, and when assessing the fairness of the procedure, the burden and standard of proof should be taken into account.

4. When authorities hold information of public interest or personal nature, certain obligations should be met:

When public authorities hold public interest information, are individuals entitled to request access to this information? Is there a procedure in place to request access? Is public interest information accessible for everyone? Is there a possibility of challenging a denial of access to such information?

When public authorities hold personal information, are individuals entitled to request access to, modification of, or removal of the personal information in their possession? Additionally, does the institution, if they store or collect information, have a legal basis to do so, and has the institution adopted measures to prevent third- party access to the information?

In this step, one analyzes first what type of information the international institution holds, and whether such information is of a personal and/or of public interest nature. For instance, both the UNHCR and the World Bank Sanctions Board hold information of a personal nature and of a public interest nature.

The UNHCR collects and stores personal information in the course of their decision-making procedure to determine whether an asylum seeker is eligible for refugee status. The Model suggests that those affected are entitled to access personal information held by public authorities. Asylum seekers are, in principle, permitted to access all documents that they have provided to the UNHCR.[29] The disclosure of other information only takes place

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enforceable decisions without being accountable for them or obliged to justify their validity and without there being a legal recourse.

See also, Constitutional Court of Bosnia and Herzegovina, *AP-954/05, Milorad Bilbija i Dragan Kalinić* (July 8, 2006) available at <www.ccbh.ba> (accessed on July 21, 2009) at §35.

28 See, for instance, the case of the removal of Mr. Raguz. He was held responsible for not making the city Stolac sufficiently safe. An elderly Serbian refugee couple got killed after they had returned to Stolac, and the High Representative held Raguz politically responsible for their murder although it provided no evidence for Raguz's complicity in the murder; M. Parrish, 'The Demise of the Dayton Protectorate' (2007) 1 *Journal of Intervention and State Building* 11 at 14.

29 They should be provided with the originals or copies of the documents (UNHCR, Procedural Standards Handbook, unit 2.1.2); see, in contrast, the *Concluding Observations* of the Human Rights Committee on Bulgaria where the Human Rights Committee held that it was concerned about the national RSD procedure for, amongst other things, the lack of access to the personal files by the applicants and

when a protection staff member appointed to that end under the established confidentiality procedures of the UNHCR has approved the disclosure. Regardless of this assessment, the asylum seeker will not have access to the RSD file that forms the basis of the RSD assessment, nor to the expert reports or medical reports prescribed by the UNHCR.[30] At most, if an asylum seeker has a legal representative, which is rare, the legal representative may access these RSD files and expert reports, but only on the premises of the UNHCR.[31]

In light of the World Bank Group sanctions mechanism[32] to fight fraud and corruption in WB-financed projects, the Department of Institutional Integrity (INT) of the World Bank Group collects personal information, or evidence, related to those under investigation for fraudulent or corrupt practices. The World Bank sanctions framework stipulates that any evidence found and/or produced in the context of such an investigation has to be provided to those affected[33] unless one of the restrictions applies.[34] However, all evidence that may mitigate the responsibility of, or have an exculpatory effect on, those to be sanctioned (in other words, those affected) always has to be provided.[35] As argued by the World Bank's Sanctions Board such evidence has to be disclosed by the INT as it is:

their legal representatives before a decision was taken. HRCee, *Concluding Observations on Bulgaria* (CCPR/C/BGR/CO/3, (August 19, 2011), 16.

30 Unit 2.1.2 of the UNHCR, Procedural standards Handbook.

31 UN High Commissioner for Refugees (UNHCR), *UNHCR RSD Procedural Standards - Legal Representation in UNHCR RSD Procedures*, 2016, available at: http://www.refworld.org/docid/56baf2c84.html [accessed August 13, 2018].

32 When the Sanctions Committee concludes that "contractors, bidders, suppliers, consultants and individuals involved in activities with the World Bank through procurement or consultancy activities have committed fraud, corruption, coercion, collusion, and/or obstructive practices," they can be sanctioned accordingly. There are five possible administrative sanctions: Public Letter of Reprimand, Debarment, Conditional Non-Debarment, Debarment with Conditional Release, and Restitution. See World Bank Sanctions Procedures, section II (r), section III A.1.01 (a) of the Sanctions Committee procedure (issued June 28, 2016), available at https://www.worldbank.org/en/about/unit/sanctions-system#3; See also L. Boisson de Chazournes and E. Fromageau, 'Balancing the Scales: The World Bank Sanctions Process and Access to Remedies' (2012) 23 *European Journal of International Law* 963 at 967.

33 The Sanctions Board often uses as a yardstick the premise whether the evidence is necessary for the respondent to "mount a meaningful response." See, for instance, World Bank Sanctions Board, *Decision no. 64, Sanctions Case 122 IDA Credit 3746 KH* Cambodia (March 31, 2004), §32. In this case, the INT had concealed information on the records of interviews conducted by the INT, including information on the identity of the alleged bribe beneficiaries. As held by Sanctions Board, the respondent had no opportunity to verify the record, therefore it was not probable that the respondent had exercised sanctionable conduct. Accordingly, the temporary suspension was ended. See also World Bank Sanctions Board, *Decision no. 63, Sanctions cases 119, 124, IDA Credit no 3771 TA, Tanzania* (January 31, 2004), §41.

34 There is however a discussion about whether these limitations are sufficiently restrictive, and whether they do not, in the end, give the INT too many grounds for not providing the evidence to the respondent. For instance, the Committee may in its discretion and upon request by the INT withhold certain evidence if there is a reasonable basis to conclude that providing such information may endanger "the life, health, safety or well-being of a person," section 7 (a) and (c) of the Sanctions Committee procedure.

35 In contrast, in the context of the Sanctions Committee decision-making and review procedure, there is no obligation to disclose exculpatory evidence. See above in chapter 7, sections 4.2 and 6.2.5-6.2.6.

> …a matter of fundamental fairness and is essential to the Sanctions Board's ability to identify and weigh all relevant factors in reaching its sanction decision and to provide possibility to respondent to review and comment on evidence.[36]

In general, respondents will gain access to the information when they receive a Statement of Accusation and Evidence. In other words, although the two international institutions operate in a different context, the Model allows for an analysis of whether, and to what extent, those affected are entitled to access their personal information that is in the possession of the decision-making body. The Model also enables one to identify any strengths and weaknesses in the way personal information is handled by each institution, or by other actors involved.

In general, information of a public interest nature can only be accessed by individuals if the international institution in question has published this information online. Only some international institutions have adopted a procedure to request access to information of a public interest nature. For example, the World Bank has adopted an Access to Information Policy. This policy addresses the proactive publication of information and the possibility of requesting access to information that is of public interest.[37] Everyone has a right to request access to public interest information in the World Bank's possession; this information may only be refused if one of the exceptions applies.[38] Those whose request for information has been denied may appeal the decision, first to the Access to Information Committee, and if the conditions are met, thereafter to the Independent Appeals Board.[39] As stated in the 2018 Year Report of the World Bank Group Sanctions Regime:

> Rules, guidance, and data should be public, not just for the sake of transparency, but also to ensure consistency and stability. Public reporting ensures accountability to team members, management, and other internal audiences, as well as external stakeholders. This in turn bolsters the system's credibility.[40]

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36 World Bank Sanctions Board, *Decision no. 56, Sanctions case 177, MDTF Grant TF056894 Indonesia* (June 10, 2013) §32; see on access to evidence also World Bank Sanctions Board, *Decision no. 65, Sanctions case 173, IBRC Loan no. 4769 Russian Federation* (May 2, 2014) §32.

37 See further http://www.worldbank.org/wbaccess. The policy was initiated in 2010. Since then, the World Bank has published online more than 150,000 documents to be accessed via the website using the general search function; annual report FY 2013, at 1.

38 Paragraph 2 of the World Bank Policy on Access to Information (July 1, 2013) doc no. 79034.

39 The Access to Information (AI) Appeals Board is comprised of three independent external experts and assesses whether the "World Bank has improperly or unreasonably restricted access to information that it would normally disclose under the Policy"(see further http://www.worldbank.org/en/access-to-information/ai-appealsboard). See, e.g., AI Appeals Board decision, *Case Numbers AI4300 and AI4409 Certain information related to the Empowerment and Livelihood Improvement "Nuton Jibon" Project* (February 3, 2017). In this decision, the Appeals Board concluded that the World Bank had correctly applied the exception in regards to certain information as it had been given to the World Bank in confidence by a member country or third party.

40 World Bank Group Sanctions System Annual Report FY18 http://pubdocs.worldbank.org/

For instance, all information that is considered to be of public interest in relation to sanctioning by the World Bank Group is available online.[41]

5. The duty to ensure meaningful participation in the decision-making procedure for those affected:

Have the public authorities concerned established a participatory procedure for those affected? Did authorities sufficiently inform those affected of the participatory process and provide them with information to participate in a meaningful manner? Have the authorities provided an opportunity to those affected to participate in a meaningful manner in the decision-making procedure? Did the authorities concerned duly consider the views of those affected? Did the authorities provide reasons for their decision?

International institutions enjoy discretion in realizing a meaningful participatory procedure for those affected. This discretion is however diminished when those affected are considered to be (particularly) vulnerable; in these cases, authorities have to do more to ensure that the participation is in fact meaningful for those affected. For example, the Model stipulates that in order for the participatory process to be meaningful, authorities have to duly inform those affected. The institutions enjoy wide discretion in choosing the means to achieve this result. Thus, international institutions can choose the medium to inform those affected and the language in which the international institution would like to inform them, as long as those affected are duly informed. The assessment is a contextual one. For instance, the World Bank Inspection Panel ('WB IP' or 'Panel') held in several cases that the World Bank failed to duly inform those affected as the medium or language it used to inform those affected posed obstacles, for example by providing information only in English,[42] by using too many technical terms when informing those affected,[43] or by providing information only via the Internet.[44] A lack of access to information has a crippling effect on the overall level of inclusionary governance. As held by, for instance, the World Bank Sanctions Board, when information is withheld from those affected by the decision, it limits their ability to participate in a meaningful manner.[45]

en/227911538495181415/WBG-SanctionsSystemARFY18-final-for-web.pdf, at 41.

41 See further, https://www.worldbank.org/en/access-to-information.

42 WB IP, *Papua New Guinea: smallholder Agriculture* (2009), IR §212-213

43 WB IP, *Nigeria/Ghana: West African Gas Pipeline* (2006), IR §344.

44 WB IP, *India: Mumbai Urban Transport* (2004), IR §353-354.

45 See, for instance, World Bank Sanctions Board, *Decision no. 64, Sanctions Case 120: IDA Credit No. 3746-KH IDA Grant No. H034-KH Cambodia* (March 31, 2004). The Sanctions Board held in §32 that considering that the INT had concealed information (including the identity of the alleged bribe beneficiary), it had negatively affected the ability of the respondent to mount a meaningful response. In an earlier decision, the WB Sanctions Board explained that the INT investigation procedure combined with the review by the Suspension and Debarment Officer (SDO) has to adhere to basic principles of fairness, which:

> require, among other protections, that interviewees be informed in due course of the possible

Overall, the Inclusionary Governance Model recognizes the wide discretion authorities have in organizing the participatory processes; in other words, authorities may choose the format, duration, timeframe, as long as participation of those affected in the decision-making procedure remains meaningful and the views of those affected are duly considered. Thus, solely informing those affected of the upcoming decision is not sufficient in the context of the Model; their views should be heard and taken into account. Along similar lines, the WB IP concluded that "information sessions" held by the World Bank about upcoming projects in which those affected are only informed by public authorities of the upcoming decision do not meet the standards of meaningful participation.[46] Instead, the WB IP held that what is required is to hold consultation sessions in which those affected can present their views on the upcoming decision in question.[47]

The Model suggests that the amount of discretion that is conferred upon authorities in setting the participatory format and its conditions is determined, inter alia, by factors of vulnerability. The approach the World Bank uses in regards to its decisions to finance development projects seems to follow this line of reasoning. Depending on the type of project and who is affected, different policies and safeguards of the World Bank apply. Several different conditions for the participatory process have to be specified for the various policies and safeguards; for instance, for both the situation of involuntary resettlement and when indigenous communities are adversely affected,[48] separate policies have been adopted.[49] In regard to the latter, an obligation exists to obtain the prior informed consent of indigenous communities when they are adversely affected by World Bank projects. The operational policy describes the obligations of the World Bank's task team. One of such obligations is

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outcome of an investigation, and be provided an opportunity to mount a meaningful response to any allegations against them.

WB Sanctions Board, *Decision no. 60* (September 9, 2013), Case no. 170, §58. See further for the role of the office of suspension and debarment, https://www.worldbank.org/en/about/unit/sanctions-system/osd.

46 The Inspection Panel stated that although information sessions may be necessary as "a preliminary to 'informed' consultation, they are not consultations." WB IP, *India Coal Sector Environmental & Social Mitigations* (2001), IR 437. The IP concluded:

> when meetings with PAPs took place, 'consultation' with them seemed to be more in the nature of telling them what was to occur than engaging them in meaningful discussion on alternative options that might better meet their needs. The Panel finds that in addition to the lack of consultation on alternative resettlement sites, there was a lack of meaningful consultation on other elements of the Project, such as alternative alignments of the road.

See similarly WB IP, *Ecuador mining development and environmental control technical assistance Project* (1999), IR §52, 57, 103; WB IP, *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project* (2004) IR (ES) at 21.

47 WB IP, *India Coal Sector Environmental & Social Mitigations* (2001), IR 437.

48 The Operational Policy on indigenous peoples is intended to ensure that "the development process fully respects the dignity, human rights, economies, and cultures of indigenous Peoples," BP 4.10, at 7, and OP 4.10 (Indigenous Peoples) (July 2005, revised in April 2013), at 1.

49 For a brief explanation of the recognition of vulnerabilities by the World Bank, see above in step 2; see further, e.g., A Naudé Fourie, *World Bank Accountability* (Eleven Publishing 2016).

to conduct a screening early in the project cycle to determine whether indigenous people are present in or have a "collective attachment to" the project area concerned.[50] If so, the task team informs the borrower[51] thereof, and accordingly, the Operational Policies/Bank Procedures (OP/BP) 4.10 have to be applied and further procedural guarantees as stipulated for indigenous peoples have to be provided.[52] As a result, the borrower has to undertake social assessment in order to evaluate the project's potential positive impact on the indigenous people in question and the potential adverse effects. If these adverse effects are significant, it has to be determined whether alternative options to the project have to be considered by the borrower.[53] The free, prior and informed consent about the proposed project has to take place throughout the project cycle. It has to start early, taking into account the decision-making processes among indigenous peoples;[54] it has to be a free and voluntarily consultation.[55]

As illustrated by the World Bank's participatory processes in relation to the financing of development projects in a decision-making procedure, a variety of actors are often involved in participatory decision-making procedures. When multiple actors are involved, it is necessary to map their respective roles. Accordingly, a more nuanced analysis is possible of the extent to which inclusion is realized vis-à-vis those affected by the institution and how various actors influence the accountability process, whether positively or negatively. Moreover, in a decision-making procedure, several decisive moments in the procedure exist that influence the level of inclusion required in a given context. Consequently, in the analysis, one needs to identify these moments and chart who is responsible for what moment, to be able to better identify the strengths and weaknesses in the accountability framework of the international institution in question.

50 BP 4.10, at 3 and 4.

51 The term *borrower* refers to "the recipient of an IDA grant, the guarantor of an IRBD loan" (which can be a borrowing member state) or to a "project implementing agency, if it is different from the borrower," OP 4.10. See further, for instance, A. Naudé Fourie at 58-60. In principle, there is a formal division between the obligations of the World Bank and those of the borrower (see, for instance, World Bank Inspection Panel, *Honduras: Land Administration* (2006) MR, §29). However, the relation of the borrower with the WB is far more intricate. Naudé Fourie stated. that what the "World Bank is to be (held) accountable for, is also shaped by the content and scope of Borrower obligations." A. Naudé Fourie, *World Bank Accountability* (Eleven Publishing 2016) at 114, see further 114-129. It should be noted that the World Bank Inspection Panel has competence to assess the accountability of the World Bank vis-à-vis those affected, but it has not competence to assess the compliance of the borrower.

52 BP 4.10, at 3 and 4.

53 BP 4.10, at 6, and OP 4.10, at 9. It should be noted that a Social Assessment (SA) will only be developed if, after screening, it is determined that indigenous people are present or have collective attachment to the project area. The indigenous people should have free prior informed consent in this SA. The World Bank's Task Team is responsible to review whether those indigenous peoples will indeed give their prior informed consent. They review the terms and process of the SA in this light.

54 Idem, at 2(c).

55 Idem, BP. 4.10, at 2(a); see also OP 4.10, at 10.

Within the UNHCR RSD procedure, the participatory process is similarly not one singular moment of communication with the officials. In the RSD procedure, several moments of interaction occur in which the asylum seeker presents his/her reasons for applying for RSD. Amongst others, the asylum seeker needs to fill in the RSD application form;[56] its completeness and accuracy is verified through an individual and confidential registration interview.[57] However, the phase that matters the most is the RSD interview in which the asylum seeker presents his/her claims in person to a qualified eligibility officer.[58] The interview is to be used to clarify incomplete or contradictory facts or statements, and inconsistencies in the evidence provided, also when compared with other sources of relevant information. Asylum seekers may bring a legal representative to the interview; moreover, those asylum seekers with a legal representative have access to further procedural guarantees.[59] As explained above, asylum seekers have in principle no access to their RSD file, nor to the evidence submitted by other parties or to the interview transcript. Only if they have a legal representative, then their legal representative may access the interview transcript files on the premises of the UNHCR office. However, for those without a legal representative – which is the case for most asylum seekers – their participatory process is negatively affected by the lack of access to such information.

When those affected are considered to be particularly vulnerable, institutions are required to do more to realize a meaningful participatory procedure, including fulfilling their obligation to provide a safe environment for those affected to present their views and to protect where necessary their privacy and safety by holding confidential participatory sessions. Both the World Bank and the UNHCR have recognized the importance of creating a safe environment in which those affected can present their views freely.[60]

The Model further stipulates that authorities have to provide reasons for their decision. The UNHCR field offices are required to inform "wherever possible"[61] the asylum seekers

56 Procedural Standards 3.2.4.
57 Procedural Standards 3.2.5.
58 Procedural Standards 4.3.1. For further information on the qualification of eligibility officers, see 4.2.2 and 4.2.3. of the Procedural Standards.
59 The legal representative – and not the asylum seeker – is permitted to see medical reports of third parties used in the RSD procedure and other expert reports used by UNHCR officials.
60 The WB IP held that this obligation derives from the requirements for "full and informed" consultation, as laid down in OPs 4.20 (esp. §8) 4.30, and 4.01, WB IP, *China Western Poverty Reduction Project* (1999), Investigation Report, at §116. A key principle in UNHCR procedures to ensure a safe environment for asylum seekers is the right to confidentiality. After all, asylum seekers come to the UNHCR field offices as they fear for their lives and live in fear of persecution. The reasons why they believe they face persecution and the evidence relied upon to prove their need for protection constitute sensitive and personal information, which – if it falls in the wrong hands – may endanger the lives of these asylum seekers. The UNHCR Procedural Standards Handbook therefore stipulate the right to confidentiality for applicants for RSD Procedural Standards, unit 2.1.1.
61 Unit 6.2 of the UNHCR Procedural Standards Handbook.

whose claims were rejected of the reasons for the rejection in writing.[62] The field offices are advised to use the standard *Notification of Negative RSD Decision Letter* for informing the applicant of a negative decision.[63] The standardized letter contains a list of *boxes* of reasons to reject refugee status. Eligibility officers have to tick those boxes that apply to the case of the applicant.[64] As a best practice, the Procedural Standards Handbook advises the officers to provide a brief explanation of the specific facts in the applicant's claim that are relied upon for their conclusion to deny refugee status; in other words, they are encouraged to explain why each box is ticked.[65] Furthermore, it is *advised* to include in the completed Notification of Negative RSD decision letter references to the evidence submitted by the applicant that was considered insufficient and/or to the evidence that was not accepted by the decision-maker as well as to include a summary of the reasons why the evidence was rejected.[66] The information that formed part of the decision-making procedure will be disclosed to the applicant, unless it could jeopardize UNHCR staff, prevent UNHCR to from working effectively, or if the disclosed information could jeopardize the source of the information.[67] In practice, this means that the applicant will receive a copy of the evidence they have submitted to the UNHCR; however, the applicant will not receive a copy of the transcript of the RSD interview[68] nor will they receive a copy or summary of the evidence submitted by third parties or information relied upon from the government of their country of origin or from the host country. When applicants have only limited access to the evidence relied upon, and when only limited reasons are provided for the decision reached, it has a crippling effect on the overall level of inclusionary governance realized by the institution; including on the effectiveness of the remedy available to those affected, which is the step that will be discussed next.

62 Idem.

63 See Annex 6-1 to the Procedural Standards Handbook for the format.

64 The reasons include: the information provided in support of the claim was not sufficiently detailed, and one did not provide a reasonable explanation for failing to provide this relevant information; and the information provided to the UNHCR was not considered to be reliable on points that are material to the asylum seeker's claims. The reasons for being considered unreliable include: the harm that the asylum seeker fears is not of the nature and/or seriousness that constitutes a form of persecution; the authorities in the country of origin of the asylum seeker are able to provide effective protection from the harm feared; or the asylum seeker is able to live in another part of his/her country of origin without fear of persecution and could reasonably return to live in this area without undue hardship. See the Procedural Standards Handbook, Annex 6-1, Notification of Negative RSD decision.

65 See Annex 6-1, and Unit 6.2 of the UNHCR Procedural standards Handbook.

66 Unit 6.2 of the UNHCR Procedural Standards Handbook.

67 Procedural Standards, 2.2 and 6.2.

68 After the interview is conducted, a transcript of the interview is read back to the applicant, but no hard copy of the document is given to the applicant. See further above with regard to the right to an individual interview; see also Procedural Standards, 4.3.11.

6. The duty to ensure an effective remedy to those affected:
Do those affected have access to a competent, independent and impartial review body; if so, has the review body provided a fair review procedure? Did the review body duly reason its decision and communicate these reasons to those affected?

Were those affected provided with reparation to remedy the harm done?

The first component of the entitlement of an effective remedy is the entitlement to a review. The review has to be conducted by a competent, independent and impartial review body. The independence and impartiality of the review body has both a de iure and a de facto aspect. The difference between these two can best be illustrated by the functioning of the World Bank Inspection Panel. The World Bank Inspection Panel was established by a resolution of the Board of Directors,[69] and the Panel members are appointed by the Board after being nominated by the World Bank President.[70] The website of the WB IP highlights that it is an "independent complaints mechanism." However, the Inspection Panel answers directly to the Board and the Panel members are bank officials.[71] In other words, one may argue de iure that the Panel is not independent. Nevertheless, certain safeguards are in place that seek to ensure independence of WB IP members from the World Bank; for instance, Panel members may not have been employed by the Bank prior to an appointment to the Panel unless more than two years has elapsed since the end of their service nor may they be employed by the World Bank after they step down. More importantly, the Inspection Panel has established its de facto independence from the World Bank through its review of requests from people affected by the World Bank's projects.[72] The World Bank Sanctions Board[73] faced similar problems as it was comprised of a mix of bank officials and external experts; in 2016, however, the Sanctions Board's de iure independence was improved. Now, the WB Sanctions Board is comprised of

69 In 1993, the World Bank Inspection Panel was established by Resolution IBRD 93–10 of the International Bank for Reconstruction and Development and Resolution IDA 93–6 of the International Development Agency (IDA) (September 22, 1993).

70 Website of the WB Inspection Panel: http://ewebapps.worldbank.org/apps/ip/Pages/Home.aspx; see also http://www.cao-ombudsman.org/ for complaints related to development projects supported by other agencies of the World Bank Group, of the International Finance Corporation (IFC) and of the Multilateral Investment Guarantee Agency (MIGA). These are dealt with by the Office of the Compliance Advisor Ombudsman (CAO). For a comparison, see A. Naudé Fourie and D.D. Bradlow 'The Operational Policies of the World Bank and the International Finance Corporation Creating Law-Making and Law-Governed Institutions?' 10 *International Organizations Law Review* (2013), at 3-80.

71 For a further discussion, see A. Naudé Fourie, *The World Bank Inspection Panel and Quasi-Judicial Review Oversight, in Search for the 'Judicial Spirit in Public International Law'*. (Utrecht: Eleven International Publishing 2009), at 163-164.

72 See, e.g., Naudé Fourie, at 186-212 In this regard, see particularly the 1999 *China Western Poverty Reduction Project (Qinghai)* IR, §116; *2001 Chad Pipeline Development & Pipeline Project, Chad Pipeline,* IP Chairperson address at §8.

73 According to the Website of the World Bank Sanction Board, the Sanctions Board "is an independent administrative tribunal that serves as the final decision-maker in all contested cases of sanctionable misconduct occurring in development projects financed by the World Bank Group."

only external experts. The Sanctions Board offers safeguards to ensure the impartiality and independence of its members individually and collectively in the execution of adjudicatory tasks. For instance, for two years after the end of their term, members are prohibited to accept employment or consulting positions in a firm that appeared as respondent in one of the review procedures in which the respective member participated. Moreover, members are disqualified from serving as agent, legal representative, or attorney of any respondent in the proceedings of the Sanctions Board for two years after their term.[74]

In contrast, the UNHCR's review procedure is not executed by external experts or by a review body that established its de facto independence. The review is conducted by a qualified UNHCR Eligibility Officer (or another UNHCR Protection staff member) who was not involved in the RSD decision-making procedure at first instance.[75] When possible, the appeal should be decided by an Eligibility Officer (or another Protection staff member) who has equivalent or greater experience with RSD procedures than the Eligibility Officer deciding the claim at first instance. In other words, the review is handled, at most, by a higher authority within the same decision-making body. There is no possibility of appealing this review decision to an independent and impartial review body.

In addition to the requirements of independence and impartiality, the review body also has to be sufficiently competent to provide an adequate and effective remedy. A key factor is whether the review body can make a final decision and provide reparation that remedies the harm suffered. For instance, the World Bank Sanctions Board, the final review instance in the sanction proceedings, explained that the principle of finality[76] is a:

> …fundamental aspect of any judicial and quasi-judicial process inclusive international administrative tribunal proceedings. Finality is essential to provide certainty, prevent re-litigation of claims already adjudicated, conserve judicial resources and encourage respect for adjudicatory outcomes (res judicata).[77]

Overall, the World Bank Sanctions Board is sufficiently competent to provide an adequate remedy. UNHCR appeals officers are similarly competent to make a final decision and determine whether or not the original rejection of refugee status was correct. However, these UNHCR officers cannot address potential procedural flaws or other grievances that

74 Statute of the World Bank Sanctions Board (October 18, 2016), Section III – B.11.

75 Unit 7.3 of the UNHCR Procedural Safeguards, *UNHCR RSD Procedural Standards - Appeal of Negative RSD Decisions*, (2017), available at: http://www.refworld.org/docid/5915c1b14.html.

76 Both the Statute of the World Bank Sanctions Board (article XIV) and the World Bank Sanctions Procedure (Section 8.03(d)) speak of finality of Sanctions Board decisions.

77 World Bank Sanctions Board, *Decision no. 49, Sanctions Case 130* (May 30, 2012), §47, accessible via the website of the World Bank; see also World Bank Sanctions Board, *Decision no. 43* (2011), §11-14, summarized in the World Bank Sanctions Digest, (last updated in 2011).

can influence the extent to which an adequate remedy can be provided. After assessing the competence, independence and impartiality of a review body, it needs to be assessed whether the provided procedure is fair.

The Model recognizes the discretion of authorities in setting the format of and conditions for a review procedure, as long as the review procedure remains fair. Overall, several elements play a role in determining the fairness of the review procedure: a reasonable timeframe, transparency in the procedure, and equality of arms. The lack of one or more of these elements negatively affects the fairness of the procedure. For example, the lack of access to detailed reasons, combined with a lack of access to third-party experts' and doctors' reports and limited access to their personal RSD file puts asylum seekers in a disadvantaged position for the review procedure. As a result, there is no equality of arms within the UNHCR RSD review procedure; an asylum seeker may not cross-examine witnesses or experts, and there is a general lack of information made available to the asylum seeker. All these factors have a negative effect on the fairness of the review procedure. Overall, when a lack of certain identified common core guarantees exists in a given review procedure, it is presumed to negatively affect the fairness of the procedure. Thus, when those affected are not duly informed of the decision-making and review procedure, when authorities do not provide reasons for the decision reached, when there is no possibility of presenting one's view in the decision-making and/or review procedure, the fairness of this procedure is negatively affected. In its consideration of a case, the World Bank Sanctions Board takes into account whether such factors have negatively impacted the fairness of the procedure. For example, in case of grave procedural flaws, the WB Sanctions Board may dismiss the case.[78] The Sanctions Board takes other procedural flaws into account when it reviews the merits in a particular case and in the determination of appropriate sanctions.[79] In general, when imposing a sanction, the WB Sanctions Board considers the totality of circumstances and all potential aggravating and mitigating factors to determine an appropriate sanction.[80]

78 Even though the Sanctions Board mentioned the possibility, it did not state when and what procedural flaws would have such effect. In the decision at hand, the respondent was unable to sufficiently substantiate their claim according to the Sanctions Board. See World Bank Sanctions Board, *Decision no. 63, Sanctions Cases no. 119, 124, IDA Credit no. 3771 TA, Tanzania* (January 31, 2004); in *Decision no. 64,* the World Bank Sanctions Board stated that when more than 10 years (statutory limitations) have passed since the alleged fraud or corruption took place, it will result in direct dismissal of the case. See World Bank Sanctions Board, *Decision no. 64, Sanctions Case 122, IDA Credit 3746 KH Cambodia,* (March 31, 2004), §30.

79 For instance, see World Bank Sanctions Board, *Decision no. 44* (2011), §77, summarized in the World Bank Sanctions Digest, §77. In this case, the Sanctions Board argued that **"s**uch passage of time may impact on the weight SB attaches to the evidence presented as well as the fairness of the process for respondents;" see also World Bank Sanctions Board, *Decision no. 50, Sanctions Case 117* (May 30, 2012), §25; World Bank Sanctions Board, *Decision no. 38* (2010), §54, summarized in the World Bank Sanctions Digest.

80 World Bank Sanctions Board, *Decision no. 66, Sanctions Case 208, PPIAF Trust Fund Grant NO TF023613 Vietnam* (May 19, 2014), §32. This decision states: "the choice of sanction is not a mechanistic

The second component of the entitlement to an effective remedy is that international institutions have to provide reparation that is effective and adequate in remedying the harm suffered by those affected. International institutions are accorded wide discretion in achieving this result and in determining the type of reparation to be provided to those affected. For instance, when the UNHCR decides not to grant refugee status to an asylum seeker, there is a possibility for the asylum seeker of having this decision reviewed by a higher authority in the same decision-making body. The review constitutes a substantive review of the rejection of refugee status; in other words, it will be reviewed whether or not the refugee status was correctly denied. In this review procedure, the original RSD decision will be re-examined to determine whether the decision was based on a "reasonable finding of fact and a correct application of the refugee criteria."[81] The appeal consists of a "thorough review" of the RSD file, including the RSD interview transcript and RSD assessment,[82] the appeal form and any other information provided by the applicant in support of the appeal.[83] Asylum seekers have little opportunity in this review procedure to address procedural flaws in the procedure or misconduct by the decision-making authority; however, other review mechanisms are available in the UNHCR context.

In addition to the review of the substantive decision upon request by those affected, the majority of international institutions has a form of internal review mechanism in place. These procedures can provide for another type of reparation. For instance, the UNHCR works with RSD supervisors who are responsible for the oversight of the RSD operations to ensure the quality and integrity of the RSD procedures.[84] An RSD supervisor reports to the Representative or Head of Office who is ultimately accountable for proper implementation of the procedural standards. In addition, every UNHCR field office has to have a procedure in place to receive and respond to complaints of RSD applicants.[85] The complaint procedure has to focus on:

determination, but rather a case-by-case analysis tailored to the specific facts and circumstances presented in each case." World Bank Sanctions Board, *Decision no. 40* (2010), §28, summarized in the World Bank Sanctions Digest, §56. There is also a sanctions guideline that provides the Sanctions Board with "guidance as to the type of considerations potentially relevant to a sanction determination." In *Decision no. 66* of the WB Sanctions Board, the factors that were considered were, for instance: the severity of the misconduct, minor role in the misconduct, voluntary corrective action, cooperation, period of temporary suspension; in this case, it resulted in a formal letter of reprimand, §35-51; see similarly World Bank Sanctions Board, *Decision no. 1* (2007), §8.

81 Unit 7.4.1. of the UNHCR Procedural Standards Handbook.

82 The interview and/or RSD assessment are not disclosed to the applicant.

83 Unit 7.4.1 of the UNHCR Procedural Standards Handbook.

84 M. Smrkolj, 'International Institutions and Individualized Decision-Making: An Example of the UNHCR's Refugee Status Determination', at 1797 and ff. See also UNHCR Procedural Standards Handbook, 4-16.

85 UNHCR Procedural standards Handbook, unit 2.6.

> Reporting serious misconduct by UNHCR staff, security guards or implementing partners, or procedural unfairness (including complaints about the quality, availability or conduct of interpreters, or denial of access to UNHCR premises or staff or RSD procedures.[86]

These procedures are free of charge, and everyone who approaches a UNHCR office will receive information regarding the basic rights of asylum seekers and the procedures for reporting mistreatment or misconduct in UNHCR procedures.[87] However, whether these procedures can provide reparation that is effective and adequate in repairing harm suffered by those affected depends on various factors, including whether these individuals feel they can file their complaints without fear of repercussions, whether the review of these claims is conducted while taking into account the proper procedural safeguards required, and the type of reparation that the reviewing authority can provide.

Thus, internal review procedures can contribute to providing reparation to the harm suffered by those affected. Moreover, as chapter 7 demonstrated, internal review procedures can form an important additional component to assess the overall quality of the procedure, which assessment can contribute to the effectiveness of legal remedies offered to those affected.

7. What is the overall conclusion of the level of inclusionary governance realized by the international institution in question?

In the last step, the decision-making procedure and review procedure are assessed as a whole to examine whether and to what extent the international institution in question has realized inclusionary governance for those affected, and hence, whether and to what extent such institutions are accountable vis-à-vis those affected by their decisions. In this step, the sum of the assessment is evaluated per step. One evaluates whether and to what extent the international institution met the different benchmarks per building block. The yardstick allows one to identify the strengths and weaknesses in a given accountability framework of an international institution exercising public power vis-à-vis individuals and how these affect the overall level of inclusionary governance realized. Accordingly, it enables someone to identify potential differences in the extent to which the various actors within the same international institution are accountable to those affected.

For example, the UNHCR Procedural Standards Handbook on RSD Mandate Procedures accords discretion to RSD field officers in determining how extensive the reasons will be that are provided for RSD decisions. As illustrated above, the standardized reasons form is by itself not a problem; the form *suggests* that field offices should further explain the reasons beyond

86 Idem.
87 Idem.

the *ticking of the box*. However, practice reveals that the field offices often do not provide further explanation.[88] Accordingly, when too much discretion is accorded to authorities, it constitutes a weak point within the procedure, which may lead to non-compliance with one or more benchmark(s), including the duty to give reasons. Moreover, unfettered discretion has a negative effect on the overall quality of a procedure. There are nevertheless examples of some UNHCR field offices providing extensive reasons at their own initiative, and thereby, complying with the UNHCR's best practice suggestion.[89]

In this last step of the Model, where the overall level of inclusionary governance realized is assessed, these nuances come to the surface. As a result, recommendations can be formulated on how the accountability of an international institution can be improved vis-à-vis those affected by its decisions and how weaknesses in the procedure can be mitigated or compensated.

3. Conclusions

Chapter 1 posed two underlying criteria for a yardstick to analyze the accountability of international institutions vis-à-vis those affected by their decisions: (1) the yardstick is to identify the procedural arrangements that are necessary to decrease the accountability deficit of international institutions vis-à-vis those affected; and (2) in the identification of the elements of the yardstick, a proper balance is to be struck between the general nature of the accountability problem and each institution's specific circumstances. This chapter presented the fine-tuned Inclusionary Governance Model for International Institutions and demonstrated that the Model as set out here meets the two underlying criteria for a yardstick.

Section 1 of this chapter explained how the Draft Model is fine-tuned to better accommodate the specific circumstances in which each international institution operates. In section 2, the functioning of the Model as a general yardstick was used to illustrate how the accountability of international institutions can be analyzed. The step-by-step application of the IGM enables one to use the yardstick to conduct a systematic and thorough analysis of an international institution's accountability framework. Moreover, it enables one to use this

88 See, e.g., the report published by RSDWatch, 'No Margin for Error: Implementation of UNHCR's *Procedural Standards* at Selected UNHCR Field Offices in 2007' (No Margin for Error) (June 2008), available at https://Rsdwatch.Files.Wordpress.Com/2010/03/Nomarginforerror2007.Pdf. The UNHCR Lebanon office actually applied a lower standard and provided only general rejection letters. Legal representatives of asylum seekers are allowed to see the internal assessment of the case at hand and, therefore, become aware of the reasons for rejection. However, those asylum seekers without a legal representative (which constitute the majority of the applicants) have no access to these files and will not receive the reasons for their rejection, 'No Margin for Error', at 19.

89 In 2007, for example, the UNHCR Nairobi office provided individualized reasons for refusing refugee status to all applicants who were denied recognition as refugees. See No Margin for Error Report, at 18.

yardstick for internal evaluation purposes, both for an ex ante evaluation of the inclusionary governance that has to be realized by an international institution and the legal framework that should be developed and for an ex poste evaluation to identify strengths and weaknesses in an international institution's current practice and how it may be improved. Hence, the Inclusionary Governance Model for International Institutions is a dynamic yardstick that serves to analyze and address in a systematic manner the accountability of international institutions vis-à-vis those affected by their decisions.

9 Final Remarks

Increasingly, international institutions make decisions that have far-reaching consequences, affecting not only their member states, but moreover, directly affecting individuals. In a time where problems often require a transnational and global solution, international institutions can be powerful and necessary actors in addressing these problems. Each international institution that makes decisions that directly affect individuals has as a rationale to address the threats against international peace and security, to foster the rule of law, to fight poverty, or to address corruption in development projects – but these aspirations are difficult to achieve by states independently within their own borders. However, the fact that their decisions have far-reaching consequences and directly affect individuals is a problem.[1] Whenever international institutions act instead of domestic public authorities, individuals lose the protection of the law and the procedural safeguards that they would normally have within a state governed by the rule of law. In these instances, the question arises: who guards the guardians?[2] The argument made by practitioners within international institutions from a humanitarian perspective that "we have good intentions, we are not the bad guys"[3] is no longer sufficient in this era. This research therefore used a public law approach to analyze the exercise of public power at the global level. Public law has a dual function: it serves to *constitute* and *constrain* the exercise of public power. In any society, constraints on the exercise of public power are necessary, regardless of the noble intentions of its authorities. As James Madison said already in 1788:

> If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[4]

At the global level, it is even more pertinent to have proper constraints in place on the exercise of public power by international institutions. The control of member states over the functioning of international institutions is limited and the exercise of public power by international institutions is expanding in breadth and depth without a legal framework to commensurate those powers. There is an increasing use of specialized agencies and expert bodies; this places

1 See, for instance, the news articles addressing the lawsuit initiated against the IFC (World Bank Group) over how their actions harmed rural communities. V. Maru 'The World Bank shouldn't hide when it funds projects that harm communities' The Washington Post (May 9, 2018).

2 G. Verdirame, *The UN and Human Rights: Who Guards the Guardians* (Cambridge University Press 2011).

3 This argument was made by an OSCE official in a lecture on the work of the OSCE in Bosnia and Herzegovina and their cooperation with the OHR in the removal of public officials from their office, Sarajevo, Bosnia and Herzegovina, (June 2009)

4 J. Madison, 'The Federalist No. 51- The Structure of Government Must Furnish the Proper Checks and Balances Between Different Departments' (1788).

member states of international institutions further away from the decision-making authority. As a result, individuals are directly affected by decisions of these institutions without having the ability to hold these authorities to account for their exercise of public power.

The public law approach adopted in this research provides a lens and a language with which to understand and map what is happening at the global level, to address the accountability deficit of international institutions vis-à-vis those affected by their decisions. The main justification for this approach lies in the functional similarity[5] between the exercise of public power by an international institution and that by domestic authorities: individuals are affected in a similar manner by such exercises of public power, whether the authority is exercised at the global or at the domestic level. Studies that use public law language to address the exercise of public power by international institutions often use an internal yardstick that is not made explicit to analyze what is happening and to come with recommendations on how to improve the accountability of these institutions. However, when a yardstick is used for an accountability analysis that contains value-laden norms and/or *commonly understood* concepts without a clear explanation and justification of the definitional considerations, it makes it problematic for other researchers to apply the yardstick: it becomes difficult to distinguish between the normative dimension(s) and the descriptive mapping exercise within a given research; and, in particular, it easily leads to misunderstandings of, or misconceptions about, the norms and their suitability for application in different contexts. Particularly in the legal discipline, scholars are often not explicit about their methods and methodology used in a research; whether it derives from an underestimation of the necessity of discussing the used methodology in comparison to other disciplines or from another logic, a lack of a discussion of the methodology negatively affects the overall quality of the research conducted. When developing a normative yardstick, it is important to be conscious and explicit in the methodological choices made to develop it. The dissatisfaction with existing approaches to the accountability deficit faced by international institutions incentivized this research to develop a robust normative and evaluative yardstick with which to analyze and address the accountability of international institutions vis-à-vis those affected in a systematic manner. This book contributes to existing literature by addressing the criticism and sets out a dynamic Model with clearly defined benchmarks for each building block. Throughout the book, a thorough explanation and demonstration has been given of the path taken to develop this yardstick. The contribution of this research lies both in the development of a novel normative yardstick with which to analyze the accountability of international institutions and in the methodology used, which is the combination of doctrinal legal research with model-building and comparative methods.

5 A. Momirov. and A. Naudé Fourie, 'Vertical Comparative Law Methods: Tools for Conceptualizing the International Rule of Law' (2009) 2(3) *Erasmus Law Review* 291.

The Inclusionary Governance Model for international institutions

The normative yardstick (the Inclusionary Governance Model) was developed in steps, which included extensive comparative research to evaluate and compare how public power is regulated by international law for domestic public authorities and for international institutions. As a result, the Model identifies both the nature of the procedural arrangements necessary to decrease the accountability deficit and the yardstick's required elements to be able to strike a proper balance between the general nature of the accountability problem and the specific circumstances in which each institution operates. Although the benchmarks of the building blocks of the Inclusionary Governance Model are formulated as minimum norms to be provided by public authorities, there is a general understanding that international institutions – or any public authorities – are best suited to determine how the result should be achieved. Accordingly, public authorities have a certain amount of discretion in the exercise of their public power. This research took a first step in decrypting the black box of such discretionary power: the administrative space in which authorities have the freedom to make the policy choices best suiting the institution within the inclusionary governance framework. The concepts of vulnerability and the substantive limitation of non-arbitrariness serve in the IGM as a trigger factor to determine the extent to which international institutions enjoy discretion in their exercise of public power. Moreover, these two concepts influence the content and scope of the inclusionary governance to be realized in a given context. Future research will continue to decrypt this by conducting case studies at the domestic and international levels of the exercise of public power and its applicable legal framework.

Although it goes beyond the scope of this research, the way in which the concept of vulnerability is currently treated by the monitoring bodies of human rights treaties can be criticized.[6] As demonstrated in this book, the various human rights bodies use the term of vulnerability to identify an ever-increasing category of individuals or groups of individuals in need of *further* protection by the state. Such further protection is triggered by being *more*

6 See, for instance, the vulnerability theory developed by Fineman. She takes as a point of departure the "inherent vulnerability embodied and embedded" in each individual; when addressing these vulnerabilities, the extent to which the individuals are resilient is what distinguishes them. Shifting the focus to examine the extent to which someone vulnerable is *resilient*, and what is required to make a person more resilient, allows one to better understand the more complex social, family and societal structures that influence the overall level of inclusionary governance realized. M. A. Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1-23; M.A. Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4(3) *Oslo Law Review* 133-149; it should be noted that the Martha Fineman's main argument was developed as a counter argument to equality and non-discrimination laws in the US, her response, *the vulnerability theory*, addresses the limitations to this equality argument, and that the state should go beyond formal equality and impermissible discrimination. The main argument she puts forward is how the vulnerability theory demands for the state to be more responsive, to make individuals more resilient, and as a result, what is expected from the different structures to improve the resilience of individuals. Individuals are all equally vulnerable, what differs is whether individuals are better positioned and thus more resilient. She explains that in situations of inevitable inequality, such as employment contracts, the state is expected to do more.

affected than others, by distinguishing the factual, social, legal, and/or personal situation of one individual or group versus another and by demonstrating why the state has to provide further protection to these people. However, there is a danger in this approach if one does not question the application and interpretation of the concept across the various treaties. For example, one may wonder whether an ever-increasing recognition of people or groups warranting further protection does not lead instead to a diminished general right to protection by the state. In other words, if further guarantees can only be offered when the vulnerability factor can be demonstrated, it may lead to less protection of individuals instead of more, especially of those who are not deemed to be particularly vulnerable. Combined with the inconsistent and contradicting usage of this concept by treaty monitoring bodies, it may lead to a lack of legal certainty as to who has to receive further protection from public authorities and under what circumstances. In turn, this may result in the concept of vulnerability becoming a hollow or meaningless concept.

The Inclusionary Governance Model as a yardstick to analyze the accountability of international institutions

The Model serves as yardstick for both internal and external evaluation of the accountability framework of an international institution. In general, the elements of the Model are the identified minimum standards of both a procedural and a substantive nature, the *benchmarks*, combined with a set of constraints on any exercise of public power. Together these serve to address the accountability deficit faced by international institutions in a systematic manner. The exercise of public power by international institutions is increasingly disorganized, involving a variety of actors, and encompassing fewer clear accountability structures within the institution and between the various organs and the various parties affected. In other words, it often involves multiple levels of governance. Therefore, the dynamic IGM, responding to the particular circumstances in which international institutions operate, offers a language with which to address these developments. For example, the European Union (EU) is a prime example of multilevel governance by an international actor that can directly affect individuals. The Inclusionary Governance Model provides one with a lens to analyze the strengths and weaknesses in the current accountability structure of the decisions made by the EU that directly affect individuals. For instance, do citizens-participation initiatives offer an opportunity to participate in a meaningful manner in the decision-making procedure or is it rather a pro forma process? Are NGOs entitled to a review of decisions adopted by the EU for lack of compliance with environmental standards? To what extent do the various actors involved in a decision-making procedure enjoy certain discretion in the exercise of their powers and are the common core guarantees realized to prevent an arbitrary decision? In other words, the Model has strong practical relevance considering its wide scope of applicability and relevance. As scholars, we need to continue to map, analyze, and compare these practices, not only to contribute to an enhanced understanding of the normative

development thereof but also to provide input on the functionality of the international institutions, and to identify key moments in a decision-making procedure and the strengths and weaknesses in the execution of the decision-making procedure.

In this regard, this research builds on and contributes to existing literature on the accountability of international institutions. The results of the extensive legal survey conducted provide further proof of the necessity to combine both administrative and constitutionalist approaches and apply their outcome to the accountability deficit international institutions vis-à-vis those affected by their decisions. The adopted public law approach offers a rich set of data on how treaty monitoring bodies understand and interpret the exercise of public power by public authorities and its constraints. The enhanced understanding of how such public power is, and should be, constrained according to international law enables one to further theorize, for instance, the role and necessity of discretionary powers and the role of law in ensuring the accountability of the various actors operating in the global arena. Similarly, whereas rules of evidence, burden of proof and standard of proof are only evaluated in the Model when an international institution's decision-making and review procedure have inherent arbitrary features, or in relation to only a small set of particular decisions, these concepts are underexplored in the international arena and deserve further exploration. Both the analysis of the practices of international institutions and the outcome of the legal survey reveal that these are highly contextual concepts. In opposition to public authorities at the domestic level whose exercise of public power is challenged less, international public authorities are incentivized to more actively discuss and justify their level of procedural safeguards and legal framework in place. In defining these concepts, public authorities have to find a balance between what is at stake in the given procedure and how the given standard is justified in light of the circumstances. The parameters for such a determination are the applicable legal framework and the extent to which authorities enjoy discretion to determine these concepts. The explanation or justification provided by international institutions gives insight into the rationale of a decision-making body, its legal and factual positioning in comparison to other relevant actors or into the context of potentially relevant legal frameworks, and into the extent to which the specific context is of influence. Ensuring the accountability of an international institution is a continuous process, which is constantly influenced by internal and external factors. The IGM allows one to map these processes, and to assess strengths and weaknesses in the institutional design of international institutions and in the execution of public power by international institutions.

In conclusion, the Inclusionary Governance Model for international institutions offers an answer to the accountability problem of international institutions. The dynamic and normative yardstick accommodates the context in which international institutions operate while simultaneously setting benchmarks for the inclusion of those affected in the decision-making procedure of international institutions.

Nederlandse Samenvatting

Internationale instellingen oefenen steeds vaker publieke bevoegdheden uit die individuen en hun leefomgeving ongunstig kunnen beïnvloeden. De meest ingrijpende voorbeelden hiervan zijn de lijsten van de sanctiecomités van de VN-Veiligheidsraad waarop individuen en entiteiten geplaatst worden voor hun vermeende betrokkenheid bij terroristische activiteiten. Degenen die op de lijst staan worden geconfronteerd met een reisverbod en een bevriezing van alle banktegoeden. De impact van deze individuele sancties is groot, niet enkel diegenen die op de lijst staan ervaren de effecten ervan, maar ook hun directe familie wordt hierdoor geraakt. Voor deze individuen is het heel moeilijk om de sancties aan te vechten op internationaal niveau, temeer omdat zij vaak niet weten welke redenen ten grondslag liggen aan de sanctionering. Op gelijkerwijze nemen andere internationale instellingen besluiten die individuen direct kunnen raken; zoals, de besluiten van de Wereldbank om ontwikkelingsprojecten te financieren en de VN Hoge Commissaris voor Vluchtelingen die in meer dan zestig landen bepaalt of asielzoekers recht hebben op een vluchtelingstatus wanneer deze landen zelf de administratieve procedure niet uit willen of niet uit kunnen voeren. Deze internationale instellingen worden bekritiseerd om hun gebrek aan waarborgen voor diegenen die geraakt worden door deze besluiten. Echter stelt het internationaal recht geen duidelijke waarborgen om de positie van geraakte individuen te beschermen en mist het regels om de verantwoordingsplicht van internationale instellingen ten opzichte van individuen te bewerkstelligen. Ondank dat in toenemende mate overeenstemming is dat een dergelijke verantwoordingsplicht bestaat, is er tot op heden nog geen duidelijk raamwerk of toetsingskader om de naleving van deze plicht door internationale instellingen te analyseren.

Dit onderzoek ontwikkelt een dergelijk raamwerk, dat men ertoe instaat stelt op een systematische manier de verantwoordingsplicht van internationale instellingen ten opzichte van individuen te analyseren. Het raamwerk dat ontwikkeld wordt in dit boek, *Inclusionary Governance Model for International Institutions*, dient te voldoen aan twee voorwaarden. Het is (1) van voldoende algemene aard om minimum standaarden te formuleren die gelden voor alle internationale instellingen die besluiten nemen die individuen direct kunnen raken, en (2) voldoende flexibel om de specifieke context van elke internationale instelling die dergelijke besluiten neemt in acht te nemen. Dit onderzoek neemt aan dat de minimum standaarden een combinatie zullen zijn van inhoudelijke en procedurele standaarden. De procedurele waarborgen die nodig zijn om individuen voldoende te betrekken bij de besluitvormingsprocedure, zijn onder te verdelen in drie dimensies: het recht op informatie, het recht op participatie en het recht op een effectief rechtsmiddel.

Hoofdstuk 1 bespreekt de invalshoek van het onderzoek, alsmede de methoden en de gebruikte definities. Dit boek stelt als uitgangspunt voor de analyse dat de manier waarop internationale instellingen publieke bevoegdheid uitoefenen, vergelijkbaar is met hoe nationale actoren publieke bevoegdheid uitoefenen op het nationale niveau. Op het nationale niveau stelt het publiekrecht de grenzen aan overheidshandelen. Voor de ontwikkeling van het Model wordt er, onder andere, onderzocht hoe de publieke bevoegdheid van nationale actoren gereguleerd wordt in het internationaal recht. Het Model wordt in vier stappen ontwikkeld, die overeenkomen met de vier delen van dit boek:

- Deel 1: Evaluatie van het huidige internationale recht wat van toepassing is op internationale instellingen en de bestaande theorieën die zien op de globalisering en het gebrek aan verantwoordingsplicht van internationale instellingen op het internationale niveau. De uitkomst is een conceptueel model (*Conceptual Model*).
- Deel 2: Evaluatie van hoe het internationaal recht de nationale actor die publieke bevoegdheid uitoefent, reguleert en hoe er invulling gegeven wordt aan de verantwoordingsplicht van deze actoren ten opzichte van individuen wanneer zij besluiten nemen die individuen en hun leefomgeving direct kunnen raken. De uitkomst is een concept model (*Draft Inclusief Governance Model*).
- Deel 3: Het demonstreren en testen van het werken van het concept model door toepassing op de VN Veiligheidsraad Sanctie Comité inzake ISIL (Da'esh) en Al-Qaida.
- Deel 4: Verfijning van het concept model. De uitkomst is een aangepast inclusief governance model (*Inclusionary Governance Model for International Institutions*).

In Deel 1 (*hoofdstuk 2*) wordt het conceptueel model ontwikkeld op basis van een evaluatie van de *state of play* van de huidige regels van het internationaal recht die van toepassing zijn op de regulering en de bevoegdheden van internationale instellingen die besluiten nemen die individuen direct kunnen raken. Het huidige internationaal publiekrecht stelt weinig grenzen aan de bevoegdheden van internationale instellingen, behalve dat deze uitgeoefend dienen te worden in overeenstemming met de constitutie van een instelling en dat algemene regels van het internationaal recht beperkingen kunnen op leggen aan de bevoegdheden van internationale instellingen. Het Rapport van de International Law Association inzake de verantwoordingsplicht van internationale organisaties is één de gezaghebbende onderzoeken die inzicht geeft in de mogelijke inhoud van (zelf)regulering van de verantwoordingsplicht van deze internationale instellingen. Dit niet-bindende rapport geeft een lijst van 'recommended practices and rules' voor de verantwoordingsplicht van internationale instellingen, welke twee type regels en praktijken bevat: die regels en praktijken die zien op de regulering van de bevoegdheden van internationale instellingen en die regels en praktijken die zien op de procedurele waarborgen. De analyse van de verschillende theorieën die het probleem van het gebrek aan verantwoordelijkheid van internationale instellingen ten opzichte van individuen adresseren geeft verdere invulling aan de inhoud en reikwijdte

van een verantwoordingsplicht van internationale instellingen. *Global administrative law* beschrijft en analyseert administratieve handelingen op het globale niveau. Deze theorie formuleert procedurele standaarden die globale actoren in acht dienen te nemen wanneer zij administratief handelen. De gedachtegang is dat wanneer de administratieve beginselen van transparantie, participatie, toegang tot effectieve rechtsmiddelen, en de motiveringsplicht aanwezig zijn, de administratieve besluitvormingsprocedure (in principe) legitiem is en de desbetreffende globale administratieve organen verantwoordelijk zijn. Vanuit de beweging *constitutionalization of international law*, wordt onder andere de globalisering besproken en geanalyseerd door een constitutionele lens. Ondanks dat de specifieke definitie wat de constitutionele lens inhoudt verschilt per schrijver, op zijn minst, houdt het in dat elke bevoegdheidsuitoefening een wettelijke grondslag dient te hebben, arbitrair handelen niet is toegestaan en het handelen van actoren niet mag leiden tot schenden van dwingend recht. Voor dit onderzoek is een combinatie van administratiefrechtelijk en constitutioneel denken wenselijk. Uit de analyse van dit hoofdstuk volgt het conceptueel model voor inclusief governance. Deze heeft twee sets standaarden: standaarden die grenzen opleggen aan het uitoefenen van welke bevoegdheid dan ook door internationale instellingen en procedurele waarborgen die in acht genomen moeten worden wanneer er besluiten genomen worden die individuen kunnen raken.

In Deel 2 (hoofdstukken 3-6) wordt het Conceptueel Model als uitgangspunt gebruikt om te analyseren hoe het internationaal recht de publieke bevoegdheden van publieke actoren reguleert. Hierbij worden de verschillende verdragen vergeleken met elkaar met inachtneming van hun verschillende normatieve relevantie (bovenal mensenrechtenverdragen zowel van regionale als universele aard, van algemene en specifieke aard, maar ook bijvoorbeeld milieurecht verdragen). De drie dimensies van inclusionary governance: het recht op informatie, het recht op participatie in de besluitvormingsprocedure en het recht op een effectief rechtsmiddel, worden elk in een apart hoofdstuk besproken.

Hoofdstuk 3 zet de bouwstenen (building blocks) uiteen van het recht op informatie. Dit onderzoek identificeert twee verschillende op zichzelf staande rechten op informatie, het recht op informatie van algemeen belang en het recht op informatie van personele aard. Beide informatierechten worden gekenmerkt door een sterk recht op toegang tot de informatie die in bezit is van autoriteiten; een recht wat bestaat zonder dat er een belang getoond hoeft te worden. Autoriteiten dienen de informatie op verzoek openbaar te maken, tenzij het recht wordt beperkt in overeenstemming met de vereisten van legaliteit, noodzakelijkheid en legitimiteit. Het recht op persoonlijke informatie verschilt echter van het recht op informatie van algemeen belang, niet alleen in de aard van de informatie, maar ook in de reikwijdte van het recht. De taken van de overheid zijn veel uitgebreider. De mogelijke inmenging in de materiële rechten van de betrokkenen is ook groter wanneer autoriteiten persoonlijke

informatie verzamelt, opslaat en/of deelt. Die personen wiens persoonlijke informatie in handen is van de overheid hebben het recht om de rechtmatigheid aan te vechten van het verzamelen, het opslaan, en/of het delen van deze informatie met derden.

Hoofdstuk 4 zet de bouwstenen uiteen van het recht op zinvolle participatie in de besluitvormingsprocedure. Het recht op participatie, anders dan het recht op informatie, heeft zich ontwikkeld op een gefragmenteerde wijze. Er zijn slechts enkele verdragen die een expliciete rechtsgrondslag voor het recht op participatie in de besluitvormingsprocedure bevatten, echter die zijn alleen van toepassing in specifieke omstandigheden. Het recht op zinvolle deelname aan de besluitvormingsprocedure is voornamelijk ontwikkeld door het werk van toezichthoudende verdragsorganen. De meerderheid van deze verdragsorganen heeft het recht herleid uit een van de materiële rechten van het respectievelijke instrument. Er is aldus in internationaal recht een algemeen procedureel recht op deelname aan de besluitvormingsprocedure en enkel in bepaalde situaties bestaat er een expliciet recht. Degenen die door besluiten worden getroffen hebben het recht om op zinvolle wijze deel te nemen aan de besluitvormingsprocedure. De autoriteiten moeten de benadeelden voldoende informeren, ervoor zorgen dat zij op een zinvolle wijze betrokken worden in de procedure, dat de benadeelden hun standpunten naar voren kunnen brengen en deze in overweging genomen worden en autoriteiten dienen het genomen besluit te motiveren. Over het algemeen beschikken de autoriteiten over een ruime beoordelingsvrijheid bij het bepalen hoe deze participatieprocessen -- het formaat, de duur en het tijdsbestek -- moeten worden georganiseerd, zolang de deelname van de betrokkenen aan de besluitvormingsprocedure zinvol blijft.

Hoofdstuk 5 bespreekt het recht op een effectief rechtsmiddel in het internationaal recht. Dit recht heeft twee componenten, het recht op een review of een herziening en het recht op reparaties. Het recht op een herziening bevat verschillende elementen: het recht op toegang tot een beoordelingsinstantie, het recht op een eerlijke beoordeling door een bevoegde, onpartijdige en onafhankelijke beoordelingsinstantie, een verplichting om de betrokkenen in kennis te stellen van de beoordelingsmogelijkheden en de procedurele vereisten, en een verplichting om een met redenen omklede schriftelijke beslissing te geven. Met betrekking tot het recht op herstel is de begeleiding van het internationaal recht beperkter. De te verstrekken reparatie moet effectief en adequaat zijn om de aangetaste schade aan te pakken; hoe dit wordt bereikt -- dat wil zeggen met welk herstel -- valt onder de bevoegdheid van de autoriteiten.

Hoofdstuk 6 presenteert het Concept Inclusief Governance Model (Draft Inclusionary Governance Model of Concept Model) en vormt het sluitstuk van deel 2. Het Concept Model bevat verschillende elementen:

- De bouwstenen (informatierechten, plicht om zinvolle deelname aan de besluitvormingsprocedure te realiseren, plicht om een effectief rechtsmiddel te realiseren) vormen de kernelementen van het Concept model en komen overeen met de aanvankelijke drie geïdentificeerde dimensies van inclusieve governance.
- De benchmarks zijn de minimumnormen die voor elke bouwsteen zijn vastgesteld, op basis waarvan de uitoefening van publieke bevoegdheden door internationale instellingen moet worden beoordeeld.
- De beperkingen zijn die beperkingen die zijn vastgesteld voor de uitoefening van publieke bevoegdheden door overheidsinstanties, ongeacht het soort openbare macht die zij uitoefenen.

Zoals dit hoofdstuk laat zien, is het Concept Model dynamisch. Er zijn bijvoorbeeld interacties zichtbaar tussen de verschillende elementen van het Concept Model, en in het bijzonder tussen de verschillende geïdentificeerde normen. Ten eerste beïnvloeden de rechten elkaar en lijken ze elkaar te versterken. Bijvoorbeeld, personen (of groepen) wiens informatierechten en/of participatierechten gedeeltelijk of volledig zijn geweigerd, hebben recht op een effectief rechtsmiddel. Dit recht stelt de getroffenen in staat hun informatierechten en hun recht op zinvolle deelname aan de besluitvormingsprocedure af te dwingen. Ten tweede zijn er overeenkomsten tussen de drie dimensies in de type procedurele vereisten die een rol spelen bij het realiseren van inclusieve governance. Bepaalde procedurele waarborgen worden als essentieel aangemerkt door verdragsmonitoring organen in de verschillende besluitvormings- en herzieningsprocedures: de plicht tot degelijk informeren van een te nemen besluit, het recht om gehoord te worden, een verplichting om voldoende input in acht te nemen, de verplichting om een besluit schriftelijk te nemen en te voorzien van redenen, en als laatste de verplichting om een genomen besluit kenbaar te maken. Deze normatieve interacties laten de noodzaak zien tot het doen van een *contextuele* beoordeling van de verantwoordingsplicht van autoriteiten die publieke macht uitoefenen die individuen treft.

In het Concept Model wordt erkend dat autoriteiten over beoordelingsvrijheid beschikken bij het implementeren en nakomen van hun verplichtingen. Een aantal factoren bepaalt echter de omvang van deze beoordelingsvrijheid en beïnvloedt dienovereenkomstig de reikwijdte van de standaarden die moeten worden gerealiseerd. Het verbod op willekeur vormt een materiële beperking op de uitoefening van publieke macht door autoriteiten. De geïdentificeerde gemeenschappelijke procedurele waarborgen dienen als de belangrijkste toetsstenen om een willekeurige uitoefening van openbare macht te voorkomen en de kwaliteit van de procedure te garanderen. Wanneer de uitoefening van discretionaire bevoegdheden niet voldoende wordt gereguleerd, is er een groter risico dat er willekeurige beslissingen worden genomen. Daarnaast fungeert het concept van kwetsbaarheid (vulnerability) fungeert als triggerfactor: het beïnvloedt de reikwijdte en inhoud van verplichtingen van

overheidsinstanties en beperkt de beoordelingsvrijheid van overheidsinstanties bij de uitvoering van deze verplichtingen. Kwetsbaarheid wordt in dit onderzoek breed gedefinieerd en verwijst naar zowel de persoonlijke factoren die iemand kwalificeren om als kwetsbaar te worden beschouwd, en/of naar de omstandigheden rond de beslissing die iemand kwetsbaar maakt. Hoofdstuk 6 concludeert met een stappenplan hoe het Concept Model toegepast kan worden in de praktijk.

Het derde deel, *hoofdstuk 7*, had een tweeledig doel: (i) de werking van het Concept Model demonstreren en (ii) het evalueren of de formulering van de bouwstenen van het Concept Model voldoende duidelijk en nauwkeurig zijn om de mate waarin de 'VN Veiligheidsraad ISIL (Da'esh) en het Al-Qaida Sanctiecomité' verantwoording af legt aan degenen die het op de terrorisme lijst heeft geplaatst te analyseren.

Met betrekking tot het eerste doel laat de analyse in hoofdstuk 7 zien hoe het Concept Model een diepgaande beoordeling mogelijk maakt van de verantwoordingsplicht van een internationale instelling jegens degenen die geraakt worden door hun besluiten, rekening houdend met de context waarin een instelling opereert. De toepassing liet zien in hoeverre het Sanctiecomité verantwoording verschuldigd is aan degenen die door haar besluiten worden geraakt. Verder werden in dit hoofdstuk mogelijke tekortkomingen en zwakkere punten in de procedure geïdentificeerd. De procedure wordt bijvoorbeeld gekenmerkt door maar een zeer beperkte toegang tot het bewijs voor de aangewezen personen. Er is geen procedure om toegang tot de informatie te vragen. Verder hebben de staten die de sanctionering voorstellen in het Sanctiecomité, in de praktijk, onbeperkte beoordelingsvrijheid om te bepalen of bewijs al dan niet als vertrouwelijk wordt aangemerkt. Uit de analyse bleek verder dat hoewel de ombudspersoon procedure toegankelijk is voor de aangewezen personen, er enkele structurele tekortkomingen zijn met betrekking tot de *fairness* van deze procedure en de doeltreffendheid van de geboden reparaties. Een aantal van deze tekortkomingen vloeien voort uit de institutionele opzet van het Sanctiecomité, het mandaat dat aan de ombudspersoon is gegeven en de beperkingen die door de Veiligheidsraad en de VN-lidstaten aan het functioneren van de ombudspersoon zijn opgelegd. Bijvoorbeeld, het gebrek aan toegang tot vertrouwelijke informatie - niet alleen voor de gesanctioneerde, maar ook voor de ombudspersoon en de leden van het Sanctiecomité - heeft een verlammend effect op het algehele niveau van inclusief governance dat kan worden gerealiseerd. De toepassing van het Concept Model toont echter ook de verbeteringen aan die in de loop van de jaren zijn aangebracht en hoe, onder meer op voordracht van de ombudspersoon, de positie van het kantoor van de ombudspersoon wordt versterkt. Bovendien laat de toepassing van het Concept Model op het ISIL (Da'esh) en Al-Qaida Sanctiecomité zien hoe de verschillende bouwstenen van het Concept Model elkaar beïnvloeden en hoe deze interacties geïdentificeerd kunnen worden. Met andere woorden, het realiseren van

verantwoording van een internationale instelling jegens diegenen die geraakt worden door hun besluiten, is een proces wat beïnvloed wordt door meerdere factoren.

Het testen van de werking van het Concept Model laat zien dat enerzijds het Concept model in staat is de verantwoordingsplicht van internationale instellingen jegens benadeelden te beoordelen, anderzijds liet het Concept Model zien dat in bepaalde situaties de praktijk van het sanctiecomité niet voldoende kon bevatten. De context waarin een internationale instelling opereert werd niet voldoende in acht genomen. In het kort, het Concept Model is in zijn huidige vorm niet voldoende in staat de complexiteit van meerlaagse governance structuren van internationale instellingen te duiden. Met als consequentie dat in de analyse niet wordt meegenomen hoe een verscheidenheid aan actoren de procedure en de impact daarvan op het gerealiseerde inclusieve governance kan beïnvloeden.

Daarom wordt er in *hoofdstuk 8* uitgelegd hoe het Concept Model aangepast wordt om deze context beter in acht te nemen. De eerste stap van de toepassing van het Model – het beschrijvende overzicht van de besluitvormingsprocedure – wordt uitgebreid om deze complexiteit van meerlaagse governance door meerdere actoren beter vast te leggen. In dit deel 4 wordt het verfijnde Inclusionary Governance Model gepresenteerd. Het verfijnde Inclusionary Governance Model for International Institutions dient als maatstaf om de verantwoordingsplicht van internationale instellingen ten opzichte van degenen die door hun beslissingen worden getroffen, systematisch te analyseren en realiseren. Kortom, de ontwikkelde maatstaf identificeert de procedurele regelingen die nodig zijn om het gebrek aan verantwoording te verminderen en de elementen die nodig zijn om een goed evenwicht te vinden tussen de algemene aard van het verantwoordingsprobleem en de specifieke context van elke internationale instelling. Tevens wordt er stapsgewijs uitgelegd hoe het Model in de praktijk toegepast kan worden om te illustreren hoe de verantwoordingsplicht van internationale instellingen systematisch wordt geanalyseerd. Verwijzingen naar de praktijk van andere internationale instellingen die publieke macht uitoefenen die rechtstreeks gevolgen hebben voor individuen laat zien hoe men door de toepassing van het model in staat is de verschillende contexten waarin verschillende instellingen opereren te begrijpen en tegelijkertijd de verantwoordingsplicht van een specifieke internationale instelling ten opzichte van de betrokkenen te analyseren. Door de stapsgewijze toepassing van het Inclusionary Governance Model kan men de maatstaf gebruiken om een systematische en grondige analyse van het verantwoordingskader van een internationale instelling uit te voeren. Het Model kan gebruikt woorden voor interne evaluatiedoeleinden, zowel voor een ex ante evaluatie van de inclusieve governance die moet worden gerealiseerd door een internationale instelling als voor het juridische kader dat moet worden ontwikkeld, en voor een ex post evaluatie om sterke punten en mogelijke tekortkomingen in de huidige praktijk van een internationale instelling te identificeren en te bepalen hoe deze kunnen worden

verbeterd. Het Inclusionary Governance Model for International Institutions is daarom een dynamische maatstaf die dient om op systematische wijze de verantwoordingsplicht van internationale instellingen ten opzichte van degenen die door hun beslissingen worden getroffen, te analyseren en aan te pakken. *Hoofdstuk 9* concludeert met enkele algemene beschouwingen.

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