ON THE QUESTION OF WHETHER INTERNATIONAL ORGANIZATIONS ARE BOUND BY INTERNATIONAL LAW*

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Introduction

In this article, I will analyse the validity of the proposition that international organisations, when they are performing their activities, are largely bound by general international law. For this purpose, in the first section, I will briefly analyse the question of international personality of international organisations in international law. In the second section, I will analyse the obligation to be bound by international law by referring to the practices of several international organisations on this issue. In the third section, I will analyse the arguments regarding the legal basis of the obligation to be bound by international law. This analysis will help to understand on what basis the relationship between international organisations and the rules of international law can be formulated in the context of various international organisations. Finally, in the last section, I will point out to problems concerning the compliance with international law, ie., to what extent international organisations are or have been willing or capable of fulfilling their international obligations.

Section One

The Question of International Personality of International Organisations

The development of international organisations started from the middle of the nineteenth century with non-political and technical organisations (or so-called administrative unions) such as Universal Telegraphic Union and General Postal Union, and continued with others, which were established by states to manage international problems having political dimensions, such as River Commissions, international judicial bodies and the institutions created to implement peace treaties. After the World War I, this development

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gained a new momentum with the establishment of the League of Nations and finally it reached its peak with the creation of the United Nations (UN). In consequence, international organisations become important actors on the international scene as a result of their proliferation and the subsequent worldwide expansion of their institutional and operational activities.[1]

International society welcomed the creation of these new international actors and accepted their autonomous status in order to protect them from outside interference, which would prevent them to fulfil their tasks independently. In this regard, American Society of International Law described this new phenomenon with the following comment, "A consequence of the expanding scope of international organisations' activities is that these organisations have become active participants in the policy-making process in many of their member countries…Coupled with this expanding role is the increasing independence and power of the international organisations and the staff within those organisations".[2] Hence, although the activities of international organisations has been the result of and under the control of the power exercised within every international organisation by its constituent members, it is generally accepted that international law endows international organisations with legal personality,[3] which makes them subjects of international law separate from the member states.[4]

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1 Some argued that international organisations nowadays resemble large multinational corporations that operate in hundreds of locations, own or lease large stocks of real property, employ tens of thousands of individuals, manage large quantities of assets, and conduct billions of dollars worth of transactions. In this way, they exercise political, economic and social influence of massive importance, see Brower, C.H., "International Immunities: Some Dissident Views on the Role of Municipal Courts", 41 Virginia Journal of International Law (VJIL) 2000, p. 5-6.

2 American Society of International Law (ASIL), The Accountability of International Organisations to Non-State Actors, Proceedings 1998, p. 559. Brower argues that although the early administrative unions and their personnel did not receive immunities of any kind, those with political functions were commonly granted diplomatic privileges and immunities in order to ensure that these organisations would not fall under the control of any particular state. By the 1930s, the concession of diplomatic privileges and immunities to international organisations and their personnel arguably evolved into a rule of customary international law, op.cit., p. 14.

3 Otherwise, their conduct would be attributed to their member states. The International Law Commission (ILC) noted that the international legal personality of international organisations has a firm foundation in international law, Yearbook of International Law Commission (YILC) 1975, Vol. II (2), p. 89. However, according to Reinisch, although the possession of a legal personality distinct from its member states and the existence of an independent will are sometimes included in definitions of an international organisations, these elements are rather a consequence than a constitutive criterion of an international organisation, Reinisch, A., International Organisations Before National Courts, Cambridge, 2000, p. 5.

4 Starting from the 1969 Vienna Convention on the law of Treaties, several other

As subjects of international law, international organisations are competent to act on the international plane and assume conventional or other international obligations in their own name.[5] However, when the International Court of Justice (ICJ), in its *Reparation* Opinion,[6] derived an *erga omnes* capacity to bring international claims on the international plane from the personality of the UN, this view troubled many who dealt with the relationship between the personality of international organisations and their capacities. In this case, the ICJ, after an examination of the Charter, concluded that the Organisation, in theory and in practice, occupied a position in certain respects in detachment from its member states.[7] In the opinion of the Court, this could only be explained on the basis of the possession of a large measure of international personality and the capacity to operate on the international plane, which would necessarily involve the

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conventions have defined the term international organisation. Although the text of some of these conventions added some further elements to the definition, in each case the definition was given only for the purposes of the relevant convention and not for all purposes. The 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, Article 2(1)(I) provides that international organisation means an intergovernmental organisation, 25 International Legal Materials (ILM) 1986, p. 543. Although, the term intergovernmental may be inappropriate to a certain extent, because several organisations have been established by entities other than states, this thesis will deal only with organisations established by states as it analyses the question of the international responsibility of member states.

5 For an early account, see the informal opinion of the United States to the UK in 1943 on the nature of the UN Relief and Rehabilitation Organisation (UNRRA); "...UNRRA will derive from the international agreement creating it the legal capacity to discharge the functions entrusted to it by the agreement...the effect of the international agreement is not to modify existing rules of law but to create as the agent of the signatory nations as a group a new legal person which would be entitled as such to exercise rights under the existing law", quoted by Marston, G., "The Personality of International Organisations in English Law", 2 Hofstra Law & Policy Symposium 1997, p. 79.

6 *Advisory Opinion on the Reparation for Injuries suffered in the service of the UN*, ICJ Reports 1949, p. 174. The facts of this case arose from the killing of a UN agent in the performance of a duty on behalf of the Organisation in a non-member state. In order to protect its agent's and the Organisation's interests, the General Assembly asked the Court if in the event of an agent of the UN suffering injury in the performance of his duties in circumstances involving the responsibility of a non-member state, does the UN, as an organisation, have the capacity to bring an international claim against the responsible government with a view to obtaining the reparation due with respect to the damage caused the UN.

7 In this respect, the Court found that the Charter had gone further than creating a mere centre of for harmonising the actions of nations in the attainment of common ends and had defined the position of members in relation to the Organisation, which occupied a position in detachment from its members, ibid., p. 179-80.

capacity to bring an international claim.[8] In other words, it is from the international personality of this distinct entity that the Court derived, among others, the right to present an international claim.[9]

This opinion of the Court caused disagreement within the International Law Commission (ILC) in its discussion on the true basis of the capacity of international organisations, in that the Commission's members could not agree whether the capacities of an international organisation were the result of each organisation's own internal rules, or they were conferred to an organisation by international law on the basis of their personality.[10]

International writers dealing with this issue have also come to different conclusions. At one side, there are objectivists, who claim that when certain legal preconditions are completed,[11] the personality of an organization can be assumed to exist and certain capacities are conferred upon the organization by international law on the basis of this personality. According to Seyersted, international organisations and states are on an equal footing from the point of view of their legal capacities[12] and competence of an

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8 The Court further enlarged its concept of international personality in respect of the defendant state, which was a non-member state, by arguing that "On this point, the Court's opinion is that fifty states, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely a personality recognized by them alone, together with capacity to bring international claims", ibid., p. 185. In this respect, McNair considered the Charter as an example of international legislation creating objective obligations, McNair, A., The Law of Treaties, Oxford, 1961, p. 269-71. However, Klabbers argues that if the erga omnes doctrine provides the justification of objective effect, it is difficult to see why the obligations for members and non-members would not be identical, Klabbers, J., "The Life and Times of the Law of International Organisations", 70 Netherlands Journal of International Law 2001, p. 307. See also Special Rapporteur Waldock's Report to the ILC for the difference between the objective personality of an organisation and the question of objective effect of the constitutive treaty, YILC 1964, Vol. II, p. 31.

9 In this respect, Rama-Montaldo expresses that the capacity to bring an international claim and connected rights are, in the opinion of the Court, not synonym but one of the consequences of the international personality of the Organisation, Rama-Montaldo, M., "International Legal Personality and Implied Powers of International Organisations", British Yearbook of International Law 1970, p. 129.

10 See the ILC's commentary to Article 6 of the 1986 Convention, YILC 1981 Vol. II, Part 2, p. 127, para. 2.

11 These are an international agreement creating an association of states; endowed with at least one organ; which expresses a will detached from that of the member states; and possessing defined aims or purposes to be attained through the fulfilment of functions or powers, Rama-Montaldo, op.cit., p. 144-46.

12 He argues that, "International organisations, like states, have an inherent legal

international organisation stem directly from the personality (or functional needs) of that organization, thus the capacities of an organization do not depend upon its constituent instrument.[13] Nevertheless, one must note in this respect that, the Court, in answering the question whether the Organisation had the right to bring the kind of international claim described in the request for the Opinion, also stated that the rights and duties of an entity such as the Organisation must depend upon its purposes and functions as specified or implied in its constituent document and developed in practice.[14] Hence, it can be argued that the Court did not detach the capacities of the Organisation from its constitutive instrument completely.[15]

At the other side, there are formalists, who claim that there are no such inherent powers and the capacities of an organization is derived from its charter, as expressly or impliedly provided and appropriated by its founding states.[16] For example, Arangio-Ruiz criticizes the Court's view in the Opinion by stating that while it is possible to argue that the UN's personality is clearly objective and separate from that of member states, this should not deny that such personality is simultaneously intimately bound up in the

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capacity to perform an sovereign or international act which they are in a practical position to perform. They are in principle from a legal point of view general subjects of international law, in basically the same manner as states", Seyersted, F., "Objective International Personality of Intergovernmental Organisations, 3 Indian Journal of International Law 1963, p. 28-9.

13 Seyersted, F., "International Personality of Intergovernmental Organisations: Do Their Capacities Really Depend upon Their Constitutions?" 4 Indian Journal of International Law 1964, No. 1, p. 1. For a similar view, see Bekker, P.H.F., The Legal Position of Intergovernmental Organisations: Functional Necessity Analysis of their Legal Status and Immunities, Martinus Nijhoff, Boston and London, 1994, p. 55-60, where he relies on the ICJ's opinion in the *Namibia Case*: in this case, the Court found that the only limit on the UN Security Council's power to carry out its duties under the Charter were the fundamental principles and purposes found in the Charter, ICJ Reports 1971, p. 52.

14 ICJ Reports, 1949, p. 179.

15 Objectivists explained this reasoning of the Court by making a distinction between the capacity of an organisation and its content. However, as Rama-Montaldo observes this latter reasoning should be labelled as implied powers argument, op.cit., p. 129-31.

16 This view is criticised by the objectivists as reducing international legal personality to merely a descriptive notion, lacking practical usefulness. Apart from these two, there are also those "inductivists", who starts from the basis of the existence of certain rights and duties expressly conferred upon the organisation, and derives from these particular rights and duties a general international personality. They generally link this approach with the foundation of the personality on the will of states concerned either expressed or implied in the constituent instrument, Rama-Montaldo, op.cit., p. 112.

inter-state treaty that is the UN Charter, therefore, the capacities of the Organization is the result of this relationship.[17] In this regard, Brownlie warns that, "Particular care should be taken to avoid an automatic implication, from the very fact of legal personality, of particular powers (or capacities to be precise), such as power to make treaties with third states or the power to delegate powers."[18] Therefore, the ICJ's *Reparation Opinion* has been considered unfortunate by these writers as it neglects the distinction between legal personality and capacity of international organisations.[19]

Those who criticize the ICJ in this Opinion also note that one has to make a distinction between the personality of states and those of international organisations, since the latter are not the primary subjects of international law. For example, Chinkin argues that there is a crucial distinction between a newly independent state and an international organisation. An independent state is presumed to have all the territorial competencies of a sovereign state from the time of its emergence as a state, but there is no parallel principle with respect to organisations; the competence of any organisation is defined by the treaty creating it.[20] Similarly, Wellens argues that, "Whereas the competence of states are considered to be of a general and comprehensive nature, subject of course to the limitations imposed by international law... the competence of an international organisation are necessarily limited, attributed nature: it has to act *intra vires* and, of course, in compliance with international law".[21] Consequently, while the answer to

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17 Arangio-Ruiz, G., "The Normative Role of the General Assembly of the UN", The Academy of International Law, The Hague, 1972-III, p. 673-80. Arangio-Ruiz later argued that, "we have stressed long ago that the international personality of the UN is not a legal effect of the constituent instrument. Naturally, such an instrument has a role, in that it was by carrying out the provisions of the Charter that the organs were actually set up...The Charter was the legal basis upon which the Organisation could be materially constituted. As noted, personality derived, for the entity actually established, from general international law", Arangio-Ruiz, G., "The Federal Analogy and UN Charter Interpretation: A Crucial Issue", European Journal of International Law 1997, Vol. 8, No. 1, p. 15.

18 Brownlie, I., Principles of Public International Law, 4th edit.,Clarendon, Oxford,1990, p. 691.

19 Schermers and Blokker, International Institutional Law, Martinus Nijhoff, London, 1997, p. 1570, footnote 19; Schneider, SC JW, Treaty-making Power of International Organisations, Oxford, 1963, p. 135.

20 Chinkin, C., Third Parties in International Law, Clarendon, Oxford,1993, p. 95.

21 Wellens, K., Remedies against International Organisations, Cambridge, 2002, p. 21. Restatement (Third) of Foreign Relations, differentiates international organisations from states in that states exercise power of implied statehood and sovereignty, whereas international organisations do not, 301(2), p. 223 cmt.

the question of whether an organisation has international personality or not needs an absolute yes or no, the answer to the question of what rights and duties an individual organisation has vary from one to another depending on their constituent treaties.[22]

Accordingly, the ICJ has recognized this fact in its later opinions.[23] In particular, in the *Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the ICJ has clearly stated that, "The Court need hardly point out that international organisations are subjects of international law which do not, unlike states, possess a general competence."[24]

On the basis of these arguments, it is submitted that an international organisation, while enjoying legal personality in international law, still commands only those powers conferred on it by member states in its constitutive treaty.[25] In this regard, Bederman argues that international organisations are not fictive persons, holding rights and duties under international law, autonomous and independent of the will of other state

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22 Lauterpacht argues that, "international organisations derive all their powers from a conventional or statutory source and are bound to act only within the limits and in accordance with the terms of the grant made to them", Lauterpacht, E., "The Legal Effect of Illegal Acts of International Organisations", Cambridge Essays in International Law: Essays in Honour of Lord McNair, Stevens & Sons, London, 1965, p. 88.

23 In the *Administrative Tribunal Opinion*, the ICJ upheld the right of the UN to establish an administrative tribunal as arising by necessary intendment6 out of the Charter, but not out of the international personality of the organisation, ICJ Reports 1949, p. 57.

24 ICJ Reports 1996, p. 78. In this Opinion the Court also recognised that, "International organisations are governed by the 'principle of speciality', that is to say, they are invested by the states which create them with powers, the limits of which are a function of the common interests whose promotion those states entrust to them", ibid., p. 78.

25 In this respect, as early as 1956, the International Law Association (ILA) adopted a motion with the aim of imposing upon the organs of the UN the obligation to request from the ICJ an advisory opinion concerning any situation in which a claim is made by a member state that the organ has exceeded its jurisdiction under the Charter, ILA Report of the 47th Conference, 1956, p. 104. In its *Advisory Opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation*, the ICJ found that the relevant Committee of the Organisation had not been constituted in accordance with the constituent instrument of that Organisation, hence, the Organisation had acted *ultra vires*,, ICJ Reports 1960, p. 150. Within the law of the European Communities, the principle judicial review of *ultra vires* acts of the organisation has been recognized in the case of *Meroni v. High Authority*, 1958 ECR 177, and Advocate General Romer's Opinion in this case, ibid., p. 190.

actors.[26] Similarly, Chinkin argues that international organisations are bound by their own constitutive instruments, and the competence of any organisation is defined by the treaty creating it. Member states create an organisation with defined and limited functions, and they intend the organisation to operate within these restraints.[27] In the UN context, Brownlie states that even if the political organs have a wide margin of appreciation in determining that they have competence. There is no dichotomy involving discretionary power and the rule of law. Thus, the Security Council is subject to the test of legality in terms of its designated institutional competence.[28] Bernhardt also endorses this point,

> *"one can argue that each main organ of an international organisation determines its own jurisdiction and competence with binding force, and nobody else has the right to challenge such a decision as being ultra vires. This would be an extraordinary solution because the organ could act like a sovereign, in spite of the fact that the constitutive treaty concluded by sovereign states is the basis of the organisation's activity and confers only limited competence to the organ. Therefore, it is hardly acceptable that an organ has always the final word in the determination of its competence."*[29]

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26 For the constitutive personality of international organisations, see Bederman, D.J., "The Souls of International Organisations", 36 Virginia Journal of International Law 1996, p. 275 and 343-71. See also the comment of Waelbroeck in, *Annuaire de l'Institutt de Droit International* 1995, Vol. 66-I, p. 322.

27 Chinkin, op.cit., p. 97-105, where she also argues that members of an international organisation keep a residual power to supervise the implementation of the constitutive treaty through the organisation.

28 Brownlie, I., "The Decisions of Political Organs of the UN and the Rule of Law", Essays in Honour of Wang Tieya, 1993, p. 95-102. In the *Admission to UN Membership* case, the ICJ stated that, "the political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment", ICJ Reports 1948, p. 64. Similarly, in the *Advisory Opinion on the Interpretation of the Agreement between the WHO and Egypt*, ICJ Reports 1980, p. 89-90, the Court stated that, "international organisations...are bound by any obligations incumbent upon them under ...their constitutions". For a judicial review of the *ultra vires* decisions of the UN Security Council in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia, see the decision of the Appeals Chamber in *Prosecutor v. Dusko Tadic*, 35 ILM 1996, p. 32, para. 20, where the Côurt reviewed the legitimacy of the Security Council Resolution establishing the Tribunal.

29 Bernhardt, R., "Ultra Vires Activities of International Organisations", Theory of International Law at the Threshold of the 21th Century: Essays in Honour of K. Skubiszewski, Makarczyk ed., Kluwer, The Hague, 1996 p. 604.

Section Two
The Practices of International Organisations vis-à-vis International Law

I. The Practice of the UN

In terms of the United Nations, an amendment proposed by a delegation at the San Francisco Conference stated that "in the fulfilment of the duties inherent in its responsibility to maintain international peace and security, the Security Council shall respect and enforce and apply the principles or rules of existing law" was not accepted.[30] This earlier view was based on the assumption that the Security Council (SC) was controlled exclusively by political means when it was exercising its peace enforcement role under the UN Charter.[31] Moreover, in terms of the relation between humanitarian law and the UN Charter, the official UN view has been that,

> *"The UN is not substantively in a position to become a party to the 1949 Conventions [on humanitarian law], which contain many obligations that can only be discharged by the exercise of juridical and administrative powers which the Organisation does not posses, such as the authority to exercise criminal jurisdiction over members of the forces, or administrative competence relating to territorial sovereignty. Thus the UN is unable to fulfil obligations, which for their execution require the exercise of powers not granted to the Organisation, and therefore cannot accede to the Conventions."*[32]

However, in light of the wide ranging activities of the UN and the Security Council, it is considered essential to recognise that the law has some role to

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30 Doc. 2, G/7(p), 3 UNCIO Docs. 393, 1945, p. 431, however, the delegate of the Soviet Union expressly stated that Art. 25 did not give unlimited powers to the SC, UNCIO Docs. 5-97, 1945, III/1/30.

31 Bowett argued that Article 2(5) and 25 of the Charter could be interpreted as overriding the traditional rules of international law on the relationship between the UN and a government, however, these obligations of the Charter should not derogate from the standards of treatment of persons or property owed to the civilian population, see Bowett, D.W., United Nations Forces: A Legal Study of United Nations Forces, Stevens & Sons, London, 1964, p. 491. As far as the peace enforcement is concerned, Bowett was of the opinion that, "whereas, traditionally, a state waging war was entitled to do so to the stage of complete annihilation and subjugation of the other side, it can scarcely be maintained that United Nations action can be pursued so far. Such collective or enforcement action, as distinct from war, is limited to the measures necessary to resist aggression and to maintain and restore international peace and security. To this extent the United Nations can only wage a limited war", ibid., p. 54-5.

32 Legal Opinion of the Secretariat of the UN, UN Juridical Year Book, 1972, p. 153, para. 3.

play in setting the limits of their powers. As far as the powers of the SC is concerned, some writers argue that the Article 24(2) of the UN Charter contains a provision obliging the SC to act "in accordance with the Purposes and Principles of the UN", among which Article 1(1) lists, *inter alia*, the maintenance of peace and security "in conformity with the principles of justice and international law."[33] In this regard, Gardam adds that,

> *"Article 24 (2) states that the Security Council, in discharging its duties under Article 24 (1) 'shall act in accordance with the Purposes and Principles of the United Nations'. By virtue of Article 1(3), one of the purposes of the Charter is to promote and encourage respect for human rights. This reference to human rights could be interpreted as indicating that all Security Council action must be consistent with the standards of international law that have been developed in this area and regulate all actors in the international arena. To the extent the Security Council operates within the general system of law, it is subject to appropriate principles of international law. The reference to human rights in Article 1 (3) provides the link for the argument that places the Security Council within the general international legal system."*[34]

In terms of the UN, it is again argued that the principle of functionality, which circumscribes the international personality of the organisations and its legal capacity, also determines the scope of the applicable law to activities carried out by the UN in the performance of its functions. The legal capacity of the UN to conclude international agreements, to bring international

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33 See Bowett, D.W, The Law of International Institutions, 4th edit., Stevens &Sons, London, 1982, p. 33. Similarly, Lamb argues that "it seems clear that Article 25 [of the UN Charter] does not mean that members are obliged to carry out all decisions of the SC, and the article appears to reinforce the obligation upon the SC to adhere to the legal limits set by the Charter", Lamb, S., "Legal Limits to UN Security Council Powers", The Reality of International Law, Essays in Honour of Ian Brownlie, Clarendon Press, Oxford, 1999, p. 366-67.

34 Gardam, op.cit., p. 301-2, where she rejects the view that the Security Council is controlled exclusively by political means when it is exercising its role under the UN Charter. The text of the Charter, a legal document, is not only compatible with but arguably, through its emphasis on human rights and humanitarian values, requires the Security Council to measure its responses against legal criteria, ibid., p. 322; Gowlland-Debbas also suggests that the Security Council cannot hide behind the corporate veil and remain indifferent to the developments in human rights and humanitarian values that are influencing the work of the International Law Commission on unilateral countermeasures, Gowlland-Debbas, V., "Security Council Enforcement Action and Issues of State Responsibility, 43 International and Comparative Law Quarterly (ICLQ), 1994, p. 90-4. See also Petersmann, E., "Time for a UN Global Compact for Integrating Human Rights into the Law of Worldwide Organisations: Lessons from European Integration", 13 European Journal of International Law (EJIL), 2002, p. 633.

claims on behalf of its agents, to enjoy privileges and immunities and to incur international responsibility is thus governed, respectively, by the laws of treaties, diplomatic protection, privileges and immunities and state responsibility, as they were transposed and made applicable to it by analogy and *mutatis-mutandis*.[35]

Moreover, the International Court of Justice in its *Reparations Opinion*, when analysing the UN's personality in international law, emphasized that the Organisation, as a person possessing broad powers, is also subject to attendant duties and responsibilities, and later in its *Advisory Opinion on the Interpretation of the Agreement between the WHO and Egypt*, where the Court was asked to evaluate the status of an international treaty between an international organisation and a state, it stated that, "international organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law...or under international agreements to which they are parties".[36] Although these statements of the Court does not clearly show the basis of the relation between the Organisation and international law, they, nevertheless, recognise the fact that when the Organisation acts on the international plane it has to take into account the relevant rules of international law regulating the area where the activities are taking place. This view has been lately confirmed by Judge Weeramantry, as far as the Security Council's powers are concerned, in his dissenting opinion in *Libya v. UK &US* Case, where he argued that, "the history of the UN Charter corroborates the view that a clear limitation on the plenitude of the SC's powers is that those

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35 Shraga, D., The United Nations as an Actor Bound by International Humanitarian Law, 5 International Peace-keeping, 1998, p. 65. In this regard, Brownlie points out some problems, especially in the area of the legal status of the assets of international organisations. In this respect, he explains that international organisations cannot have territorial sovereignty and have no competence to confer nationality on assets. However, he argues that the functional competence of organisations includes significant powers of jurisdiction and a regime of jurisdictional immunities, and both jurisdiction and the immunities of assets from national jurisdictions are analogues of ownership. Nevertheless, in the case of ships or aircraft used in furtherance of the purposes of an organisation, the question of competence is still open, and there are some serious obstacles, Brownlie, I., Principles of Public International Law, 5th edit., Clarendon, Oxford, 1998, p. 433-4.

36 *Advisory Opinion on the Reparations for Injuries Suffered in Service of the UN*, ICJ Reports 1949, p. 185, and *Advisory Opinion on the Interpretation of the Agreement between the WHO and Egypt*, ICJ Reports 1980, p. 89-90. For the financial responsibility of the UN, see Judge Fitzmaurice's separate opinion in the *Advisory Opinion on the Certain Expenses of the UN*, ICJ Reports 1962, p. 200 and Alvarez, J.E., "Financial Responsibility", The UN and International Law, Boyner ed., Cambridge, 1997, p. 409.

powers must be exercised in accordance with the well-established principles of international law". [37]

Recently, the International Criminal Tribunal for Yugoslavia Appeals Chamber also concurred on this point in its *Prosecutor v. Tadic Case*, where the Tribunal had to consider the Security Council's mandate to establish and empower the Tribunal to adjudicate issues according to international law, by holding that Article 1 of the four Geneva Conventions is a principle which lays down an obligation that is incumbent, not only on states, but also on other international entities including the UN, and that "the SC is an organ of an international organisation, established by a treaty, which serves as a constitutional framework for that organisation. The SC is thus subjected to certain constitutional limitations, and neither the text nor the spirit of the Charter conceives of the SC as unbound by law."[38] This opinion of the Tribunal is much specific on the basis of the relation between the Organisations and international law and derives the limitations on the Organisation from the interplay of the rules between the Organisation's constitutive treaty, ie., the Charter, and international law.

In this regard, various writers have also pointed out this relationship between the UN and international law. For example, Schachter argues that the protection of human rights and humanitarian law standards are derived from the Charter, whose purposes include such concerns and set limits on the Organisation's activities, thus the Organisation has to observe these limits in its activities.[39] Similarly, Bongiorno argues that, "The UN, however, is not superior to the international order by virtue of its regulatory functions. Accordingly, its international rights and duties as an international organisation include the obligation to ensure that it does not violate human rights standards that have become norms of international law".[40]

II. European Community Practice

Similar conclusions have also been reached within the European Community (EC) context. The Court of this Organisation (ECJ) decided in the *International Fruit Company* Case that the Organisation is bound by

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37 ICJ Reports 1992, p. 175; similarly, see Judge Skubiszewski's Dissenting Opinion in the *East Timor* Case, ICJ Reports 1995, p. 224.

38 *Prosecutor v. Tadic,* Case IT-94-1-AR72, 35 ILM 1996, p. 42, para. 93.

39 Schachter, O., "UN Law in the Gulf Conflict", 85 American Journal of International Law (AJIL), 1991, p. 468.

40 Bongiorno, C., "A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor", 33 Columbia Human Rights Law Review 2002, p. 643.

international law[41] and its competence must be exercised in conformity with the pertinent rules of international law. In another case, the Court decided that the Community competence had to be exercised in conformity with the customary law of the sea.[42]

Moreover, in two recent cases, where the Court was required to assess the validity of Community acts, which were allegedly not in conformity with international customary law of treaties, it referred to the Vienna Convention on the Law of Treaties for controlling the validity of these act, as it considered the Convention a codification of customary law in this respect.[43] The ECJ has also recognised that general principles of international law are part of the Community legal order, implementation of which are supervised by this Court.[44] In this regard, the Court stated that fundamental human rights form an integral part of the general principles of law whose observance the Court ensures and respect for them is a condition of the lawfulness of the Community acts.[45] Consequently, it can be inferred from the ECJ's relevant case law that this Court interprets and applies international obligations, which are binding on the Community on the international plane, in conjunction with the EC Treaty according to the relevant international law principles.[46]

Accordingly, writers also endorse this position of the Court.[47] In this respect,

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41 Joined Cases 21-24/72 *International Fruit Company*, 1972 ECR 1226, paras. 6-7.

42 Case C-286/90 *Poulsen/Diva*, 1992 ECR 6019, para. 10; similarly in Case C-146/89 *Territorial Sea,* 1991 CMLR 649, paras. 23-5, the Court pronounced that the Community is bound by international law and it cannot force its member states to violate their international obligations.

43 Case 162/96 *Racke* 1998 ECR I-3655, paras. 53-9, and Case T-115/94 *Opel Austria*, 1997 ECR II-39, paras. 77 and 90.

44 Case T-572/93 *Odigitria*, 1995 ECR II-2045, para. 48, the Court recognised international law as the basis of the Community's general principles of law.

45 *Opinion 2/94*, 1996 ECR I-1759, paras, 33-5.

46 Case 181/73 *Haegeman II,* 1974 ECR 459, paras. 2-6;in Case C-61/94 *Commission v. Germany*, the Court decided that international agreements concluded by the Community and the relevant Community measure must, so far as is possible, be interpreted in a consistent manner, 1996 ECR 4006, para. 52; see also Advocate General Saggio's opinion in Case C-149/96 *Portugal v. Council*, 1999 ECR I-8395.

47 Bethlehem, D., "International Law, European Community Law, National Law: Three Systems in Search of a Framework", International Law Aspects of the European Union, Koskenniemi ed., Kluwer,1998, p. 173. See also, Meessen,K.M., "The Application of Rules of Public International Law within Community Law", 13 Common Market Law Review (CMLR), 1976, p. 487; Groux & Manin, The European Communities in the International Order, The European Perspectives Series, Brussels, 1984, p. 116-8; Macleod and Hendry, The External Relations of the European Communities, Oxford, 1996, p. 131-32; Kuijper, P.J., "The Court and Tribunal of the EC and the Vienna Convention on the Law of Treaties", 25 Legal Issues of European Integration 1998/1, p. 13.

Mendelson argues that Article 230 and 235-36 of the Community Treaty, which empower the ECJ to annul the acts of the Community infringing any rule of law relating to the application of the Treaty, include relevant international law as well.[48] Canor further argues that the Community Court, when interpreting an international act, must enlarge the scope of its analysis and must define the object and purpose of the international act by reference to its international purpose.[49] Finally, some writers point out that whenever an international obligation binding the Community is meant to be enforced by the relevant authorities, the performance of the ECJ in fulfilling that international obligation will consequently affect the subsequent international claims.[50]

III. International Labour Organisation

The Administrative Tribunal of the International Labour Organisation (ILO) referred to general principles of international civil service law in its administrative cases.[51] For example, in *re Callewaert-Haezebrouck,* the Tribunal held that, although the legislative organ of the Organisation (the Assembly) had the authority to make alterations and adjustments in the staff regulations, these were subject to certain limitations, and that an interpretation given to a text, which involved discrimination, offended against the general principles of law, particularly international civil service.[52]

IV. World Bank

The World Bank responded to the criticism that it failed to respect to international norms regarding human rights by establishing an Inspection Panel, which examine the claims of groups of individuals claiming to be

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48 Mendelson, M.H., "The Impact of EC Law on the Implementation of the ECHR", 3 Yearbook of European Law 1983, p. 105. For further ideas, see, Wouters, J. and Van Eeckhoutte, D., "Giving Effect to Customary International Law through EC Law", Institute for International Law, Working Paper No. 25, 2002.

49 Canor, I., "Can Two Walk Together, Except They be Agreed? The Relationship between International Law and European Law: The Incorporation of United Nations Sanctions Against Yugoslavia into European Community Law through the Perspective of the ECJ", 35 CMLR 1998, p. 156.

50 Toth, A.G., The Oxford Encyclopaedia of European Community Law, Vol. I, p. 269; Stein, E., "External Relations of the EC", Collected Courses of the Academy of European Law, 1990, Vol. I-1, p. 178.

51 International Labor Conference, 42nd Session, Fifth Report of the Credential Committee, Provisional Record, No. 32.

52 *re Callewaert-Haezebrouck* (No.2), ILO Administrative Tribunal Judgement No. 344.

affected by projects carried out by the organisation.[53] Bradlow explains that the Panel investigates complaints with reference to the Bank's operational policies and procedures. In this respect, the complainants, in drafting their complaint, need to rely on applicable general principles of international law to interpret the Bank's operating rules and procedures in order to define the Bank's obligations toward the complainants. Then, the Panel would also need to engage in a similar exercise in its review of the complaint. Thus, the complaint process will lead to the further incorporation of general principles of international law into the regulation of Bank operations. [54]

V. The World Trade Organisation

The Appellate Body of the World Trade Organisation (WTO) has also taken into account various relevant international principles and international environmental rules governing the relations between the parties in a dispute before itself in reaching a decision.

For example, in the *US-Import Prohibition of Certain Shrimps and Shrimp Products*, the appellate body noted that the sea turtles subject to prohibition inhabited waters over which the US had jurisdiction and there were relevant rules of international law protecting such species and governing the relations between the members. In the opinion of the appellate body, the objective of sustainable development, set out in the preamble to the agreement establishing the WTO, and the relevant international environmental norms governing the relations between the parties, should be taken into account in the interpretative processes at the WTO.[55]

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53 Bowett, D.W., The Law of International Institutions, 5th edit., Stevens & Sons, London, 2001, p. 516. The Statute of the European Bank for Reconstruction and Development also declares the issue of human rights and a multiparty democracy as one of the priorities of the Bank, EC Official Journal, L372, 31 December 1990.

54 Also, the Panel's findings and recommendations can have the potential to influence substantive areas of international law, like human rights and environmental law, Bradlow, D.D., "International Organisations and Private Complaints: The Case of the World Bank Inspection Panel", 34 Virginia Journal of International Law 1994, p.554-57 and 610.

55 Report of the WTO Appellate Body, WT/DS58/AB/R, paras. 129-135, 153-55 and 168. See Qureshi, A.H., "Extraterritorial Shrimps, NGOS and the WTO Appellate Body", 48 ICLQ 1999, 199. See also *US Standards for Gasoline*, 35 ILM 1996, p. 62. For more ideas on this topic, see Bowett,op.cit., 5th edit., 2001, p. 458; Cameron and Gray, "Principles of International Law in the World Trade Organisation Dispute Settlement Body", ICLQ, Vol. 50, Issue 2, 2001, p. 248; Sands, P., "Treaty, Custom and the Cross-fertilization of International Law", Yale Human Rights & Development Law Journal, Vol. I, 1998, p. 85; Pauwelyn, J., "The Role of Public International Law in the WTO", 95 AJIL 2001, p. 578

Section Three

Legal Basis of the Applicability of International Law to International Organisations

As to the legal basis of the applicability of international law to international organisations, it can be argued that as international organisations are constituted by the common will of states through the act of transfer of powers on the basis of an international treaty, the resulting sub-legal system cannot acquire more powers than their creators have agreed to give it in its constitutive instrument. As far the rules of international law regarding human rights are concerned, Cogen argues that,

> *"the Universal Declaration and the International Covenants represent minimal standards of conduct for all peoples and all nations. Inter-governmental organisations are inter-state institutions and they too are bound by the generally accepted standards of the world community...Regrettably there is an obvious lacuna since international organisations are not expressly mentioned as being bound by these human rights principles. [However], inter-state relations include treaties establishing international organisations as well as operations of international organisations. The activities of organisations are determined or legitimated post factum by the plenary organ, being composed of representatives of all member states. It is their duty to make sure that minimal standards of human rights are part of the operational criteria of the organisation in relation to member states."*[56]

In this respect, one must, first of all, note that between the sources of international law, ie., treaty, custom or general principles, there is no hierarchy and all the relevant rules of international law are applicable in case of a legal dispute, as long as an intention to the contrary between the parties cannot be inferred. As Pauwelyn argues states as subjects of international law, unlike individuals in domestic law, do not elect an international legislator, which is then mandated to make law on their behalf, each state as well as each treaty is born into the general international law, which ensures the existence of international legal system.[57] Consequently, the presumption in international law that the parties to a treaty intend

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56 Cogen, M., "Human rights, prohibition of political activities and the lending policies of Worldbank and International Monetary Fund", The Right to Development in International Law, S.R. Chawdhury et. al. eds., 1992, p. 387-89. In this regard, it was explained that "Anything the Bank does has always to be with the consent of the member states...It is dangerous to overstate the degree to which authority has been delegated legally because the constituent instruments of international organisations provide that accountability is to the states that created them", American Society of International Law, Proceedings 1998, p. 360-65.

57 Pauwelyn, op.cit., p. 535.

something not inconsistent with generally recognized principles of international law, or with previous international obligations toward third states,[58] explains the basis why international organisations, when they are performing their activities, take general international law into account.[59] In this regard, Gowlland-Debbas argues that,

> *"International organisations do not operate in a vacuum, for it is clear that the constituent instruments of international organisations form part of the corpus of international law. To give an example, undoubtedly human rights law sets limits on SC economic sanctions in the form of the purposes of the UN Charter, which have evolved to include economic, social and cultural rights, but also in the form of customary norms (in the absence of an express derogation) and general principles of law, such as good faith and abuse of rights, as well as in the form of peremptory norms that set absolute limits. The SC can therefore be held legally responsible for overstepping these constraints."*[60]

Moreover, it is to be remembered that, in international law, the collectivity of states cannot opt out of customary law and the general principles of law with a treaty between themselves as far as the rights of third parties are concerned. In other words, although member states can abrogate between themselves most of general international law by the constitutive treaty of an organisation, this does not affect the rights and obligations of third parties arising from those general rules of international law, as that treaty will be regarded *res inter alios acta* in terms of third parties. Therefore, international law will continue to govern the relations between an organisation and third parties and the organisation will be required to act in accordance with the relevant rules of international law.[61]

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58 Oppenheim's International Law, 9th edit., Jennings and Watts ed., Longman, London, 1992, p. 1275; Wolfke, K., "Treaties and Custom: Aspect of Interrelation", Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag, Klabbers and Lefeber ed., Martinus Nijhoff, 1998, p. 36. See also, Wright, "Conflicts between International Law and Treaties", AJIL Vol. 11, 1917, p. 575, where the author argues that between the parties, treaties are generally be interpreted so as not to conflict with customary international laws or derogate from rights recognised under such laws.

59 In this regard, a useful reference point is Article 31 (3/c) of the 1969 Vienna Convention on the Law of Treaties, according to which in the interpretation of a treaty any relevant rules of international law applicable to the relation between the parties should be taken into account, Blackstone's International Law Documents, 2nd edit., M.D. Evans ed., London, 1994, p. 165.

60 American Society of International Law, Exploring the Evolution of Purposes, Methods and Legitimacy: Accountability of International Organisations, Proceedings 2000, p. 207.

61 In this regard, Brownlie argues that "General international law provides criteria according to which an organisation may be held to be unlawful in conception and

As pointed out above, parties to a treaty can provide exceptions in this respect, like the obligation in Article 103 of the UN Charter, which provides that "In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".[62] Similarly, Article 4 (6) of the Annex IX of the 1982 Law of the Sea Convention provides that "In the event of a conflict between the obligations of an international organisation under this Convention and its obligations under the agreement establishing the organisations or any acts relating to it, the obligations under this Convention shall prevail".[63] It is also possible that exceptions may result from an interpretation of the treaty by the relevant authority.[64] Yet, as far as *jus cogens* norms of international law are concerned,[65] these exceptions may not provide a relief. In this context, it is argued that

> *"It would be unduly formalistic to restrict the breadth of jus cogens to the context of treaty lawfulness...As the concept of jus cogens predates the Vienna Conventions by many decades, as its association with treaty law can be seen as simply a specific instance of a more general application, and as the very definition of a 'peremptory norm' in Article 53 of both Vienna Conventions in no way limits the concept to the treaty context, it would be faulty to deduce that jus cogens norms shall serve only to restrict state conduct in matters of treaty formation (Article 53) and treaty continuation (Article 64). As guiding principles of minimally acceptable conduct in the world order, peremptory norms must equally proscribe non-contractual international acts that would otherwise be permitted by international law, including acts such as resolutions of*

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objects, and, apart from this, particular acts in the law may be void if they are contrary to the principle of *jus cogens*", Brownlie, Principles, 1990, p. 701, and Brownlie, Principles, 1998, p. 690; Schermers, HG., "The Legal Bases of International Organisation Action", A Handbook on International Organisations, 2nd edit., The Academy of International Law, The Hague, p. 401-2. Yet, Jennings argues that non-member states' duty to respect the constitutive treaty of an organisation stems from the general law but not from the terms of the treaty, and this duty does not mean that such a treaty can impose obligations upon them, Jennings, R.Y., "Treaties as Legislation", Jus et Societas, Essays in Tribute of Wolfgang Friedmann, Martinus Nijhoff, The Hague, 1979, passim.

62 Blackstones' International Law Documents, 2nd edit., p. 25.

63 Ibid., p. 352.

64 However, one must note that these exceptions are valid only for the states parties to these treaties but it cannot be argued against third states.

65 For a detailed analysis of this concept, see de Hoog, A.J.J., Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States, Nijmegen, 1995.

> *organs of international organisations that would themselves have juridical consequences if treated as valid."*[66]

Consequently, it is possible to argue that scrutinising a decision of an organ of international organisation, such as UN Security Council, in light of *jus cogens* norms is very close to scrutinising treaty provisions themselves, since international organisations and their various organs are themselves treaty-constituted and the formal validity of the relevant decision of an organ is traceable to treaty-conferred procedures and powers. Most significantly, the legal obligation of states to obey a binding decision is treaty-dependent. If treaty provisions must conform to *jus cogens* duties, it seems indisputable that treaty provisions cannot authorise or delegate authority to engage in juridical acts that would be treated as void according to the law of treaties if they were directly spelled out in the treaty itself. In other words, non-state actors whose specific capacities are constituted by a state-state treaty will be prohibited from doing what the states parties could not do for themselves.[67] Therefore, to the extent that Article 103 analogises Charter obligations to domestic law constitutional obligations, that analogy must be modified so as to accord *jus cogens* norms a constitutional status vis-à-vis Charter delegated decisions of UN organs. The status of *jus cogens* norms as a body of law superior to both customary international law and treaty law requires that Article 103 provides no relief where Security Council conduct conflicts with *jus cogens*. [68]

On this basis, within the context of the UN, it has been argued that the Charter of the UN, as a treaty, acts as a mechanism by which states delegate specific powers to an organ of an international organisation, but the original source of that power-which is transferred via the Charter- is member states acting collectively.[69] Thus, the Security Council, as an international institution, is a delegate of powers by member states. For example, states possessed an international police power prior to the UN Charter and Article 24(1) represents a delegation of this type of power by states to the Council.

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66 Scott, Qureshi, Michell, Kalajdzic, Copeland, Chang, "A Memorial For Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina", 16 Michigan Journal of International Law, 1994 (hereinafter referred as The Memorial), p. 109-10.

67 Hence, there seems to be no barrier to a direct extension of the relevance of *jus cogens* from the field of the responsibility of states to the field of the responsibility of international organisations. The conduct and juridical acts of international organisations cannot be in a privileged position when compared to the relevance of *jus cogens* to all conduct and juridical acts of states, ibid., p. 111-12.

68 Ibid., p. 124.

69 Sarooshi, op.cit., p. 20-46.

Consequently, when powers are being delegated the limitations on the exercise of the power must also be imposed on the delegate.[70] In this regard, Schachter notes that UN members have not ceded all sovereign authority to the SC. Neither the Council nor its members collectively can violate essential elements of sovereignty. Although the scope of these rights and any limits on the SC with respect to them are not clearly set out in the Charter, institutional practice, customary international law and general principles help to fill gaps in the Charter and demarcate the Council's margin of appreciation. [71]

The UN War Crimes Tribunal for the former Yugoslavia in the *Tadic* case, where the Tribunal had to consider the Security Council's mandate to establish and empower the Tribunal to adjudicate issues according to international law, confirmed the validity of this argument by stating that,

> *"Support for the view that the Security Council cannot act arbitrarily or for an ulterior purpose is found in the nature of the Charter as a treaty delegating certain powers to the UN. In fact, such a limitation is almost a corollary of the principle that the organs of the UN must act in accordance with the powers delegated to them."*[72]

On this basis, it has been argued that human rights law should be applied to the UN in this way as well, i.e. rights and freedoms in some human rights conventions, like Universal Declaration of Human Rights and International Convention on Civil and Political Rights are afforded to individuals and states or groups are only vehicles for promoting such rights. Therefore, the UN intervention is merely a surrogate vehicle for the administration of human rights standards applicable to the community. The Organisation has also recognised in its Charter a commitment to the promotion of human

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70 Franck argues that the UN is the creature of a treaty and, as such it exercises authority legitimately only in so far as it deploys powers which the treaty -parties have assigned to it, Franck, T., "Fairness in the International Legal and Institutional System", The Academy of International Law, The Hague, 1993-III, p. 190. For similar ideas, see Paenson, I., Manual of the Terminology of Public International Law and International Organisations, Bruylandt, Brussels, 1983, p. 362; Reinisch, A., Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions, 95 AJIL 2001, p. 85. For a contrary opinion, see Fassbender, B., "Quis judicabit? The Security Council, Its Powers and Its Control", 2000 EJIL, Vol. 11, No. 1, p. 230-32.

71 Schachter, op.cit., p. 468. As regards the rules of *ius in bello*, see Reisman, W.M. and Stevick, D.L., "The Applicability of International Law Standards to UN Economic Sanctions Programmes", EJIL, Vol.9 No.1, p. 86, where it is argued that when the community of nations applies coercion in defence of public order, it is subject to the same laws of war or humanitarian law that have been prescribed for others.

72 105 International Law Reports (ILR), p. 432.

rights principles, thus the UN is the source of the law, as such it must enforce adherence to international human rights standards and provide means of remedy for violations.[73]

In the European Community law, it is recognised that the Community cannot exercise all the powers that a state possess but only those powers vested on it by member states. Hence, when the Community exercises such powers it must comply with international law, which specifies the conditions and limits of the powers of member states in the relevant area.[74] Schermers argues that at the time when the member states created the Community, their powers were restricted vis-à-vis the international obligations, thus all powers transferred to the Community were subject to this restriction and the Community inherited the limitations of the powers of the governments in that regard. Therefore, it is possible to argue that the principle of *nemo plus juris tarnsferre potest quam ipse habet* is applicable in this regard.[75] In this regard, Bethlehem writes that Community law is a conduit for the interaction of international law and municipal law, forging a unity between international law and municipal law.[76]

As far as the rights of third parties are concerned, the European Court of Justice, in *France v. Commission* Case, after finding the Commission's

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73 Abraham, E., "The Sins of the Saviour: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in its Mission in Kosovo", 52 The American University Law Review, 2003, p. 1320-22.

74 See Advocate General Mayras opinion in Case 48/69 *ICI*, 1972 ECR 619, p. 693. For a similar view, see Advocate General Warner's opinion in Case 7/76 *IRCA*, 1976 ECR 1213, p. 1237. In this respect, Mendelson argues that Article 230 and 235-36 of the Community Treaty, which empower the ECJ to annul the acts of the Community infringing any rule of law relating to the application of the Treaty, include relevant international law as well, Mendelson, op.cit., p. 105

75 Schermers, "Constituent Treaties of International Organisations Conflicting with Anterior Treaties", Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag, Klabbers and Lefeber ed., Martinus Nijhoff, 1998, p. 22. Lenaerts and Smijter argues that in so far as international commitments are provided in a multilateral treaty to which member states were parties before creating the Community, Article 30(5) in combination with Article 41(1)(b) of the 1969 Vienna Convention on the Law of Treaties should apply. On this basis, there is a duty on the part of the institutions of the Community not to impede the performance of such obligations of member states stemming from earlier international obligations, Lenaerts and Smijter, "Some Reflections on the Status of International Agreements in the Community Legal Order", Melanges en Hommage a Fernand Schockweiler, Nomos, 1999, p. 362-66.

76 Betlehem, op.cit., p. 173. In this respect, he further argues that in its reliance on general principles of law, the ECJ has relied on a methodology which is quintessentially a methodology of international law, which can be traced back to Article 38 (1/c) of the Statute of the International Court of Justice, ibid., p. 182-3.

conclusion of a competition agreement in breach of Community's competence rules, held that that finding did not affect the validity of the agreement in international law in accordance with Article 46 of the 1969 Vienna Convention on the Law of Treaties. Thus, it decided that the Community is under the duty to act in accordance with the relevant international laws in its relations with third parties and that the validity and effects of an international obligation vis-à-vis a third party cannot be challenged on the international plane by relying upon the internal rules established by the constitutive treaty of the Community.[77] Advocate General Tesauro, in his opinion to this case, argued that the Community's internal law could not stand in the way of the honouring of the international obligations contacted under an international agreement and the Community and the member states have to align the internal and external effects of that agreement, either by withdrawing from that agreement or by rectifying the defect of Community Treaty.[78]

Similarly, within the WTO context, some reject the argument that the participating states to the WTO treaty have contracted out of many substantive rules of international law and argue that it is generally accepted that the WTO treaty is not a totally sealed system and its rules are part of the wider corpus of international law, as is international trade law, international economic law, international environmental law and human rights law. In this respect, Pauwelyn points out the possibility of using Article 31(3) (c) of the Vienna Convention on the Law of Treaties, which states that in the interpretation of an international treaty account is to be taken of any relevant rules of international law applicable in the relations between the parties.[79] This view also finds support within the case law of the European Court of Human Rights. In the case of *Al-Adsani v. UK*, the Court tried to reconcile the requirements of international law with the requirements of the European Convention on Human Rights by interpreting the provisions of the Convention in the light of the rules set out in the Vienna Convention on the Law of Treaties, in particular Article 31(3) (c). This

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77 Case C-327/91 *France v. Commission*, 1994 ECR I-3641,para. 12.

78 Ibid. On this note, one has to remember that as far as the ECJ's jurisdiction is concerned, the ECJ is competent to review the legality of secondary Community measures under the international obligations of the Community. Yet, as to the relationship between the Community Treaty and international agreements, this is a matter of compatibility but not superiority, as the Court is not competent to review the legality of Community Treaty itself, as stated in Case C-253/94 *Roujansky*, 1995 ECR I-10, para. 11. Therefore, the Court in reviewing the legality of Community Treaty itself in relation to international law can only use its interpretative function to align these two.

79 Pauwelyn, op.cit., p. 535.

enabled the Court to interpret the relevant provision of the Convention in harmony with other rules of international law, of which it forms part.[80]

Section Four

Problems in Compliance with International Law

Despite the fact that international organisations are considered as bound by international law, there are important instances where this comes into question. Therefore, some analysis of those instances where the functioning of organisations has been questioned from the international law point of view is required to give a better picture of the relationship between international organisations and international law.

A. Security Council Resolutions

In the case of the Security Council, it is generally accepted that its obligation to respect the purposes and principles of the UN Charter includes, under Article 1, the obligation to respect principles of international law. Then, the question arises whether the SC is obliged to respect existing international law, when the SC adopts a measure, which is on its face incompatible with general international law or treaty law, even if the SC has made a binding determination by invoking its powers under the Charter.[81]

An example where this was alleged to have occurred was the Lockerbie incident, where two Libyan nationals were accused of bombing a Pan Am aircraft over UK. In Resolution 731, adopted by the Security Council under Chapter VII, the Council demanded the extradition of two Libyan nationals and thus made dispositions in an area governed by precise principles of international law and the regime established by the 1971 Montreal Convention. The general principle in this area is that extradition can take place on the basis of an extradition treaty, but the two states demanding the surrender of Libyan nationals did not have extradition treaties with Libya. In adopting resolution 731, the SC took the view that a refusal to respond to demands for surrender of the two suspects by Libya constituted a threat to the peace under Chapter VII, even though Libya was not obliged, under

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80 *Al-Adsani v. UK*, 34 European Human Rights Reports 2002, p. 27, para. 55. For further analysis of this issue, see Higgins, R., "The ICJ, the ECJ, and the Integrity of International Law", ICLQ 2002, p. 11 and 16.

81 For an early example of a Security Council decision which was identified as not in accordance with the Charter in terms of Article 25, see the debate surrounding the undertaking by the SC to assure the integrity and independence of the Free Territory of Trieste, Kelsen, H., The Law of the UN: A Critical Analysis of its Fundamental Problems, 1950, p. 833.

international law, to do so.[82] When this dispute was brought before the ICJ,[83] the Court gave an extensive interpretation of the powers of the Security Council and held that a decision of the Council is, by virtue of Articles 25 and 103 of the Charter, able to prevail over the obligations of the parties under any other international agreement.[84]

However, this conclusion has been questioned on the basis of the argument that even if the Council has made a determination of a threat to the peace which is in principle *intra vires*, problems of legality are still entailed as this determination does not justify all the means of implementation for that purpose.[85] In other words, while the Security Council exercises a wide discretion under Chapter VII, this does not mean that its powers are unlimited. A discretion can only exist within the law and letting the Security Council to use its discretion freely, in deciding what the modalities of the means of implementation should be, creates a police state rather than a state based on the rule of law. Some also pointed out the role that the ICJ can play in this regard and argued that,

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82 For this case, Lamb points out that "What is troubling is that even the original act of (alleged) terrorism, the bombing of the aircraft in the first place, had occurred several years before the case was brought and was never classified as such a threat. It is therefore controversial in the extreme to view Libya's subsequent failure to respond fully to the US' requests to surrender suspects…as a threat to international peace…It is not alleged that the concept of breach of the peace is necessarily synonymous with a breach of international law, which it clearly is not, but rather, that the threat appeared rather insubstantial, or at least disproportionate to the measures adopted", Lamb, op.cit., p. 378-79.

83 *Lockerbie Case (Libya v. UK),* Provisional Measures, ICJ Reports 1992, p. 3 and *Lockerbie Case (Libya v. USA),* Provisional Measures, ICJ Reports 1992, p. 114. Libya had originally alleged that the SC had employed its power to characterize the situation for purposes of Chapter VII simply as a pretext to avoid applying the Montreal Convention, ibid., p. 14, 43 and 126, 153 (dissenting opinion of Bedjaoui).

84 The two respondent states raised as defences two Security Council resolutions, the earlier one being a non-binding recommendation and the later one being a binding decision taken under Chapter VII of the Charter. The ICJ ruled that the later resolution prevented the Court from indicating provisional measures because of the trumping effect of Article 103. However, it is clear that the Court felt that, at this stage of litigation, it only had to accept that the resolution was prima facie valid in order to establish its binding effect under Article 25 and its resulting effect under Article 103. Hence, this decision of the Court leaves open a role for itself, at the merits stage of the case, in assessing whether a presumptively valid Security Council resolution is actually valid in terms of creating obligations for states with respect to which the protection of Article 103 can then be enjoyed.

85 In his dissenting opinion, Judge Shahabuddeen asked whether a decision of the SC may override the legal rights of states, and, if so, are there any limits to the Security Council's powers of appreciation, *Lockerbie Case*, ICJ Reports 1992, p. 32 and 142.

> *"In Article 24, UN members confer on the Council 'primary responsibility for the maintenance of international peace and security'...it is significant that the Council's responsibility is primary and not exclusive. The fact that the issue before the Council concerns the maintenance of international peace and security, therefore, does not exclude the power of the Court to fulfil its judicial function by interpreting the legality of the Charter-delegated acts taken by the Security Council...There is no hierarchical structure in the Charter as between the Council and the Court; therefore, the appropriate conceptual paradigm for understanding judicial involvement in disputes or situations with which the Security Council deals is one of concurrent authority rather than one of either 'judicial supremacy' or 'executive supremacy'."*[86]

Another example involved a Security Council arms embargo against the former Yugoslavia,[87] which had the incidental effect upon the Genocide Convention. Bosnia and Herzegovina raised this issue in a case[88] brought by

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86 See The Memorial, op.cit., p. 76-7, where it is further argued that, "Litispendence is applicable only to cases with which organs of an identical or similar character simultaneously deal. The Security Council is a political organ and the ICJ a judicial one. Although both jurisdictions overlap, their functions are not identical. The practice of the ICJ and its predecessor the PCIJ establishes categorically that the doctrine does not apply to the UN... Two or more international organs which have been seized of the same matter may follow independently their own procedures, touch on the merits, and possibly arrive at different conclusions as to the contested facts, the applicable law, the admissible evidence, and the most appropriate way for the resolution of the pending dispute...Moreover, by acting in such manner, the Court is not to be seen as fettering the ability or duty of the Security Council to act within the powers that the Charter delegates to it. Nor is the Court to be seen as ousting the Council's powers to interpret the constraints placed by law on those powers. Rather, the Court need only be recognised as having, within the Court's institutional legal realm, competence to give its opinion, as a co-interpreter of the UN Charter, on the nature of these constraints, on whether such constraints have in the opinion of the Court been transgressed, and on the legal consequences of any finding of transgression for proceedings before the Court".

87 SC Res. 713 (1991), UN Doc. S/RES/713.The purpose of the Security Council Resolution 713 was to prevent external interference in Yugoslav affairs and to prevent the dissolution of Yugoslavia. The resolution came at the request of the then-Yugoslav government. While the resolution has been reaffirmed in subsequent resolutions, Resolution 713 itself clearly states that the arms embargo applies to Yugoslavia, an entity no longer existing and which is entirely distinct from the successor states, including Bosnia. Despite the fact that the collapse of Yugoslavia drew into question the international legal status of this entity to which the resolution applies, most Security Council members treated the embargo as continuing to apply to post-Yugoslavia Bosnia.

88 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures , ICJ Reports 1993. Bosnia sued Serbia

it before the ICJ against Serbia, where Bosnia alleged that the arms embargo imposed by the SC, applicable across the entire territory of the former Yugoslavia, had the incidental effect of aiding and abetting the Serbian campaign of genocide against the Bosnian Muslims.[89] This raised the question whether the Security Council, which must act in accordance with the Charter like all UN organs, is obliged to respect peremptory norms of international law, and whether its decisions can, under Article 103 of the Charter, prevail over existing treaties in this area, like the Genocide Convention. In this regard, Bosnia sought to persuade the Court to consider the legal status and effects of the arms embargo in the context of Serbian responsibility, as the case was initiated on the basis of the contentious jurisdiction of the Court by virtue of Article IX of the Genocide Convention.[90] For this purpose, Bosnia attempted to convince the Court to use the occasion of the provisional measures request "to clarify the legal situation for the

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both for acts of Serbian forces in Bosnia and for Serbian support of genocide carried out by Bosnian Serb forces, which support Bosnia argues to be sufficient to engage Serbia's state responsibility under the Genocide Convention. Given the urgency of the situation, Bosnia sought an indication of provisional measures from the ICJ twice in 1993. At the first Provisional Measures stage, the Court ruled in Bosnia's favour, ordering that Serbia must cease and desist from all genocidal actions. Then, Bosnia filed its second request claiming that Serbia was not complying with the first order, again, the Court ruled in Bosnia's favour.

89 In Resolution 47/121, the General Assembly cited with approval the findings of UN Commission on Human Rights Special Rapporteur, stating that another factor which had contributed to the intensity of ethnic cleansing in areas under Serbian control was the marked imbalance between the weaponry in the hands of the Serbian and Muslim population, then, the General Assembly urged the Security Council to exempt the Republic of Bosnia and Herzegovina from the arms embargo as imposed on the former Yugoslavia under SC Resolution 713, GA Res. 47/121(1992), UN Doc. A/RES/47/121. It is also clear from the letter of the President of the Security Council to the Secretary-General that the members of the Council were aware of the causal relationship between the embargo and genocide, UN Doc. S/26049 (1993).

90 Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide provides that, "Disputes between the Contracting parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or of any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute", 78 UNTS 277. The Memorial suggests that the Genocide Convention's provisions are incompatible with any interpretation other than one, which accords the Court a prominent role in setting out the precise requirements of *jus cogens* norms and of Genocide Convention obligations and rights. The most obvious point in this regard is that Article IX of the Convention clearly singles out the ICJ as the organ of choice to resolve disputes of several kinds, op.cit., p. 95.

entire international community".[91] On this basis, Bosnia asked the Court if it had rights of access to the means, arms etc., to prevent genocide and if these rights prevailed over Security Council obligations to uphold an arms embargo. Nevertheless, the Court declined to relate the arms embargo to Serbia's alleged responsibility for genocide on the basis of its interpretation of the wording of Article 41(1) of the Statute of the ICJ on provisional measures and the jurisdictional nexus of the case.[92] However, Judge ad hoc Lauterpacht, in his separate opinion, addressed the consequences of a conflict between a Security Council resolution and a peremptory rule of international law, where he noted that,

> *"[It cannot be said that] the SC can act free of all legal controls…The present case, however, cannot fall within the scope of the doctrine enunciated [by the ICJ in Lockerbie case]. This is because the prohibition of genocide, unlike the matters covered by the Montreal Convention in the Lockerbie case to which the terms of Article 103 could be directly applied, has generally been accepted as having the status not*

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91 ICJ Reports 1993, p. 344-45. In this regard, The Memorial argues that, "[although] it is conceded that resolutions of the Security Council must enjoy an initial presumption of validity… such a presumption can be no more than a starting point and cannot relieve the Court of its Charter-based duty to address the legal aspects of the dispute brought before it…The *travaux preparatoires* of the Charter and the emphasis therein on the notion of general acceptability, the history and text of the Genocide Convention, the normative signals sent by the two Vienna Conventions, and the general principles of interpretation applicable where human rights and the natural law strain in international law intersect –all speak to the very special role to be played by the Court in contexts such as that at bar. The result is that the weight to be given to the presumption of validity must be appropriately tailored (ie., significantly lessened) where *jus cogens* norms are implicated…It is submitted that the Court has full authority to carry out the following without fear that it is compromising the specific functions of the Council: (1) determine and declare the precise contours of those norms that enjoy *jus cogens* status; (2) determine and declare the legal consequences of a breach of *jus cogens* norms; (3) apply extant norms to a putative fact situation)in a contentious case, notably at the Provisional Measures stage) or hypothetical fact situation (in some advisory opinions) in order to determine and declare what breaches and legal consequences would result if those facts proved to be true or, if true, remained unchanged; and (4) based on full factual argument and proof, judge the conformity of past conduct of the Security Council with peremptory norms and judge what the legal effects of any lack of conformity were in the period in question", op.cit., p. 34 and 102-5.

92 The Court saw its power to issue provisional measures as limited to preservation of rights, which could be the subject of binding legal judgement at the eventual merits stage of a case. Since the Court's eventual judgement at the merits stage is only binding on the states before it, it was not free to issue provisional measures with respect to the rights of any party if the Court did not have jurisdiction over a party with the correlative obligation to respect those same rights.

> *of an ordinary rule of international law but of jus cogens. ...One only has to state the opposite proposition thus -that a SC resolution may even require participation in genocide- for its unacceptability to be apparent."*[93]

This conclusion shows that when a clash occurs between a binding SC resolution and a peremptory norm of international law, the construction of the limits of SC's powers have to be carefully rethought.[94] In this respect, the Memorial, which was prepared on the topic by a team of academicians initiated at the Bosnia's request, argues that,

> *"Article 25 clearly circumscribes the powers of the Security Council. Council decisions, if they are to have any binding effect, must be in accordance with the Charter...Article 25 does not operate so as to make all Security Council decisions binding. Otherwise, the words 'in accordance with the present Charter' would be superfluous...[In this regard] it is consistent with both the concept of jus cogens and the nature of the UN legal order to treat the fundamental precepts of jus cogens to be part of internal Charter law...Article 103 provides: 'In the event of conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. Read together, Articles 25 and 103 require member states 'to accept and carry out' all Security Council decisions that are 'in accordance with the present Charter'... Jus cogens norms of international law are, by definition, norms from which no derogation is permitted, even by the Security Council. Thus to the extent that Article 103 analogises Charter obligations to domestic law constitutional obligations, that analogy must be modified so as to accord jus cogens norms a constitutional status vis-à-vis Charter delegated decisions of UN organs...If the phrase 'principles of justice and international law' in Article 1(1) is to have any concrete meaning within the UN system, then at a minimum the Council must not be permitted to derogate from such fundamental legal norms...The status of jus cogens norms as a body of law superior to both customary international law and treaty law requires, as a matter of the hierarchy of legal norms which the Court must apply, that Article 103 provides no relief where Council conduct conflicts with jus cogens...Security Council resolutions that do not conform to jus cogens norms are ultra vires according to the internal*

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93 Judge ad hoc Lauterpacht's separate opinion in the *Genocide Case*, ICJ Reports 1993, para. 39.

94 See also the Report of the Secretary General pursuant to General Assembly Resolution 53/35 on responsibility for the fall of the UN safe area of *Serebrenica*, para. 468; the Report of the Independent Inquiry into the Actions of the UN during the 1994 Genocide in Rwanda, C.19, A/54/549.

> *legal order of the Charter. As a result, no binding Article 25 obligation emanates from such a resolution as long as it is ultra vires".* [95]

Concerns regarding the legal limits to the SC's powers have also been raised when the SC established a subsidiary organ with the power to take binding decisions. For example, when the SC created the International Criminal Tribunal for the former Yugoslavia by its Resolution 827 (1993) taken under Chapter VII of the UN Charter, numerous representatives complained that the establishment of the Tribunal left unresolved a number of legal issues relating to the powers and competence attributed to the Council by the Charter, such as whether the SC purported to exercise judicial or legislative functions which the SC does not possess the competence to exercise.[96] The UN Secretary General in his Report clarified some of the issues in this regard by recognizing that

> *"[In] this particular case, the SC would be establishing, as an enforcement measure under Chapter VII, a subsidiary organ within the*

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95 See op.cit., p. 122-6. The Memorial also argues that, "Bosnia has been the victim of Serbian aggression and thus of an 'armed attack', even under the restrictive Nicaragua approach to self-defence, as a result of the transfer of JNA units to the Bosnian Serb forces and continued provision of arms and other support to the Bosnian Serb forces by Serbia. Bosnia thus has the inherent right of individual and collective self-defence to take necessary and proportionate measures to secure its territorial integrity and political independence...[Also] If a people has the right to seek and receive support to liberate itself from foreign domination, it must also possess the same right to prevent the genocidal domination of its territory. Since self-preservation is a necessary logical precondition to self-determination, a people must also possess the right to seek and receive support to prevent genocide against it...Given both that the prohibition of aggression is a *jus cogens* norm, and that the prohibition of genocide is also a *jus cogens* norm, the exercise of the inherent right to self-defence against genocidal aggression, contextually analysed, must be understood as constituting a *jus cogens* norm of the highest order. [Accordingly] it is reasonable to start from the presumption that a state's exercise of the right to self-defence may be suspended by the Security Council only in certain limited circumstances and then only where the Security Council replaces a state's inherent right to self-defence with its functional equivalent: effective collective intervention in lieu of self-defence...In such circumstances... the sole alternatives are effective armed intervention on behalf of the international community or, failing that, a lifting of the arms embargo so as to enable Bosnia to exercise its inherent right to individual and collective self-defence. In the latter case, the Security Council should condemn the combined armed attacks and acts of genocide, reaffirm Bosnia's right to self-defence, and request that member states extend assistance to Bosnia", ibid., p. 50-73.

96 Similar concerns were also raised for an earlier SC Resolution of 837(1993), where the Council, in response to armed attacks against the personnel of the UN operation in Somalia acting under Chapter VII of the Charter, identified one of the parties in the local situation as responsible and reaffirmed that the Secretary General was authorized to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment, UN Doc. S/PV.3229, 1993.

> *terms of Article 29 of the Charter, but one of a judicial nature. This organ would, of course, not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions. [Moreover] ...in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the SC would not be creating or purporting to legislate that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law."*[97]

Similarly, when the SC settled the question of boundary in the absence of an agreement between the parties, this was again protested as against the well-established principles of international law, one of which is that states are not bound, in the absence of an agreement to the contrary, to submit their disputes with other states to final adjudication by a third party. An example can be found, in this respect, in the SC's demarcation of the Iraqi-Kuwait boundary in the absence of an agreement.[98] On this issue, Brownlie points out that "It is one thing to effect a restoration of Kuwaiti sovereignty on the basis of the *status quo* prior to Iraq's invasion. It is quite another to impose a boundary in the absence either of bilateral negotiations and agreement or an arbitration or reference to the International Court".[99]

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97 UN Doc. S/25704, 3 May 1993. In this respect, the Appeal Chamber of the Tribunal established by the SC also held that "The establishment of the International Tribunal by the Security Council does not signify that the Security Council has delegated to it some of its own functions or the exercise of some of its own powers. Nor does it mean that the Security Council was usurping for itself part of a judicial function, which does not belong to it but to other organs of the UN according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of the maintenance of peace and security", *Tadic case*, 35 ILM 1996, p. 32. The Appeals Chamber again dismissed the prosecutor's attempt to base the issue of compulsory orders to states upon the Tribunal's primacy over national courts as inappropriate, since it was based upon a flawed domestic analogy as opposed to the basic structure of international community which lacks any central government and consists primarily of sovereign states, hence does not necessarily possess, *vis-à-vis* national organs, the same powers which accrue to national courts in respect of the administrative, legislative, and political organs of the state, *Prosecutor v. Blaskic*, 110 ILR 723, paras. 30-1.

98 The demarcation of boundary by the SC Resolution 687 (1991). An earlier example in this regard can be found in the France's written statement to the Namibia Advisory opinion, where it contested the Assembly's competence to decide whether this or that territory belongs to this or that state, thus, considering itself invested with legislative power on a universal scale, ICJ Pleadings 1970, Vol. I, p. 367-68.

99 Brownlie, I., "International Law at the Fiftieth Anniversary of the UN, General Course on Public International Law", The Academy of International Law, The Hague, 1995, p. 220; see also Lamb, op.cit., p. 370-72.

Other examples, in this regard, involve the harmful effect of SC sanctions upon individuals' human rights. In this respect, Gardam writes that,

> *"There is another aspect of Security Council practice under Chapter VII whose impact on civilians is causing disquiet –the imposition of economic sanctions associated with an armed conflict...The impact of economic sanctions on the civilian population is not a new phenomenon. But it has assumed a new aspect where economic sanctions are associated with enforcement action of the Security Council. The civilian population mat well be devastated by the conflict. International initiatives to provide humanitarian assistance, however, have to overcome the hurdle of the Sanctions Committee to enable the effects of the forceful action on civilians to be minimised. This is one of the aspects of the new role of the Security Council that has not been fully appreciated."*[100]

Despite the fact that UN Security Council resolutions regularly exclude from the sanctions regime "supplies intended strictly for medical purposes and, in humanitarian circumstances, foodstuffs",[101] on the basis of the actual consequences, various UN bodies have criticized multilateral sanctions[102] imposed by the SC pointing out the legal requirement that the SC is bound to comply with the whole array of international humanitarian law and human rights law when deciding and implementing these sanctions. For example, in August 2000, the Sub-Commission on the Promotion and Protection of Human Rights appealed to the Human Rights Commission "to recommend to the SC that, as a first step, it alleviate sanctions regimes so as to eliminate their impact on the civilian population by permitting the import of civilian goods", as these sanctions regimes were "unequivocally illegal under existing international law and human rights".[103] In particular, working paper of the Sub-Commission urged that the legal remedies should

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100 Gardam, J.G., "Legal Restraints on Security Council Military Enforcement Action", 17 Michigan Journal of International Law 1996, p. 293-94. See also Reismann, W.M. and Stevick, op.cit., p. 86; Scharf, M.P. and Dorosin, J.L., "Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee", Brooklyn Journal of International Law, Vol. XIX:3, 1993, p. 771.

101 SC Res. 661, SC Res. 670, SC Res. 748, SC Res. 757, SC Res. 760, SC Res. 841.

102 See the 1999 UN Children's Fund report on the increase in the child mortality in Iraq and the confirmation by the NATO of its use of depleted uranium in Kosovo; the Human Rights Watch letter to UN Security Council, www.hrp.org/hrw/press/2000/01/iraq-ltr.html; Report of the Panel of Experts established by the UN Security Council pursuant to Resolution 1237 on Violations of Security Council Sanctions against UNITA, where traders claimed remedy for the alleged damage to their reputation by the publication of a report by an international organisation.

103 Sub-Commission Resolution, 2000, UN Doc. E/CN.4/Sub.2/RES/2000/1, op. para. 1. In this respect, the UN Committee on Economic, Social and Cultural Rights considered

be available for victims of sanctions regimes that are at any point in violation of international law, mentioning national courts, UN or regional human rights bodies, and the ICJ as potential fora for such claims.[104]

All these examples above show that compliance with international law in the activities of the UN Security Council has been a matter of dispute to a certain extent. In this regard, although some argue that, "Article 25 [of the Charter] does not mean that members are obliged to carry out all the decisions of the SC, and the article appears to reinforce the obligation upon the SC to adhere to the legal limits set by the Charter. Hence, there is room for the view that only resolutions which are intra vires the UN Charter acquire binding force in terms of Article 25",[105] no member states has so far successfully claimed these limits against the Organisation, moreover, the ICJ has also so far abstained from judicially reviewing the decisions taken by the SC, even in cases where *jus cogens* norms are involved. Nevertheless, as Gardam observes although the proposition that, the Security Council when acting under Chapter VII can derogate from the existing rules of international law in its actions, has never been seriously in doubt, there is an increasing perception that there must be some limits to the Security Council's powers. Nowadays, there is considerable support for the view that it is one thing to allow the Security Council to determine its own jurisdiction and quite another to conclude that in the exercise of its powers it is similarly unrestrained. The use of force in both municipal and international law traditionally has always constituted a primary area for legal regulation. This means that the Council operates to some extent within the general system of law that governs all international legal persons. Consequently, in the context of enforcement measures under the Charter, there appears to be no justification for the view that the Security Council is at liberty to completely disregard the purposes and principles of the Charter, and even less for the denial that it operates to a certain extent within the general system of international law. Thus, it can be argued that the Charter leaves open the possibility of applying appropriate general principles of international law to enforcement actions by the Security Council that are consistent with the other principles of the Charter. [106]

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that the provisions of the International Convention on Economic, Social and Cultural Rights could not be considered to be inoperative, or in any way inapplicable, solely because a decision had been taken that warranted the imposition of sanctions on the basis of considerations regarding international peace and security, the UN Committee on Economic, Social and Cultural Rights, General Comment No.8, UN Doc. E/1998/22, Annex V, para. 7; the General Comment 14 of the Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/2000/4.

104 UN Doc. E/CN.4/Sub.2/2000/33, para. 106.

105 Lamb, op.cit., p. 366-67.

106 Gardam, op.cit., p. 298-304.

B. Peace-enforcement, Peace-keeping and Peace-building Activities

The question of the applicability of the regime of laws of war in the context of UN operations –whether described as enforcement measures or peace keeping act-[107] has never been satisfactorily resolved. Therefore, when the implementation of a decision of the UN Security Council requires military action, compliance with international law becomes an issue.

In this regard, one must, first of all, note the difference between *jus ad bellum* and *jus in bello*. As regards the relation between the *ius ad bellum* and the UN Charter, Gardam argues that although the only current source of the *ius ad bellum* is the Charter itself, under which the use of force is restricted to self-defence and collective enforcement action, the Charter also incorporates to a limited extent the pre-existing *ius ad bellum*. When the Security Council authorises use of force by states, this brings out the question whether authorised states need to take into account considerations of necessity and proportionality in carrying out their mandates. The answer, in this respect, lies in the provisions of the Charter itself as collective enforcement action is solely a creation of the Charter. The relevant question, here, will be the Security Council's own obligations in relation to the limits on the permissible use of force. After all, the Security Council is a treaty body and dependent on treaty provisions.[108]

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107 For the difference between enforcement actions and peacekeeping actions, see Gardam, ibid., p. 291-3, where she notes that although these activities in theory are distinguishable, ie., enforcement action presuppose some use of force whereas peace-keeping functions do not, in recent times the distinction between these two has been almost impossible to maintain as peace-keeping forces have been increasingly authorised to use significantly more force than previously was the case. Therefore, the distinction of significance is not so much on what these forces are called but what they in fact do. If their mandate involves the use of force, their activities raise the questions regarding the applicability of humanitarian law to such forces. In this regard, Bongiorno writes, "UN peace-keeping is itself a manifestation of the principle of functionality, because there are no Charter provisions relating to peace-keeping activities. The Security Council has authorised peace-keeping operations on a Chapter VI basis, either as one of the generic measures allowed under Chapter VI to ensure the 'Pacific Settlement of Disputes', or as the use of military force permissible under Chapter VII 'to maintain or restore international peace and security'. The practice of peace-keeping has developed on an ad hoc basis", op.cit., p. 643-44. Although, in some cases the establishment and the functioning of the operation within the host state is based upon an international agreement between the UN and that state, the relationship is not always a contractual one, but rather that the status, rights and functions of the UN force are basically determined according to whether or not the action was taken in order to counteract an international threat to peace, see the Secretary General's Report of 18 July 1960 regarding ONUC, Official Records of the SC, Doc. S/4389, para. 7; YILC 1975, Vol. II, p. 90.

108 Gardam, op.cit., p. 297. As regards the principle of proportionality, Gardam argues

The reference to the inherent right of self-defence in Article 51 is also regarded as incorporating the customary principles relevant to its exercise, such as proportionality and necessity. In this regard, some writers point out that the Article 51 of the UN Charter provides that a state may exercise its inherent right to self-defence until the Security Council has taken measures necessary to maintain international peace and security. While the Security Council clearly has the power to suspend a state's right to self-defence, that power must be exercised within a legal framework. The central question to be determined is: what is meant by "measures necessary"? The accepted view would seem to be that not every action of the Security Council amounts to measures necessary: only when the Security Council adopts effective measures will a state's inherent right to self-defence be suspended. Consequently, Article 51 must be interpreted to require that states yield their right to self-defence to the Security Council on the understanding that the Security Council will undertake measures, which will have the equivalent effect of individual or collective self-defence. That is, the Security Council measures must actually be effective in establishing international peace and security, not merely in freezing the aggression into a stalemate situation or in sacrificing the territorial integrity of the aggrieved state to political considerations. To this end, objective criteria to determine effectiveness may be gleaned from the very principles, which guide a state's exercise of individual or collective self-defence under customary international law. These principles are proportionality and necessity, which may serve as positive guidelines for the margin of discretion within which the Security Council can take what it perceives to be measures necessary in order to invoke the machinery of collective security and suspend a state's inherent right to self-defence. The Security Council as an agent of the international community must ensure that there is an effective substitute for the right of self-defence.[109]

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that Article 39 and 42 read together constitute the yardstick for determining the application of proportionality, that is, the only force involving the use of force contemplated by the Charter are those taken to maintain or restore international peace and security. As to the question of necessity in collective enforcement actions, the Charter system leaves to the Security Council the difficult assessment of whether the overall good to be gained from the resort to force is balanced by the overall evil. Article 42 imposes two conditions which must be satisfied before the Security Council can make a decision to use force: there must be a threat to the peace, breach of the peace, or act of aggression; and the Council must consider that the measures provided for in Article 41 would be inadequate or have proved to be inadequate. In all other situations, the use of force, irrespective of benefits, is outside the jurisdiction of the Security Council, ibid., p. 308-10.

109 The Memorial, p. 60-70.

As to the question of *jus in bello*, which is related with the extent to which the relevant parties undertaking a UN operation are bound by the principles of humanitarian law, some writers have argued that there are two different basis for subjecting the UN operations to the laws of war. The first one is based upon an analogy from states to the UN, according to which the capacity of the Organisation to take military action is based upon the right of the traditional subjects of international law, ie., states, to wage war in collective self-defence. So, the Organisation, as an international person, can exercise its right under general international law only in the manner prescribed by the laws of war as developed between states.[110] According to the second argument, the Charter also provides an independent legal basis for the capacity of the Organisation to conduct military operations. In this case, the Organisation, when it acts on the basis of its own constitution, is not entitled unilaterally to lay down a law, which differs from that applicable to war, unless there is a specific basis to this effect in the Charter.[111] Consequently, it is generally accepted that members of the UN force must follow the customary rules of international humanitarian law, by which members of the force remain bound throughout their service with the UN operation. In this vein, Bowett argues that,

> *"It is difficult to posit any persuasive theories which would release a state's military forces from the binding force of the laws of war, as a matter of law, simply because they are engaged in fulfilling a UN mandate...Thus, it must be concluded that national contingents in the service of the UN are bound, to the same extent and degree, to all those rules of warfare which would obtain if the same forces were engaged in international armed conflict for the state alone...It is further submitted that, even should the UN fail to declare its intentions with respect to*

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110 Seyersted, F., UN Forces in the Law of Peace and War, Sitjhof, Leiden, 1966, p. 204-7.

111 Gardam argues that, "There are two approaches to resolving the question of the *ius in bello* and the Security Council in the exercise of its military enforcement powers. First, one that is based on the terms of the Charter itself. Second, an approach that draws on the broader point that the United Nations operates to some extent within the general system of international law...In contrast to the *ius ad bellum*, the Charter does not deal with the *ius ad bellum*, so it is easier to infer that the application of these rules to the organs of the United Nations is consistent with the purposes of the Charter. Thus a consideration of the requirements of Article 1 and 24 (2) of the Charter may provide a solution...Alternatively, an analysis based on the relationship between the Security Council as an international organisation and the general system of international law appears to be an appropriate starting point to unravelling the difficulties posed by the new activities of the Council. Although developed in the context of states, currently the *ius in bello* is more correctly understood as serving the purpose of regulating the conduct of all international entities engaged in armed conflict", op.cit., p. 319.

> *those laws, the better legal opinion would probably hold that no analogy to pleas of superior orders would exculpate the national contingents from their duty to adhere to all the relevant rules."*[112]

Another complicating factor, in this regard, is that while in some UN operations, the force is established as a subsidiary organ[113] of the General Assembly or the Security Council, which has the political control over the forces, in some other cases, UN-authorized operations are conducted under national or regional command and control. In the former type of operations, the SC or the General Assembly delegates their authorities in this respect to the Secretary-General. Thus, national contingents take orders only from the Secretary-General and the Chain of Command, who has the full command authority over the force with full operational responsibility for the performance of all functions assigned to it by the UN, and also responsible for the order and the discipline of the force.[114] However, in respect of disciplinary matters, members of the force are subject to their own military laws and regulations, and the criminal jurisdiction resides entirely with the participating states, to the exclusion of any other authority. This division between the Commander's responsibility for good order and the participating state's responsibility for discipline raises the serious questions concerning the requisite responsibility along the entire chain of command, which the

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112 Bowett, UN Forces, p. 503-5. See also Shraga, D., "UN Peacekeeping Operations: Applicability of International Law and Responsibility for Operations-Related Damage", 94 AJIL 2000, p. 409. The International Committee of the Red Cross took the position that, -although the UN was responsible for its force's compliance with the humanitarian laws of war of a customary nature- since the UN had not acceded to the 1949 Geneva Conventions, each contracting party to these Conventions would remain responsible for their application by the contingents they might provide for the Organisation, *Comite international de la Croix-Rouge, Notes d'information*, No. 6, 1 Dec. 1961.

113 Once a competent organ of the UN establishes a peace-keeping operation in accordance with the UN Charter, and it is assembled and placed at the disposal of the Secretary General, it acquires the status of a subsidiary organ of the UN. Thus when states are acting as subsidiary organs of the UN, the responsibility for these forces lies with the organisation. Article 1 of the Convention on the Safety of UN and Associated Personnel defines UN operations as those established by a competent organ of the UN and conducted under UN authority and control, 34 ILM 1995, p. 482.

114 In this respect, Gardam argues that, under the general rules of attribution, the effective control of the forces supplied to the UN is an indispensable condition precedent to liability of the organisation. However, the argument that the Security Council retains ultimate control over states acting under its control belies the reality that the Council does not have the established mechanisms for overseeing such operations, and that the states are not ready to relinquish control over their forces to the Council, op.cit., p. 297, note 37.

laws of war demand.[115] Namely, a violation of the rules of warfare by an individual member of the UN Force could be protected from punishment by his state, notwithstanding the good intentions of the Organisation. If this were the case, declarations by the UN of its intention to adhere to the law of war would be meaningless.[116]

On the other hand, in cases of UN-authorized operations conducted under national or regional command and control; the question of who has the responsibility to respect and ensure respect for international humanitarian law, i.e., the UN or the states or regional organisations conducting the operation, is a matter of dispute. Some writers make a distinction, in this respect, between operations of UNEF/ Congo type and Korea type operations. According to them, in the former type, supreme power of decision and the command authority over national contingents in operational matters belong exclusively to Commander of the Force, who is appointed by and acting under the order of the Organisation, thus acts in the name of the Organisation. In other words, members of the national contingents act separately and independently from their national authorities (they must do so otherwise it constitutes intervention by foreign states). Therefore, this is an international law jurisdiction exercised directly over the State organs concerned, which have for the time being and for the specific purpose become an organ of the Organisation (civilians or military force enlisted individually by the Organisation and became international officials are also of this type). Consequently, in these types of operations, force represents the personality of the Organisation and the Organisation assumes the responsibility to respect and ensure respect for international humanitarian law. On the other hand, in case of Korea type operations, operational order do not come from the Organisation, even though the Organisation makes recommendations or decisions on major policy matters. Thus, in these cases operational control vests exclusively in a member state or a group of member states acting as executive authority (a coordinated action of states), where participating states are responsible for acts performed by their contingents on their own initiative, or jointly for acts performed pursuant to orders of unified command in accordance with the law relating to coalition armies.[117] However, in this regard some argue that the question of who exercises

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115 If the official act is simply criminal under the law of the host state, the UN responsibility is satisfied by fulfilling its duties to investigate, to insist upon the participating state exercising jurisdiction and to make whatever monetary compensation is appropriate.

116 Nevertheless, for example, during 1998, forty-two military personnel were placed under investigation on grounds of alleged misconduct. Seven cases were resolved, disciplinary action being taken by national authorities in four cases, A/54/839, 20 March 2000, para. 48

operational command and control over the force is immaterial, but who exercises overall authority and control is more important. In the case of forces from member states exercising delegated Chapter VII powers, it is the Security Council that exercises overall authority, therefore, it is the Council which must accept primary responsibility for the acts of the force, unless states' forces have acted *ultra vires* when exercising their delegated powers.[118]

In the case of peace-keeping operations, the UN undertook in most of the status of forces agreements the obligation to ensure that UN forces would conduct their operations with full respect for the principles and spirit of the general conventions[119] applicable to the conduct of military personnel. In this regard, when armed combat is inevitable, the mandate of the force either includes an authorization to initiate hostilities or comprehend a combat possibility, and the UN reserves to the peace keeping forces the inherent right to employ arms in order to defend themselves. If this right is directly opposed or attacked by force, the activities of the force in this conditional belligerency were to be regulated by the "general international

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117 Seyersted, op.cit., p. 90-126 and 189. Yet, when complaints of infringements by the Korea operation forces were addressed to the US, the US insisted that the proper recipient of such complaints was the UN. Nevertheless, the US subsequently admitted some of these infringements and an offer of payment of damages were tendered through the Secretary General.

118 See Sarooshi, D., The UN and the Development of Collective Security, The Delegation by the UN Security Council of its Chapter VII Powers, Clarendon, Oxford,1999, p. 163-5. Similarly, Bowett argues that the Korea operation was an enforcement action authorized by recommendations under Article 39 of the Charter, even if the chain of command and political and strategic control of the Command of the forces vested effectively in the US, which acted as the executive agent of the UN Force, Bowett, UN Forces, p. 29-60.

119 However, the UN authorities had never defined these principles and spirit as the UN believed that it was the responsibility of contributing states to ensure that their nationals were fully acquainted with the relevant principles of the humanitarian conventions. The UN first assumed responsibility for ensuring that its forces would be fully acquainted with the relevant principles of the humanitarian law in the 1993 Rwanda Mission, where reports of abuses by UN forces put pressure on the UN to affirm its commitment to applying the core rules of international humanitarian law. For the suggestion that the UN is responsible for actions of its forces for their violation of humanitarian law, and the UN is to take a coordinating role to ensure that individuals participating in UN forces received adequate instructions in relation to humanitarian law, see the resolutions of the Institute of International Law, Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which UN Forces may be engaged, 2 *Annuaire de l'Institutt de Droit International* 1971, Vol. 54, p. 465; 6 *Annuaire de l'Institutt de Droit International* 1975, Vol. 56, p. 543.

conventions applicable to the conduct of military personnel".[120] In 1999, the Secretary General unilaterally promulgated a Bulletin on the Observance by UN Forces of International Humanitarian Law, which concisely reflects the fundamental principles of the laws and customs of war.[121] These instructions are applicable to UN operations conducted under UN command and control, when they are actively engaged in situations of armed conflict as combatants to the extent and for the duration of their engagement.[122] Therefore, the Bulletin provides a framework for the humanitarian obligations of the military components of UN operations.[123]

Since the end of the Cold War, UN peace-keeping operations have become involved in peace-building missions as well, which can be characterised by developing governmental institutions in conflict-ravaged lands where state institutions have collapsed or malfunctioned.[124] For this purpose, UN operations in places like Kosovo and East Timor have temporarily assumed some or all sovereign powers.[125] For example, the Authority of the Interim

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120 GA Res. 33/114 of 18 Dec. 1978; Status of Forces Agreement of Nov. 5, 1993, UN-Rwanda, Art.7, UNTS, p. 1748. For earlier developments in this regard, see the Regulations enacted by the Secretary-General regarding UN Emergency Force (UNEF), UN Forces in Congo (UNOC) and UN Forces in Cyprus (UNFICYP), in Seyersted, F., UN Forces, p. 184-8; Bowett, UN Forces, p. 499-510.

121 38 ILM 1999, p. 1656. The Bulletin includes provisions related to prohibition of certain forms of combat and weapons, prohibition of certain orders, proper treatment of civilians, protection of the wounded, the sick, medical and relief personnel, and proper treatment of detained persons.

122 The Bulletin applies as an instruction issued by the Secretary-General as commander in chief of UN operations, where the use of force is authorised; however, it reserves prosecution of members of UN military personnel to their respective national courts.

123 Bongiorno argues that the Bulletin, together with the Secretary-General's recommendations on limited liability for third party claims arising from peace-keeping activities, provide a framework for people to sue the UN for damage incurred out of violations of international humanitarian law committed by UN personnel in the course of their official duties, op.cit., p. 649. See also, Oswald, B.M., "The creation and control of places of protection during UN peace operations", International Review of Red Cross, Vol. 83,2001, p. 1026.

124 The UN, since its inception, has engaged in more than fifty peace-keeping and thirteen peace-building missions. Earlier examples of the UN assuming supervisory powers included the City of Jerusalem, the Free City of Trieste, West Irian and South West Africa. In this respect, Brownlie argues that the UN has supervisory functions specified in the Charter and supported by practice, thus the existence of such administrative powers rests legitimately on the principle of necessary implication and is not incompatible with the view that the UN cannot have territorial sovereignty, Principles, 1998, p. 172.

125 These powers included supervising administrative structures, administration of justice and the rule of law, establishing police forces, and designing and supervising constitutional, judicial and electoral reforms. In relation to such operations, some point out that these were unique in that the UN undertook a role in civil administration for the first time in such a holistic form, see Abraham, op.cit., p. 1302.

Administration in Kosovo (UNMIK) has been given all legislative and executive authority,[126] including the administration of the judiciary, which was to be exercised by the Special Representative of the Secretary-General.[127] Consequently, when the UN has undertaken governmental functions, its obedience to human rights obligations during such operations has started to be questioned. Although the relevant regulations acknowledged the relevance of the human rights standards in the administration of the territory,[128] blanket immunities granted by these regulations made it unclear how these standards would be enforced on the UN personnel in this mission.[129] Particularly, the problems arising from the

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126 UN Resolution 1244, UN Doc. S/RES/1244 (1999), under which the UN assumed the responsibility of providing humanitarian relief, facilitating reconstruction and overseeing the development of provisional institutions in Kosovo.

127 UN Resolution 1244 authorised the Secretary-General to appoint a Special Representative to oversee the territorial administration of Kosovo, ibid. In the first regulation, the Special Representative announced the scope of his power to encompass legislative, executive and some judicial authority, ie., to assist in administering the judiciary, and to appoint and remove judges, see UNMIK Regulation 1999/1, On the Authority of the Interim Administration in Kosovo, 25 July 1999, www.unmikonline.org/regulations/1999/reg01-99.htm.

128 UNMIK Regulation 1999/1 provides that, "in exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognised human rights standards and shall not discriminate against any person on any grounds". UN Resolution 1244 has also expressly recognised the responsibility of the international presence in protecting and promoting human rights, UN Doc. S/RES/1244 (1999). The Regulation provides, also, some remedies for third party liability; "third party claims for property loss or damage and for personal injury, illness or death, arising from or directly attributed to KFOR, UNMIK or their respective personnel and which do not arise from operative necessity of either international presence, shall be settled by Claims Commissions established by KFOR and UNMIK", www.unmikonline.org/regulations/2000/reg47-00.htm. Later on, the first Special Representative initiated the creation of an Ombudsperson's office "to promote and protect the rights and freedoms of individuals and legal entities", whose jurisdiction extended to the investigation of complaints from any person in Kosovo concerning human rights violations and actions constituting an abuse of authority by the interim civil administration. The mandate expressly excluded the KFOR, which came to Kosovo under NATO auspices rather than directly under UN, from the jurisdiction of the Ombudsperson, and limited the latter's authority to submitting reports and recommendations to the KFOR commander, who was to determine further action on the relevant complaint, see UNMIK Regulation 2000/38, 30 June 2000, at www.unmikonline.org/regulations/2000/reg38-00.htm.

129 UNMIK Regulation 2000/47, On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, grants UN personnel immunity when they are acting within their official capacity. The Ombudsperson Institution in Kosovo questioned the compatibility of the privileges and immunities under Regulation 2000/47 with international human rights following complaints that KFOR had occupied or damaged private property, and recommended the establishment of a Claims Commission to address such issues, available at www.omdudspersonkosovo.org/doc/spec%20reps/pdf/sr1.pdf.

administration of justice in Kosovo by UNMIK have been condemned by various human rights groups.[130] In this regard, Abraham argues that, "since the only check on the Special Representative is through the Security Council or the Secretary-General, the check is an impractical means to hold the Special Representative accountable for human rights violations".[131] Similarly, Amnesty International criticised the UN's activities in East Timor, where the UN Security Council established a transitional authority (UNTAET) with a broader governmental mandate than conventional peacekeeping,[132] requiring it to establish a clear framework of obligations and rights under the relevant international norms.[133] Amnesty International's later report criticised the judiciary and inconsistencies between some UNTAET regulations and international standards, and the

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130 For example, OSCE's Department of Human Rights and Rule of Law reported that the defendants in pre-trial custody in Kosovo waited for up to six months for judicial proceedings, available at www.osce.org/kosovo/documents/reports/justice/report2.htm. A press release by Amnesty International specifically stated that the executive orders of detention by the Special Representative of the Secretary General violated the detainees' rights under Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, available at www.amnesty.org/library/Index/ENGEUR700172001?open&of=ENG-2EU. UNMIK responded to these allegations by justifying such prolonged executive detention orders on the basis of the state of emergency in Kosovo, www.unmikonline.org/pub/news/nl98.html. Later on, the Special Representative established a detention review commission to review executive order detentions, see UNMIK Regulation 2001/18.

131 Abraham, op.cit., p. 1333.

132 UNTAET has been established by the Security Council acting under Chapter VII of the Charter, and gave all legislative and executive authority to UNTAET including even treaty-making powers, SC Decision 1272, UN Doc. S/RES/1272 (1999). This decision was taken after the UN Secretary General informed the Security Council that the departure of Indonesian civil authorities had created a vacuum of authority and that urgent measures were required. Bongiorno argues that when the UN undertakes governmental functions, the duties corresponding to these functions in international law should apply, like the standards of international human rights law, particularly since the UN is obliged under the Charter to promote respect for human rights, see Bongiorno, op.cit., p. 644-45.

133 Amnesty International, East Timor, 2000 Report. In this regard, SC Decision 1272 gave a list of enumerated human rights standards by which UN personnel were bound, the Universal Declaration on Human Rights of 10 Dec. 1948; the International Covenant on Civil and Political Rights of 16 Dec. 1966 and its Protocols; the International Covenant on Economic, Social and Cultural Rights of 16 Dec. 1966, the Convention on the Elimination of All Forms of Racial Discrimination of 21 Dec. 1965; the Convention on the Elimination of All Forms of Discrimination Against Women of 17 Dec. 1979; the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 17 Dec. 1984; the International Convention on the Rights of the Child of 20 Nov. 1989, UN Doc. S/RES/1272 (1999).

spectre of immunity for certain political groups despite the allegations of widespread human rights violations.[134]

As a result of these criticisms, a Memorandum of Understanding between the Office of the High Commissioner for Human Rights and the Department of Peace-Keeping Operations was concluded in 1999.[135] The memorandum provides a formal framework for cooperation between the Office and the Department in order to increase the effectiveness of UN peace-keeping and human rights activities. To this end the Memorandum promotes joint training programs between the Office, the Department and member states contributing personnel to ensure that all deployed peacekeeping personnel are provided with human rights training that is relevant to their functions. The Memorandum also promotes the integration of "human rights components" into peace-keeping operations, whose work is to be based upon the standards of international human rights law, and combine monitoring and reporting for this purpose.[136] Thus the Memorandum gives the Office the leverage to address problems in missions that contain civil components, although always in consultation with the Special Representative.

C. European Community Measures

Although, the European Court of Justice has long established that the Community is bound by general international law, implementation of which it supervises, some decisions of this Court have been criticised as failing to take into account the relevant international rules properly. For example in one case, the Court refused to recognise movement certificates issued by Northern Cyprus authorities on the basis of a de facto embargo never decided by the UN.[137]

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134 Amnesty International, East Timor, 2001 Report. However, Special Representative in East Timor did not provide for the immunity of UNTAET personnel and cases involving wrongdoing by UN peace-keepers were referred to East Timor Prosecutor General's Office leading to formal charges and trials, Bongiorno, op.cit., p. 663.

135 www.unhcr.ch/html/menu2/4/mou<uscore>dpko.htm.

136 These human rights components will be under the authority of the Special Representative of the Secretary-General in charge of the mission and have the same status as other components of the operation. UNTAET's human rights component, the Human Rights Unit, was established as part of the office of the Special Representative of the Secretary-General in East Timor. The Unit was responsible for advising the Special Representative on human rights abuses and protections, including abuses committed by UNTAET staff, and for monitoring, reporting and intervening in these abuses. The Unit also reviewed access to justice issues and facilitated the safe return of refugees. It served on the Cabinet's Legislation Committee, formed a steering committee for a Truth and Reconciliation Commission, and provided human rights training, UNTAET: Human Rights Report (Mar. 2001), iiasnt.leidenuniv.nl:8080?DR/DR26<uscore>04<uscore>2001/onefile.

137 Case C-432/92 *Anastasiou*, , 1994 ECR I-3087. For the nature of the embargo, see

Again, in the case of international agreements concluded by the Community, the ECJ has sometimes refused to grant these agreements any effect within the Community by resorting to criteria based upon Community priorities and inspired from the executive institution's political discretion in external affairs, which resulted in disregarding the agreement concerned.[138] In some cases, the ECJ's decisions to the effect that a whole agreement is incapable of having any effect by virtue of the fact that the spirit and nature of the agreement in question prevent such effect, have been criticised as giving the impression that the executive institutions' right to conduct external affairs is entirely discretionary.[139] Particularly, the Court's case law with respect to GATT is notorious, where it refuses not only an application from individuals but also from member states for judicial review of Community measures on the grounds of the infringement of this agreement.[140]

In this respect, it has been argued that the Court, as a Community institution, is also bound by the relevant agreement and therefore required to demand the complete performance of that agreement. Canor argues that

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Advocate General Mancini's opinion in Case 204/86 *Hellenic Republic v. Council*, 1988 ECR 5323. Again, in Case C-120/94 *Commission v. Greece*, the Court failed to examine the unilateral embargo of Greece against Macedonia, which was in violation of international law, 1994 ECR I-3040.

138 The main justification for disregarding international treaties is based upon the argument that most of these agreements are incapable of direct effect, thus, do not confer rights upon individuals to rely upon them before courts, even though some of these contain clear and precise provisions, which is regarded by the Court as the basis of direct effect, Case 12/86 *Demirel*, 1987 ECR 3719; Case C-276/93 *Chiquita*, 1993 ECR I-3345. Pescatore argues that the Court raises the question of direct effect when it intends to deny any legal effect to that agreement, Pescatore, P., "Treaty-making by the European Communities", The Effect of Treaties in Domestic Law, Jacobs and Roberts ed., Sweet Maxwell, 1987, p. 185-8.

139 In this respect, Advocate General Tesauro argues that, in the Community law, the direct effect concept had been devised to secure compliance with Community law by utilising individual's legal position. In this sense, direct effect is used for granting a procedural remedy for preventing the relevant authority from taking advantage of a failure to fulfil its obligations under Community law. Therefore, the self-limited role adopted by the Court in exercising its powers with regard to controlling the executive institution's discretion in external affairs by resorting to a narrowly defined effect test of international agreements has the danger of giving those institutions the ultimate discretion as to whether to comply with international law at all, see Tesauro's opinion in Case C-61/94 *Commission v. Germany*, 1996 ECR I-3992, footnote 17; Tesauro's opinion in Case C-58/93 *Yousfi*, 1994 ECR I-1357, para. 4; and Advocate General Saggio's opinion in Case C-149/96 *Portugal v. Council*, 1999 ECR I-8395.

140 Case C-280/93 *Germany v. Council*, 1994 ECR I-4973. For the criticism of the Court's similar attitude with respect to WTO in Case C-149/96 *Portugal v. Council*, 1999 ECR I-8395, see Zonnekeyn, GA., "The Status of WTO Law in the Community Legal Order", 25 ELR 2000, p. 302.

the Court should not forget that from the perspective of international law it itself is an organ which is required to conform with international norms, and it is its responsibility to give the lawful interpretation to the law and it cannot hide behind its executive.[141] Some also point out that the Court's approach is capable of engaging the international responsibility of the Community and the member states, as the ECJ's jurisdiction to interpret and apply agreements concluded by the Community remain binding only within the Community and they have no effect on third parties, thus, the performance of the ECJ in fulfilling the Community's international obligations would consequently affect subsequent international claims.[142]

Conclusion

The arguments and examples above show that when international organisations are performing their activities on the basis of their constitutive treaties, they are bound by general international law in their normal functioning both within the internal legal order established by their constitutive treaty and in their relations with third parties. Therefore, they are required to take into account the relevant rules of international law applicable in their areas of activity. However, it also clear that compliance with international law, in practice, by international organisations are not as smooth as one would expect from the arguments providing the basis of the applicability of international rules to the activities of international organisations.

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141 Canor, "Can Two Walk Together, Except They Be Agreed?", op.cit., p. 156-7. See also Hahn & Schuster, "Le Droit des Etats Membres de se prevaloir en justice d'un accord liant la Communaute", *Revue General de Droit International Public*, 1995/2, p. 367; Mastellone, C., Note on Cases 266/81 and Joined Cases 267-69/81, 20 CMLR, 1983, p. 579; Hancher, L., "Constitutionalism within EC", Netherlands Yearbook of International Law, Vol. XXV, 1994, p. 279; Cheyne, I., "International Agreements and the EC Legal System", 19 ELR 1994, p. 589-90; Meessen, op.cit., p. 497; Kuijper, op.cit., p. 6-7.

142 Groux & Manin, op.cit., p. 128; Toth, op.cit., p. 268. Accordingly, in Case C-327/91 *France v. Commission*, 1994 ECR I-3641,para. 12, the Court held that the Community is under the duty to act in accordance with the relevant international laws in its relations with third parties and that the validity and effects of an international obligation vis-à-vis a third party cannot be challenged on the international plane by relying upon the internal rules established by the constitutive treaty of the Community.