

**UN ACCOUNTABILITY FOR VIOLATIONS OF
HUMAN RIGHTS**

GUGLIELMO VERDIRAME

THESIS SUBMITTED FOR THE PHD DEGREE IN LAW
AT THE LONDON SCHOOL OF ECONOMICS



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Abstract

This thesis examines compliance with international human rights law in United Nations (UN) operations. It focuses on the provision of emergency humanitarian assistance, and on the assumption of administrative powers by the UN both *de jure* (international administrations of territory) and *de facto* (refugee camps). It is argued that in these operations the UN has the functional capacity to have a direct impact on individuals and on the enjoyment of their fundamental rights. In part using case studies (the provision of humanitarian assistance to Afghanistan, the UN administrations in Kosovo and East Timor, and refugee camps in Kenya), it is shown that acts in violation of human rights have indeed been committed in the course of these operations. Although the UN is not itself a party to human rights treaties, various arguments are made to justify the applicability of international human rights law to the UN, and to its specialised programmes and agencies. Mechanisms – political, administrative, judicial and semi-judicial - for ensuring the accountability of the UN for violations of human rights are examined. However, existing mechanisms are largely inadequate. They neither offer remedies to the victims of the violations, nor impose sanctions on the perpetrators; their ability to modify future institutional conduct is also limited.

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List of Abbreviations

AC	<i>Appeal Cases</i>
Admin. LR	<i>Administrative Law Reports (Canada)</i>
AFDI	<i>Annuaire Francais de Droit International</i>
AJIL	<i>American Journal of International Law</i>
Austral. YBIL	<i>Australian Year Book of International Law</i>
BverfGE	Bundesverfassungsgericht (Federal Constitutional Court)
BYBIL	<i>British Year Book of International Law</i>
CARE	Co-operative for Assistance and Relief Everywhere
CEDAW	Convention for the Elimination of All Forms of Discrimination Against Women
CMLR	<i>Common Market Law Reports</i>
CNRT	National Council of East Timorese Resistance
Com. Int.	<i>Comunitá Internazionale</i>
CTS	<i>Consolidated Treaty Series</i>
DHA	Department of Humanitarian Affairs
DLR	<i>Dominion Law Reports</i>
EC	European Community
ECOSOC	Economic and Social Council
ECR	<i>European Court Reports</i>
EHRR	<i>European Human Rights Reports</i>
EJIL	<i>European Journal of International Law</i>
ELR	<i>European Law Review</i>
EU	European Union
F.2d	<i>Federal Reporter (Second Series)</i>
F.3d	<i>Federal Reporter (Third Series)</i>
F. Supp.	<i>Federal Supplement</i>
FAO	Food and Agriculture Organisation
FIDA	International Federation of Women Lawyers
FMR	<i>Forced Migration Review (formerly Refugee Participation Network)</i>
GA	General Assembly
GYBIL	<i>German Year Book of International Law</i>
Harv. Int. L. J.	<i>Harvard International Law Journal</i>
Harv. HR J.	<i>Harvard Human Rights Journal</i>
Hum. Rts. Q.	<i>Human Rights Quarterly</i>
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICJ Reports	<i>Reports of the International Court of Justice</i>
ICLQ	<i>International and Comparative Law Quarterly</i>
ICRC	International Committee of the Red Cross
IDPs	Internally displaced persons
IJRL	<i>International Journal of Refugee Law</i>
ILM	<i>International Legal Materials</i>
ILR	<i>International Law Reports</i>
IMCO	Intergovernmental Maritime Consultative Organisation
IMF	International Monetary Fund
Indian J. Int. L.	<i>Indian Journal of International Law</i>
Int. Aff.	<i>International Affairs</i>
Int. Rev. R.C.	<i>International Revue of the Red Cross</i>
Int. Org.	<i>International Organization</i>
IRO	International Refugee Organization
J. Ref. St.	<i>Journal of Refugee Studies</i>
Leiden J. Int. L.	<i>Leiden Journal of International Law</i>
KFOR	Kosovo Force
KLA	Kosovo Liberation Army
LNTS	<i>League of Nations Treaty Series</i>
LWF	Lutheran World Federation
Mich. J.Int.L.	<i>Michigan Journal of International Law</i>
MoU	Memorandum(a) of Understanding
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation
N.Y.S.	<i>New York Supplement</i>
OIOS	Office of Internal Oversight Services
OLS	Operation Lifeline Sudan
ONUC	United Nations Operation in Congo
OSCE	Organisation for Security and Co-operation in Europe
RC	<i>Recueil des Cours de l' Academie de Droit International</i>
RGDIP	<i>Révue Générale de Droit International Public</i>
Riv. It. Dir. Int.	<i>Rivista Italiana di Diritto Internazionale</i>
SC	Security Council
SOFAs	Status of Force Agreements
SPLA	Sudan People's Liberation Army
UK	United Kingdom

UKTS	<i>United Kingdom Treaty Series</i>
UN	United Nations
UNAMIR	United Nations Assistant Mission for Rwanda
UNAMSIL	United Nations Mission in Sierra Leone
UNDP	United Nations Development Programme
UNEF	United Nations Emergency Force
UNESCO	United Nations Educational Scientific and Cultural Organisation
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UN Jur. YB	<i>United Nations Juridical Yearbook</i>
UNMBIH	United Nations Mission in Bosnia and Herzegovina
UNMIK	United Nations Mission in Kosovo
UNOCHA	United Nations Office for the Co-ordination of Humanitarian Affairs
UNOMSIL	United Nations Observer Mission in Sierra Leone
UNSOM	United Nations Operation in Somalia
UNRRA	United Nations Relief and Rehabilitation Administration
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Middle East
UNTAC	United Nations Transitional Authority in Cambodia
UNTAES	United Nations Transitional Administration in Eastern Slavonia, Baranja and Western Sirmium
UNTAET	United Nations Temporary Administration in East Timor
UNTEA	United Nations Temporary Administration in West Irian
UNTS	<i>United Nations Treaty Series</i>
US	United States of America
U.S.	United States Supreme Court Reports
USCS	United States Code Service
USTS	<i>United States Treaty Series</i>
Virg. J. Int. L.	<i>Virginia Journal of International Law</i>
WFP	World Food Programme
WHO	World Health Organisation
Yale H. R. Dev. L. J.	<i>Yale Human Rights and Development Law Journal</i>
Yale J. Int. L.	<i>Yale Journal of International Law</i>
Yale L. J.	<i>Yale Law Journal</i>
YBILC	<i>Year Book of the International Law Commission</i>
YB Int. Humanit. L.	<i>Year Book of International Humanitarian Law</i>

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Introduction

Until not so long ago the accountability of the United Nations (UN) for violations of human rights would have probably been labelled as an “academic question”, where the word “academic” has the rather disparaging meaning of ‘scholarly to the point of being unaware of the outside world’.¹ Nowadays, however, it is evident that international institutions, and the UN in particular, have developed the functional capacity to have a direct impact on individuals. Indeed, there are various situations in which states have relinquished functions and responsibilities, and even effective power and control over a territory, to UN bodies and agencies. In examining the UN’s obligations in the sphere of human rights and its accountability for their violation, this thesis focuses on the provision of humanitarian assistance, and on the assumption of administrative control by the UN over a territory and a population both *de jure* (for instance, in the international administrations in Bosnia and in Kosovo) and *de facto* (as is the case in refugee camps).

The topic for this thesis was conceived in the course of research on refugee rights which I conducted in East Africa in 1997, while employed as a research officer at the Refugee Studies Programme, University of Oxford. A disquieting finding of this research was that some of the most glaring abuses of the rights of refugees were *in practice* the result of actions, omissions and policies of humanitarian agencies, and especially of the Office of the United Nations High Commissioner for Refugees (UNHCR). During one of my first visits to a refugee camp, in Kenya in 1997, I found evidence of the imposition of collective punishment on the entire population of the camp on two separate occasions. Refugees, whose survival depended almost entirely on food aid, were subjected to the punitive suspension of food distribution after protest had taken place in the camp against some UNHCR policies and practices. It soon became clear that, in part through the establishment - alongside other parallel institutional arrangements - of an extra-judicial and administrative system separate from that of the state, UNHCR exercised effective control in this and other refugee camps.²

¹ *Oxford English Dictionary* (2nd ed.).

² In the course of subsequent fieldwork in Kenya, Tanzania, Uganda, Sierra Leone and Liberia, I could verify that what had happened in Kakuma was not an isolated incident and that human rights violations in refugee camps are endemic.

The example of collective punishment in refugee camps illustrates one of the main propositions in this thesis, i.e. that the UN has developed the capacity to have a direct impact on individuals and to violate their fundamental rights in the course of its operations. The other side of my argument is that, despite the applicability of human rights obligations to the UN, the international legal framework regulating UN operations and UN accountability is inadequate failing to take into account the wide powers that are in practice exercised by the UN in these circumstances.

One difficulty with defining the topic for this thesis was that UN operations have grown in quantity and quality to such an extent as to make a cohesive all-encompassing approach to their study almost impossible. Factual and legal differences between different UN operations and interventions are significant. There are at least five categories of operations in which human rights violations can occur, or have indeed been reported to occur:

(a) The activities of international financial institutions. The World Bank and the International Monetary Fund have been accused of imposing projects and policies that violate human rights or that are detrimental to the environment. The impact of these organisations on individuals, albeit considerable, is, however, usually mediated rather than direct; it is normally the consequence of the political pressure they exercise on the state, often in conjunction with bilateral donors.

(b) Security Council action. The Security Council has been accused of violating human rights, and humanitarian law, mainly as a result of the use of its Chapter VII powers. Examples include sanctions (Iraq), the implementation of a military enforcement action (Iraq), the imposition of an arms embargo that prevents people facing genocide from defending themselves (Bosnia), and the failure to intervene to prevent a genocide (Rwanda or Cambodia). The acts and omissions in question are imputable to the Security Council whose members would bear ultimate political (and, if applicable, legal) responsibility.

(c) Peacekeeping operations. This category overlaps to some extent with (b). Peacekeeping operations vary significantly in terms of mandate, size, and command

structure. As a result, the risk, or actual occurrence of violations of humanitarian law and human rights can change remarkably from one operation to the other.

(d) Humanitarian assistance. The provision of emergency humanitarian assistance has become one of the main areas of multilateral action. Within the UN, at least four of the main agencies are primarily or significantly devoted to it – UNHCR, the UN Development Programme (UNDP), the UN Children’s Fund (UNICEF) and the World Food Programme (WFP). In many an emergency, UN agencies are the primary providers of essential services, such as water, food, sanitation, health, and education. The power they exercise in these circumstances is enormous, as is their direct impact on the lives of the millions of people who depend on this assistance.

(e) Administration of territory. International administration of territory has attained prominence in the media in recent years as a result of the establishment of UN administrations in Bosnia, Cambodia, Kosovo and East Timor. International administrations are not, however, an entirely new phenomenon, and are presumably going to be increasingly resorted to in the future as a means of post-conflict intervention. In other situations, UN agencies assume administrative powers in a *de facto* manner. With millions of refugees living in them the world over, UNHCR-administered refugee camps are the main example of *de facto* administration, and one of the best kept “secrets” of international governance.

In this thesis, I focus on the last two categories of operations - the provision of emergency humanitarian assistance, and the administration of territory by the UN - mainly because of the marginal attention that these operations have so far received from legal scholars. Humanitarian assistance has been examined from various viewpoints, but so far the contribution of lawyers has for the most part dealt with questions such as the existence of a right to humanitarian assistance, whilst the question of compliance with human rights law by the international institutions providing this assistance - or indeed by non-governmental organisations (NGOs) - has been neglected. There is also a gap between the social sciences literature in this area, which has drawn attention to the socio-economic impact of international actors, and the legal literature, which has remained for the most part oblivious to these denunciations. As far as the administration of territory is concerned, only a few

authors have dealt with *de jure* administrations, while the *de facto* exercise of governmental authority has been almost entirely ignored. This thesis also contains numerous references to peacekeeping operations, which bear important similarities with the operations I am examining. I did not devote a separate chapter to peacekeeping, however, because it has already been the object of extensive scholarly work. Moreover, the pervasive role of troops-contributing states in the conduct of peacekeeping operations distinguishes them from humanitarian operations and from the administration of territory.

There are also important inherent differences between the categories of operations on which I have chosen to concentrate, and the other categories – the activities of international financial institutions and Security Council action. Firstly, it is in the provision of humanitarian assistance and in the administration of territory that the direct impact upon individuals of the institutional activities of the UN is most evident. Secondly, violations of human rights in the course of these operations are normally the direct result of actions and decisions of UN personnel, rather than of decisions of representatives of states (as is the case with the Security Council). They are an expression, albeit a pathological one, of the bureaucracy of the Organisation. Finally, the institutions in category (a) – the World Bank and the IMF – are specialised agencies of the UN, and have a different legal status.

This thesis first examines the origins of the international legal regime that regulates international institutions and humanitarian multilateralism (Chapter I). A genealogical analysis of norms is fruitful as part of a critical approach to the concrete functioning of a legal regime. Some of the basic norms regulating international institutions were crystallised at a time when international institutions were facing an upward struggle for self-affirmation in an entirely state-centric world. Humanitarian struggles have often been conducted unilaterally, and the process of canvassing support and organising a multilateral effort has been fraught with difficulties, as the history of the centennial campaign to end the slave trade demonstrates.

Chapter II examines one of the key legal issues, the applicability of international human rights law to the UN (with some references to humanitarian law). The rules on international institutional responsibility are also dealt with in this chapter. Although

the examples are for the most part drawn from the operations examined in Chapter III and IV, the legal arguments developed in this chapter are susceptible of application to other international institutions and to the full spectrum of institutional activities.

Chapter III looks into the provision of humanitarian assistance by the UN. It discusses the general international legal framework applicable to the provision of such assistance, and examines a case-study – the provision of multilateral assistance in Afghanistan – that illustrates some of the legal difficulties and dilemmas in this type of operation. It is submitted that the provision of humanitarian assistance by the UN in Afghanistan in 1996-2000 violated the principle of non-discrimination.

Chapter IV examines the assumption of administrative powers by the UN. It discusses the practice of the UN in *de jure* administrations, with a brief reference to the experience of the League of Nations. The Chapter then analyses the exercise of *de facto* governmental authority by UNHCR in refugee camps, using refugee camps in Kenya as the main case-study.

Finally, Chapter V discusses existing mechanisms for accountability. Their effectiveness is assessed both in the light of existing practice and on the basis of their hypothetical application to some of the situations examined in the previous Chapters. In discussing the effectiveness of existing mechanisms, some proposals for change and improvement are put forward. Most, but not all, of these suggestions are made not so much from a law-as-it-should-be (*lex ferenda* or *droit desirable*) perspective, but rather as a way of reviving ‘juristic conceptions’, as well as existing legal principles and categories to make sure that they can effectively address the realities of these situations rather than ‘obscure them’.³ In the conclusion, I outline some of the challenges that lie ahead.

³ *Lighthouses of Crete and Samos* (France v. Greece), Judgment, (1937) PCIJ Series A/B, No. 71 at 127 (diss. op. of Judge Hudson).

CHAPTER I

Origins and Development of the International Legal Regime Regulating International Organisations and Humanitarianism

I.1. Introduction

The origins of both multilateralism and modern humanitarianism lie in the XIX century. The two became quickly intertwined with states relying on various forms of inter-state co-operation and on the establishment of international institutions for the pursuit of common goals, among which humanitarian ones were prominent - *e.g.* the provision of emergency humanitarian assistance, socio-economic development the relief of poverty, and, after the Second World War and particularly in the last two decades, the promotion of the rule of law and of respect for human rights.

The campaign for the end of the slave trade was the first attempt to establish an internationally recognised humanitarian standard. The legality of the British maritime policy to end the trade was questioned at the time with arguments that evoke current debates on the limits of humanitarianism and, in particular, on the legality of the use of force for humanitarian purposes. Britain, the superpower of the time, soon realised that unilateral action was not sufficient and began to promote a multilateral effort to end the trade. At the end of the XIX century, sufficient consensus among states finally emerged to establish a Public International Union for the suppression of the slave trade. Other humanitarian movements commenced in the second half of the XIX century, most notably the movement to “humanise” the conduct of warfare spearheaded by the International Committee of the Red Cross (ICRC). In spite of its non-governmental status, the principles developed by the ICRC to operationalise its humanitarian mandate became almost archetypical for multilateral humanitarianism in general.

The creation of the League of Nations represented a ‘paradigm shift’ in international relations. Undertaking a wide variety of activities, the League became the first truly global international institution. The League promoted standard-setting in various areas; it was the first international institution to administer territory (the Saarland);

and it embarked upon various humanitarian programmes, from the struggle against slavery and the slave trade to relief and settlement programmes for refugees.¹ In many respects, the UN continued in the footsteps of its predecessor and multilateralism grew steadily after World War II, despite the cold war slowing down progress for many years.

The foundations of the international legal regime applying to international organisations were largely laid down in the period before the Second World War. The main concern at the time was to secure the presence of these fledgling actors in an international arena completely dominated by states. It was believed necessary that international institutions be immune from national jurisdictions, and that accountability for their activities be essentially an internal matter so that they could be placed, as far as possible, beyond the reach of states. Later, and in a manner consistent with this approach, international organisations were shielded from being sued by states in the World Court, despite being able to avail themselves of the advisory jurisdiction of the Court. The view that international organisations are potential victims of states is still dominant today, but jars with developments in the last decades, most notably with the quantitative and qualitative expansion of international institutions.

Since the end of the Second World War, international institutions, both within the “United Nations (UN) family” and without it, have proliferated. They have undertaken tasks, and have carried out operations in different fields and on a much larger scale than ever before. Despite this expansion certain key aspects of the legal regime governing the activities of international organisations have remained static. As a result, the legal regulation of the activities of international institutions lags behind reality in many ways, and does not offer solutions to some serious problems raised by their activities.

Institutional expansion has thus often been dysfunctional. An examination of the practice of various organisations in the UN family the powers and functions shows that the powers that they actually exercise often go beyond the terms of their original mandates. Their actual *modus operandi* has come about as a result of policy statements,

¹ C. Skran, *Refugees in Inter-War Europe* (1995).

internal guidelines, but also 'unwritten' codes and practices: together these often constitute an informal statute which regulates the ways in which organisations operate on the ground.

I.2. The Struggle to End the Slave Trade and the Origins of International Humanitarianism

(a) The initial phase

The Vienna Congress of 1815 is commonly heralded as the starting point of the process of organisation of the international community of states.² Although no stable international institution was established, the principle of regular consultations among European powers was laid down. The purported aim of these consultations was to avoid the frequent recourse to war that had characterised European history before then.

The Vienna Congress also saw the adoption of a declaration that condemned the slave trade, one of the first examples of a pronouncement by representatives of states on a humanitarian matter.³ The declaration was adopted largely because of British pressure. That the abolition of the slave trade had reached such a high position on the British national agenda as to induce British leaders to raise it in Vienna was due to the strength of the abolitionist movement in Britain. Normally inspired and dominated by religious organisations, but also comprising private individuals and secular associations that had been influenced by the ideas of the Enlightenment, the abolitionists had developed a network of support across Britain that became a very effective way for promoting momentous social change at first in Britain and then on an international scale. With their assiduous campaigning since the 1780s they obtained a landmark victory with the adoption in 1807 of the Slave Trade Abolition Act.⁴ The

² D. Armstrong, *The Rise of International Organisation. A Short History* (1982); C. Archer *International Organizations* (2nd ed., 1992) at 6-7.

³ Declaration of the Eight Courts Relative to the Abolition of the Slave Trade, 8 February 1815, in N. G. Grewe (ed.) *Fontes Historiae Juris Gentium* (1992), Vol. 3/1, at 376 and in Martens, NR, T, II, 432. Also: Declaration of Eight European Courts on the Abolition of the Slave Trade, 8 February 1815.

⁴ The first European country to abolish the slave trade officially was Denmark in 1802, even though slavery was still lawfully practised in some of her colonies for another decade (Daget, 'The Abolition of the Slave Trade', in J. F. Ade Ajayi (ed.), *General History of Africa. Africa in the XIX Century Until the 1880s* (1989) 64). Britain had been among the most important slave-trading nations in the 18th century after the Peace Treaty of Utrecht in 1713 had secured her monopoly of the trade to Latin America.

abolitionist movement constituted one of the first examples of a civil society movement propounding a humanitarian cause.⁵ It found in Britain a naturally fertile soil owing to the strong economy and sizeable middle class, and to the traditional respect for free speech. However, even the progressive array of legal scholars, politicians and socialites involved in the abolitionist movement cannot always be viewed as advocates of human equality as we would intend it today. Indeed, ‘the emancipationists wished to free the slave within the minimum decency which humanity required, but they insisted on European guardianship... As a result, the primary goal was the creation of societies that, in the words of French premier Georges Clemenceau, “complied with certain principles of government” to be determined by Europeans’.⁶ Humanists - or humanitarians as we would say today - accepted the premise of European guardianship as a ‘sacred trust of civilisation’.

The declaration adopted in Vienna was later incorporated in the Final Act of the Congress and, as such, became part of the treaty that formed the basis for the European order following the Napoleonic wars.⁷ However, the wording of the declaration was carefully calibrated in order to avoid the introduction of an obligation to abolish the slave trade. It may be seen as an early example of ‘legal soft law’. The European powers simply declared that:

considering the universal abolition of the Slave Trade as a measure particularly worthy of their attention, conformable to the spirit of the times, and to the generous principles of their august Sovereigns, they are animated with the sincere desire of concurring in the most prompt and effectual execution of

⁵ D. B. Davis, *The Problem of Slavery in the Age of Revolution: 1770-1823* (1975) at 68.

It is, however, important not to romanticise ‘civil society’ as a force that pushes change from the grassroots level and defies established power. As Gramsci illustrated – A. Gramsci, *Quaderni dal Carcere* (Giulio Einaudi, 2nd ed., 1975) at 40-41, 1222-1224, 1235-1237, 1249-1250, 1603, 2010-2011 - civil society movements in the West are historically an expression of the elite and are normally respectful of the underlying balance of power in a society. In the case of the British anti-slavery movement, for example, the religious ideals of Protestant reformists played a crucial role. The British elite was prepared to embrace the abolition of the slave trade as part of a ‘package’ of religious reforms that aimed at rescuing Britain from evil. In fact, it has been argued that the association with the Jacobins and with Thomas Paine in the 1790s was counterproductive for the abolitionist movement. See at Kaufmann, Pape, ‘Explaining Costly International Moral Action: Britain’s Sixty-year Campaign Against the Atlantic Slave Trade’, 53 *Int. Org.* (1999) 631 at 662.

⁶ Siba N’zatioula Grovogui *Sovereigns, Quasi Sovereigns, and Africans. Race and Self-Determination Under International Law* (1996) 79.

⁷ Art. 118, No. 15 of the Final Act of the Congress of Vienna, 9 June 1815, 64 CTS (1815) 492. The Final Act was signed by Great Britain, Austria, France, Portugal, Prussia, Russia, Spain, and Sweden-Norway.

this measure, by all the means at their disposal, and of acting in the employment of these means, with all the zeal and perseverance which is due to so great and noble a cause.

The declaration added that 'however honourable their [the Sovereigns'] views, they cannot be attained without due regard to the interests, the habits, and even the prejudices of their subject'. Hence, Britain's hopes to reach a legally binding international commitment to end the slave trade, and to establish a common international maritime policy for the suppression of this practice were crushed.⁸

In the years that followed the Congress of Vienna, Britain pursued mainly unsuccessful diplomatic efforts to canvass enough international support in favour of a common international maritime policy against the slave-trade. At the heart of the British policy lay the right to visit, search and seize vessels suspected of transporting slaves.⁹ The other European powers, wary of British naval supremacy, feared that the international legal acceptance of the right of seizure would consolidate the policing role of the British Navy.

Another strategy adopted by Britain in this period was to include a provision on the abolition of the slave trade in treaties that it concluded with other countries for different purposes, for example in commercial agreements. By doing so, it often managed to establish the right of search and seizure bilaterally.¹⁰ For instance, the Hammerton Treaty of 2 October 1845 between Britain and the Sultan of Muscat allowed the Royal Navy to search, seize and confiscate vessels belonging to the subjects of the Sultan suspected of transporting slaves.¹¹ Abolitionist clauses were also included in some of the agreements that Britain concluded with African chiefdoms at

⁸ The inclusion of an abolitionist clause in a treaty which Britain concluded with France the year before the Congress had seemed to indicate that obtaining such a legal commitment from the other European counterparts could be possible (Additional Articles to the Definitive Treaty of Peace and Amity between Austria, Great Britain, Portugal, Prussia, Russia, Sweden and France, 30 May 1814, 63 CTS (1814-15) 193).

⁹ After failing to achieve this in Vienna, Britain tried again at the Congress of Verona in 1822 but her initiative foundered on this occasion, too. Davis, *supra* note 5 at 35.

¹⁰ R. Howell, *The Royal Navy and the Slave Trade* (1987) at 9. For a complete list of the treaties that contained a clause on the abolition of the slave trade signed by Britain until 1850. See also R. Phillimore, *Commentaries upon International Law* (3rd ed., 1879) at 420-421.

¹¹ Art. 3, Agreement between Great Britain and Muscat for the Termination of the Export of Slaves, 2 October 1845, 99 CTS (1845-46) 27. In the preamble it was stated that the Sultan was agreeing to the

the time of her colonial expansion in the continent.¹² Throughout the XIX century Britain also made recognition of the states that had gained independence in Latin America conditional upon their total renunciation of the slave trade.

However important, these bilateral agreements were not *per se* sufficient to create a generally binding international standard against the slave trade, so long as the main European powers did not become parties to them. Convincing the European powers proved much harder. Throughout the XIX century, Britain continued to stop foreign vessels on the Atlantic ocean, particularly in front of the West African coast, generally incurring the protest of the states concerned. In the 1840s, the British Navy, officially authorised by Parliament, searched Portuguese and Brazilian ships unilaterally. In the case of Brazil, the British intervention was particularly aggressive, and involved the burning of ships of slave traders in Brazilian territorial waters and harbours. This nearly led to a war with Brazil, averted when Brazil finally caved in and accepted to ratify a treaty giving British ships a right of search and visit.¹³

The British position was not always consistent. The British were alert to national security issues, and were naturally more prepared to coerce comparatively less powerful states like Portugal, Brazil or Cuba, than the United States of America (US) or France. Indeed, in official dealings with US and French officials, Britain for the most part maintained that she did not claim a right to search and seize vessels belonging to countries with which she had not entered into any agreement conferring mutual rights of search and visit.¹⁴ At times, however, Britain did argue that her warships were entitled to examine the papers of foreign vessels and, if necessary, to

end of the slave trade 'in deference to the wishes of Her Majesty and of the British nation, and in furtherance of the dictates of humanity'.

¹² See for instance: Engagement between Great Britain and King Fanatoro and the Chiefs of Cape Mount (West Africa), 2 January 1846, 99 CTS (1845-46) 272; Treaties between Great Britain and the Chiefs of Sano and Moricaryah, Malaghea, Fouricane and Benira (West Africa), 20, 23 and 28 May 1845, 98 CTS (1845) 205. These agreements normally contained provisions on free trade and access of British goods to local markets, as well as other provisions constituting the seeds of the colonial system of 'indirect rule' (M. Mamdani, *Citizen and Subject: Continental Africa and the Legacy of Colonialism* (1996) at 17).

¹³ Kaufmann and Pape, *supra* note 4 at 659.

¹⁴ See, for instance, letter from the Earl of Aberdeen to Mr Everett, 20 December 1841, XXX British and Foreign State Papers (1841-42) 1178. A discrepancy between stated practice and actual practice characterised both British and US policy in this area. In fact, the US, where the slave trade – but not slavery – had been banned in 1793, was clearly aware of the fact that vessels under the American flag were engaging in the trade but did not take active steps to suppress it. Britain, on the other hand, stated that it was not searching vessels under foreign flags, unless there was a treaty authorising the British fleet to do so. It nonetheless continued to police the seas, especially off the West African coast.

board the ship.¹⁵ Other countries, like the US for instance, categorically denied that the British fleet had such a right, and, perhaps not so surprisingly, Britain herself vehemently denied the existence of such a right when Haiti, having banned the slave trade, began to stop and search foreign vessels.¹⁶

In the still numerous cases in which the British Navy sought and seized vessels of countries with which there was no specific agreement authorising this practice, Britain was formally contravening principles of international law that she had declared to recognise. In these cases, she would usually deny that she had searched or seized such vessels – thereby implicitly ‘confirming’ the legal validity of the principle that there was no general right to stop and search – but would also refer to principles of ‘humanity and universal morality’ at a time in which the natural law tradition was still very strong.¹⁷

(b) *Judicial attitudes*

The attitude of courts was cautious when they dealt with cases of foreign ships seized on the high seas by the Royal Navy for trading in slaves. In the *Le Louis* case, the High Court of Admiralty reversed the decision of the vice-admiralty court that had condemned a French ship for engaging in the slave trade.¹⁸ In his judgment, Sir William Scott explained that there was no right of search in time of peace and that the slave trade could not be equated to piracy and, as such, treated as a crime *jure gentium*. Unlike the pirates, slave-traders did not, in his view, engage in the ‘act of freebooters, enemies of the human race, renouncing every country, and ravaging every country in its coasts and vessels indiscriminately, and thereby creating an universal terror and alarm’.¹⁹ Slave-traders were ‘persons confining their transactions (reprehensible as they may be) to particular countries, without exciting the slightest apprehension in others’.²⁰ The different treatment that international law reserved to pirates and slave-traders is revealing. Pirates were seen as disruptive of public order since they interfered with the safety of navigation and with commerce; on the other

¹⁵ Letter of Viscount Palmerston to Mr Stevenson, 27 August 1841, XXX British and Foreign State Papers (1841-42) 1152.

¹⁶ Letter of Mr Stevenson to Viscount Palmerston, 27 February 1841, XXX British and Foreign State Papers (1841-42) 1137.

¹⁷ See for instance Noyes ‘Christianity and Late XIX Century British Theories of International Law’ in M. W. Janis, *The Influence of Religion on the Development of International Law* (1991).

¹⁸ *Le Louis*, (1817) in Parry (ed.) *British International Law Cases* (1965) Vol. III at 691.

¹⁹ *Id.* at 705.

hand, slave-traders, who certainly caused much greater suffering, were not considered *hostes humani generis*.

The Court rejected the argument that the right of visit and search derived from the need to enforce Britain's own navigation laws by checking the nationality of a ship to ensure that she was not disguising her 'true' flag. Considerable weight was given to the fact that a significant number of countries were still practising slavery and that Britain could not impose its will on them.²¹ The High Court of Admiralty upheld this precedent in other decisions.²²

There were, however, also signs of a change in judicial attitudes. The 1822 case *United States v. The La Jeune Eugenie*²³ concerned a French vessel which was carrying slaves and had been seized by an American warship on the coast of Africa. The French consul protested that the American courts had no jurisdiction to hear the case. The Circuit Court stated that the preliminary jurisdictional matter concerned the international legal status of the prohibition of slave trade. It was held that 'at the present moment the traffic is vindicated by no nation, and is admitted by almost all commercial nations as incurably unjust and inhuman';²⁴ as a result 'in all cases, where it is not protected by a foreign government, [the courts will have] to deal with it as an offence carrying with it the penalty of confiscation'.²⁵ The fact that France not only had abolished the slave trade in law but had also ceased to tolerate its practice by her citizens was decisive. The court still deemed it necessary to distinguish this case from other cases in which the slave trade is carried out with the consent of a state. It explained,

The independence of nations guarantees to each the right of guarding its own honour, and the morals and interests of its own subjects. No one has a right

²⁰ *Ibid.*

²¹ 'To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; to force the way to the liberation of Africa by trampling on the independence of other states in Europe; in short, to procure an eminent good by means that are unlawful is as little consonant to private morality as to public justice' (*Le Louis*, *supra* note 18, at 703).

²² For instance in *San Juan Nepomuceno, Yambi*, (1824) 1 Hag. Adm. 265, in Parry (ed.), *supra* note 18 at 711 and in *Buron v. Denman*, *ibid.* (Vol. VI) 385.

²³ *United States v. La The Jeune Eugenie*, 26 F. Cas. 832, (2) *Mason's Reports* 409. The case is also in Dickinson *A Selection of Cases and Other Readings on the Law of Nations* (1925) 13.

²⁴ *Id.* (*La Jeune Eugenie*) at 847.

²⁵ *Ibid.*

to sit in judgement generally upon the actions of another... No nation has ever yet pretended to be the *custos morum* of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy....²⁶

In a later case, in 1841, concerning fugitive slaves from a Spanish colony, the Supreme Court of the United States declared that the slave trade as an 'atrocious violation of human rights', and held that the US was not under an obligation to return them to the Spanish authorities.²⁷

(c) *The progressive adoption of treaty standards*

On the international plane, the most significant outcome of British efforts was the adoption of a multilateral treaty on the slave trade in 1841. Five European powers were party to it - Great Britain, France, Austria, Prussia and Russia.²⁸ This treaty established mutual rights of search and visits to be exercised by warships of the contracting parties when there were 'reasonable grounds' for suspecting that a merchant vessel belonging to any of the parties to the treaty was engaged in the slave trade (Art. 2). Although this treaty instituted a form of international co-operation for policing the High Seas, it did not go as far as establishing universal jurisdiction for the suppression of the slave trade. Proceedings for the confiscation of the vessels could be started only before 'the competent Tribunal of the Country to which she belongs'.²⁹ At that time only piracy thus met the definition of a crime *jure gentium*, for which universal jurisdiction existed. Whereas slave traders were often referred to as 'pirates' in public statements, their treatment under the international law remained substantially different.

²⁶ *Ibid.*

²⁷ *The United States v. The Libellants and Claimants of the Schooner Amistad*, 40 U.S. 518.

²⁸ Treaty of London for the Suppression of the African Slave Trade, 20 December 1841 (Martens, T. XII, 170; 92 CTS (1841-32) 437). On 24 February 1848, Belgium acceded to this treaty, but France never ratified it. Fischer, 'The Suppression of Slavery in International Law', 3 *International Law Quarterly* (1950) 28.

²⁹ Art. 10, Treaty of London, *id.* The principle of the exclusive jurisdiction of the flag state for offences committed on the High Seas was still invoked by France in the *Lotus* case, Judgment, (1927) PCIJ Reports Series A, No. 10). The Court held that there was no principle of customary international law 'in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown...' See also Fischer, *supra* note 28 at 45.



The 1890 Brussels Conference recognised the right to stop vessels under 500 tons in the open sea suspected of trading in slaves, and to examine their papers.³⁰ Mutual rights of search and visit were established, but their exercise vis-à-vis vessels belonging to non-state parties was expressly excluded. This provision, which was legally superfluous merely confirming a general rule of treaty law (*pacta tertiis nec nocent nec prosunt*), implicitly recognised that the enforcement of the ban on the slave trade could not yet be considered part of customary international law.³¹ The Brussels Conference also established an International Maritime Bureau in Zanzibar to gather information and documentation from all the powers involved in the suppression of the trade.³² Albeit its powers were limited compared to contemporary international organisations, the Bureau represented one of the first concerted efforts to establish a multilateral institution for humanitarian purposes. The twinning of multilateralism and humanitarianism was inaugurated, and it would grow enormously in the following century.

The right to stop and board a ship on high seas suspected of being involved in the slave trade acquired customary status in the following decades, although, as is often the case with customary law, it is difficult to identify the precise moment in time when this happened. By the beginning of the XX century most commentators in international law argued that this right could be exercised only on the basis of a treaty provision.³³

While before the First World War the attempts to introduce a ban had been limited to the slave trade, after the War slavery *per se* became illegal with the adoption of the Slavery Convention in 1926.³⁴ The Final Act of the Berlin Conference had expressly referred to the existence of slavery (Arts. 42), but had fallen short of prohibiting it. The idea that international law could go as far as limiting the sovereignty of states and

³⁰ Art. 42, General Act of the Brussels Conference on the African Slave Trade, 2 July 1890, Martens NRG II, XVII, 345; 173 CTS (1890). Oppenheim, *International Law* Vol. I (1st ed., 1905) at 321. All European States, the US, Persia, Turkey, Zanzibar and the Congo Free State signed and ratified the General Act. Trebilcock, 'Slavery' in 8 *Encyclopaedia of Public International Law* (1985) 482. Fischer, *supra* note 28 at 49.

³¹ Art. 45, General Act of the Brussels Conference.

³² Chapter V (Arts. 74-80, General Act of the Brussels Conference, *supra* note 30).

³³ See L. Oppenheim, *supra* note 30 at 347 and J. Westlake *International Law*, Vol. I (1904) at 166-167. Sir Robert Phillimore however argued that the slave trade was a 'legal as well as a natural crime'. Phillimore, *supra* note 10 at 410.

³⁴ Slavery Convention (1926) 60 LNTS 253.

impose obligations on the treatment of individuals took some time to be accepted, and, when it finally was, freedom from slavery became the first human right protected under international law. The right of search, visit and seizure of ships engaged in the slave-trade also became part of customary international law in the period during the two wars. Any remaining doubt that this was so was dispelled with the adoption of the Geneva Convention on the High Seas in 1958 – which included a provision to this effect and was expressly declaratory of customary international law existing at the time.³⁵

(d) *The campaign to end the slave trade and the origins of humanitarianism*

One can only speculate on the course that international law would have taken, had British diplomacy been successful in its efforts to create international norms that established the right of visit, search and seizure of any vessel engaged in the slave trade. The fact that it proved very difficult even for Britain, the world's leading super-power in the XIX century, to overcome international resistance to the suppression of the slave trade testifies to the enduring strength of the principles of the freedom of the high seas, and of national sovereignty.

Interesting parallels can be drawn between the contemporary debate on humanitarianism and the legal, moral and political debates around the end of the slave trade. The opposing interpretations of the anti-slavery movement which have emerged among historians are still relevant to the current debate on the value of humanitarianism and humanitarian interventions.³⁶ According to one historical interpretation of this phenomenon, which we could term 'realist' or 'sceptical', there were no true humanitarian concerns behind the end to the slave trade: Britain and the abolitionists were moved exclusively by their own economic interest and, in a machiavellian way, they sought to create a 'humanitarian discourse' to justify their actions.³⁷ Realism also characterises Foucault's analysis of another great reform which took place in the late XVIII and early XIX centuries and which is also often connected to the rise of the 'humanitarian conscience', the reform of the penal system that led to the prohibition of torture and to the affirmation of detention as

³⁵ Art. 22, Convention on the High Seas (1958) 450 UNTS 11. It was later confirmed by Art. 110, Convention on the Law of the Sea (1982) UN Doc. A/CONF.62/122.

³⁶ T. Bender (ed.) *The Anti-slavery Debate. Capitalism and Abolitionism as a Problem in Historical Interpretation* (1992).

³⁷ E. Williams *Capitalism and Slavery*(1944).

the standard form of punishment. Indeed, Foucault argued that, in spite of its avowed humanitarian ethos, the aim of this reform was not 'to punish less, but to punish better; to punish with an attenuated severity perhaps, but in order to punish with more universality and necessity; to insert the power to punish into the social body'.³⁸

According to a different way of viewing the campaign to end the slave trade, the abolitionists movement represented a moment of real growth in humanitarian sensibility, a strengthening of 'our feeling of responsibility for the stranger's suffering'³⁹ that was pivotal in the rise of a new, and better, humanitarian conscience.

Whether the real motivation for suppressing the slave trade was altruistic or whether it was the result of self-interested economic calculations, the claim that the end of the slave trade represented a triumph for social justice is not invalidated. An explanation that is more likely to be historically accurate views domestic political factors as decisive in determining the British military campaign to end the slave trade. Throughout the first half of the XIX century the Protestant Dissenters, who were staunch abolitionists, held the key to the precarious balance of power between the two main parties in Britain, the Tories and the Whigs.⁴⁰ Because of their leverage, which thus depended on the working of coalition politics in Britain at a particular time, the Dissenters could succeed in putting British naval action to stop the trade high on the political agenda in spite of the huge economic costs of the abolition in Britain and in her colonies first, and of the military campaign to stop the trade later.

An important lesson that can be learnt from this excursus on the origins of modern humanitarianism is that since its beginning there has been a connection between hegemony and humanitarianism. Britain monopolised the great humanitarian campaign to end the slave trade in the XIX century. Today the broader discourse on humanitarianism, and especially the litmus test question of the legality of humanitarian intervention, is still the prerogative of northern states, the 'givers' in the aid relationship and at the same time those with political and military might.⁴¹ Many

³⁸ M. Foucault *Discipline and Punish: The Birth of the Prison* (1977) at 82.

³⁹ Haskell, 'Capitalism and the Origin of Humanitarian Sensibility' in Bender, *supra* note 36 at 128.

⁴⁰ Kaufmann and Pape, *supra* note 4.

⁴¹ C. N. Murphy *International Organisation and Industrial Change* (1994) at 48. Murphy uses Gramscian theory to explain the creation and evolution of international organisation. In particular, he observes, 'Gramsci's concept of a unified social order as a historical bloc linked by both coercive institutions of

realists would see in this a confirmation of the fact that humanitarianism is nothing but a smoke screen for new and perhaps more sophisticated forms of hegemony. Moreover, the fact that a humanitarian label often implies immunity from criticism surely encourages the mis-representation of hegemonic projects in humanitarian terms. It is also important for activists to be aware of the hegemonic side of humanitarianism, not only because they might become the unwitting executioners of a hegemonic strategy, but also because, learning from the experience of the Dissenters in Britain, they could exploit national political divisions to further a humanitarian agenda.

Whether the abolitionist movement really sealed the birth of a new humanitarian sensibility or not, its historical importance for the later developments of international human rights and humanitarian law and international organisations can hardly be underestimated. Two Public International Unions concerning slave trade were founded: the Union for the Suppression of the Slave Trade, originally envisaged in the General Act of the Brussels Conference in 1890, finally came to existence in 1912 and was endowed with two international offices, one in Zanzibar and the other one in Brussels attached to the Belgian Foreign Ministry, as it was common at the time for international organisations to operate directly from the office of a ministry of one of its founding members. The Union for the Suppression of the White Slave Traffic, on the other hand, came to existence in May 1904.⁴² These two Unions became ‘the first major global international organisation with a mandate to end abuses of human rights around the world’.⁴³

In the wake of the anti-slave trade movement, other humanitarian campaigns were launched in the second half of the XIX century. King Leopold’s crimes in Congo became a *cause célèbre* at the turn of the century and a movement of journalists, intellectuals and activists managed to put the brutal occupation of Congo on the world’s agenda.⁴⁴ On another front, the founding of the ICRC in 1863 signalled the growth of humanitarianism in another direction, that is the attempt to “humanise”

the state proper and consensual institutions of civil society can help us remember that the world organisations, as co-operative institutions of international civil society, have only been effective when they have worked alongside a coherent system of coercive power at the international level, a stable military order’ (p. 10).

⁴² L. Oppenheim *International Law* (2nd ed., 1912) at 622.

⁴³ Murphy, *supra* note 41 at 105.

the conduct of warfare. Capturing and promoting this humanitarian spirit - 'the spirit of Solferino' – to the point of almost becoming its embodiment, the ICRC played a pivotal role in the development of humanitarian law. The campaign to end the slave-trade had demonstrated what a private movement could achieve in terms of changing state practice and international law. The ICRC took this a step further by directly spearheading the adoption of treaties and becoming actively involved in the international law-making process.⁴⁵ International law did not limit itself to regulating the conduct of war from the standpoint of the state. At the Hague Conferences 1899-1907, rules on the conduct of warfare to protect the wounded, the sick and shipwrecked members of the naval forces were introduced.⁴⁶ 'Geneva law' took this further and extended the protection of the 'victims' of armed conflict, including civilian populations.⁴⁷

I.3. The Public International Unions

Public International Unions also trace their origins to the second half of the XIX century. Unions established in that period include International Telegraph Union (1865), the Universal Postal Union (1874) and the International Railway Congress Association (1884). By 1914 there were many Unions dealing with such different matters as communication, infrastructure, trade, intellectual property, labour, agriculture, public order, relief, health, education, and even inter-state conflicts.⁴⁸ These Unions, which 'would have been inconceivable before the first decades of the Industrial Revolution', were the predecessors of modern international organisations, but their organisational and institutional structure was embryonic compared to international organisations nowadays.

The body of treaty law that emerged from the establishment of the Public International Unions was often referred to by the commentators of the time as

⁴⁴ The history of that movement is recounted in A. Hochschild, *King Leopold's Ghost* (1999).

⁴⁵ The first humanitarian law treaty to be adopted as a result of an ICRC initiative was the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864) 129 CTS 361.

⁴⁶ The Hague Conferences also dealt with disarmament and with the peaceful settlement of disputes.

⁴⁷ Greenwood, 'Historical Development and Legal Basis' in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (1995) 1 at 19.

⁴⁸ This sub-division is the one adopted by Murphy, *id.* at 47-48.

'international administrative law'.⁴⁹ The rise of the Unions was normally explained as a result of the development and expansion of national public administrations since 'the vast majority of the interests which are the objects of public administration have evolved and have by now become group interests in the community of civilised states and, as such, [have become] international interests'.⁵⁰ It was also pointed out that commercial interests of states were best served by creating these forms of international administration.⁵¹

The constituent instrument of the Unions was a treaty which originated from a diplomatic conference convened after a public initiative or, in some cases, after the private initiative of capitalists or pressure groups.⁵² Membership of the Unions was open to all states, with the obvious exception of those Unions that operated in a geographically defined area. Unions generally had permanent organs, normally a Commission, performing executive functions, and a 'legislative' body, the Congress or Conference.

Unanimity was usually a requirement for decisions.⁵³ An important distinction in the Unions' law, or international administrative law, was between the convention and the *règlement*, the former indicating the fundamental law, always treaty-based, that regulated the Unions, the latter referring to the resolutions of the organs of the Unions.⁵⁴ Using today's preferred terminology, the convention corresponds to the binding constituent instrument of an organisation, and the *rèlements* to the non-binding resolutions or decisions of the organs.

⁴⁹ Borsi, 'Carattere ed oggetto del diritto amministrativo internazionale', 12 *Riv. It. Dir. Int.* (1912) 368; N. L. Hill *International Administration* (1931); Reinsch, 'International Administrative Law and National Sovereignty', 3 *AJIL* (1909) 1; P. S. Reinsch, *Public International Unions: Their Work and Organisation. A Study in International Administrative Law* (1911). Schucking 'L' organisation internationale', 15 *RGDIP* (1908) 15.

⁵⁰ Ullman's *Völkerrecht* cited in Schucking, *ibid.* at 15 (note 1).

⁵¹ Hill, *supra* note 49 at 14-16.

⁵² Reinsch (1909), *supra* note 49 at 20.

⁵³ Hill *supra* note 49 at 6. Reinsch adds the Sugar Commission, the Agricultural Institute and the Superior Council of Health to the list of Unions that allowed non-unanimous decisions in some cases (*ibid.* at 29).

⁵⁴ Reinsch explains that 'changes in the convention necessitate diplomatic action, and require, therefore, greater formality as well as more extensive deliberation. The presence of diplomatic representatives is always necessary when a convention is to be changed. Changes in the *reglement* may be made by technical delegates'. (*ibid.*, p. 30).

At the outset, the Unions worked very closely with the governments of the country in which their headquarters were situated. In some cases, the offices of the Union were based at a ministry. Even the Unions that had separate offices - like the Telegraphic Union, the Postal Union, or the Labour Office, predecessor of the International Labour Organisation (ILO) - operated closely with the host government, under whose supervision and direction they had been placed. Notwithstanding these limitations, the nature of the Unions as independent entities and the need to recognise them as international legal persons was quickly recognised. The Commission appointed by the Director of the International Agricultural Institute in 1914 to investigate 'the questions concerning the legal status'⁵⁵ of the Institute concluded that state parties to the 1905 Convention that had created the Institute had obliged themselves to give domestic legal recognition to the Institute. Such obligation was not explicitly provided under that Convention, but - according to the Commission - it was implied under it. According to this interpretation, the 1905 Convention established '54 different legal entities, all identical, except for their different nationality'.⁵⁶ This conclusion was not shared by Fusinato, a member of the Permanent Court of Arbitration. In his view, the only possible construction was to recognise that the Institute 'must be considered as a real international legal entity, composed of the state parties to the 1905 Convention, and recognised as such in the territory of those states'.⁵⁷ He also added that the law applicable to the Institute should be that deriving from the 'personal statute of the Institute (as resulting from the 1905 Convention and from the following *réglements*)'.⁵⁸

The recognition that the Public International Unions were international legal persons was an acknowledgement of the importance of their functions. Immunities or privileges, however, were not normally bestowed upon the officials of the Unions in the pre-1914 period, but this changed with the League of Nations whose Covenant granted immunity to its officials (Art. 7, 4).⁵⁹ The staff of Public International Unions, unlike those of subsequent organisations, were almost exclusively nationals of the

⁵⁵ G. Fusinato, *Avis sur les questions touchants la personnalité juridique de l' Institut International d' Agriculture* (1914) at 3.

⁵⁶ *Ibid.* at 5.

⁵⁷ *Ibid.* at 8.

⁵⁸ *Ibid.* at 8.

⁵⁹ Oppenheim, *supra* note 42 at 516. Immunity and privileges will become a fundamental legal feature of IGOs later. The evolution of the law on the immunities of international organisations is examined

country in which the Union had its headquarters. For example, the Swiss Government reserved most of the positions in the Unions it hosted for its own citizens.⁶⁰ Nevertheless, the principle that ‘the members of these international Commissions are not called to defend the interests of their own country, but act - with all the freedom of their conscience - for the benefit of the union of countries which they represent’ had already been asserted in relation to the work of the Unions.⁶¹ This paved the way for the creation of an international professional elite, which increased dramatically in size with the establishment of the League of Nations.

The establishment of the Unions also prompted a re-definition of national sovereignty. States had caved in to the preponderance of economic considerations and had accepted limitations on the exercise of their sovereignty in various matters. As observed by Reinsch, the view that ‘everything must be avoided which would constitute a derogation of the complete rights of sovereignty’ was abandoned.⁶²

I.4. The Inter-War Period: The League of Nations

The League of Nations was the first international organisation that could claim to be ‘global’. The League was not ‘global’ in the sense that its membership was universal – the US never acceded to the Covenant – or in the sense that it was truly representative of every people in the world – the interests of colonial peoples were not in any way represented. Both in terms of its membership and of the interests it represented, the League remained an essentially European club. However, the League was the first ‘global’ international institution in terms of the breadth of its constitutional competence that ranged from the peaceful settlement of disputes to the promotion of welfare, free communication and disarmament (Art. 23 of the Covenant). With the establishment of the League, there was a momentous acceleration in the process of international institutionalisation. The debate on ‘international government’ in those years, often promoted by national associations, went very far and proposals that would be deemed daring even by today’s standards

in Kunz, ‘Privileges and Immunities of International Organisations’, 41 *AJIL* (1947) 828. See also W. Jenks *International Immunities* (1961).

⁶⁰ Reinsch (1909), *supra* note 49 at 33.

⁶¹ Schucking, *supra* note 49 at 15.

⁶² Reinsch (1909), *supra* note 49 at 10.

were made and given serious consideration.⁶³ In the end the League represented a compromise that fell short of the suggestions of the advocates of a comprehensive form of international administration, but it still managed to embrace 'a wide range of interests, somewhat greater in extent than a casual reading of the Covenant would intimate'.⁶⁴

Usually blamed for its failure to maintain peace and to take resolute action against major breaches of peace (by Italy in Ethiopia, by Japan in China, and by Germany in Europe in the 1930s), the League should still be credited with undertaking numerous initiatives in other areas, and with achieving some successes. It established auxiliary organs to deal with economic and social questions (slavery and the slave trade, intellectual property, refugees, etc.). In the area of welfare and labour conditions, the ILO, which was part of the League system but enjoyed autonomy, achieved important results in part owing to the fact that it was not beleaguered from the start by limited membership since the US was a member.⁶⁵

In the humanitarian field, the League must be credited with establishing the first programmes for refugees and appointing Fridtjof Nansen as High Commissioner for Russian Refugees in 1921. Although mainly limited to Europe, the League's involvement with refugees and other displaced persons soon expanded beyond Russian refugees. Unlike the current refugee regime, which is essentially centred on the provision of emergency relief, the League's work for refugees aimed mainly at securing their legal status and at finding a durable solution through local integration. The only instance in which the League actively pursued the repatriation of refugees was for Russian refugees, although in the end 'only a fraction of the total number of refugees returned to their homeland'.⁶⁶ Otherwise, at the time the preferred durable solution was the integration of refugees in their host countries. The League played a pivotal role through the High Commissioner in the settlement of Asia Minor Greeks expelled from Turkey as part of the Greco-Turkish population exchange, of ethnic

⁶³ Dubin, 'Transgovernmental Processes in the League of Nations', 37 *Int. Org.* (1983) 469.

⁶⁴ Hill, *supra* note 49 at 79.

⁶⁵ The US joined the ILO, although they never joined the League of Nations. Although Italy, Germany and Japan withdrew from the ILO in the 1930s, the Soviet Union became a member, as did a number of Latin American countries that had left the League of Nations.

⁶⁶ Skran, *supra* note 1 at 149.

Bulgarians in Bulgaria, of Armenian refugees in Syria.⁶⁷ After 1933 an *ad hoc* High Commissioner was appointed to deal with German refugees. The first High Commissioner for Jewish Refugees, James McDonald, resigned after two years publicly denouncing the German Reich for its persecution of Jews and advocating a more proactive role of the League.⁶⁸

Such a functional and operative expansion could not have taken place without the formation of a large body of professional international civil servants. In order to protect them from pressure from states and to guarantee the independence of the organisation, the Covenant extended diplomatic privileges and immunities to 'officials of the League when engaged on the business of the League' (Art. 7, 4). Before then, the grant of immunity to officials of international organisations had been rare.⁶⁹ The Covenant did not grant jurisdictional immunity to the League as a legal person, but it did confer some privileges on it such as the inviolability of 'buildings and other property occupied by the League of its officials' (Art. 7, 5). At any rate, in 1926 the League reached an agreement with the Swiss Government that essentially guaranteed the organisation's immunity from lawsuits in Switzerland.⁷⁰ This regulation of the immunity of the League was seminal: the UN Charter ended up confirming the personal immunities of UN officials, and added a general provision on the immunity of the organisation (Art. 105, 1) which was fleshed out in two conventions.⁷¹ The immunity of the organisation and of its officials became a central principle in the regulatory framework of international institutions.⁷²

The existence of a professionalised civil service, in turn, facilitated the development of an institutional ethos and an organisational identity, which with time became important factors in shaping institutional practice. The League's building, with its sensational modern architecture, became a centrepiece for many career-minded and glamour-searching individuals, and for scores of dyed-in-the-wool socialites that

⁶⁷ *Exchange of Greek and Turkish Populations*, Advisory Opinion, (1925) PCIJ Series B, No. 10.

⁶⁸ Skran, *supra* note 1 at 230 ff.

⁶⁹ Kunz, *supra* note 59.

⁷⁰ In the pre-1914 period, the European Danube Commission stood as an almost unique exception among international organisations, since it was endowed with immunity. See Kunz, *id.* at 857-859.

⁷¹ Convention on the Privileges and Immunities of the United Nations (1946) 1 UNTS 15; Convention on the Privileges and Immunities of the Specialised Agencies (1947) 33 UNTS 261.

⁷² According to Brower, the UN Charter, by introducing the functional necessity doctrine, actually 'marked an historical shift towards the diminution of international immunities' (Brower, 'International Immunities: Some Dissident Views on the Role of Municipal Courts', 41 *Virg. J. Int. L.* (2000) 1 at 20).

rotated around them. This social world of high-flying League officials in Geneva in the 1920s and 1930s is brilliantly portrayed by Albert Cohen in *Belle du Seigneur*, a riveting novel and a mordant literary indictment of international careerism.⁷³

The increased importance of personal and organisational factors was not matched by the establishment of mechanisms to ensure staff or organisational accountability, or of other corrective mechanisms to remedy dysfunctional performance. An important example of the unprecedented powers with which the League of Nations was vested and of their dysfunctional use is the administration of territory. The League was often severely criticised for the way it was administering the territories – Saarland and Danzig – for which it was responsible under the peace settlement.⁷⁴ In Saarland, the powers of the League’s administration were extensive, although France retained control of the mines and maintained a significant public order presence in the territory. In Danzig, on the other hand, the League had an essentially supervisory role. Throughout its existence, the League’s administration of the Saarland was accused of oppressing the German population, and of being acquiescent to the French policy of ‘gallicisation’ of the Saarland.⁷⁵

Another area in which the work of the League was seminal was economic restructuring in war-affected countries. For example, a committee was established in 1921 to propose a scheme for economic reconstruction in Austria. A Commissioner-General, appointed by the Council of the League and residing in Vienna, advised the Austrian government on financial matters. His consent was necessary to release money that formed part of the credits granted to Austria. As a result of the recommendations of the committee and of the work of the Commissioner, important policies were implemented such as the downsizing of the civil service.⁷⁶ In other instances in the 1920s, the League assumed some measure of administrative control in relation to economic reconstruction with the consent of the affected country (*e.g.* in Hungary, Bulgaria, and Greece).⁷⁷ In the case of Bulgaria, the work of the Commissioner of the League was mainly related to refugees and the Commissioner’s

⁷³ A. Cohen, *Belle du Seigneur* (Gallimard, 1968).

⁷⁴ See Chapter IV.2(a).

⁷⁵ W. H. Dawson, *The Saar Territory: Its History, Population, Industry and Government by the League of Nations* (1934) at 18 ff.; Hill, *supra* note 49 at 96-99; R. Jones, S. S. Sherman, *The League of Nations: From Idea to Reality* (1927) at 164.

⁷⁶ Hill, *supra* note 49 at 84-88.

approval was necessary for the implementation of plans for refugees that used external resources.⁷⁸

The ILO deserves a special mention not only because it can be viewed even with hindsight as a success story in most respects, but also because it became the main welfare organisation within the circle of the League.⁷⁹ The initial mandate of the ILO was quite limited, but, pioneering a trend that would characterise other international institutions, the ILO quickly undertook functions that 'went well beyond the modest task assigned to it by article 396 in Part XIII of the Versailles Treaty'.⁸⁰ The ILO's *modus operandi*, which became typical of a certain type of welfare multilateralism, involved standard-setting, gathering and dissemination of information, and, to a more limited extent, monitoring. The ILO did undertake an operational role on various occasions, but its operative functions were quite narrowly conceived and consisted mainly of the provision of technical co-operation to countries engaged in economic or legal reforms affecting the labour market.⁸¹ Although such technical co-operation is important and arguably had a considerable impact on different situations, the ILO never extended its operational role beyond this to include the assumption of administrative responsibilities.

International institutional law was consolidated in the inter-war period, but the primary concern remained to secure the presence of international institutions in a state-dominated world. The experience of the League of Nations, and of the wide array of institutions, committees and other organs associated with it, moulded archetypical forms of multilateral action that are still in place today. In some cases, the terms of the debate are similar to current debates. Towards the 1930s the reform of the League was on the agenda, but the predominant concern was related to the League's failures in the maintenance of peace rather than to its performance in other areas. The outbreak of the war in 1939 cut short this debate.

⁷⁷ *Ibid.*

⁷⁸ See Skran, *supra* note 1 at 167 ff.

⁷⁹ In 1929, the ILO budget amounted to one-third of the total League budget (Hill, *supra* note 49 at 113).

⁸⁰ V. Y. Gheballi, *The International Labour Organisation: A Case-Study on the Evolution of UN Specialised Agencies* (1988) at 13.

⁸¹ A good analysis of ILO practice in this area is in Gheballi, *supra* note 80 at 242 ff.

The Second World War posed enormous dilemmas for humanitarian action. The collapse of the League of Nations left only the ICRC in charge of humanitarian operations during the war. The ICRC, whose model of intervention was premised on the principles of neutrality and impartiality,⁸² was confronted with one of its most difficult choices ever, the decision not to publicise the evidence it possessed about the existence of the concentration camps and the extermination of the Jews.⁸³ In October 1942, a meeting of the Committee had been convened to discuss what to do with this information. While it would appear that before the meeting the majority of the members of the Committee had been in favour of some public form of condemnation of the concentration camps, in the final vote all but one were finally persuaded that a public appeal would have been useless or even counter-productive. The fear of being perceived as partisan, and of the consequences that this could have had on the work of the ICRC in Axis-occupied Europe, were the main reasons for their final decision to abstain from any public condemnation of the concentration camps. This episode in the history of the ICRC is emblematic of the limits of neutral and impartial humanitarianism. Humanitarian neutrality is yet another example of a principle that was conceived and consolidated in a different era but that anachronistically still govern much of today's institutional practice.⁸⁴

I.5. From the League to the UN

(a) The steady growth of multilateralism

Within a few years of its establishment, the UN already found itself entangled in the Cold War. The admission of European states that had fallen under the sphere of influence of one or the other bloc, and the intervention in Korea were key questions that the Organisation addressed in the first decade of its existence. The Cold War however did not completely stop the growth of multilateralism and the progressive qualitative and quantitative expansion of international institutions.⁸⁵ Furthermore, as decolonisation increased the membership of the UN, international institutions had to

⁸² See Chapter III.3.

⁸³ C. Moorehead, *Dunant's Dream: War, Switzerland and the History of the Red Cross* (1998) at xxiv-xxxi.

⁸⁴ The ICRC is a non-governmental entity. However, its model of humanitarianism, and in particular the principles of neutrality, have pervaded the humanitarian activities of other entities, including international institutions and other non-governmental organisations. On the incompatibility of neutrality with human rights, see Chapter III.3.

accommodate the claims and interests of new members, most notably self-determination and socio-economic development.

With the exception of the United Nations Development Programme (UNDP), all other key institutional actors of the UN that currently have a significant operational dimension were in place by 1951. Some of the specialised agencies were created in the aftermath of the Bretton Woods Conference in July 1944 – the World Bank and the International Monetary Fund (IMF). Others, like the Food and Agriculture Organisation (FAO), the World Health Organisation (WHO), the United Nations Educational Scientific and Cultural Organisation (UNESCO), were established as new organisations in the 1940s, although they had predecessors in the League system. The ILO was one organisation that survived the dissolution of the League, although its Constitution was amended and it became a specialised agency of the UN. A number of important subsidiary agencies, like the United Nations Children’s Fund (UNICEF), the United Nations Relief and Works Agency for Palestine Refugees in the Middle East (UNRWA), and UNHCR, had also come to existence by 1950. The World Food Programme (WFP) and UNDP were relative late-comers, the former established in 1961 and the latter in 1965, to accommodate respectively the need to provide emergency food assistance in humanitarian crises and the developmentalist agenda of many of the UN’s new members.

An important distinction for organisations in the UN family is between specialised agencies and subsidiary agencies (or specialised programmes). Specialised agencies, such as WHO, ILO, and the international financial institutions, are established by treaty and are, in all respects, self-standing international legal persons. Specialised programmes, on the other hand, like UNHCR, UNDP, UNICEF, are established by a resolution of the General Assembly and are subsidiary organs of the UN. Despite their apparent lack of autonomy, the specialised programmes, however, play a crucial operational role, which is reflected in the expansion of their budget.⁸⁶

The UN was involved in field operations since its inception, when it provided relief in post-war Europe. The UN Relief and Rehabilitation Administration (UNRRA) co-

⁸⁵ With a simile that is perhaps excessively vivid, Philip Allott writes that after the Second World War ‘*intergovernmental organizations* multiplied like flies on rotting meat’ (*Eunomia* (2nd ed., 2001) xiii).

⁸⁶ See Chapter II.2(c).

ordinated activities for the relief and repatriation of those who had been displaced by the war in Europe, and organised the repatriation of some seven million persons in a few years.⁸⁷ It was dismantled in June 1947, when the International Refugee Organization (IRO) was established to deal with some 2 million refugees for whom repatriation was not possible. The IRO became the second largest operational specialised agency, with a staff of nearly 3,000 persons at the peak of its activities and a fleet of forty ships.⁸⁸ The IRO was eventually liquidated in 1951, and the Office of the UNHCR was instituted. With most of the work for European refugees from the war completed in the 1950s, UNHCR remained a relatively small organisation for the first two decades of its existence: in 1971 it still numbered only 350 staff,⁸⁹ but in the late 1970s, following the refugee crisis in South East Asia, its expenditure more than tripled. The trend continued in the 1980s and 1990s, although a funding crisis hit the organisation in the second half of the 1990s.⁹⁰ The other main international institution responsible for refugees – UNRWA – was created in 1949. UNRWA began to act as an operational agency quite early on, focusing on housing and education.⁹¹ In some respects, UNRWA resembled the office of the League’s High Commissioner for Refugees more than UNHCR, particularly because of the prominent role that refugees played in its administration.⁹² This in turn exposed UNRWA to accusations of becoming ‘politicised’ and of espousing the Palestinian national cause rather than adhering strictly to the humanitarian terms of its mandate.⁹³

Although to some extent stifled by the confrontational climate of the Cold War, on at least two occasions in the 1960s the UN succeeded in mounting operations on a large scale with a multifarious agenda (peace-keeping, humanitarian assistance and development, and administration). The most important of these operations was the UN Operation in Congo (ONUC), 1960-64. ONUC was primarily a peace-keeping

⁸⁷ L. Holborn, *Refugees: A Problem of Our Time* (1975) Vol. 1 at 26. One major refugee crisis in the post-war era in which international organisations did not play a crucial role was the population exchange between India and Pakistan, following the partition, in which some 14 million people moved across the border – still the largest recorded instance of forced migration.

⁸⁸ *Ibid.*, at 30-33.

⁸⁹ *Ibid.*, Vol. II at 1399.

⁹⁰ UNHCR, *The State of the World’s Refugees* (2000) at 166-167.

⁹¹ See the various articles on UNRWA in the special issue of the 2 (1) *J. Ref. St.* (1989).

⁹² *Ibid.* See also L. Takkenberg, *The Status of Palestinian Refugees in International Law* (1998).

⁹³ For example, Perlmutter, ‘Patrons in the Babylonian Captivity of Clients: UNRWA and World Politics’, 25 *Int. Org.* (1971) 306.

operation,⁹⁴ but, in addition to its 20,000 soldiers on the ground, it also employed a staff of some 3,000 for its civilian component and performed important administrative functions. Various UN agencies operated in the Congo: for instance, UNHCR and the ILO ran a joint programme in Kivu province which had been affected by the arrival of thousands of Rwandan ‘Tutsi’ refugees after 1959, and UNESCO administered its largest educational programme up to that point. The other prominent UN operation in this period was the UN Temporary Administration (UNTEA) in West Irian (West New Guinea) in 1962-63. Albeit for only a short period and smaller in size than ONUC, UNTEA exercised effective control in this territory, maintaining security and public order, organising the civil service and the judiciary and building some infrastructure.

As mentioned, the Charter strengthened the provisions in the League’s Covenant on the immunity of the organisation and on the independence of international civil servants. Indeed, Article 105 confers ‘such privileges and immunities as are necessary for the fulfilment of its purposes’ on the Organisation and on its officials.⁹⁵ Article 100 affirms the independence of civil servants from governments or ‘from any other authority external to the Organisation’, while Article 101 provides that ‘the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standard of efficiency, competence, and integrity’. One need not be a committed realist to acknowledge that, despite their loftiness, these provisions have often been disregarded, except for those conferring privileges and jurisdictional immunities on the UN. In the early years of the UN’s existence, the Secretary General had already accepted the fact that various member states “screened” their nationals before they could take up a position with the UN. In the case of the USSR and other countries in the eastern bloc, such “screening” was largely conducted behind the scenes. The US, on the other hand, instituted an official body – the International Organizations Employees Loyalty Board – entrusted with the “screening” of US nationals working for the UN. Far from contesting the legitimacy of this step, the Secretary General entered into ‘a written secret agreement with the US Department of State whereby

⁹⁴ ONUC’s operational modalities blur the distinction between peace-keeping and enforcement action (N. White *Keeping the Peace* (1997) at 260-261). See also: R. Higgins, *United Nations Peace-keeping 1946-1967 III: Africa* (1980). In recent practice, this blurring has occurred even more distinctly (C. Gray *International Law and the Use of Force* (2000) 165 ff.).

(...) applicants for and incumbents in UN Secretariat positions were “screened”, without their knowledge, by US agents’.⁹⁶ In the early 1950s, a number of US nationals working for the UN even appeared before the US Senate’s Committee on Anti-American Activities, and some of them lost their jobs. Some employees brought their cases to the UN Administrative Tribunal and received monetary compensation but they were not reinstated in their positions.⁹⁷

There is no doubt that the actions of the Secretary General at the time were in violation of the Charter. Although the victims were awarded compensation, no other remedial steps were taken, and such overt interference with the independence of the international civil service continued unabated for many years. It was only in 1986, when the US courts finally deliberated on this matter, that the work of the International Organizations Employee Loyalty Board was suspended. The District Court for the Eastern District of Pennsylvania held that Executive Order 10422, with which President Eisenhower had established the Board in 1953, was unconstitutional in that it violated the First Amendment rights of free speech and free association.⁹⁸ Although the District Court did not concern itself with the violation of the Charter, its decision indirectly put an end to such violation, after years of acquiescence and complicity on the part of the very organs of the UN entrusted with ensuring the respect of the Charter.

⁹⁵ The immunity of the UN and of UN officials is discussed in Chapter V.

⁹⁶ Hazzard, ‘Reflections. Breaking Faith-I’, *The New Yorker*, 25 September 1989, 63 at 63.

⁹⁷ The dismissal of these employees formed the basis for the damages award that then led to the Advisory Opinion of the International Court of Justice (ICJ) in *Effect of Awards of Compensation Made by the UN Administrative Tribunal* ICJ Reports (1954) 47. The Administrative Tribunal had actually ordered that four of the employees be reinstated, but the Secretary General found that it was ‘impossible or inadvisable’ to reinstate. Compensation in lieu of reinstatement was thus awarded. See Cohen, ‘The International Secretariat – Some Constitutional and Administrative Developments’, 49 *AJIL* (1955) 295 at 307.

Other employees brought a similar case against the Director-General of UNESCO who did not renew their contracts after they refused to appear before the International Organizations Employees Loyalty Board of the US Civil Service. In informing them of his decision, the Director-General of UNESCO wrote, ‘I cannot accept your conduct as being consistent with the high standards of integrity which are required of those employed by the Organization’. Judicial bodies, however, opposed this obvious injustice: the Administrative Tribunal of the ILO found in favour of the employees, and the ICJ recognised the competence of the Administrative Tribunal to hear their complaints and the validity of its decision (*Judgment of the Administrative Tribunal of the International Labour Organisation upon Complaints Made against the United Nations Educational, Scientific and Cultural Organisation*, Advisory Opinion, ICJ Reports (1956) 77).

⁹⁸ *Hinton v. Devine*, 633 F. Supp. 1023. See also Roy, ‘US Loyalty Program for Certain UN Employees Declared Unconstitutional’, 80 *AJIL* (1986) 984.

To protests against his connivance with practices that infringed the Charter, the Secretary General responded with an argument ‘that would henceforth be used by UN senior officials to deflect inquiry into malfunction and malpractice at the organization: “Everything you say will be used against this organization by the enemies of the United Nations”’.⁹⁹ Given the tendency towards bureaucratisation,¹⁰⁰ and owing to the fact that the operational practice of the UN is also a function of its institutional culture, these ‘original sins’ played an important and much-neglected role in the development of the fledgling international civil service and in shaping its ethos. In the short term,

The number of international employees who, in a steady draining, left the United Nations system during its first decade because of intimidation, indignation or disillusion may be estimated at several hundred. Some were encouraged to resign with special payments, sixty others were removed as part of an “efficiency survey”, carried out in 1952, whose records were immediately destroyed.¹⁰¹

Despite constraints on the independence of their civil service, the UN continued to expand and to undertake an ever greater operational role, a process that accelerated in the late 1960s and 1970s when the UN provided humanitarian relief in various conflicts – in Biafra, Ogaden, Bangladesh, and Indochina. This process continued in the 1980s and, as is almost a cliché to say, it gained momentum after the end of the Cold War, when it became easier to reach the necessary political consensus for operations that were not simply humanitarian. Such quantitative and qualitative expansion, however, was not always accompanied by a careful analysis of the legal aspects of these ‘new’ UN operations. International institutions often preferred a “define-as-you-go” approach rather than a legal one based on their mandates.

The history of UNHCR illustrates this process of dysfunctional expansion. Until at least the mid-1970s UNHCR was small compared with its size today. It had been operative on a few occasions, for example in the Congo in 1960, but even then its

⁹⁹ Hazzard, *supra* note 96 at 63.

¹⁰⁰ Barnett and Finnemore, ‘The Politics, Power and Pathologies of International Organizations’, 53 *Int. Org.* (1999) 699.

¹⁰¹ Hazzard, *supra* note 96 at 68.

operations required less staff and funding, than, for instance, those of UNRWA. The core of UNHCR's mandate as defined in its Statute¹⁰² was supposed to be implemented through protection activities, i.e. activities that aimed at ensuring that refugees could find an adequate replacement for the diplomatic protection denied to them by their countries of nationality. As a result, within UNHCR the Division of International Protection 'dominated a rigid hierarchy'.¹⁰³ Another advantage offered by this focus on the legal work of the organisation and on its protection activities was that the organisation could be shielded from the 'politically charged atmosphere of the United Nations'.¹⁰⁴

With the refugee crisis in Indochina in the 1970s, UNHCR became a predominantly operational organisation, in charge of so-called care and maintenance programmes to assist refugees. UNHCR's mandate, which was centred around the system of international protection of refugees as a substitute for the lack of diplomatic protection, was progressively eroded; 'responsibility and accountability to mandate fell by the wayside, to the extent that many organisational units today appear institutionally incapable of relating their performance and activities to the mandate of UNHCR as a whole'.¹⁰⁵ In addition, UNHCR became more reluctant to challenge states since it was by now closely co-operating with them in the management of refugee camps and settlements, and in the provision of relief assistance. As has been observed,

the pursuit of protection activities necessarily results in a tension between state and individual, and between states and the international agency charged with that responsibility. UNHCR cannot expect always to please all sides, but the art is to stay close to principles, not to throw them overboard in an excess of 'realistic' cohabitation.¹⁰⁶

The institutional transformation undergone by UNHCR is not unique among UN agencies. To mention only a few, other recent examples of 'controversial'

¹⁰² GA Res. 428 (V), 14 December 1950.

¹⁰³ Goodwin-Gill, 'Refugee Identity and Protection's Fading Prospect' in F. Nicholson and P. Twomey (ed.) *Refugee Rights and Realities* (1999) 220 at 235.

¹⁰⁴ *Id.* at 224.

¹⁰⁵ *Id.* at 235.

¹⁰⁶ *Id.* at 223.

humanitarian/development operations include UNICEF's 'complex emergency' intervention in Sudan (Operational Lifeline Sudan),¹⁰⁷ UNDP's provision of assistance to the internally displaced in Kenya,¹⁰⁸ and the UNHCR-UNDP joint operation in Rwanda to assist the process of *Imidugugu* which involved the forced eviction and regroupement of rural inhabitants.¹⁰⁹ In all these cases, the possible violation of the institution's mandate as well as of other rules of international law, including human rights, has been directly or indirectly raised. One of the case studies, discussed in detail at chapter III, illustrates how the operational practice of *all* UN agencies involved in Afghanistan under the Taliban was in open contrast not only with the practice of the political organs of the Organisation, but also with rules of international law (including *jus cogens* rules). The case of Afghanistan also shows that the practice of international institutions is multi-layered. Rules of hard law, both those deriving from the constituent instrument and those deriving from general international law, are progressively eroded as one goes down these layers. Paradoxically, in the case of subsidiary agencies with a strong operational component - UNDP, UNHCR, UNICEF, WFP - ensuring their accountability as well as adherence to their mandates is often more difficult than in the case of specialised agencies, which have the paraphernalia of international institutions, including a plenary body, that can perform some monitoring.

Another problem is that the operational practice of international institutions is the object of only sporadic empirical examinations, usually conducted by anthropologists and economists, and seldom if ever by lawyers and political scientists.¹¹⁰ With a few exceptions, international relations scholars themselves are paradoxically reluctant to study reality *empirically*, although many of them would still define themselves realists. Only scant attention has therefore been given to the fundamental fact of the growing

¹⁰⁷ 'Sudan's Child Soldiers Go Hungry in Unicef's Filthy Demob Camps', *The Independent*, 23 April 2001.

¹⁰⁸ Human Rights Watch, *Failing the Internally Displaced: The UNDP Displaced Persons Program in Kenya* (1997).

¹⁰⁹ Hilhorst, van Leeuwen, 'Emergency and Development: the Case of *Imidugudu*, Villagization in Rwanda', 13 *J. Ref. St.* (2000) 264.

¹¹⁰ One reason for this reluctance to face the reality of institutional practice could be the deep-seated belief that 'any increase in international organisation is a triumph of idealism over realism, that more is always better, and that cooperation is *ispo facto* better than conflict (...) And the unspoken assumption, of course, is that international officials are selfless dedicated missionaries with only the best interests of the world community at heart' - S. Strange, *The Retreat of the State* (1996) 162.

power of international institutions, especially in the south, and to the development of an institutional practice that is often dysfunctional and in some cases even *ultra vires*.¹¹¹

(b) *Categories of UN Operations*

Categorising the variety of operations undertaken by the UN and by its agencies is not an easy task, partly because of the development, as discussed, of an operational practice that is not always consistent with the mandate of the organisations, or that at least does not derive directly from their statutes.

One category of UN operations which has received significant attention by international lawyers is that of peace-keeping and peace-enforcement missions. Such missions ought to find their legal basis in either Chapter VI or Chapter VII of the Charter depending on the gravity of the situation. In practice, however, 'there is often no substantive factual distinction'¹¹² between a dispute that 'is likely to endanger the maintenance of international peace and security' (Art. 33), and a threat to the peace, breach of the peace or act of aggression (Art. 39). These situations, to which different powers of the Council correspond, 'are, in effect, often merely 'labels' put into the resolutions to indicate the political climate in the Council'.

Moreover, peace-keeping missions have evolved beyond the sheer monitoring of a border zone or of military activities within a territory with a view of preventing a conflict. Especially since the 1980s, peace-keeping operations have become 'multifunctional', comprising such activities as fact-finding and human rights monitoring, the provision of humanitarian assistance, the exercise of some administrative functions or administrative supervision, post-conflict reconstruction, the demobilisation and reintegration of former combatants, election monitoring, assistance to returnees, and judicial reform.¹¹³ As for interventions under Chapter VII, the exercise of even broader powers, including the assumption of full administrative responsibilities, has become the norm, as illustrated by the interventions in Somalia, Bosnia, Kosovo and East Timor.

¹¹¹ See Chapter III.

¹¹² White, *supra* note 94 at 37.

¹¹³ See Secretary-General, *Supplement to an Agenda for Peace: Position Paper of the SG on the Occasion of the Fiftieth Anniversary of the United Nations* (1995) at paras. 21-22, UN Doc. A/50/60. See also White's analysis of the practice of peace-keeping, *supra* note 94 at Chapter 9.

This move towards multifunctional peace-keeping has not been accompanied by more pervasive regulation of these operations on the part of the Security Council. There is a large body of Security Council resolutions adopted in the 1990s in respect of the various conflicts in which the UN intervened in a multi-functional manner (Somalia, Sierra Leone, Sudan, Iraq, Cambodia, Mozambique, Angola, Afghanistan, Haiti, East Timor, former Yugoslavia, etc.). Yet these resolutions, even when they are relatively detailed like resolution 1244 (1999) on Kosovo, normally only spell out the mandate of the mission in rather general terms, indicating the goals of the mission and leaving significant latitude to the agencies on the ground to determine the specific course of action. For example SC Res. 1244 did not spell out what the applicable law would be, nor did it specify the role of different UN agencies or NGOs. In other instances, the terms of the SC resolution are so vague as to fail to give an indication of the actual scope and nature of the UN involvement. Resolution 1181 (1998), which established the UN Observer Mission in Sierra Leone (UNOMSIL), regulated the peace-keeping component and contained a cursory reference to the role of the civilian staff, but no mention, let alone regulation, of the role of UNICEF and UNHCR - two agencies that ran key programmes in Sierra Leone at the time. When in August 1999 UNOMSIL was expanded, the Security Council simply stated that it authorised 'the strengthening of the political, civil affairs, information, human rights and child protection elements of UNOMSIL',¹¹⁴ but the detailed regulation of these activities was left to the staff on the ground. UNOMSIL became the UN Mission in Sierra Leone (UNAMSIL), when, with the Sierra Leonean crisis worsening, the Security Council acted under Chapter VII and further expanded the mandate of the UN mission.¹¹⁵ This time, some guidelines were given, and subsequent resolutions contained a relatively detailed indication of the main goals of the peace-keeping mission.¹¹⁶ The regulation of the civilian activities and of the activities of other UN agencies on the ground was in comparison scant, and the choice of means for pursuing the objectives was left to the bureaucracy on the ground. It could be argued that 'civilian' activities were undertaken with the consent of the government of Sierra Leone and their regulation did not need to feature in a resolution of the Security Council.

¹¹⁴ SC Res. 1260 (1999) at para. 6.

¹¹⁵ SC Res. 1270 (1999).

¹¹⁶ SC Res. 1289, 1299, 1313 (2000).

UN agencies have mounted important operations also outside the framework of peace-keeping. In these cases, no legal regulation of the operations, however generic, can be found in Security Council resolutions. One example is the UNICEF-led Operation Lifeline Sudan (OLS), which has organised the provision of humanitarian assistance in south Sudan since the early 1990s. In the 1990s, the Security Council condemned Sudan and, acting under Chapter VII, imposed sanctions in the aftermath of the attempted assassination of President Mubarak in Addis Ababa, for which the Sudanese government was blamed.¹¹⁷ The Council however did not regulate OLS, although it could have been argued that the protracted conflict in south Sudan warranted at least an intervention under Chapter VI. Neither the General Assembly nor the Economic and Social Council are normally forthcoming with providing a regulatory framework for these operations. When they do intervene, these organs usually limit themselves to short statements, commending the work of the UN agencies on the ground, and at times condemning certain actions of government or insurgents, particularly when they interfere with the delivery of relief or when they endanger the lives of humanitarian personnel. The paucity of regulation coming from the political organs of the UN has ensured greater autonomy and power for the UN bureaucracy.

The Secretary General has adopted a categorisation of UN interventions in the peace-keeping area that is conceptual rather than legal, and casts little light on the regulation of these various types of operations. Six main types of interventions have been identified: preventive diplomacy and peace-making; traditional peace-keeping; post-conflict peace-building; disarmament; sanctions; and enforcement action. Of these actions, the first three would require the consent of the affected state(s), while the last three can all be undertaken under Chapter VII (disarmament can be undertaken either as a consensual operation or as part of an enforcement action).¹¹⁸ Most of these operations would form part of an intervention under Chapter VI or VII, but, as acknowledged by the Secretary General, there are situations in which such operations are carried out entirely outside the umbrella of the Security Council. This can pose some problems,

¹¹⁷ SC Res. 1044, 1054 (1996) and 1070 (1996), the last two taken under Chapter VII.

¹¹⁸ *Supplement to an Agenda for Peace*, *supra* note 113 at para. 23.

The more difficult situation is when post-conflict (or preventive) peace-building activities are seen to be necessary in a country where the United Nations does not already have a peacemaking or peace-keeping mandate. Who then will identify the need for such measures and propose them to the Government? If the measures are exclusively in the economic, social and humanitarian fields, they are likely to fall within the purview of the resident coordinator. He or she could recommend them to the Government.¹¹⁹

An example of a large scale post-conflict peace-building operation in a country where no peace-keeping mission was in place is Rwanda after 1996. Although the UN Assistant Mission for Rwanda (UNAMIR) had had its mandate extended to include activities beyond the scope of 'classic' peace-keeping, with its withdrawal in March 1996¹²⁰ an inter-agency UN operation of post-conflict building remained in place albeit devoid of a Security Council mandate.

The six categories identified by the Secretary General are therefore not exhaustive of the operations that the UN in practice puts in place. In other cases, UN agencies continue to operate under their mandates and with the consent of the affected state. In such cases, the Memoranda of Understanding (MoU) concluded with the affected state should provide a regulatory basis. In practice all MoU tend to be similar, and reiterate privileges, immunities and exemptions of the international organisation, but normally have remarkably little to say about the actual conduct and the goals of the operation.

I.6. Conclusion: Autonomy v. Heteronomy

The traditional realist view is that international institutions, albeit endowed with legal personality under international law, do not possess real autonomy. They are controlled by the powerful states and are subservient to the interests of the main powers. Unfortunately, as mentioned, there is a paucity of empirical studies on decision-making in international institutions that can actually substantiate these claims.¹²¹

¹¹⁹ *Supplement to an Agenda for Peace*, *supra* note 113 at para. 55.

¹²⁰ SC Res. 1050 (1996).

¹²¹ It never fails to surprise me how unempirical most of the realist literature can be.

However, some in the international relations literature have critically re-assessed realist and statist assumptions, by tackling the two prongs of the realist attack against international law, that is scepticism both about the role of international institutions and of non-state actors, and about the ability of norms to influence the behaviour of states.¹²² Legal scholars for their part have contributed to this anti-realist offensive not only reiterating their deep-seated faith in the power of rules,¹²³ but also developing innovative – and at times empirical – approaches that attempt to demonstrate that norms and institutions do matter in international decision-making.¹²⁴

Other important contributions to the study of international organisations have highlighted the importance of bureaucratic elements and organisational culture. In particular, ‘drawing on long-standing Weberian arguments about bureaucracy and sociological institutionalist approaches to organizational behavior’, it has been argued that ‘the rational-legal authority that international organizations embody gives them power independent of the states that created them and channels that power in particular directions’.¹²⁵ The case studies at chapters IV and V of this thesis support these positions as they analyse situations in which the UN and its specialised programmes or agencies acted autonomously, even disregarding the will of the UN political organs.

It would be unwise however to generalise and conclude that the UN and other international institutions have developed the unfettered ability to act autonomously and that they challenge the interests of the most powerful states in all circumstances. In fact, states, especially the main powers, persevere with attempts to use the UN as an instrument of their foreign policy.¹²⁶ Thus, despite the distinct growth in their

¹²² See, for example, A. Klotz, *Norms in International Relations: The Struggle against Apartheid* (1995), and Risse, Ropp, Sikkink (eds.), *The Power of Human Rights: International Norms and Domestic Change* (1999), especially Risse’s and Sikkink’s Introduction ‘The Socialisation of International Human Rights Norms into Domestic Practices’ 1.

¹²³ E.g.: M. Byers, *Custom, Power and the Power of Rules* (1999) 15.

¹²⁴ E.g.: the new international legal process ‘school’ (O’Connell, ‘New International Legal Process’, 93 *AJIL* (1999) 334 at 336-7).

¹²⁵ Barnett and Finnemore, *supra* note 100 at 699. The authors correctly observe that, while international organisations are certainly constrained by states, ‘the notion that they are passive mechanisms with no independent agendas of their own was not borne out by any detailed empirical study of an international organization that we have found’ (at 705).

¹²⁶ According to Curtis, one of the primary foreign policy objectives of the leading Western states, and especially of the US and Britain was ‘to render the United Nations an instrument of their foreign

power and autonomy the instances in which international organisations succumb to the will of the most powerful states remain numerous. The sanctions against Iraq are a case in point. Notwithstanding the vocal opposition of the UN bureaucracy, particularly the humanitarian side of it,¹²⁷ sanctions against Iraq have remained in place owing to Anglo-American support, and to the attitude of other powers, such as France, Russia or China, which have at best been capable of only feeble opposition, but for the most part have acquiesced to the US-British position. It is still noteworthy however that UN officials did actually voice their criticism of the consequences of the Anglo-American policy. Various reports, like UNICEF's 1999 report on child mortality, were still issued and depicted a truthful and scathing account of the situation in Iraq.¹²⁸

This short digression shows that reality is far more complex than the claim that international organisations are weaklings to be defended against leviathan states would suggest. A 'power shift'¹²⁹ from states to international institutions has taken place and international organisations have developed over the years the capacity not only to act autonomously, but also to put in place multifunctional operations in which wide powers are exercised and in which they can have a direct impact on individuals. Reality has in some respects outpaced legal developments: the model for humanitarian actions was crystallised at a time when warfare was conducted in a very different manner; some of the founding principles of international institutional law, including the conferral of privileges and immunities on the institutions and on its

policies: serviceable as such when required; discarded when not.' (M. Curtis, *The Great Deception. Anglo-American Power and World Order* (1998) at 176). See also White, *supra* note 94 at 43.

¹²⁷ 'Former UN Official Decries Sanctions on Iraq', *The Guardian*, 27 Jan. 1999; 'Second Official Quits UN Iraq Team', *The Guardian*, 16 Feb. 2000.

¹²⁸ UNICEF-Ministry of Health (Iraq), 'Iraq Child and Maternal Mortality Survey 1999', July 1999. The reports of the human rights bodies of the UN, on the other hand, were disturbingly cautious. For example, in a country where hundreds of thousand of children are said to have died as a result of sanctions, the Committee on the Rights of the Child could only note 'that the embargo imposed by the Security Council has adversely affected the economy and many aspects of daily life, thereby impeding the full enjoyment by the State party's population, particularly children, of their rights to survival, health and education' ('Concluding Observations of the Committee on the Rights of the Child: Iraq, 26/10/1998', UN Doc. CRC/C/15/Add.94). For the rest, some of the Committee's extemporaneous recommendation to Iraq included the establishment of an independent mechanism for children to file complaints (which, incidentally, even wealthy states in the north still lack), the translation of the Convention into minority languages, training programmes for professional groups, the revision of welfare policies, the disaggregation of data collected following the guidelines set by UN specialised agencies, greater recognition of the role of NGOs like the National Federation of Iraqi Students and Youth, changes in citizenship law, etc.. None of these praiseworthy recommended steps would have had any effect on the single most important violation of children's rights in Iraq, i.e. the systematic violation of the right to life as a result of preventable or curable malnutrition-related deaths.

personnel, were consolidated at a time when international organisations still needed to be protected from the states. On the other hand, many of the important developments that have characterised institutional practice – the operational role and the direct impact on individuals - in the last decennia have not been mirrored by developments in the law.

¹²⁹ Mathews, 'Power Shift' , 76 *Foreign Affairs* (1997) 50.

CHAPTER II

The Applicability of International Human Rights Law to the UN

II.1. Introduction: Arguments for Applicability

Having outlined the key moments in the historical development of international institutions and of their engagement in humanitarian operations in the previous chapter, I now argue that international human rights law is binding on the United Nations (UN). From a legal point of view, the main obstacle to the applicability of human rights norms to the activities of the UN is the fact that the UN is not itself a party to human rights treaties – or indeed to humanitarian law ones. However, the legal obligations of the UN are not limited to those contained in the treaties to which they are party. This chapter examines other sources of legal obligations from which the applicability of human rights norms to the UN can be derived.

Firstly, international institutions possess international legal personality, which encompasses both rights and duties on the international plane. Particular attention is devoted to the legal personality of specialised agencies and specialised programmes of the UN, since they play an important role in the operations that are examined in chapters III and IV. Legal personality can form the basis for the application of human rights norms that have acquired customary status and for rules of *jus cogens*. In addition, the constituent instrument of the organisation regulates the terms of the legal personality of international organisations, not only conferring powers on them expressly as well as impliedly, but also forming the basis for institutional obligations.

Secondly, the fact that member states of international institutions have become parties to human rights treaties is not devoid of consequences for their collective action through multilateral institutions. In particular, the European Court of Human Rights has argued that, when functions are transferred to international organisations, state parties to the European Convention remain obliged to ensure respect for Convention rights. A corollary of this principle is that international institutions should not commit acts that could engage the responsibility of their member states.

The third argument, or basis, for the applicability of international human rights norms to institutional activities is policy considerations, namely the impact on international culture of the view that international organisations could operate unbound by human rights law.

Finally, the obligation to observe international norms for the protection of individuals may feature in the internal law of the organisations through the adoption of codes of conduct, resolutions and other instruments. The mandates of specific operations may also contain provisions on human rights. The way in which international norms are internalised is important because it gives an indication of how they will be operationalised in the work of the organisation; internal soft law can often be determinative of the actual behaviour of international organisations.¹

The applicability of the law of responsibility to international institutions is examined at the end of this chapter. Owing to the absence of systematic codification and to the paucity of case-law, institutional responsibility is an area of uncharted waters in many respects.

II.2. International Legal Personality

(a) Autonomy and legal personality

A legal person is in essence 'a right-and-duty bearing unit';² and legal personality is 'the capacity of being a subject of legal duties and legal rights, of performing legal transactions and of suing and being sued at law'.³

The discussion on the autonomy of international institutions, which concluded the previous chapter, is of some relevance to the question of legal personality. The link between autonomy and legal personality is important because it shows that international organisations 'deserve' their legal personality by virtue of the distinction of their powers and purposes from those of member states. In fact, Brownlie indicates

¹ An example of a clash between hard norms and their operationalisation is the provision of UN humanitarian assistance to Afghanistan examined in Chapter III.

² Maitland, quoted in Dewey, 'The Historic Background of Corporate Legal Personality', XXXV *Yale L. J.* (1926) 655 at 656. In this rare incursion in the legal field, the philosopher John Dewey also argued that 'person signifies what the law makes it signify' (at 655).

³ H. Kelsen *The Law of the United Nations* (1950) 329.

as criteria of legal personality the 'distinction, in terms of legal powers and purposes, between the organisation and its member states' and 'the existence of legal powers exercisable not solely within the national systems of one or more states'.⁴ Brownlie's position is premised on a conception of autonomy that would be opposed by realists, who would argue that an international organisation can satisfy these requirements and still enjoy only limited or even no effective autonomy from states. Realists normally view 'organisations simply as fora for attempting to resolve conflict of national interest, and therefore lacking distinct personality'.⁵ There are schools of thought that do not take such a radical view; in particular 'the functionalist, rationalist and conflictive (developing States') views ... put forward the idea that international organisations not only have a separate personality from the member states, but can and do have powers which States by themselves cannot have, although this is relatively rare'.⁶

For essentially practical reasons, the autonomy of an international organisation is normally presumed, and not based on a case-by-case factual assessment. Such presumption of autonomy characterises the notion of legal personality in other areas of the law too. For example, criminal liability, as well as the preclusion of certain rights under private law, can be excluded on grounds of age, insanity or intoxication, but only after proving that particular conditions have obtained.⁷ On the other hand, psychological or environmental factors that can in practice affect the psycho-social autonomy of an individual do not usually constitute sufficient grounds for departing from the presumption of autonomy.

The argument that an international institution should not be considered a legal person for any purpose in view of its complete heteronomy was considered in the *Phosphate Lands in Nauru* case in which the International Court of Justice (ICJ) held that the Administering Authority for Nauru 'did not have an international legal personality

⁴ I. Brownlie, *Principles of Public International Law* (5th ed., 1998) 679-680.

⁵ N. White, *The Law of International Organisations* (1996) 27. The implications of realism for international institutional personality are similar to those of determinism in the sphere of individual criminal responsibility. Realism and determinism maintain that the conduct of, respectively, an international institution and a person is determined by factors beyond their volitive control. These positions can lead to a significant reduction of the sphere of legal personality, and offer grounds for limiting or excluding responsibility for wrongful acts. On determinism and criminal responsibility, see H. L. A. Hart, *Punishment and Responsibility* (1968) 28 ff.

⁶ N. White, *supra* note 5 at 27.

⁷ A. Ashworth, *Principles of Criminal Law* (3rd ed., 1999) 210 ff.

distinct from those of the States'.⁸ The Administering Authority had been established under the Trusteeship over Nauru that the UN granted jointly to Australia, New Zealand and the United Kingdom in 1947, and that originated from a previous mandate of the League of Nations. The Court remarked that the Administrator 'was at all times appointed by the Australian Government and was accordingly under the instructions of that Government' and his acts 'were subject to confirmation or rejection by the Governor-General of Australia'.⁹

An institution that is autonomous can still be shown to have lacked autonomy in the performance of a particular act. In this case, it would be inappropriate to deprive the institution of its legal personality, but the validity of the act in question may be affected. For instance, a treaty concluded by an international organisation or a state under external coercion is invalid.¹⁰ Coercion is an extreme example of heteronomy. Other 'softer' or better disguised forms of heteronomy – such as political and economic pressure - do not usually have consequences on the validity of the act or on the personality of the organisation. From the point of view of the law of state responsibility, coercion *per se* does not preclude the wrongfulness of an act and the responsibility of the coerced state, but it does have the effect of making the coercing state internationally responsible.¹¹ The responsibility of an international organisation for wrongful conduct committed under coercion is an area in which autonomy can have important legal consequences. This is in essence the vexed question of 'lifting the veil', in which the law of legal personality and the law of responsibility become intertwined.¹² In the hypothetical case of an international organisation lacking any degree of autonomy, member states could be considered the 'real' legal persons behind the organisation and bear responsibility for its acts, but the ILC Special Rapporteur for State Responsibility has opined that such cases are 'inconceivable'.¹³ It

⁸ *Case Concerning Certain Phosphate Lands in Nauru* (Nauru v. Australia), Judgment (Preliminary Objections), ICJ Report (1992) 240 at 258.

⁹ *Phosphate Lands in Nauru*, *supra* note 8 at 257.

¹⁰ Arts. 52-53, Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (1986), 25 ILM 543, *not yet in force*.

¹¹ Art. 18, Draft Articles on State Responsibility provisionally adopted by the Drafting Committee of the International Law Commission on Second Reading (2001), UN Doc. A/CN.4/L.602 [hereinafter Draft Articles on State Responsibility].

¹² On the law of responsibility see II.6.

¹³ For this reason, he has recommended that Article 9 and 13 should be deleted to the extent that they referred to responsibility for the conduct of organs placed at the disposal of a state by an international organisation. International Law Commission, 'First Report (and Addenda) on State Responsibility by

does in fact appear that the interactions between member states and international organisations tend to be far more complex and that international institutions normally do have a minimum degree of autonomy even if this is limited to their constitutional powers shorn of any effectiveness. As for the argument, raised in the context of the International Tin Council litigation,¹⁴ that the relationship between a state and an international organisation can in some circumstances be described as one of agency,¹⁵ this argument would not imply by necessity that the institution is heteronomous. On the contrary, even under private law the agent is a legal person in his/her own right.¹⁶

(b) *International legal personality in international decisions*

The Permanent Court of International Justice had discussed the legal personality of international organisations in an advisory opinion on the International Labour Organisation.¹⁷ However, it was in the advisory opinion on the *Reparation* case that institutional legal personality was examined in a systematic fashion, this time by the ICJ and in regard to the UN.¹⁸ The General Assembly requested an opinion from the ICJ on the capacity of the UN to bring an international claim for damages caused against its employees and against the Organisation itself. In its opinion, the Court determined that the UN is endowed with international legal personality, because ‘the Organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane’.¹⁹ The UN is thus ‘a subject of international law and capable of possessing international rights and duties, and ... has capacity to maintain its rights by bringing international claims’.²⁰ The Court then considered whether ‘the sum of the international rights of the Organisation comprises the right to bring the kind of international claim described in the Request for this Opinion’.²¹ The Court answered this question in the affirmative, having had regard to the ‘purposes and

James Crawford, Special Rapporteur’, UN Doc. A/CN.4/490 at paras. 256-262; and ILC Report (1998), UN Doc. A/53/10 at paras. 414-15.

¹⁴ See below II.6(d).

¹⁵ C. Chinkin, *Third Parties in International Law* (1993) at 114-118.

¹⁶ See *infra* at 125 ff.

¹⁷ *Competence of the International Labour Organisation to Regulate, Incidentally, the Personal Work of the Employers*, Advisory Opinion, (1926) PCIJ Reports Series B, No. 13.

¹⁸ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports (1949) 174.

¹⁹ *Id.* at 179.

²⁰ *Ibid.*

²¹ *Ibid.*

functions as specified or implied in its constituent documents and developed in practice'.²²

As pointed out by Bowett, the pronouncement of the ICJ in the *Reparation* case can be construed as based on a circular notion of international legal personality: personality is inductively inferred from the existence of specific rights and duties, while at the same time the capacity of the organisation to bear a particular right or duty is deduced from its international legal personality.²³ In this sense international legal personality would be an essentially flawed concept with an exclusively descriptive validity, and it could be substituted with a case-by-case enquiry to determine if the organisation has a particular right or duty.²⁴

Rama-Montaldo has given a different reading of the *Reparation* case endeavouring to salvage the concept of international legal personality. He has argued that the Court adopted an objective and material approach to the question of personality, firstly by identifying certain objective structural prerequisites of international legal personality, and secondly by attaching to such personality 'precise legal consequences in regard to the potential activities of the organization'.²⁵ According to Rama-Montaldo, there are rights and duties 'that find their source in personality itself – like (...) : the rights to bring a claim, to negotiate, to conclude a special agreement, protest, request for an inquiry, etc.'²⁶ In addition to these rights and duties arising directly from legal personality, international organisations would be able to bear other rights and duties linked with the purposes and functions of the organisation.

The thesis that any international institutional person has a minimum of rights and duties that derive directly from its personality undoubtedly has its appeal, but the best case that can be made for it is that the ICJ did not entirely rule it out in the *Reparation*

²² *Id.* at 180.

²³ '... one might be tempted to deduce, say, a general treaty-making power, from the very fact of personality, even though personality is itself deduced from a specific treaty-making power' (D. W. Bowett, *The Law of International Institutions* (4th ed., 1982) at 337).

²⁴ This seems to be the view of E. Lauterpacht, who, commenting on the distinction between powers and personality, asks 'if it is in any event necessary to determine the scope of powers, what function is performed by the concept of personality?' (E. Lauterpacht, 'Development of Law of International Organization', in 152, IV RC (1976) 381 at 407).

²⁵ Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organisations', in XLIV BYBIL (1970) 111 at 116. Rama-Montaldo's views are shared by C. F. Amerasinghe (*Principles of the Institutional Law of International Organizations* (1996) 69-70 and 100-104).

case, although there is clearly no indication of an endorsement either. Indeed, in a decisive passage, the Court inferred the personality of the UN from the Convention on the Privileges and Immunities of the United Nations of 1946,²⁷ in a sense justifying Bowett's concerns about the circular nature of the notion of personality. The practical consequences of these juxtaposed views of international legal personality are not significant. Certain basic rights of international organisations, such as those alluded to by the Court in the *Reparation* case, can find a sound enough legal basis in the functions and powers vested upon the organisation by its constituent instrument,²⁸ without need to resort to the hermeneutically more convolute notion of inherent rights. As will be seen, however, different approaches can yield conflicting results in respect of the extent of the implied powers and the practice of the organisation.

The *Legality of Nuclear Weapons (WHO request)* case is the most recent case in which the ICJ discussed the international legal personality of international organisations.²⁹ The Assembly of the World Health Organisation (WHO) had requested an opinion from the Court on the legality of the use of nuclear weapons in armed conflict, and based this request on its constitutional powers.³⁰ The Court examined the scope of the Charter-based right of the WHO, as a specialised agency of the UN, to request an advisory opinion 'on legal questions arising within the scope of their activities' (Art. 96, II). The Court drew an unpersuasive distinction between the effects on health of the use of nuclear weapons, which would come under the competence of the WHO, and the question of the legality of the use of nuclear weapons, which formed the subject matter of the request and which, in its view, was not covered by the functions of the WHO as enumerated at Article 2 of its Constitution.³¹ This reasoning has been

²⁶ *Ibid.*, at 139.

²⁷ *Reparation*, *supra* note 18 at 179: 'It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality'.

²⁸ In the course of debates within the International Law Commission, it was observed that capacity and competence are two distinct concepts which should be kept separate (P. Bekker, *The Legal Position of Intergovernmental Organizations* (1994) at 88), whilst the proposed approach seems to conflate them. However, although the two terms are not normally inter-exchangeable on the plane of domestic law, for all practical purposes the capacity of an international organisation is indeed determined by its powers as derived from, or implied in the constituent instrument. Art. 16 of the Constitution of the Food and Agriculture Organisation (FAO) reflects this conceptual overlap of capacity and competence: 'The Organization shall have the capacity of a legal person to perform any legal act appropriate to its purpose which is not beyond the powers granted to it by this Constitution'.

²⁹ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (World Health Organization Request), Advisory Opinion, ICJ Reports (1996) 66, 110 ILR 1. See L. Boisson de Chazourmes, P. Sands (eds.) *International Law, the International Court of Justice and Nuclear Weapons* (1999).

³⁰ World Health Assembly Res. 46 (40), 14 May 1993.

³¹ *Nuclear Weapons – WHO Request*, *supra* note 29 at 75-76.

almost universally criticised, and even described as ‘formalistic, oversimplistic, cynical and even logically flawed’.³²

The Court also maintained that international institutions ‘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’.³³ Furthermore, although the implied powers of an organisation were considered, it was controversially held that the competence of the WHO to address the legality of the use of nuclear weapons could not be a necessary implication of its constituent instrument.³⁴ It was found that, as a result of the ‘logic of the overall system contemplated by the Charter’, the responsibilities of a specialised agency like the WHO could not be construed so widely as to allow them to encroach upon the responsibilities of other parts of the UN system, in particular the exclusive competence of the UN on ‘questions concerning the use of force, the regulation of armaments and disarmament’.³⁵ In his dissenting opinion, Judge Weeramantry was critical of this approach, which, in his view, denied the obvious interrelatedness of health and peace and the fact that health matters do normally overlap with concerns of peace and security.³⁶

The *Nuclear Weapons (WHO Request)* should not be regarded as representing a retrogression in the jurisprudence of the ICJ on international legal personality that will be decisive in future determinations of the rights and duties of international organisations.³⁷ Indeed, this case concerned a particular right of an international organisation, the duty-holder of which was the Court itself. The existence of this right was preliminary to the exercise of the Court’s jurisdiction, and the decision could also

³² Bothe, ‘The WHO Request’, in Boisson de Chazournes and Sands, *supra* note 29, 103 at 104. See also Akande, ‘The Competence of International Organisations and the Advisory Jurisdiction of the International Court of Justice’, 9 *EJIL* (1998) 437 at 447-448.

³³ *Nuclear Weapons – WHO Request*, *supra* note 29 at para. 25. Lauterpacht observes that principle of speciality is ‘an expression directly derived from French law’, which the Court employed without any ‘introductory or explanatory comment’ (Lauterpacht, ‘Judicial Review of the Acts of International Organisations’, in Boisson de Chazournes and Sands, *supra* note 29, 92 at 98-99).

³⁴ Elsewhere the Court used the expression ‘necessary intendment’ (*Effect of Awards of Compensation Made by the UN Administrative Tribunal*, Advisory Opinion, ICJ Reports (1954) 47 at 56-57).

³⁵ *Nuclear Weapons – WHO Request*, *supra* note 29 at para. 26.

³⁶ *Id.* at 133-134, 148 (diss. op. of Judge Weeramantry). Judge Koroma, also dissenting, emphasised that the question that the WHO had posed to the ICJ was not about the illegality of the use of nuclear weapons *per se*, but on the effects of such use on the state obligations related to the environment and health (*Id.* at 201, diss. op. of Judge Koroma).

be viewed as an example of judicial self-restraint on the part of the Court.³⁸ The ICJ also knew that it was going to address the issues raised in the WHO request as a result of the similar request for an advisory opinion by the General Assembly. More importantly, the Court was hamstrung by the adoption of a restrictive approach to the principle of speciality and to the interaction between the personality of the UN and that of its specialised agencies. It was assumed that the rights of the WHO must terminate where the rights of the UN begin, thus leaving no room for co-extensive activities in spite of existing practice. Hence, this opinion of the Court does not imply a narrow approach to international legal personality in general, and is actually premised on a generous construction of the legal personality of the UN at the expense of the personality of the specialised agencies.³⁹

A cogent indication of the Court's stance towards legal personality is to be found in the *Certain Expenses* case. This advisory opinion concerned the scope and meaning of the expression 'the expenses of the organisation' at Article 17, II of the Charter.⁴⁰ The Court had to determine the scope of a right of the UN – the right to have expenses covered by member states – to which corresponded a duty of member states, without consequences for the rights of other international organisations. Different states had submitted that they were not under an obligation to cover expenses for those peace-keeping operations that, in their view, had not been duly authorised. Hence, the Court also had to make a preliminary finding on the capacity of the UN to establish the peace-keeping operations in question. In its opinion, the Court recognised a large measure of personality to the UN. It held that the General Assembly had the right to establish the peace-keeping operations in question in spite of the lack of an express provision in the Charter, and that by doing so the Assembly had not 'usurped or

³⁷ Akande maintains that in this case the Court departed from its own previous jurisprudence (*supra* note 32 at 444).

³⁸ It would be difficult, however, to reconcile this reading of the Court's decision with the antecedent judgment in *Qatar-Bahrain* (Maritime Delimitation and Territorial Questions Between Qatar and Bahrain, Judgment, ICJ Report (1995) 6) in which the Court asserted its jurisdiction notwithstanding the manifest lack of consent to it of at least one party. In addition, as pointed out by the three dissenting judges in the *Nuclear Weapons* case, the precedents of the Court indicated that the Court normally exercises its judicial function, and refrains from delivering an advisory opinion only in extreme circumstances, such as, for example, the occurrence of irregularities. *E.g.* see: *Nuclear Weapons – WHO Request*, *supra* note 29 at 193 (diss. op. of Judge Koroma).

³⁹ See below 87 ff.

⁴⁰ *Certain Expenses of the UN*, Advisory Opinion, ICJ Reports (1962) 151.

impinged upon the prerogatives conferred by the Charter on the Security Council'.⁴¹ It was also found that the term 'expenses' did not refer only to 'regular expenses',⁴² and that internal irregularities in the establishment of the operations would not change the qualification of the expenditure as 'expenses of the organisation'.⁴³ In the view of the Court, the ultimate test for determining whether the 'expenses' were 'expenses of the organisation' was 'their relationship to the purposes of the UN' as set forth in Art 1 of the Charter.⁴⁴ Since the action in question 'was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such an action is not *ultra vires* the Organisation [sic]', and that, even 'if the action was taken by the wrong organ, it was irregular as a matter of that internal structure [of the organisation], but this would not necessarily mean that the expense incurred was not an expense of the Organisation'.⁴⁵

In spite of the 'backward step'⁴⁶ represented by the advisory opinion on *Nuclear Weapons (WHO Request)*, it does not seem too optimistic to assume that the more purposive and generous interpretation of the legal personality of international organisations that had characterised the previous case law of the ICJ will form the basis for future decisions. The view that emerges from this case law is that, rather than determining in abstract what the content of legal personality is, the better approach is to ascertain whether an international institution has sufficient personality for performing a certain act. The idea of personality 'with a variable content',⁴⁷ or personality for different purposes, may appear outlandish, because we tend to conceptualise legal personality having states in mind. However, whereas there is a general principle of equality of states - the corollary of which is equal personality for all states - no such principle exists for international institutions. In addition, the idea of a flexible legal personality suits the fact that international institutions often take on new functions in the course of their existence.

⁴¹ *Ibid.* at 177. The Court rejected the argument that there had been a violation of the Charter in the implementation of the resolution of the Security Council on the operations in the Congo, inasmuch as the Secretary General had determined which states were going to participate in the mission although such determination should be made only by the Security Council (*Ibid.* at 175).

⁴² *Ibid.* at 161.

⁴³ *Ibid.* at 168.

⁴⁴ *Ibid.* at 167.

⁴⁵ *Ibid.* at 167-169.

⁴⁶ Leary, 'The WHO Case: Implications for Specialised Agencies', in Boisson des Chazourmes and Sands, *supra* note 29, 112 at 127.

(c) *Legal personality of the Specialised Agencies and the Specialised Programmes*

The Charter identifies two fundamental prerequisites for specialised agencies: the constituent instrument must be a treaty, and the agencies must have 'wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health and related fields' (Art. 57, I). The first of these prerequisites excludes important organisations, such as the United Nations High Commissioner for Refugees (UNHCR), the United Nations Development Programme (UNDP), and the United Nations Children's Fund (UNICEF),⁴⁸ which, although entrusted with significant responsibilities both at the operational and at the policy-formulation level, were not established by treaty, but by resolutions of an UN organ, normally the General Assembly.⁴⁹ The legal status of specialised agencies, such as the Food and Agriculture Organisation (FAO), the International Monetary Fund (IMF), the World Bank, the International Labour Organisation (ILO) and WHO, 'is no different from that of other international organisations'.⁵⁰ Their special characteristic is the existence of a relationship agreement with the UN which spells out the terms of the co-ordinative and recommendatory role of the UN pursuant to Articles 58 and 63 of the Charter. While there is universal agreement on the proposition that specialised agencies have international legal personality,⁵¹ it is argued by some that the legal personality of specialised agencies, in contrast with that of the UN, is not opposable to non-member states.⁵²

⁴⁷ Bettati, 'Création et Personnalité Juridique des Organisations Internationales', in R. J. Dupuy, *A Handbook of International Organizations* (2nd ed., 1998) 33 at 53.

⁴⁸ Bowett's use of the term 'operational agencies' (Bowett, *supra* note 23, at 57) to describe these programmes seems appropriate, while Conforti's claim that the UN remains primarily a normative rather than an operative entity is out of line with institutional practice and historical developments (B. Conforti, *Le Nazioni Unite* (5th ed., 1994), at 236).

⁴⁹ UNDP: GA Res. 2029 (XX), 22 November 1965; UNHCR: GA Res. 428 (V), 14 December 1950; UNICEF: GA Res. 57 (I), 11 December 1946. An interesting case is that of the UN Industrial Development Organisation (UNIDO) which was initially established as subsidiary organ of the General Assembly and was later transformed into a specialised agency (Bretton, 'La transformation de l'ONUDI en institution spécialisée', 25 *AFDI* (1979) 567). In the humanitarian field, another important organisation established as a subsidiary organ by the General Assembly (GA Res. 302 (IV), 8 December 1949) is the UN Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA).

⁵⁰ Meng, 'Article 57', in Simma, B. Simma (ed.) *The Charter of the United Nations: A Commentary* (1995) 796 at 800.

⁵¹ *E. g.*: Brownlie, *supra* note 4, at 680; A. Verdross and B. Simma, *Universelles Völkerrecht* (3rd ed., 1984) 180.

⁵² Meng, *supra* note 50, at 800-801. The opposability of the UN's international personality to non-member states was addressed by the Court in the *Reparation* case. Judge Kryzov in his dissenting opinion opted for an objective approach which echoed the declaratory doctrine of recognition of states. He argued that an international organisation possessing certain minimum requirement ought to be recognised by all other actors, including non-member states (*Reparation*, *supra* note 18, at 218-219). However, the Court was more cautious and insisted on the fact that 'fifty states, representing the vast majority of the members of the international community had the power, in conformity with

Prerequisites for the lawful establishment of a subsidiary agency are that an UN principal organ has established it in accordance with the Charter, and that the parent organ exercises some control over its subsidiary.⁵³ The parent organ has the power to revise, and even to revoke, the mandates of the subsidiary agencies.⁵⁴ The World Food Programme (WFP) is a special case in that it has two parent organs, the UN General Assembly and FAO.

The fact that specialised programmes are endowed with legal personality is expressly recognised in some constituent instruments, for example in WFP's General Regulations.⁵⁵ But it is widely accepted that, even where similar provisions do not feature, by virtue of their organisational structure and of the functions they perform, specialised programmes possess a degree of international legal personality, albeit derivative rather than primary.⁵⁶ The mandates of the specialised programmes spell out the terms of their relationship of subsidiarity with other UN organs, normally the General Assembly and the Economic and Social Council. For example, UNHCR is mandated to follow 'policy directives' of the General Assembly and of the Economic and Social Council, and can engage in other activities, 'such as repatriation and

international law, to bring into being an entity possessing objective international personality, *and not merely personality recognized by them alone...* [emphasis added]' (*Ibid.* at 185). The position of the Court could be interpreted as implying that the personality of other non-universal organisations, such as regional or functionally limited international organisations, would not be opposable to non-member states.

⁵³ Sarooshi, 'The Legal Framework Governing United Nations Subsidiary Organs', LXVII *BYBIL* (1996) 413 at 416. Sarooshi adds that the subsidiary organ has to have such a degree of independence from the parent organ as to warrant its 'separateness' as an entity from the parent organ. This, however, is a logical requirement rather than an additional prerequisite of lawfulness.

⁵⁴ For example, UNHCR's mandate is renewed by the General Assembly every five years (G. S. Goodwin-Gill, *The Refugee in International Law* (2nd ed., 1996) 214 fn 41). The General Assembly has also modified and expanded UNHCR's mandate in the course of the years, for example to include some responsibilities for providing assistance to internally displaced persons (*Ibid.*, at 264 ff).

⁵⁵ GA Res. 1714 (XVI), 19 December 1961, and in FAO Conference Res. 1/61, 24 November 1961.

⁵⁶ For example, the General Regulations of WFP state that the 'Programme (...) shall, *drawing on* the legal personality of the United Nations, have legal capacity...' (emphasis added). Some trace the ultimate legal source of their personality in Art. 104 of the Charter conferring personality on the UN (Rudolph, Seidl-Hohenveldern, 'Article 104', in Simma, *supra* note 50, 1125 at 1131). Goodwin-Gill states that 'clearly, by derivation and by intention, UNHCR does enjoy international personality' (Goodwin-Gill, *supra* note 54 at 216). On the personality of UNRWA, see: Dale, 'U.N.R.W.A. – A Subsidiary Organ of the United Nations', 23 *ICLQ* (1974) 576. In support of the legal personality of subsidiary organs, see Brownlie, *supra* note 4, at 62 and 680. Recent practice that bespeaks the international legal personality is the conclusion of agreements by the *ad hoc* Tribunals with states for the detention of individuals sentenced by the Tribunals (See, for example, the agreements of the International Criminal Tribunal for Rwanda with Benin and Mali, Fact Sheet no. 7, at www.ictt.org). A restrictive view of the extent of the legal personality of subsidiary organs is held by Hilf, 'Article 22', in Simma, *supra* note 50, 380 at 389.

resettlement, as the General Assembly may determine'.⁵⁷ UNICEF, on the other hand, must act 'in accordance with such principles as may be laid down the by the Economic and Social Council and its Social Commission'.⁵⁸ Rules of treaty interpretation do not apply to the interpretation of these mandates given that they are acts of an UN organ and not treaties 'having certain special characteristics'.⁵⁹

The authority and control that parent organs can exercise on their subsidiary agencies should not obscure the fact that subsidiary agencies may enjoy a large measure of autonomy. Indeed, in the *Effect of Awards* case the ICJ even accepted that in principle the decisions of the UN Administrative Tribunal - a subsidiary organ of the General Assembly - can bind the General Assembly itself, as long as the General Assembly had intended to confer these powers on the Tribunal.⁶⁰ The degree of autonomy that subsidiary agencies concretely possess depends on the terms of their mandates, but also on institutional practice. In particular, the creation of a professional civil service and the process of bureaucratisation have contributed to buttressing the autonomy of the specialised programmes. With time these programmes have developed distinct institutional identities and organisational ethoi, while inter-agency competition often characterises their interactions.⁶¹ The size of their staff, their budget, the range and importance of the operations they lead are by now often larger than those of the putatively more autonomous specialised agencies.⁶² The field offices of UNHCR or UNICEF, with their display of agency's flags, pictures of the head of the institution, and various gadgets and posters with the institutional logo, visually illustrate these developments. Specialised programmes, like other international organisations, have thus grown more powerful as a result of the concurrent affirmation of 'the legitimacy

⁵⁷ GA Res. 428 (V) at paras. 3 and 9.

⁵⁸ GA Res. 57 (I) at paras. 3 (a) and 9.

⁵⁹ *Certain Expenses*, *supra* note 40, at 157.

⁶⁰ *Effect of Awards* case, *supra* note 34, at 60-61.

⁶¹ Barnett and Finnemore, 'The Politics, Power and Pathologies of International Organizations', 53 *Int. Org.* (1999) 699 at 704 ff.

⁶² A differentiation between specialised agencies and specialised programmes in terms of budget and functions is therefore not possible (Dagory, 'Les rapports entre les institutions spécialisées et l'organisation des Nations Unies', 73 *RGDIP* (1969) 286 at 291). UNICEF, for example, had 5827 employees and a budget of nearly US\$ 1 billion in 1998 (<http://www.unicef.org/emerg>). UNHCR had 5200 staff members and a budget of US\$ 1,27 billion in 1999 (<http://www.unhcr.ch/un&ref/numbers/numbers.htm>). FAO, on the other hand, which is a specialised agency, had 4,300 members staff and a biennial budget of US\$ 650 million in 1998-1999 (<http://www.fao.org/UNFAO/WHATITIS.HTM>). WFP's budget was larger than that of one of its parent bodies, FAO (US\$ 1,4 billion in 1999, <http://www.wfp.org/info/Intro/donors/index.html>).

of the rational-legal authority they embody' and of 'control over technical expertise and information'.⁶³

An important difference between specialised agencies and specialised programmes remains that the latter rely principally on voluntary contributions from states to finance their operations and are therefore potentially more susceptible to pressure from donor countries.⁶⁴ It would be wrong to conclude, however, that specialised programmes are more easily manoeuvrable by states; on the contrary, it may often be easier for them to evade the political control of states.⁶⁵ Whereas the plenary organs of specialised agencies include representatives of member states and are usually entrusted with a function of control and general policy-making, specialised programmes are not constitutionally subject to forms of direct control by member states. Their conduct is subject to indirect scrutiny by states through the parent organ, usually the General Assembly, or the Economic and Social Council.⁶⁶

The General Assembly tends to discharge its functions of control over subsidiary agencies in a cursory manner. For example, with respect to UNHCR, Goodwin-Gill has observed that its resolutions are 'rarely consistent in their language, and their rationale, too, is often hidden'.⁶⁷ He has underscored the 'after the event' nature of the interventions of the General Assembly simply to rubber-stamp changes in institutional practice and competence that have already occurred. The General Assembly therefore seems to have 'established subsidiary organs that act as specialised agencies without having that qualification'.⁶⁸ As is discussed elsewhere, the erosion and/or abdication of responsibilities on the part of the political organs of the UN, and the attendant empowerment of the institutional bureaucracy is a phenomenon of great practical significance.⁶⁹ Seen in this light, the practice of the General Assembly seems incongruous: in the area of standard-setting, it stretches its role to the limit, or even

⁶³ Barnett, Finnemore, *supra* note 61 at 707.

⁶⁴ An important difference between specialised agencies and subsidiary agencies is that contributions to the latter are on a voluntary rather than treaty-based assessed basis (see D. Williams, *The Specialised Agencies and the United Nations* (1987) at 43).

⁶⁵ See Chapter V.4.

⁶⁶ White observes that, while specialised agencies have a reporting obligation to the Economic and Social Council, specialised programmes, like UNDP and UNCTAD, have not only grown very autonomous but they have often become rivals of the Economic and Social Council (White, *supra* note 6 at 146).

⁶⁷ Goodwin-Gill, *supra* note 54, at 11, and at 15 fn 61.

⁶⁸ Dagory, *supra* note 62 at 291.

beyond the feasible limit, by adopting a plethora of resolutions on the most disparate subjects and contributing to the development of a rich body of soft law, which according to some aids the governance of globalisation;⁷⁰ on the other hand, the General Assembly fails to exercise its constitutional powers in the area of institutional governance and leaves unencumbered latitude to the programmes it has established, although in this case it would have the instruments to play a more significant role.

As has been seen, the restrictive approach to the position of specialised agencies vis-à-vis the UN that was adopted in the *Nuclear Weapons (WHO Request)* hinged upon the notion that there can be no functional overlap between the UN and its specialised agencies. This reasoning, which would apply *a fortiori* to specialised programmes, is at variance with much institutional practice, especially in the humanitarian field, where functional overlap is not only accepted but recurrent. The Court gave little regard to the consequences of its reasoning: if the WHO is not even permitted simply to request an advisory opinion from the Court because this could encroach upon the UN's prerogatives, does it not follow that - to give only one example - statements of UNICEF, UNDP or UNHCR officials that denounce violations of humanitarian law and that have not been sanctioned by the UN are *ultra vires*? This position would be unsustainable and would paralyse the work of UN agencies and programmes particularly in situations of conflict. Furthermore, it has been correctly pointed out that such a rigid attitude to the division of functions and responsibilities among various international organisations could undermine co-operation among agencies.⁷¹

It is not the sheer functional overlap that should be of concern but the functional overlap accompanied by contradictory practice, as is the case when a specialised agency or programme acts in a manner that contradicts antecedent acts or practice of other bodies of the UN. For example, a number of operational agencies of the UN have entered into agreements not only with insurgents in effective control of territory - such as the Rahanwein Resistance Army (RRA) in Somalia and the Sudan People's Liberation Army (SPLA) in south Sudan - but also with non-recognised entities

⁶⁹ See, for example, Barnett and Finnemore, *supra* note 61. See also Chapter I.6.

⁷⁰ O'Connell, 'The Role of Soft Law in a Global Order', in D. Shelton (ed.), *Commitment and Compliance* (2000) 100 at 102.

⁷¹ Akande, *supra* note 37 at 450-451. Critical is also Leary, *supra* note 46 at 119-120.

claiming statehood, like Somaliland.⁷² Although there is no Security Council resolution imposing a duty of non-recognition of Somaliland – as is the case for northern Cyprus – no member state of the UN has thus far recognised Somaliland. It could thus be argued that the UN should have refrained from acts implying recognition of Somaliland. On the other hand, to justify this practice it could be submitted that these agreements are meant to ensure the provision of essential humanitarian assistance and do not imply recognition.

(d) *Identifying the duties of international organisations*

The existence of a legal duty to observe human rights or humanitarian law cannot be derived *tout-court* from the sheer conferral of international legal personality on the UN. Such an inference would be a *non sequitur*, since international legal personality simply involves the capacity to bear rights and duties, but does not imply *per se* the existence of specific legal duties.⁷³ Even if one shares Rama-Montaldo’s views on the existence of rights and duties inherent to international legal personality, the logical nexus between the conferral of legal personality and specific duties would still need to be established. In other words, the fact that subject A has sufficient capacity to bear duty X does not mean that A is automatically bound by X; or, to give an example from private law, whereas there is no doubt that corporate personality could in principle encompass an obligation to invest part of the profits of the company in a particular manner, whether this obligation actually exists or not is a different matter.

Existing case law does not offer clear-cut guidance on how to go about the determination of the specific duties of the UN. Although the ICJ observed that ‘attendant duties and responsibilities’ flowed from the ‘entrusting of certain functions’ to the UN,⁷⁴ in practice its decisions have dealt with specific rights of the ILO, the

⁷² E.g.: the tripartite Agreement on the Implementation of Principles Governing the Protection and Provision of Humanitarian Assistance to War Affected Civilian Populations, between the Government of Sudan, the Sudan Peoples’ Liberation Movement (SPLM) and the UN-Operation Lifeline Sudan (OLS), signed in Geneva, 15 December 1999, available at www.reliefweb.int. This is part of a series of tripartite and bilateral agreements concluded by OLS in the context of the conflict in Sudan. While these agreements do not normally contain a clause that explicitly states that they are binding agreements regulated by international law, they do contain numerous references to international law but none to the domestic law of Sudan. As a result not only of these textual elements, but also of the intention of the parties, the alternative – that these agreements are contracts regulated by Sudanese contract law, or by administrative law given the involvement of the government – does not seem at all plausible.

⁷³ On this, see, for example, H. G. Schermers, N. M. Blokker, *International Institutional Law* (3rd ed., 1999) at 981.

⁷⁴ *Reparation*, *supra* note 18 at 179.

UN, and the WHO.⁷⁵ The dearth of judicial decisions on the duties of the UN is not so surprising, as UN organs and specialised agencies are likely to make use of the advisory jurisdiction of the Court to invoke their rights rather than to request clarifications on their duties.⁷⁶

It is still worth surveying the handful of indirect references to duties of international organisations that can be found in the sparse case law of the ICJ. In the *Effect of Awards* opinion, the Court justified the establishment of the UN Administrative Tribunal by the General Assembly notwithstanding the absence of an express provision in the Charter in the following terms,

It was inevitable that there would be disputes between the Organization and staff members as to their rights and duties (...) The Charter contains no provision which authorizes any of the principal organs of the United Nations to adjudicate these disputes, and Article 105 secures for the United Nations jurisdictional immunities in national courts. It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between and them.⁷⁷

The question that had been put to the Court was whether the General Assembly had the power to establish the UN Administrative Tribunal. In response, the Court reasoned that, since the General Assembly *had* to provide *some* remedy, it was empowered to provide the particular remedy in the form of the UN Administrative Tribunal. The Court did not overtly state that the UN was under an ‘implied duty’ to provide a remedy to its own staff for the settlement of disputes, but it did assert that

⁷⁵ The judgment in the *Reparation* case does not deal with specific institutional duties. One incidental reference, however, is to the duty of the Organisation to remind member states of certain obligations (*Reparation*, *supra* note 18, at 179).

⁷⁶ In addition, the paucity of litigation, as well as scholarly analysis, on institutional duties can be explained in the context of the challenges historically faced by international organisations in a state-dominated world. Perpetuating this attitude today, however, would mean to deny that international society has entered into a new phase in which once marginal actors, like international organisations and non-governmental organisations, play a central role and have significant powers (J. Mathews, ‘Power Shift’, 76 *Foreign Affairs* (1997) 50).

⁷⁷ *Effect of Awards*, *supra* note 34 at 57.

failure to provide such remedy would be incompatible with the Charter, and thus constitute a violation thereof.

In another decision the ICJ made an explicit, albeit curt, reference to the obligations of international organisations. In the *Interpretation of Agreement* case, it found that ‘international organizations are subjects of international law, and, as such, *are bound by any obligations incumbent upon them under general rules of international law*, under their constitutions or under international agreements to which they are parties’ (emphasis added).⁷⁸ The expression ‘general rules of international law’ includes at least custom and *jus cogens*.⁷⁹ The applicability of customary rules to international organisations is also recognised, albeit implicitly, in Article 38 of the Vienna Convention on Treaties between States and International Organisations, and between International Organisations themselves,⁸⁰ while Article 53 expressly confirms the subjection of international organisations to *jus cogens*. There are, however, two grounds that could justify the non-applicability of specific rules of general international law to international organisations. Firstly, the organisation may not concretely exercise such functions as to warrant the existence of certain obligations. Secondly, the constituent instrument, or any other international agreement, may expressly exempt the organisations from particular obligations.⁸¹ Similar arguments apply to the obligation of specialised agencies and specialised programmes to comply with international customary law and *jus cogens*. Specialised programmes, in particular, cannot be endowed with more rights – i.e. the right to act free from obligations in the human rights and humanitarian sphere - than their parent organs possess on account of the general principle, *nemo plus iuris in alium transferre potest quam ipse habet*.

As for obligations that cannot be based on ‘general rules of international law’, the starting point must be the statement in the *Reparation* case that ‘rights and duties [of the organisation] will depend upon its purposes and functions as specified or implied

⁷⁸ *Interpretation of the Agreement of March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports (1980) 73 at 90. See also Judge El-Erian’s independent opinion at 168.

⁷⁹ See also Schermers and Blokker, *supra* note 73 at 824.

⁸⁰ Art. 38, Vienna Convention, *supra* note 10, reads: ‘Nothing in Arts. 34-37 precludes a rule set forth in a treaty from becoming binding upon third states and third organizations as a customary rule of international law, recognised as such’.

⁸¹ The constituent instrument, like any other treaty, could contain provisions that are different from existing customary rules, but, in case of conflict between a rule of *jus cogens* and a treaty provision, the former prevails (Art. 53, Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331).

in its constituent documents and functions in practice'.⁸² Leaving aside the fact that many rules of human rights and humanitarian law are customary in nature, there are two other ways of proving that the UN is bound by the whole body of human rights and humanitarian law. It must be demonstrated that either human rights and humanitarian law obligations expressly feature in the Charter,⁸³ or that such obligations are in a sense 'implied duties' of the organisation, which are necessary for the fulfilment of its purposes and the discharge of its functions.

The Charter contains a number of direct references to human rights that provide a legal basis for the applicability of human rights law to the activities of the UN. Of particular importance is the fact that one of the purposes of the UN, as enumerated at Article 1, is to promote and encourage 'respect for human rights and for fundamental freedoms'. It would be impossible for the UN effectively to promote and encourage respect for obligations by which it does not consider itself bound and which it sets out to violate. Furthermore, the Charter explicitly obliges the Security Council, in discharging its duties, 'to act in accordance with the Purposes and Principles of the United Nations' (Art. 24, 2). Human rights do not feature in Article 2 of the Charter, which lists the principles regulating the action of the organisation and of its members, but this omission is not material. Indeed, in spite of its opening sentence,⁸⁴ Article 2 is directed at member states rather than at the Organisation itself. Of the seven principles therein listed, only the duty to ensure that non-member states act in accordance with the principles and the principle of non-intervention in matters within the domestic jurisdiction of states apply also to international organisations, while all the others pertain typically to states. Furthermore, Article 2 does not provide an exhaustive set of rules for the organisation, and some of the legal obligations that derive from these principles are fleshed out in other provisions of the Charter.⁸⁵

Article 55 of the Charter specifies the purposes enumerated at Article 1. It asserts that the UN shall 'promote' *inter alia* 'universal respect for, and observance of (*respect effectif*), human rights and fundamental freedoms for all without distinction as to race, sex,

⁸² *Reparation*, *supra* note 18 at 180.

⁸³ An international organisation cannot obviously be a party to its own constituent instrument, but this can nonetheless create binding obligations on the organisation. This argument is developed in detail by Chinkin, *supra* note 15 at 94-96.

⁸⁴ 'The Organisation and its Members, in pursuit of the purposes stated in Article 1, shall act in accordance with the following principles...'

language or religion'. On the one hand, the use of the word 'promote' – rather than 'ensure' or 'secure' – bespeaks the inevitably programmatic nature⁸⁶ of this obligation since the UN was not going to be empowered to enforce human rights the world over; on the other hand, 'universal respect' and 'observance' are robust terms – and the locution *respect effectif* used in the French text even more so. Again, the duty to respect and observe human rights in its activities is an implied and indispensable premise for the successful promotion by the UN of effective compliance with human rights in the practice of its member states. Paraphrasing the aforementioned passage in the *Effect of Awards*,⁸⁷ it could be observed that, since disputes on the fundamental rights of individuals are bound to arise in the course of UN operations, it would hardly be consistent with the expressed aim of the Charter to promote freedom and justice and with the constant preoccupation of the UN to do the same if the UN were allowed to act without regard to human rights and humanitarian law.

In dealing with the now defunct Trusteeship system, Chapter XII of the Charter gives prominence to 'respect for human rights and for fundamental freedoms' (Art. 76). Although trust territories no longer exist, it is evident from these provisions that under the Charter the exceptional exercise of governmental authority by an entity other than the member state to which the territory belongs is to be accompanied by certain duties, which, incidentally, also include the obligation 'to promote the political, economic, social and educational advancement of the inhabitants' of the territory (*Ibid.*). It is reasonable to assume the applicability of similar standards to the UN in all situations in which it exercises administrative functions.

Identifying obligations that are 'implied' in the constituent instrument and in the practice of the organisation requires an even more demanding interpretative effort. This is especially so because, as mentioned, the method for fleshing out the legal personality of international organisations has been developed having the 'rights' of the organisations in mind rather than their 'duties'. One can only attempt to apply this method *mutatis mutandis* to institutional duties, but little help is found in scholarly

⁸⁵ Randelzhofer, 'Introduction to Article 2', in Simma, *supra* note 50, 72 at 73.

⁸⁶ Partsch, 'Article 55 (c)', in B. Simma, *supra* note 50, 776 at 780.

⁸⁷ *Supra* note 77.

writings because, with a few exceptions,⁸⁸ most authors have also concentrated on the rights of international organisations.

Another difficulty is that the scope of 'implied powers' is also quite controversial. The Permanent Court of International Justice considered the extent of the implied powers of the ILO in an advisory opinion. It recognised the implied power of the ILO to provide an incidental regulation of the work of employers, regardless of the lack of an express reference to employers in the constituent instrument of the ILO.⁸⁹ The Permanent Court explained that this power was consistent with the institutional goal of assuring humane conditions of labour and the protection of workers, and that 'a limitation of the powers of the International Labour Organization, clearly inconsistent with the aim of the scope of Part XIII [of the Treaty establishing the organisation] (...) would have been expressed in the Treaty itself.'⁹⁰ It could be inferred from this passage that powers necessary to the fulfilment of the institutional purposes can always be implied, unless they are expressly excluded from the constituent instrument. But in the *Reparation* case the ICJ fine-tuned this position by making reference to 'those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties' (*fonctions* in French). A number of judges dissented from the majority on the question of implied powers, most notably Judge Hackworth, who uttered a series of cautionary remarks on the use of implied powers.⁹¹

Writers' views on the acceptable extent of implied powers have also differed. Seyersted has argued in favour of a large measure of implied powers. He maintains that international organisations have inherent rights and that the fact that they exercise territorial and personal jurisdiction to a more limited extent than states is due to a difference of fact between international organisations and states, and not to differences in their inherent legal capacity. He thus concludes that an international organisation can perform any act as long as it is not expressly forbidden by its

⁸⁸ C. Eagleton, 'International Organisation and the Law of Responsibility', 76 RC (1950) 323 at 385 ff. Some have simply acknowledged that these areas are 'uncharted seas' (Morgenstern, 'Legality in International Organizations', XLVIII BYBIL (1976-77) 241 at 253).

⁸⁹ *Competence of the ILO*, *supra* note 17.

⁹⁰ *Competence of the ILO*, *supra* note 17, at 18.

⁹¹ *Effect of Awards*, *supra* note 34 at 80 (diss. op. Judge Hackworth). He also dissented on similar grounds in *Reparation*, *supra* note 18 at 198.

constituent instrument.⁹² It is not necessary – in his view – ‘to look for specific provisions in the constitution, or to resort to strained interpretations of texts and intentions, or to look for precedents or other constructions to justify legally the performance by an intergovernmental organisation of a sovereign or international act not specifically authorised in its constitution’.⁹³

Perhaps the most helpful approach to the theory of ‘implied powers’ is to view it as ‘nothing but an interpretative directive of the constituent instruments of international organisations’.⁹⁴ Such interpretative directives would apply equally for the identification of rights or powers of international institutions, and of their duties. In fact, although the question of institutional duties has not been tackled systematically, there would almost certainly be general agreement on the proposition that institutional duties are not simply limited to those based on the constituent instrument. For example, legal writers unanimously acknowledge that – to give a paradigmatic example of international legal obligations – the law of responsibility applies, *mutatis mutandis*, to the UN in spite of no express mention of this in the Charter.⁹⁵ Another example of ‘implied duties’ of the UN is the obligation to respect humanitarian law. Chapter VII of the Charter gives the UN the power to use force, and the exercise of these functions is to be accompanied by the obligation to respect the laws of warfare, as, in the words of the ICJ quoted above, functions were entrusted to the UN ‘with the attendant duties and responsibilities’.

To summarise, as a result of international legal personality, international organisations have the undisputed capacity to carry obligations in the human rights and humanitarian sphere. The specific sources of obligation can be found in the constituent instrument, in treaties to which they have become parties, but often result from the purposes and functions of the organisations. With respect to custom, it could be remarked that international organisations play a marginal role in the formation of custom, their exclusion being one of the enduring legacies of a state-

⁹² Seyersted, ‘International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend upon Their Constitutions?’, 4 *Indian J. Int. L.* (1964) 1 at 20-25.

⁹³ *Ibid.*, at 22.

⁹⁴ N. Q. Dinh, P. Daillier, A. Pellet, *Droit International Public* (6th ed., 1999) at 598. A similar position is in Verdross, Simma, *supra* note 51 at 494-495.

⁹⁵ See *infra* p. 113 ff.

centred international legal order.⁹⁶ It may appear unfair that international organisations have to respect norms to the formation of which they have not contributed, but the same was expected of states that became independent in the post-colonial period. It would be far less desirable to have a category of ever more powerful actors in the international arena exempted from respect of custom.

II.3. The Effects of Member States' Obligations on Institutional Duties

Legal personality alone cannot justify the applicability to international organisations of rules that have not acquired customary status, unless they feature, expressly or impliedly, in the constituent instrument.⁹⁷ Given that such organisations 'hitherto ... have been accepted as parties to multi-lateral law-making treaties only exceptionally',⁹⁸ the problem of the applicability to international organisations of treaty standards is not only theoretical. The widespread reluctance to include international institutions as parties to human rights treaties was confirmed in Opinion 2/94 of the European Court of Justice, which held that the European Community did not have the competence to accede to the European Convention of Human Rights emphasising that the 'institutional implications' of accession to the European Convention would have 'constitutional significance'.⁹⁹ This decision is anachronistic considering that the European Community actively promotes respect for human rights in its external relations, including its commercial policies.¹⁰⁰ If the European Community does not have the competence to enter into human rights agreements, would its credibility as a promoter of human rights in its external relations not be affected?

The European Community is a powerful international institution, which its constituent instrument endows with a high measure of legal personality and of

⁹⁶ International organisations can however play an important role in the identification of custom, most notably the International Law Commission as part of its mandate to contribute to the progressive codification of international law.

⁹⁷ For example, the European Court of Justice has held that, since the European Community is not a party to the Vienna Convention on the Law of Treaties, it cannot be bound by its terms except for those rules in the Convention which have acquired customary status (Case C-162/96, *A. Racke GmbH and co. v. Hauptzollamt Mainz*, [1998] 3 CLMR 219 at 227).

⁹⁸ Schermers and Blokker, *supra* note 73, at 984.

⁹⁹ *Opinion 2/94* [1996] ECR I-1759, at para. 36. However, the European Court of Justice has affirmed in other cases that 'the European Community must respect international law in the exercise of its powers' (Case C-286/90, *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.*, [1992] ECR I-6019 at para. 9), and that a Community act adopted in manifest violation of a rule of customary international law can be annulled (*Racke*, *supra* note 97 at 245-246).

autonomy from member states. The interpretation of its competence in Opinion 2/94 could *a fortiori* apply to less powerful international organisations. At present, there is no recognisable international effort to promote the accession of international organisations to human rights or humanitarian law treaties; it is an effort that neither states nor international organisations have an interest to undertake.

The conclusion that the human rights obligations incumbent upon international organisations are limited to the 'minimum common denominator' of customary law remains, to say the least, disturbing. However, the argument that humanitarian and human rights law treaty standards should bind the UN *ipso facto* appears to clash with the consensualist foundations of contemporary international law: treaties to which an international organisation is not a party are *res inter alios acta*.¹⁰¹ It is certainly no coincidence that the ICJ in the *Interpretation of Agreement* case, when listing the sources of binding obligations for international organisations, only mentioned the agreements to which they are parties.¹⁰² While even the most rigid consensualist would accept that there is one category of treaties, i.e. constituent instruments, that bind international organisations although they are not parties to them, this still seems to be a logical exception rather than a falsification of the consensualist principles. As in the case of custom, it would be similarly ironic if the marginalisation of international organisations from the international legal process were to result in an outright exemption from certain obligations. Moreover, as Schermers and Blokker appropriately observed, "Their [international organisations'] general abstention from becoming such parties cannot therefore be interpreted as a desire not to be bound. In considering the question whether an international organization is subject to rules of treaty law, one cannot start from the hypothesis that this is not the case unless the organization expressly bound itself."¹⁰³ A 'proper' consensualist and statist approach, in other words, would also imply that international organisations are bound by certain treaty standards, since after all it is the consent of states that is the basis of the whole system.

¹⁰⁰ On the human rights policy of the European Community, see Brandtner and Rosas, 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice', 9 *EJIL* (1998) 468.

¹⁰¹ Chinkin, *supra* note 15, at 89.

¹⁰² *Interpretation of Agreement*, *supra* note 78.

¹⁰³ Schermers and Blokker, *supra* note 73 at 984.

The arguments developed by the European Court of Human Rights in the *Matthews* case are useful at this point. The applicant, a resident in Gibraltar, contended that her rights under Article 3, Protocol No.1,¹⁰⁴ had been violated because the EC Act on Direct Elections of 1976 limited the franchise for the elections of the European Parliament to the United Kingdom, excluding Gibraltar. In its opinion, the Commission, while finding the application admissible, stated that no violation of Article 3, Protocol 1, had taken place. Five dissenting commissioners referred to a previous case,¹⁰⁵ in which the Commission had opined that the Convention does not 'prohibit a Member State from transferring powers to international organisations', but that the State 'would be answerable for any resulting breach of its obligations' under the Convention.¹⁰⁶ According to another dissenting Commissioner, 'at the present stage of European and international development, where increasingly governmental powers are transferred to European or international organs, I consider it essential to underline that the Contracting States remain responsible for infringements of human rights if they do not provide for adequate protection of these rights by the institutions to which powers are transferred'.¹⁰⁷

The judgment of the Court supported the position of the dissenting commissioners. It was held that 'the Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be "secured"'.¹⁰⁸ The Court rejected the submission of the United Kingdom (UK) that 'to engage the responsibility of any State under the Convention, that State must have a power of effective control over the act complained of'.¹⁰⁹ In another decision on the same day, although it found that no violation of Convention rights had been committed, the Court confirmed its position in *Matthews*,

¹⁰⁴ 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.

¹⁰⁵ *M. and Co. v. Germany* (No. 13258/87), Report of the Commission, 9 February 1990.

¹⁰⁶ *Matthews v. United Kingdom* (No. 24833/94), Report of the Commission, 29 October 1997 (diss. op. of Commissioners Weitzel and others).

¹⁰⁷ *Ibid.* (diss. op. of Commissioner Schermers).

¹⁰⁸ *Ibid.* at par. 32. This approach was criticised by Judges Sir John Freeland and Jungwiert, who, in their dissenting opinions, stated (at par. 9):

... we see a certain incongruity in the branding of the United Kingdom of as a violator of obligations under Article 3 of Protocol No. 1 when the exclusion from the franchise effected multilaterally by the 1976 Decision and Act ... was at that time wholly consistent with those obligations...; when at no subsequent time has it been possible for the United Kingdom unilaterally to secure the modification of the position so as to include Gibraltar within the franchise; and when such a modification would require the agreement of all member States.

The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective.¹¹⁰

The point of law in *Matthews* could thus be summarised: when effective control over certain acts is *voluntarily* transferred to an international organisation, the state will retain at least *some* responsibility for violations of human rights. The *ratio decidendi* of this case is not applicable to those situations in which the state has lost effective control involuntarily, as a result, for example, of a resolution of the Security Council. Furthermore, the Court could not make a finding on the question of the responsibility of the European Community, since the Community is not a party to the Convention. Far from logically excluding its responsibility, the approach of the Court can be construed as implicitly supporting the notion of joint and several liability of states and of international organisations in certain situations.

Matthews places a significant burden on member states by making them responsible, in certain circumstances, for violative acts of international organisations. The Court did not find that the UK was responsible for a violation of the Convention rights because the act was nominally imputable to the Community but effectively imputable to the UK. On the contrary, it was recognised that the act in question was a Community act. The responsibility of the UK was in a sense at the root, resulting from the violation of the obligation to 'secure' that rights are respected by international organisations when the UK transfers functions to them. The corollary of this finding is that international organisations – the European Community in this case – have an obligation not to

¹⁰⁹ *Matthews v. United Kingdom* (No. 24833/94), Judgment (Merits), 18 February 1999 at para. 27.

¹¹⁰ *Waite and Kennedy v. Germany* (No. 26083/94), Judgment (Merits), 18 February 1999, para. 67.

commit an act that could engender the responsibility of the member states. It may be a rather tortuous path to reach the desired goal, i.e. the conclusion that international organisations have to respect human rights, but one that could have far-reaching consequences because it requires states to exercise effective control over international organisations.

There are, however, some difficulties with applying *Matthews* to the UN. First, while there is uniformity in the obligations incumbent upon European states under the European Convention of Human Rights, the human rights obligations of member states of the UN can vary significantly. If the *Matthews* approach is extended to the UN, there could be situations in which a certain UN act would engage the responsibility of state A but not of state B because of differences in the obligations incumbent on these two states. Even worse, the commission of a certain act by the UN could result in the responsibility of state A, whereas the omission of the same act would cause a breach of state B's obligations.¹¹¹ However, it could still be argued that the UN ought to comply with treaty standards accepted only by some of its member states, whenever such compliance is devoid of consequences for other member states – which would be so in the vast majority of cases. In practice, the *Matthews* approach can thus still be applied to the UN, and it signifies that, when some member states have accepted a certain human rights obligation whilst others have not, the UN normally has to consider itself bound by it.

Another difficulty is that in *Matthews* it was easy to identify the 'culprit' state, which had failed its obligation to secure respect for Convention rights when it transferred certain functions to the European Community. When complex UN operations are involved, it is not so easy to identify one culprit state, or a small group of them; in most cases, the culprits would be all the member states of the UN. This may be an interesting proposition legally, but hardly useful practically, since victims cannot bring a lawsuit in every member state of the UN.

Thirdly, *Matthews* is premised on the idea that states transfer functions to international organisations and that they have the power, and are under an obligation to 'secure'

rights at this stage. This is ultimately a statist, Hobbesian approach based on the notion that all power originates from states, and from them it may be transferred to other entities, which are born powerless and whose power is always derivative. It is an approach that overlooks the role of international organisations as autonomous centres of power, which often exercise functions without an express, or a clearly identifiable, prior attribution from states. The doctrine of implied powers, and the institutional practice examined in the following Chapters of this work are evidence of the autonomous power of international organisations.

Finally, without relapsing into the endless debate on the role of fault in responsibility, it is important to define the boundaries of this 'obligation to secure' rights, which according to the European Court of Human Rights is incumbent upon state parties when they give up functions and powers to international institutions. International institutions often grow beyond what their founders had envisaged, not necessarily as a result of subsequent transfers of functions from states, but also, and perhaps principally, as a result of their own autonomous expansion. Would it be possible to construe the 'obligation to secure' rights in such a way as to make states responsible for what is in practice a failure 'to foresee the future', that is the growth of power of the UN? Furthermore, the establishment of many an international organisation predates the development of human rights law, and in these cases states cannot be blamed for not entrenching human rights in the constituent instruments.

There are cases, however, in which the obligations of member states can be of great importance in the regulatory framework of UN operations. In particular, whenever an UN operation is carried out through member states, the latter normally remain bound by their international obligations. Peace-keeping operations and enforcement actions are examples in question.¹¹² Since the UN does not have its own military forces, it continues to rely on troops made available by nation states. The fact that national troops are acting under the UN banner does not exempt them from their international legal obligations.¹¹³ Indeed, as is also the case with human rights law, states are not

¹¹¹ This is however a notional hypothesis. I cannot think of any example in the human rights field where this situation could obtain.

¹¹² On delegation to member states, see: D. Sarooshi, *The United Nations and the Development of Collective Security* (1999).

¹¹³ Greenwood, 'International Humanitarian Law and United Nations Military Operations', 1 *YB Int. Humanit. L.* (1998) 3 at 17. Also: Gasser, 'Die Anwendbarkeit des humanitären Völkerrechts auf

simply to respect but to 'ensure respect in all circumstances' for the Geneva Conventions and for Additional Protocol I.¹¹⁴

Matthews shows that human rights obligations are not devoid of consequences for the collective action of state through multilateral institutions. States have a duty to 'secure' human rights, when they transfer functions; international organisations, in turn, have a duty not to commit acts that constitute breaches of the human rights obligations of their members. The 'maximum denominator' - or 'most progressive member states' - standard is the one that is likely to ensure in most circumstances that member states of the UN do not incur responsibility for acts of the UN in breach of their obligations, and, as such, is the one that should provide the yardstick for UN compliance with human rights.

II.4. Policy Considerations

The arguments for the applicability of international human rights law to international institutions that have just been discussed are alone sufficient to justify such applicability. However, other grounds for applicability can still be found. For example, the conclusion that human rights law is applicable could be based on the promotion of the fundamental values of international society.

There is disagreement on what values and policies are fundamental in the international society. Cassese, for example, argues that peace, human rights and self-determination are the three sets of values that 'underpin the overarching system of inter-state relations', but adds that 'if a conflict or tension emerges between two or more of these values, peace must always constitute the ultimate and prevailing factor'.¹¹⁵ Policy-oriented jurisprudence has developed 'a classification to inventory human desires or wants, i.e. ... "values"' that the system of international law is meant to promote.¹¹⁶

militerische Operationen der Vereinten Nationen', 5 *Revue Suisse de Droit International et de Droit Européen* (1994) 443 at 462.

¹¹⁴ Greenwood, 'Scope of Application of Humanitarian Law', in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (1995) 39 at 46. See also L. C. Green, *The Contemporary Law of Armed Conflict* (2nd ed., 2000) 338-339. D. W. Bowett expressed doubt about the applicability of humanitarian law to UN forces (*UN Forces: A Legal Study of United Nations Practice* (1966) at 484).

¹¹⁵ Cassese, 'Ex Iniuria Jus Oritur. Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', 10 *EJIL* (1999) 23 at 24.

¹¹⁶ Wiessner and Willard, 'Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity', 93 *AJIL* (1999) 316 at 318.

This list of basic values is significantly broader than Cassese's 'three sets of values'.¹¹⁷ Policy-oriented theorists would argue that the exclusive pursuit of security characterised international law of the Grotian era, and is not appropriate to our era which is characterised 'by a rich pluralism in effective power and by the pursuit, beyond security, of the goals of an optimum order in the shaping and sharing of all values'.¹¹⁸ Despite such disagreements, the Preamble of the UN Charter offers a clear indication of what at least some fundamental values are: security ('to save succeeding generations from the scourge of war'), human rights ('to reaffirm faith in fundamental human rights'), rule of law ('to establish conditions under which justice and the obligations arising from treaties and other sources... can be maintained), and quality of life ('to promote social progress and better standards of life in larger freedom').

Echoes of the policy-oriented approach can be found in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons (GA Request)*.¹¹⁹ The decision was controversial also because a conflict between values (humanity vs. security/self-defence) lay behind it. The *non liquet* which the Court reached could be attributed to the failure to solve such conflict. Judge Higgins, however, dissented from the majority and underscored that 'the corpus of international law is frequently made up of norms that, taken in isolation, appear to pull in different directions'. She added that in these cases 'the judicial lodestar ... must be those values that international law seeks to promote and protect'.¹²⁰ It could similarly be argued that, whenever the question of the applicability of certain human rights standards to UN activities becomes problematic from the point of view of positive law, the temptation to succumb to a *non liquet* should be shunned and the values of international law ought to be affirmed by confirming that international institutions are not exempt from the rule of law. This position would be a function of the pursuit of at least three of the fundamental values

¹¹⁷ The eight values identified by policy-oriented theorists are power, enlightenment, wealth, well-being, skill, affection, respect and rectitude (*ibid.*). See also H. D. Lassall, M. S. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (1992).

¹¹⁸ McDougal and Reisman, 'International Law in Policy-Oriented Perspective', in R. St. J. Macdonald, D. M. Johnston, *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983) 103 at 128.

¹¹⁹ *Legality of the Threat or Use of Nuclear Weapons (GA Request)*, Advisory Opinion, ICJ Reports (1996), 110 ILR 227.

¹²⁰ *Legality of Nuclear Weapons (GA Request)*, *supra* note 119, at paras. 40-41 (diss. op. of Judge Higgins). The ambitions of the policy-oriented jurisprudence would probably go beyond the essentially interpretative function assigned to it by Judge Higgins, and purport to offer a comprehensive way of looking at international law. Judge Weeramantry also filed a dissenting opinion observing that the

identified in the Preamble of the Charter – human rights, rule of law and quality of life.

II.5. Other arguments for applicability

(a) *General Assembly and Security Council Resolutions*

Neither Security Council nor General Assembly resolutions have addressed the applicability of human rights or humanitarian law to UN forces and to UN operations. However, resolutions of these organs have dealt with human rights extensively and, to a lesser extent, with aspects of humanitarian law. In particular, many human rights treaties were adopted first as resolutions of the General Assembly,¹²¹ while numerous resolutions address human rights issues in specific country situations.¹²² The normative production of the General Assembly in the human rights sphere began with the adoption of the Universal Declaration of Human Rights, which provides ‘an authoritative guide’ to the interpretation of the provisions of the Charter that refer to human rights and that often lack precision.¹²³

General Assembly resolutions are an important tool for setting standards in the human rights field for specialised programmes. As a parent organ, the General Assembly has a general regulatory power vis-à-vis its subsidiaries.¹²⁴ Moreover, under Article 60 of the Charter, ‘responsibility for the discharge of the functions’ of the UN in the area of international economic and social co-operation ‘shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council’. Resolutions of the General Assembly bind the recipient organs,

‘cardinal unit of value’ in the global society envisaged by the Charter was the dignity and worth of the human being (at para. I.3 (diss. op. of Judge Weeramantry).

¹²¹ For example: Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 UNTS 277; Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948; International Covenant on Civil and Political Rights (1966), 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (1966), 993 UNTS 3; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979), 19 ILM 33; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, 10 December 1984; Convention on the Rights of the Child, GA Res. 44/25, 20 November 1989.

¹²² Quinn, ‘The General Assembly into the 1990s’, in P. Alston, *The United Nations and Human Rights: A Critical Appraisal* (1992) 55 at 77.

¹²³ Brownlie, *supra* note 4 at 574-575. The Universal Declaration is GA Res. GA Res. 217A (III), 10 December 1948.

¹²⁴ The *Effects of Awards* case was rather peculiar because the Court concluded that the General Assembly was bound by the awards of the Tribunal, which it had established. But this conclusion does not contradict the relationship of subsidiarity between the Assembly and the Tribunal, since the power

when these are subsidiary programmes established by the Assembly. Indeed, in *Certain Expenses*, the ICJ observed that certain resolutions are not ‘merely hortatory’, but do have ‘dispositive force and effect’.¹²⁵ In the words of Amerasinghe, they constitute ‘institutional or organizational acts’.¹²⁶

In part owing to the failure of the General Assembly to exercise its powers of control and policy direction over specialised programmes like UNICEF, UNHCR and UNDP and over UN operations in general, there are only a few resolutions addressed specifically to them, and these tend to be unsubstantial in terms of content.¹²⁷ On the other hand, the mandate of some UN operations, especially peace-keeping and peace-building ones, is contained in a resolution of the Security Council. In some cases - for example East Timor, Kosovo, Bosnia -¹²⁸ the Security Council resolution enumerates the protection and promotion of human rights among the responsibilities of the UN. However, as observed, one of the problems is that in many other cases such a mandate from either the Security Council or the General Assembly does not exist.

Specialised programmes are also bound by the terms of resolutions that are not specifically addressed to them, for example standard-setting resolutions in the field of human rights. The General Assembly, as a parent organ, can expect its own subsidiaries, over which it has greater clout than over states, to comply with the standards it sets. With respect to the specialised agencies, the situation is not so straight-forward. Art 58 empowers the UN to ‘make recommendations for the co-ordination of the policies and activities of the specialised agencies’. The agreement between the UN and the specialised agencies is meant to flesh out the terms of this relationship. However, the practice of the IMF, the World Bank and the International Civil Aviation Organization (ICAO) suggests that some specialised agencies do not consider themselves bound by the resolutions of the General Assembly, although the

to bind the General Assembly had been vested with the Tribunal by the Assembly itself. See *supra* note 60.

¹²⁵ *Certain Expenses*, *supra* note 40 at 163.

¹²⁶ Amerasinghe, *supra* note 25 at 192 ff.

¹²⁷ See *supra* page 90.

¹²⁸ Respectively: SC Res. 1272 (1999) at paras. 8 and 15; SC Res. 1244 (1999) at para. 11 (j); SC Res. 1088 (1996) at para. 28.

Assembly, supported by the Secretariat, traditionally views its powers vis-à-vis the specialised agencies more extensively.¹²⁹

A separate but related issue is that of the limits of the powers of the Security Council and of the scope of Article 103. The question whether Security Council has the power to adopt binding resolutions that involve a breach of human rights and humanitarian law (or even *jus cogens*) has been very much debated and has given rise to divergent views.¹³⁰ It has been argued, for example, that through the imposition of sanctions on Iraq, which resulted, among other things, in a shocking increase in child mortality,¹³¹ the Council has perpetrated a breach of the most fundamental human rights. States that support the sanctions argue that this dismal situation is causally related to the sanctions, but legally imputable to the Iraqi government, which could put an end to it by complying with the terms of the Security Council resolution. Whether this argument is persuasive or not, it is important to note that in the practice of the Security Council this putative power to breach customary law or *jus cogens* has not been invoked. Whether or not the Council has such power in theory, its practice suggests that it does not avowedly exercise it.

(b) *Other sources of law regulating UN operations*

UN peace-keeping practice includes the conclusion of treaties with host countries; these treaties are known as Status-of-Forces Agreements (SOFAs). Given the consensual nature of most peace-keeping operations, SOFAs constitute an important source of regulation.¹³² Following the adoption of a model SOFA in 1990 by the Secretary General upon a request of the General Assembly,¹³³ it has been the practice of peace-keeping missions to apply it provisionally pending the negotiation of a final

¹²⁹ Schermers and Blokker, *supra* note 73 at 1073-1075; I. Shihata, *The World Bank in a Changing World* (1991). Vol I, at 99 ff.; D. Williams, *supra* note 64 at 160 ff..

¹³⁰ Martenczuk argues that the Council's discretion under Chapter VII 'is essentially unlimited' ('The Security Council, the International Court of Justice and Judicial Review', 10 *EJIL* (1999) 517 at 546), whilst Gowland-Debbas ('Security Council Enforcement Action and Issues of State Responsibility', 43 *ICLQ* (1994) 55) and Watson ('Constitutionalism, Judicial Review, and the World Court', 34 *Harv. Int. L. J.* (1993) 1) have taken the view that at least *jus cogens* should bind the Security Council. See Chapter V on accountability.

¹³¹ UNICEF (with Iraq's Ministry of Health), 'Iraq child and Maternal Mortality Survey', Preliminary Report, July 1999, available on the internet at www.unicef.org/reseval/pdfs/irqrptsc2.pdf.

¹³² Like SOFAs, Memoranda of Understanding are also treaties concluded between UN agencies and the host state to regulate a particular operation. Memoranda of Understanding, however, normally involve a slightly less formalised procedure. In addition, no central blueprint for such Memoranda approved by the General Assembly exists.

¹³³ UN Doc. A/45/594.

SOFA with the host state.¹³⁴ The model should constitute only a starting point for negotiations, although in practice the final agreement is unlikely to depart substantially from its provisions.

SOFAs normally impose an obligation on the UN to refrain from activities that are incompatible with the impartial nature of its operations, and to respect the laws of the host country. These obligations, which also feature in the 1994 Convention on the Safety of UN and Associated Personnel,¹³⁵ may provide an adequate legal basis for binding the UN to respect norms of humanitarian law and human rights at least to the extent these norms form part of the laws of the host country. SOFAs impose a wide range of legal obligations on the UN, including the grant of privileges and immunities to its personnel. Although the 1990 model SOFA did not contain any reference to the applicability of international humanitarian law, recent peace-keeping and ‘peace-building’ practice has often included applicability clauses.¹³⁶ In addition, the mandates of ‘peace-building’ operations often include the obligation to promote and protect human rights.¹³⁷

In 1999, the Secretary General adopted guidelines for UN Forces about compliance with international humanitarian law.¹³⁸ The guidelines, which apply ‘in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence’ (Sec. 1), specify that the ‘obligation to respect (...) is applicable to the United Nations forces even in the absence of a status-of-forces agreement’ (Sec. 3). Together with the entry into force in 1999 of the Convention on the Safety of UN Personnel, the Bulletin of the Secretary General ought to finally put an end to the antinomial

¹³⁴ GA Res. 52/12 B, at para. 7. Security Council resolutions have normally contained a clause to this effect, see for example SC Res. 1159 (1998), on the peace-keeping mission to the Central African Republic; SC Res. 1198 (1998), on western Sahara; SC Res. 1270 (1999) on Sierra Leone.

¹³⁵ GA Res. 49/59, 9 December 1994. In spite of a savings clause on ‘the applicability of international humanitarian law and universally recognised standards of human rights’ (Art. 20), Costa Rica decided to enter a reservation stating that ‘in the event of conflicts with the application of the Convention, Costa Rica will, where necessary, give precedence to humanitarian law’.

¹³⁶ Carlevaris, ‘Recenti sviluppi nella prassi degli Status-of-Forces Agreements per le operazioni di peace-keeping delle Nazioni Unite’, 53 *Com. Int.* (1998) 667 at 677; Shraga, ‘UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damages’, 94 *AJIL* (2000) 406 at 407.

¹³⁷ See Chapter IV.2 and IV.3 on human rights in Security Council resolutions establishing international administrations.

¹³⁸ UN Doc. ST/SGB/1999/13 (6 August 1999), reprinted in 836 *Int. Rev. R. C.* (1999) 812-817. The SG’s Bulletin is considered ‘binding on members of UN forces in the same way as are all other instructions issued by the Secretary General in his capacity as “commander in chief” of UN operations’ (Shraga, *supra* note 136 at 409).

practice of the past within the UN that denied the applicability of international humanitarian law to UN forces.¹³⁹ On the other hand, however, it must be noted that the better option would have been to accept explicitly that UN forces are bound by the whole of body humanitarian law rather than attempt to encapsulate ‘the fundamental principles and rules’ of international humanitarian law in a document that inevitably turned out to be ‘short, succinct, and simplified’.¹⁴⁰ Some non-customary rules and principles were included, but others excluded, inevitably creating the appearances of arbitrariness in the process of deciding which rules and principles are truly ‘fundamental’.

Another important development has been the commissioning of the Brahimi report to review peace-keeping practice. Among the final recommendations of the report was the inclusion of human rights and humanitarian law in peace-keeping missions,¹⁴¹ and it is likely that this will lead to the incorporation of clauses on compliance with human rights and humanitarian law in an ever growing number of SOFAs.

In addition to SOFAs, rules of engagement are another important source of regulation of the activities of UN forces; soldiers and officers on the ground would probably be more familiar with these rules than with the Security Council mandate for their mission or with the SOFAs. The Brahimi report called for the adoption of ‘robust rules of engagement’ to deal with those parties to a conflict that renege on previous

¹³⁹ The Office of Legal Affairs traditionally maintained that the UN was not bound by the Geneva Conventions, emphasising in the early 1990s that one problem with applicability is that ‘some of the troops put at the disposal of the United Nations are provided by countries which are not yet parties to some of the humanitarian law conventions’ (UN Office of Legal Affairs, ‘Letter to the President of the ICRC on the Question of the Application of the 1949 Geneva Conventions’, 17 September 1992, *UN Jur. YB* (1992) 431). See also Gutman, ‘United Nations and the Geneva Conventions’, available at www.crimesofwar.org/essays.html, and M. Hirsch, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles* (1995) at 32-35. There were occasions, however, when the position of the Legal Office on a related matter implied the applicability of the Geneva Conventions to the UN. For example, it was argued that the UN could not unconditionally surrender the mercenaries (for the most part European citizens) in its detention to the Congolese authorities because of its ‘duty’ under Common article 3 ‘to satisfy itself ... that [the Congolese Government] is able and willing to treat such personnel humanely and, in particular, to afford it, in accordance with sub-paragraph (d) [of Common Article 3] “all the judicial guarantees which are recognized as indispensable by civilized people”’ (UN Office of Legal Affairs, Note to the Under-Secretary for Special Political Affairs and the Under-Secretary for General Assembly Affairs on the Legal Policy concerning the detention by the UN of mercenaries, *UN Jur. YB* (1962) at 244).

¹⁴⁰ Shraga, *supra* note 136 at 408.

¹⁴¹ Report of the Panel on United Nations Peace Operations [hereinafter ‘Brahimi report’], 21 August 2000, UN Doc. A/55/305, S/2000/809, at 54-58.

commitments.¹⁴² Rules of engagement are drafted by the Secretariat, who, while retaining some discretion, has to tailor them to the mandate of the mission as established by the Security Council. It is interesting that the rules of engagement of the UN Assistance Mission in Rwanda (UNAMIR) implicitly recognised that not only were UN forces obliged to respect humanitarian law, but that they also had an obligation to ensure its respect and to intervene to stop violations of humanitarian law. In fact, paragraph 17 asserted that the commission of crimes against humanity would 'legally and morally require UNAMIR to use all available means to halt them'.¹⁴³ As is well known, this rule was tragically flouted during the genocide.

Last but not least, one should not omit the rich body of institutional soft law (reports, guidelines, etc.) that is normally quite important in bureaucratic decision-making processes. In some operations, a more formalised law-making procedure may even be in place. For example, the UN Mission in Kosovo (UNMIK) issues regulations that cover a wide range of aspects of its administration in Kosovo.

(c) *Human rights as entitlements*

Another route for arriving at the conclusion that human rights and humanitarian law are applicable to international institutions is by focusing on the entitlements that this body of law vests in individuals, rather than on the obligations that it imposes on states. It is axiomatic that such entitlements are inalienable and appertain to the individual, whichever is the authority that exercises effective control.

Human rights treaties have traditionally referred almost exclusively to states, but there are some important, and ever more frequent exceptions. The Universal Declaration of Human Rights already stated that 'every individual and organ of society ... shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance'.¹⁴⁴ Of particular relevance to the activities of the UN is Article 28 of the Declaration, which provides that 'everyone is entitled to a social *and*

¹⁴² Brahimi report, *supra* note 141 at 10 (para. 55).
¹⁴³ Commission of Inquiry on Rwanda (1999) 'Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda'.
¹⁴⁴ GA Res. 217 A (III).

international order in which the rights and freedoms set forth in this Declaration can be fully realised' (emphasis added).

The Convention on the Rights of the Child is an example of a human rights treaty that goes beyond traditional approaches by explicitly imposing obligations on 'private welfare institutions', in addition to the institutions of the state (Art. 2). In the field of humanitarian law, Protocol II logically applies to the conduct of hostilities by non-state actors as well as the state, and the standards it lays down apply indistinctly to the former and the latter.¹⁴⁵ The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) follows a more oblique way for 'ensuring' a woman's right to be free from discrimination: it imposes direct obligations only on states, but some of these obligations are to 'take all appropriate measures' to end discrimination in areas such as education and work, where the regulation of the activities of non-state actors is necessary. In other words, CEDAW obliges states to impose obligations on third parties.¹⁴⁶ Future human rights law-making should continue the tendency initiated by the Convention on the Rights of the Child and refer to obligations of actors other than the states as a way of fleshing out the content of the obligation to ensure rights. This would also reflect the inalienable nature of human rights as well as the diverse faces that power and authority can assume.

II.6. The Law of Responsibility

The ILC's work on the law of responsibility has so far concentrated on state responsibility, leaving out the responsibility of other subjects of international law.¹⁴⁷ Owing to the lack of codification, some uncertainty on the rules that regulate international institutional responsibility remains. Despite this, at least two basic principles are widely accepted. First, the UN bears responsibility on the international plane for the international wrongful acts that it commits.¹⁴⁸ Secondly, the rules of the

¹⁴⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (1977) 1125 UNTS 609.

¹⁴⁶ *Eg* Art. 2 (e) of CEDAW, *supra* note 121, which obliges states 'to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise'.

¹⁴⁷ The responsibility of international organisations is part of the long term programme of work of the Commission (ILC Report (2000) at 290 ff.).

¹⁴⁸ This is also implicitly recognised in the Draft Articles on State Responsibility (*supra* note 11). Art. 57 states that 'these articles are without prejudice to any question of responsibility under international law of an international organization, or of any State for the conduct of an international organization'. This provision did not feature in the 1996 Draft Articles provisionally adopted by the International Law Commission on First Reading, ILC Report (1996), UN Doc. A/51/10 [hereinafter 1996 Draft Articles

law on state responsibility, which have customary status,¹⁴⁹ apply, *mutatis mutandis*, to international organisations.¹⁵⁰ The paucity of case-law on international institutional responsibility is a function of the lack of fora for bringing claims against international institutions. Consequently, the process of adapting the rules on state responsibility to international organisations is left entirely to the interpreter. The main elements of institutional responsibility - the commission of an internationally wrongful act, the attribution of this act to the international institutions, circumstances excluding wrongfulness, and responsibility of member states – are examined here with examples taken from the specific type of UN operations and the case studies analysed in chapters III and IV.

(a) *Wrongful act*

A wrongful act is defined as an action or omission which constitutes a breach of an international obligation.¹⁵¹ Whether a breach has really occurred is the question that is likely to arouse controversy when the author of the wrongful act is a state. When an international organisation commits a wrongful act, on the other hand, the very existence of an obligation binding the organisation is likely to be disputed, given that the identification of international institutional obligations can raise more problems than in the case of state obligations.

In the sphere of human rights, it is important to emphasise that states' obligations are not limited to the obligation to respect, but encompass the obligation to ensure human rights.¹⁵² As a result, states in whose territories UN operations are carried out

on State Responsibility]. I will rely mainly on the 2001 draft, and refer to the provision in the old draft whenever appropriate. The main differences between the old draft and the proposals on which the 2001 draft is based are explained by Crawford, 'Revising the Draft Articles on State Responsibility', 10 *EJIL* (1999) 435.

¹⁴⁹ Scobbie, 'International Organizations and International Relations', in R. J. Dupuy, *A Handbook of International Organizations* (2nd ed., 1998) 831 at 887.

¹⁵⁰ See: Amerasinghe, *supra* note 25 at 240; Arsanjani 'Claims against International Organizations: *Quis Custodiet Ipsos Custodes*' (1981) 7 *Yale Journal of World Public Order* 131; Eagleton, *supra* note 88 at 323; Hirsch, *supra* note 139 at 7-10; Scobbie, *supra* note 150 at 887; and N. Quoc Dinh, P. Daillier, and A. Pellet, *supra* note 94 at 756, who underscore that *a fortiori* customary rules on responsibility should apply to international organisations. See also International Law Commission, 'First Report on State Responsibility by the Special Rapporteur, Mr F. V. Garcia-Amador', UN Doc. A/CN.4/96, and in (1956, II) YBILC 173 at pp.189-190.

¹⁵¹ Art. 2, Draft Articles on State Responsibility.

¹⁵² See for example Art. 2 (1), International Covenant on Civil and Political Rights (ICCPR) (1966), 999 UNTS 171. As has been mentioned above (see note 114), the obligation to ensure also applies to humanitarian law obligations. See Art. 1 in each of the four Geneva Conventions and in Protocol I: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva (1949), 75 UNTS 31; Geneva Convention (II) for the Amelioration of the

are, in principle, under an obligation to ensure that the UN, like any other authority in the country, complies with the full spectrum of human rights obligations undertaken by them. In practice, however, it is quite often the case that the weaker the territorial state, the stronger the UN, i.e. the range of powers that UN agencies assume on the ground tend to be inversely correlated to the strength of national institutions. In fact, situations of internal strife and conflict, and most notably in the case of the failed states, are those in which there is a need for a multifunctional UN presence. These are also the situations in which obligations, including the obligation to ensure respect for human rights, are to a significant extent “transferred” to the UN agencies that have assumed such a large measure of control.

In order to determine whether a wrongful act has been committed by the UN in the course of its operations, it is necessary at first to determine the content of the specific obligation at stake, which might involve adapting an obligation that has been formulated for states to the particular activities of the international organisation.¹⁵³ Being itself obliged to ensure human rights, the UN could incur responsibility in some circumstances for failing to act. For example, when the UN is a provider of humanitarian assistance that is material to the enjoyment of fundamental human rights, and is forced to operate in a social context in which women are discriminated against, it is obliged to strive ‘to modify the social and cultural patterns of conduct of men and women’¹⁵⁴ that result in discrimination against women. In the light of this obligation, even conceding that there might be disagreement on the choice of the

Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (1949), 75 UNTS 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War (1949), 75 UNTS 135; Geneva Convention (IV) Relative to the Protection of Civilians in Time of War, Geneva (1949), 75 UNTS 287; Protocol I Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflict (1977), 1125 UNTS 3.

¹⁵³ In some cases, a negative conduct, i.e. refraining from doing something, is all that is required; in others, a positive obligation exists. Most rights involve some type of positive obligation, including “traditional” civil and political rights. For example, in order to ensure the right to life states not only have to refrain from arbitrarily depriving individuals of their life, but might also have ‘to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual’ (*Osman v. UK* (No. 23452/94), Judgment (Merits), 28 Oct. 1998, 29 EHRR 245 at 246). The content of the obligation is to be determined giving due regard to existing treaty provisions, case-law and practice of international judicial, and semi- or quasi-judicial bodies, including the general comments of the two Committees established under the ICCPR and the ICESCR, and state practice. See Chapter IV.3 and IV.4.C. for a broader discussion of the implications of the obligation to ensure human rights in international administrations and in refugee camps.

¹⁵⁴ Art. 5 (a) CEDAW, *supra* note 121. States cannot thus use the socio-cultural *status quo* as an excuse for discrimination; on the contrary, they can bear responsibility on the international plane for maintaining it ‘despite evidence of pervasive inequality’ (Cook, ‘State Responsibility for Violations of Women’s Human Rights’, 7 *Harv. HR J.* (1994) 125 at 137).

most effective means for bring about the necessary changes in society, it would be hard to deny that the UN practice in Afghanistan to acquiesce to the sexual apartheid created by the Taliban regime constitutes a wrongful act.¹⁵⁵

The rule that states can incur responsibility for having been accomplices in the commission of an internationally wrongful act by another state also applies to international organisations. Article 16 of the Draft Articles on State Responsibility provides that ‘a State which aids or assists another State in the commission of an internationally wrongful act’ bears responsibility if it had knowledge of the circumstances of the wrongful act, and if the act would have constituted an international wrong if committed by that state.¹⁵⁶ What ‘aiding and abetting’ concretely means depends on the wrongful act in question. For example, in his Separate Opinion in the Order of the ICJ in the Bosnia Genocide case, Judge Lauterpacht took the view that compliance with the arms embargo imposed on Bosnia could make members of the UN ‘accessories to genocide’.¹⁵⁷ The rule on aiding and abetting is of great importance for the UN, since in various situations it can in practice aid or abet in the commission of a wrongful act by a state. For example, it could be argued that, through the provision of humanitarian assistance to Afghanistan under the Taliban, or to Ethiopia in the days of the Menghistu regime, the UN became an accessory to the systematic human rights violations perpetrated by the rulers in those two countries.¹⁵⁸ Another example, also examined below, of complicity with the wrongful act of a state is the rigid application of neutrality in humanitarian action in conflict.¹⁵⁹

In other instances, the international organisation can be the primary author of a wrongful act, while a state is an accessory. With the exception of UN operations in failed states and of UN *de jure* administration of territory, the UN relies on some form of co-operation with the territorial state, even if is only the acceptance of its presence. The violations of the refugees’ human rights in camps are primarily committed by

¹⁵⁵ See Chapter III.4.

¹⁵⁶ Art. 27 in the 1996 Draft Articles on State Responsibility.

¹⁵⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), Order of 8 April 1993, ICJ Reports (1993) 325 at 441 (sep. op. of Judge Lauterpacht).

¹⁵⁸ As far as Afghanistan is concerned, the responsibility of the humanitarian agencies there is also primary to the extent that they directly provide certain services like education and health in a gender discriminatory manner.

¹⁵⁹ See Chapter III.3.

UNHCR, but the state is an accomplice, for example by enforcing the policy of encampment and by imposing heavy sanctions on refugees who run away from the camps.¹⁶⁰

(b) *Imputability*

The attribution to the UN of alleged breaches of human rights committed in the exercise of *de jure* or *de facto* control of territory, or in humanitarian operations, can pose some problems: should the wrongful act be imputed to the nominal sovereign – the host state in refugee camps, and the Federal Republic of Yugoslavia (FRY) in Kosovo – or to the organisation that exercises effective control? Or, when UNHCR assumes responsibility for refugee status determination, is the state still responsible for violations of the rights of asylum-seekers resulting from the application of a legal procedure which the state should normally put in place, but which it has decided to relinquish to an international organisation?

The attribution of the act is also one of the elements of responsibility in which the adaptation of the existing rules on state responsibility to international organisations can turn out to be problematic. The general rule on state responsibility is that the conduct of an organ of the state is imputable to the state, whether it ‘exercises legislative, executive, judicial or any other function, whatever position it holds in the organization of the State’ (Art. 4, Draft Articles on State Responsibility).¹⁶¹ The adaptation of a similarly broad rule on the attribution of the acts of organs to international institutions would presumably result in the imputability of the acts of any of organ or office, including field offices, to the organisation. Furthermore, by analogy with state responsibility (Art. 7, Draft Articles on State Responsibility),¹⁶² the acts of organs that have acted *ultra vires* or of officials acting in excess of authority are imputable to the organisation. It would therefore be no justification to argue, for example, that the imposition of collective punishment on the entire population of a refugee camp¹⁶³ is carried out by “rogue” UNHCR officials acting in excess of authority, and that it does not engage the responsibility of the organisation.

¹⁶⁰ Chapter IV.4.

¹⁶¹ Arts. 5-6, 1996 Draft Articles on State Responsibility.

¹⁶² Art. 10, 1996 Draft Articles on State Responsibility. See also, for example, the *Rainbow Warrior* case, 26 ILM 1346.

¹⁶³ Chapter IV.4.C.

Acts committed by UNHCR, or by UNDP and WFP - which are, as we have seen, subsidiary agencies of the General Assembly – are subject to dual attribution: to the UN as a whole, and to the specific operational agency as an international legal person in its own right. Dual attribution can raise some problems. While the general principles on the law of responsibility, including the obligation to make reparation for illegal wrongs,¹⁶⁴ apply to specialised agencies and specialised programmes alike, for the latter a problematic aspect is the determination of the responsibility of the parent organ. The statutes of some specialised programmes make express provision in this respect, normally excluding the liability of the UN for claims arising in the context of the operations of the subsidiary organs.¹⁶⁵ The legality of these provisions could be contested since they could obliterate the obligation to make reparation if the operational agency is financially “starved” as a result of lack of voluntary contributions. The UN could shun its obligation to make reparation each time it so wishes by transferring the discharge of its functions to subsidiary agencies in financial troubles.

Another paradigmatic example of dual attribution is that of wrongful acts committed in the course of peacekeeping operations. In these cases, the wrongful act is normally imputable both to the UN and to the state(s) to whose armed forces the individual(s) responsible for the act belongs. The Secretary General has maintained that, in such cases, the UN is entitled to ‘seek recovery from the State of nationality’,¹⁶⁶ and this position has been endorsed by the General Assembly.¹⁶⁷

A separate issue, and one of great importance in the context of humanitarian operations, is the attributions of wrongful acts of non-governmental organisations (NGOs) or private companies sub-contracted for the provision of certain services.¹⁶⁸ The rules on state responsibility for wrongful acts committed in the private sphere are influenced by the public/private dualism.¹⁶⁹ States can bear responsibility only for the

¹⁶⁴ Lauterpacht, ‘The Legal Effect of Illegal Acts of International Organisations’, in R. Y. Jennings (ed.), *Essays in Honour of Lord Mc Nair* (1965) 88 at 89.

¹⁶⁵ Statute of UNHCR, *supra* note 49, at sec. 20; UNICEF’s mandate, *supra* note 49, at sec. 5; General Regulations of WFP, *supra* note 49, at sec. 9, b.

¹⁶⁶ Report of the Secretary General on Administrative and Budgetary Aspects of the Financing of United Nations Peacekeeping Operations, 20 Sept. 1996, UN Doc. A/51/389 (*reproduced in* 37 ILM 700) at para. 42.

¹⁶⁷ GA Res. 52/247, 17 July 1998.

¹⁶⁸ On the privatisation and sub-contracting of humanitarian aid, see Chapter III.1.

¹⁶⁹ Chinkin, ‘A Critique of the Public/Private Dimension’, 10 *EJIL* (1999) 387.

conduct of an insurrectional movement provided that it becomes the new government (Art. 10, Draft Articles on State Responsibility), and for the conduct of persons or entities exercising elements of governmental control if empowered to do so by the law of the state (Art. 5, *ibid.*) or ‘in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority’ (Art. 9, *ibid.*).¹⁷⁰ In spite of this rather narrow approach, state obligations in the human rights sphere have been interpreted in such a way as to make states responsible in various circumstances for the acts of private actors.¹⁷¹ In particular, in *Costello-Roberts v. UK*¹⁷² and in the *Osman* case,¹⁷³ the European Court of Human Rights found that the positive nature of the states’ obligations vis-à-vis Convention rights can result in state responsibility for acts of private actors, like a private school or an individual. In *Van der Musselle v. Belgium*,¹⁷⁴ the Court held that ‘Contracting parties cannot relieve themselves of their responsibilities under the Convention by imposing them by law on private bodies’ - the Belgian Bar Association in this case.

The same arguments could be used in respect of international organisations when they delegate functions to private actors. *A fortiori* these arguments apply to international organisations that exercise governmental authority: by delegating powers to private entities and individuals - including, for example, the community leaders who in refugee camps are given significant judicial powers –¹⁷⁵ they cannot elude responsibility. A wrongful act committed by an NGO in these circumstances is again susceptible of dual attribution, to the international institution and to the NGO; but as far as responsibility on the international plane is concerned, only the attribution to the international institution can be consequential.

The attribution of acts in the context of administration of territory raises particular problems, in part related to the interaction between sovereignty and the exercise of effective control, especially when there is a disassociation between these two. Under the rules on state responsibility, acts of persons or entities exercising elements of governmental authority are attributed to the state if the person or entity was

¹⁷⁰ In the previous version of the Draft Articles, these rules were formulated in a different manner and were at Arts. 7, 8, 11, 14 (1996 Draft Articles on State Responsibility).

¹⁷¹ See Chinkin, *supra* note 169 at 393-394, and Cook, *supra* note 154.

¹⁷² *Costello-Roberts v. UK* (No. 13134/87), Judgment (Merits), 25 Mar. 1993, 19 EHRR 112.

¹⁷³ *Osman*, *supra* note 153.

¹⁷⁴ *Van der Musselle v. Belgium* (No. 8919/80), Judgment (Merits), 23 Nov. 1983, 6 EHRR 163 at 163.

empowered by the law of the state to exercise such authority (Art. 5, Draft Articles on State Responsibility).¹⁷⁶ But what if the entity exercising elements of governmental authority is another international legal person? The distinction between nominal sovereignty and effective control is germane to the question of attribution in these circumstances.

In *Lighthouses in Crete and Samos*,¹⁷⁷ the Permanent Court took the view that nominal sovereignty is what ultimately matters. The Court held that, 'although the Sultan had been obliged to accept important restrictions on the exercise of his rights of sovereignty in Crete, that sovereignty had not ceased to belong to him'.¹⁷⁸ The dispute hinged upon the power of the Ottoman Empire to grant concessions in Crete, where the 'Ottoman Government exercised no governmental powers (...) although the Sultan's flag was ceremoniously flown until February, 1913'.¹⁷⁹ Judge Hudson, dissenting, argued that

'if it can be said that a theoretical sovereignty remained in the Sultan after 1899, it was *a sovereignty shorn of the last vestige of power*. He could neither terminate nor modify the autonomy with which Crete had been endowed against his will and with the sanction of the four European States. A juristic conception must not be stretched to the breaking-point, and a ghost of hollow sovereignty cannot be permitted to obscure the realities of this situation' (emphasis added).¹⁸⁰

In *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the ICJ dealt with the reverse situation: South Africa had continued to exercise effective control in Namibia in spite of the termination of its mandate, that is of its title to administer Namibia. Regardless of the lack of any title to territory South Africa thus continued to exercise rights connected to sovereignty.¹⁸¹ The Court then considered

¹⁷⁵ Chapter IV.4.B.

¹⁷⁶ Art. 7, 1996 Draft Articles on State Responsibility.

¹⁷⁷ *Lighthouses in Crete and Samos* (France v. Greece), (1937) PCIJ Series A/B, No. 71.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Id.* at 127 (diss. op. of Judge Hudson).

¹⁸⁰ *Ibid.*

¹⁸¹ Whether in a mandate sovereignty lies with the mandatory state or with other entities (the population living in the mandated territory, the League of Nations or the UN, etc.) is a moot point (R. Jennings, A. Watts, *Oppenheim's International Law* (9th ed., 1992) at 296 n 6.

the legal consequences of the unlawfulness of South Africa's presence in Namibia on other states.

In neither case did the Court explicitly examine the effect of the dissociation of sovereignty from administrative and legislative powers on the attribution of acts respectively to the nominal sovereign and to the entity in effective control. The doctrine of *effectivité* ('effectiveness'), developed mainly in the context of territorial disputes, can offer some guidance in questions of attribution. Under this doctrine the effective exercise of administrative power can be determinative of the final destination of the territory, if sole consideration of the legal titles would result in a *non liquet*.¹⁸² Applied to imputability, *effectivité* would imply a recognition of the essential role of effective control for imputing acts and allocating the attendant responsibility between the nominal sovereign and the administering entity.

An application of the principle of *effectivité* for the attribution of violations of human rights can be found in the decision of the European Court of Human Rights in the *Loizidou* case, where it held that 'the responsibility of a Contracting Party could also arise when as a consequence of military action--whether lawful or unlawful--it exercises *effective control* of an area outside its national territory' (emphasis added).¹⁸³ Given this earlier decision, the judgment of the Court in the *Matthews* case¹⁸⁴ might appear odd, or even in contradiction with *Loizidou*. In its submissions to the Court, the UK Government had argued that 'to engage the responsibility of any State under the Convention, that State must have a power of effective control over the act complained of'.¹⁸⁵ The argument of the UK Government essentially relied on the doctrine of *effectivité* without mentioning it: responsibility should ensue, according to this approach, only if, and to the extent that the state has effective control over the act. Lack of

¹⁸² In *Frontier Dispute* (Burkina Faso v. Mali), Judgment, ICJ Reports (1986) 554 at 586-587, the Court explained that 'where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is, in effect, administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it related. The *effectivité* can then play an essential role in showing how the title is interpreted in practice'.

¹⁸³ *Loizidou v. Turkey* (No. 15318/89), Judgment (Merits), 18 Dec. 1996, 23 EHRR 513 at 530.

¹⁸⁴ For the facts of this case and the decisions, see *supra* II.3. See also *supra* note 106 (Report of the Commission) and 109 (Judgment of the Court).

¹⁸⁵ *Matthews* (Judgment), *supra* note 109 at para. 27.

effective control would thus prejudice the imputability of the act in question to the state. The Court rejected this argument and held that ‘the Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be “secured”’. Clearly, in *Matthews* the European Court of Human Rights found itself in a difficult position since it did not have jurisdiction *ratione personae* to adjudicate on the responsibility of the Community, but its finding is nonetheless important. Furthermore, it could be argued that this decision does not really contradict *Loizidou*: in *Loizidou* the Court held that effective control means responsibility, but in *Matthews* it specified that lack thereof does not necessarily mean lack of responsibility. Effective control is not therefore a necessary condition of responsibility, but it is a sufficient one.

A key element in *Matthews* was that the UK had transferred competences to the EC voluntarily. Applied to the responsibility of the UN and the territorial state, this means that, when power is not transferred voluntarily, the responsibility of the nominal sovereign is excluded. This would apply to international administrations of territory, such as the one over Saarland, created by a peace treaty. It would, after all, be ironic if Germany, which had reluctantly lost all control over the Saarland, should have retained some measure of responsibility for the acts committed by the international administration led by the League of Nations. The same considerations could apply to the international administration in Kosovo and to the responsibility of the FRY.¹⁸⁶

In *de facto* administrations of territory, states normally transfer powers to the international organisations voluntarily, or have acquiesced to their presence. In these cases, states are responsible for the acts committed as part of the operation of an international organisation in their territory, although this does not exclude the responsibility of the international institutions. For example, both UNHCR and the territorial state can incur responsibility for wrongful acts committed by UNHCR as part of the exercise of its wide administrative powers in refugee camps. A similar answer would be given to the attribution of an internationally wrongful act committed

¹⁸⁶ The international administration in the Saarland and in Kosovo are discussed in Chapter IV respectively at IV.2.A and IV.2.B. But the involuntary character of a transfer of authority to an international institution is not always manifest. Distinguishing between formal consent and real consent is particularly important in the relations between international financial institutions and developing countries. In fact, while developing countries formally consent to economic re-structuring programmes

as part of the refugee status determination process when this is conducted by UNHCR.¹⁸⁷ In these situations, given that the act, or the series of acts, is imputable simultaneously to the state and the international organisation, the problem becomes mainly the apportionment of responsibility, which can only be carried out on the basis of a rigorous determination of the facts and context of each operation. In all phases it is imperative to heed the advice of Judge Hudson and overcome the predilection for juristic conceptions and formalities often regardless of the realities of a given situation.¹⁸⁸ In order to determine the attribution of acts and allocate responsibility for them in such complex situations, it is necessary to lift the veil of some of these juristic conceptions and formalities, and to unmask the reality of effective power relations.

(c) *Circumstances precluding wrongfulness*

The rules on defences (Arts. 20-27) are for the most part not susceptible of application to international organisations, or are not at least easily adaptable. What does self-defence mean for an international organisation? And how can the notion of ‘grave and imminent peril’, which underlies necessity as a circumstance excluding wrongfulness, apply to an international organisation?

Distress (Art. 24)¹⁸⁹ is a defence that can be adapted to international organisations. In fact, UN official(s) might be forced to commit a wrongful act because there is ‘no other reasonable way’ to save his/her life or the lives of other persons ‘entrusted to the author’s care’ (*ibid.*). It is difficult, however, to imagine situations in which the breach of a human rights obligation could not have been avoided because of distress. Distress cannot be invoked to justify violations of peremptory norms of international law (*jus cogens*). It could not thus exclude the wrongfulness of the provision of humanitarian assistance in Afghanistan in a gender discriminatory manner.¹⁹⁰ In contrast, there are situations in which distress can be invoked to justify breaches of other international obligations *in the interest* of human rights.¹⁹¹ For example, UN peacekeepers or officials who are forced to violate the terms of their presence in a country and thereby the territorial states’ sovereignty, can invoke distress if their

proposed by the international financial institutions, in practice they have no choice but to do so, although it would be difficult legally to characterise such political and economic pressure as coercion.

¹⁸⁷ Chapter IV.4.

¹⁸⁸ *Lighthouses in Crete and Samos* (diss. op. of Judge Hudson), *supra* note 179.

¹⁸⁹ Art. 32, 1996 Draft Articles on State Responsibility.

¹⁹⁰ Chapter III.4.

actions are needed to save human lives. Hence, during the genocide in Rwanda, the Belgian peacekeepers stationed at the Ecole Technique Officielle (ETO) could have refused to comply with the order to withdraw, thus exposing themselves to the accusation of committing a wrongful act,¹⁹² because leaving the school would have meant, as it did, abandoning hundreds of human lives to sure death. This is the exact opposite of what happened.¹⁹³

For its peacekeeping operations the UN has developed the concept of ‘operational necessity’ as a circumstance excluding the liability of the organisation ‘for property loss and damage’.¹⁹⁴ Operational necessity is considered distinct from military necessity and applies ‘where damage results from necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandates’.¹⁹⁵ The concept of operational necessity as defined in reports of the Secretary General is an attempt at adapting necessity as a general circumstance precluding wrongfulness to the specifics of a UN peacekeeping operation. Nevertheless, it is extraordinary that this concept, which amounts to a circumstance precluding wrongfulness tailored to UN peacekeeping, has been surreptitiously introduced by the Secretary General. This is even more surprising if one compares the “smoothness” of this operation with the laborious work that the ILC has had to put into defining each aspect of state responsibility.

¹⁹¹ Saving human life is after all a human rights imperative (right to life).

¹⁹² The interim government in Rwanda, which was carrying out the genocide, would have presumably argued that, lacking a Security Council resolution under Chapter VII, the peacekeepers could not engage in combat with the Rwandan army. However, this argument was weak not only because of its provenance (a government which was committing genocide) but also because the rules of engagement of the UN Mission in Rwanda would have allowed peacekeepers to intervene to stop the commission of violations of humanitarian law (*supra* II.5(b)).

¹⁹³ Hundreds of Rwandans had sought refuge at the school believing that the presence of the UN peacekeepers would guarantee their safety. As soon as the peacekeepers left and abandoned them to their destiny, those inside were slaughtered mercilessly. In June 1997 in Nairobi, I interviewed a Rwandan refugee who lived with a excruciating sense of guilt for having told his wife and his little daughter to go to ETO, where he thought they would be safe. A lot of people were trying to get into the premises of ETO, and he believed that they stood a better chance of being allowed inside if he and his brothers did not accompany them. In fact, they were allowed in, but were among the victims of the massacre. He miraculously survived hiding throughout the genocide. For a full account of what happened at the school, see Human Rights Watch/Federation Internationale des Ligues des Droits de l’Homme *Leave None to Tell the Story: Genocide in Rwanda* (1999); African Rights, *Rwanda: Death, Despair, Defiance* (1995) at 1113 ff..

¹⁹⁴ Report of the Secretary General, *supra* note 166 at para. 13 and GA Res. 52/247 at para. 6.

¹⁹⁵ *Id.*(Report).

Any definition of operational necessity cannot encroach upon the customary content of necessity. Thus, the rule that necessity cannot be invoked when 'the state has contributed to the situation of necessity' (Art. 25, 2) should apply to international organisations, too, and to peacekeeping operations. In addition, operational necessity, like any other defence, cannot be invoked when the wrongful act constitutes a breach of a *jus cogens* rule. Finally, resort to operational necessity should be limited to peacekeeping operations and not extended to other operations, such as humanitarian operations and administration of territory. In the context of these operations justificatory arguments are still developed by the UN and other humanitarian agencies but they are usually clothed in morality.¹⁹⁶

(d) *Concurrent or secondary responsibility of states*

The application of existing rules on state responsibility to international institutional responsibility shows its greatest limit in the field of concurrent responsibility. There are three grounds on which states could bear responsibility for acts of international organisations. Firstly, they can be responsible as accomplices for 'aiding and abetting' the commission of a wrongful act by an international organisation.

Secondly, it could be argued that the states in whose territory a UN operation is conducted normally bear some measure of responsibility for the wrongful acts committed by the Organisation. The 1996 Draft Articles on State Responsibility specified that the fact that an act has been committed by the organ of an international organisation in the territory of the state is not in itself sufficient to consider it an act of that state.¹⁹⁷ However, concurrent responsibility is not necessarily premised on the full attribution to the state of all acts committed by international organisations in their territory, but it is rather premised on the notion that the territorial state, as a result of acquiescence, negligence or collaboration, bears some responsibility, even if only marginal, for acts committed in its territory. An exception to this is the case of the failed state whose institutions have ceased to operate in an effective manner, and do not possess the capacity to express an autonomous political will, let alone to interfere with the conduct of the operation by the international organisation. Another

¹⁹⁶ Chapter III.5. and IV.4.D.

¹⁹⁷ Art. 13, 1996 Draft Articles on State Responsibility; see *supra* note 13.

exception is a UN intervention under Chapter VII, since the territorial state is under an obligation to comply with the resolution of the Security Council.¹⁹⁸

The third and most controversial hypothesis of concurrent or secondary responsibility is that of the member states of the international organisation. There are serious reasons for avoiding a regime of unlimited responsibility of member states, most importantly the fact that this would represent a serious disincentive against multilateralism since states would be reluctant to accept liability for acts over which they have no direct control.

The argument that member states should carry concurrent liability for human rights violations committed by international organisations has not yet been tested in court. However, there is a rich litigation on the liability of member states for the debts of insolvent international organisations. In general, courts have rejected the idea that member states are liable for the debts incurred by international organisations. In *J. H. Rayner (Mincing Lane) Ltd v. Department of Trade and Industry and Others*,¹⁹⁹ the creditors of the International Tin Council (ITC) brought an action against the UK government to recover their losses. The plaintiffs argued, *inter alia*, that member states of the ITC carried secondary liability for the debts of the organisation, and that the organisation had acted as the members' agent.²⁰⁰ The High Court's decision to dismiss the claim was affirmed by the Court of Appeal and the House of Lords. The English courts struggled to avoid two possible results: a) the direct recognition of the international legal personality of the ITC without incorporation, on the one hand; and b) the concurrent responsibility of member states on the other. Since a) would have led to the sole responsibility of member states - a highly undesirable outcome in their eyes - the courts resorted to the convoluted fiction of the 'body corporate' to recognise that the ITC was a legal person and thus bore responsibility for its debts.

¹⁹⁸ Whether the Security Council can violate norms of *jus cogens* is however a moot point. See *supra* note 130.

¹⁹⁹ *J.H. Rayner Ltd v. Department of Trade and Industry* [1990] 2 AC 418 for the House of Lords' decision. The decisions of the High Court and of the Court of Appeal are reported respectively at 77 ILR 56 and 80 ILR 49. See also Case 241/87, *Maclaine Watson and Co. Ltd v. Council of the EC and Commission of the EC*, 96 ILR 201.

²⁰⁰ While liability based on agency 'may theoretically be a proper basis for the direct liability of members of an international organization, it must be recognised that proof of such agency is not easy' (Amerasinghe, *supra* note 25 at 262).

It is important to bear in mind that the conclusion in the ITC cases that there is no 'plausible evidence' of the existence of a rule of joint and several liability of the member states under international law²⁰¹ was reached in the context of financial claims and in respect of a sectorial international institution. The near universal membership of the UN would make the application of a regime of secondary or concurrent responsibility of member states even less viable and appropriate. On the other hand, the gravity of the violations in question and the fact that one of the reasons why such violations can occur is the member states' abdication of their supervisory function²⁰² are factors that militate in favour of some form of member states' responsibility.

The apportionment of responsibility between international organisations and states cannot be presumptive, and needs to be based on a stringent analysis of the facts and of all relevant sources of law, including the constituent instrument of the organisation, the mandate of the operation, and any agreement between the territorial state and the organisation. Furthermore, the regime of concurrent or secondary responsibility for states is only relevant to one form of reparation, i.e. monetary compensation. Other remedies to violations of human rights not only exist, but are even more appropriate in some circumstances.²⁰³ Other forms of reparation, which only the primary author can normally offer, include apology, restitution, modification of future conduct, and disciplinary proceedings against the officials responsible for a certain violation.

II.7. Conclusion

That international human rights obligations are binding upon international organisations has been argued on various grounds. There can be little doubt that customary standards are binding, but uncertainty can persist for treaty standards. The lodestar, however, should be the application of the highest standard available, firstly because the UN has to promote the rule of law and respect for human rights; and secondly because it ought to avoid causing embarrassment to, or even engaging the responsibility of those member states who have agreed to higher standards of human rights protection.

²⁰¹ *Maclaine Watson v. Department of Trade and Industry*, 29 ILM 670 at 675 (per Lord Templemann).

²⁰² See Chapter V.4.

²⁰³ See D. Shelton, *Remedies in International Human Rights Law* (1999).

International institutions can incur responsibility for breaches of an applicable obligation in the human rights sphere. However, owing to the lack of codification and the paucity of case law, international institutional responsibility is still characterised by some grey areas, in particular the regulation and the effects of the dual attribution of a wrongful act to an international organisation and a state, and aspects of causation and attribution. The codification work of the ILC is urgently needed in this area as in few others.

CHAPTER III

Human Rights and Multilateral Humanitarian Assistance

III.1. Introduction

This chapter examines the provision of humanitarian assistance by the United Nations (UN). It is argued that human rights, which - as has been shown in chapter II - are applicable to the activities of the UN, are at times violated in UN humanitarian operations.

The provision of humanitarian assistance now constitutes one of the main activities of multilateral institutions, both non-governmental and inter-governmental. The beneficiaries of humanitarian assistance are for the main part the victims of conflict or natural disasters and the displaced. Large sections of the population in general in developing countries are also affected directly or indirectly by multilateral development programmes. Emergency humanitarian assistance in conflict situations is principally provided by the main UN operational agencies – the United Nations High Commissioner for Refugees (UNHCR), the United Nations Children’s Fund (UNICEF), the World Food Programme (WFP), and, to a lesser extent, the United Nations Development Programme (UNDP) - while international financial institutions, most notably the World Bank, play the leading role in the provision of development assistance. Although development projects also raise human rights issues, this chapter focuses on humanitarian assistance provided by the UN humanitarian agencies since international financial institutions do not come under the scope of this thesis.

Humanitarian assistance is provided by UN agencies in various ways, usually through the medium of partner non-governmental organisations (NGOs), more seldom through local institutions and/or local government. The provision of such assistance is at times accompanied by forms of governance and administration of territory, as is the case in refugee camps, which are examined in chapter IV. In other cases, however, the lack of effective control and administration does not mean that humanitarian agencies do not possess the capacity to violate the human rights of individuals in the

affected population; it is the dynamics of the violation, as the case study of Afghanistan at the end of this chapter illustrates, that is quite different.

Neutrality and impartiality are cardinal principles in the practice of humanitarian assistance, but it is argued that violations of human rights are at times the result of too strict an adherence to these principles. Again the case of humanitarian assistance to Afghanistan, and the systematic violation of the principle of non-discrimination, serves to illustrate some of these points. UN practice is examined distinguishing between the political practice of the organisation (as expressed in the resolutions of the Security Council and of the General Assembly), the institutional/bureaucratic practice, and the operational practice - that is the real conduct - of the UN on the ground. It is submitted that the practice of the institutional bureaucracy of the UN was determinative of its actual behaviour. This is a phenomenon of the utmost importance to international law, because it highlights a loss of institutional regulatory efficacy, and, at worst, a process of substantial dis-empowerment of the political organs of the UN. It also reveals that the 'softer than soft law' body of institutional practice can end up being more 'effective' - that is more capable of determining behaviour - than 'hard law' (including rules of *jus cogens*, as is arguably the case with the principle of non-discrimination),¹ in spite of the hierarchical superiority and the avowed greater normative strength of the latter. The case study of Afghanistan also illustrates how the relationship between human rights standards, on the one hand, and humanitarianism, as currently practised and conceptualised by the UN, can become strained.

III.2. International Law on Humanitarian Assistance

(a) Definitions

The legal aspects of humanitarian operations have often been discussed alongside the question of humanitarian interventions. Both humanitarian assistance and humanitarian interventions have been analysed against the background of those principles of international law that are affected by them, in particular the principle of non-intervention in matters within the domestic jurisdiction of states and the

¹ On the question whether *jus cogens* is really hard law, see Riphagen, 'From Soft Law to Jus Cogens and Back' *Victoria University of Wellington Law Review* (1987) 81.

prohibition on the use of force.² In the Francophone legal literature, the key distinction is between *intervention humanitaire* and *intervention d'humanité*. The former is the provision of humanitarian assistance accompanied by the eventual deployment of some security forces solely for the purpose of protecting the safety of humanitarian personnel and guaranteeing access to the victims. An 'intervention d'humanité' is, on the other hand, characterised by a use of force on a significantly larger scale in favour of one party in the conflict, or of the civilian victims.³

In this chapter, the terms 'humanitarian operation' and 'humanitarian assistance' refer to the non-forcible provision of humanitarian aid by states, international organisations, and NGOs. According to its commonest meaning in the Anglophone legal literature, the term humanitarian intervention refers to 'cases in which a substantial part of the population of a state is threatened with death or suffering on a grand scale, either because of the actions of the government of that state, or because of the state's slide into anarchy...' and intervention is, thus, 'taken to mean action involving the use or threat of force'.⁴ Whereas in principle humanitarian operations do not involve the use of force in breach of international law, the distinction between humanitarian operations and humanitarian interventions has often become 'blurred' in practice.

Militarisation and privatisation of aid are two important developments. Militarisation can transform the humanitarian operation into a forcible intervention with important

² Art. 2(4), UN Charter and GA Res. 2625 (XXV), 24 October 1970, Declaration on Principles of International Law Concerning Friendly Relations Among States in accordance with the Charter of the United Nations.

³ Spiry, 'Interventions Humanitaires et Interventions d'Humanité: La Pratique Française face au Droit International', 102 *RGDIP* (1998) 407. Bettati, 'Un Droit d'Ingerence?', 95 *RGDIP* (1991) 639.

⁴ Greenwood, 'Is There a Right of Humanitarian Intervention?' 49(2) *World Today* (February 1993) 34. Pogany identifies three fundamental characteristics of humanitarian intervention: the occurrence of gross violations of human rights in a certain country, the use of armed force by a third party, the lack of consent or acquiescence on the part of the state on whose territory the intervention takes place (Pogany, 'Humanitarian Intervention in International Law: The French Intervention in Syria Re-Examined', 35 *ICLQ* (1986) 182, at 186). The legality of humanitarian intervention has recently become topical following NATO's intervention in Kosovo. On the legality of that intervention, see Bronwlie, Chinkin, Greenwood and Lowe 'International Legal Issues Arising in the Kosovo Crisis', 49 *ICLQ* (2000) 934.

On humanitarian interventions see also: Franck and Rodley, 'After Bangladesh: Humanitarian Intervention by Military Force', 67 *AJIL* (1973) 275; R. B. Lillich (ed.), *Humanitarian intervention and the United Nations* (1973); P. Malanczuk, *Humanitarian intervention and the legitimacy of the use of force* (1993); S. D. Murphy, *Humanitarian Interventions: The UN in an Evolving World Order* (1996); Roberts, 'Intervention and Human Rights', 69 *Int. Aff.*(1993) 429; F. R. Tesón, *Humanitarian Intervention : An Inquiry into Law and Morality* (1988).

consequences for its legality.⁵ Privatisation consists of sub-contracting some of the services provided by the UN to NGOs. It poses a series of problems for the application and enforcement of international law, because some principles of international law only apply to states.⁶ However, even when aid is sub-contracted, the sub-contracting entity, be it a state or an international organisation, cannot completely relinquish its obligations and responsibilities.⁷

At present there is no international legal definition of humanitarian assistance.⁸ Even the proposed Draft Convention on Expediting the Delivery of Emergency Relief is purposefully vague on this aspect, stating in a rather circular manner that ‘emergency assistance’ means ‘the relief consignments and services of an exclusively humanitarian and non-political character provided to meet the needs of those affected by disasters’.⁹ The practice of humanitarian organisations frequently refers to the distinction between aid for development and humanitarian assistance, the former being related essentially to the longer term objective of achieving economic and social development, whilst humanitarian assistance is normally connected to emergencies of a natural or social/political character (famine, armed conflict, natural disasters, refugee influxes, etc.). While not containing a general definition, international humanitarian law instruments are, on the other hand, replete with examples of assistance considered ‘humanitarian’ under those treaties, including not only food relief and medical services, but also educational services and the facilitation of religious worship.¹⁰ In defining

⁵ The trend towards militarisation of aid, especially of relief in conflict situations, appears to be endorsed by large sectors of the UN humanitarian bureaucracy, and the practice of the organisation is beginning to reflect this. See, for instance, SC Res. 1208 (1998) on the situation in refugee camps in Africa, in which the Council expressed its support ‘for the inclusion in the United Nations Stand-by Arrangements of military and police units and personnel trained for humanitarian operations, as well as related equipment’ (at para. 11). In favour of this trend is Donini, ‘Asserting Humanitarianism in Peace-Maintenance’, 4 *Global Governance* (1998) 81.

⁶ Schindler gives the example of the principle of non-intervention, ‘Humanitarian Assistance, Humanitarian Interference and International Law’ in R. J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (1994) 689, at 701. Domestici-Met, ‘Aspects Juridiques Récents de l’ Assistance Humanitaire’, 35 *AFDI* (1989) 117; Bothe, ‘Relief Actions: The Position of the Recipient State’ in F. Karlshoven (ed.) *Assisting the Victims of Armed Conflict and Other Disasters* (1989) 91 at 95-96; Macalister-Smith, ‘Rights and Duties of the Agencies Involved in Providing Humanitarian Assistance and their Personnel in Armed Conflict’ in Karlshoven 99.

⁷ Chapter II.6.

⁸ See N. Q. Dinh, P. Daillier, A. Pellet, *Droit International Public* (6th ed., 1999) 1020.

⁹ Draft Convention on Expediting the Delivery of Emergency Relief (1984), drafted by the UN Disaster Relief Co-ordinator, in Annex H in F. Kalshoven, *supra* note 6 at 248.

¹⁰ For example: Art. 24, Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), 75 UNTS 31; Arts. 25-28, Geneva Convention (III) Relative to the Treatment of Prisoners of War (1949), 75 UNTS 135; Arts. 23, 55, 108, Geneva Convention (IV) Relative to the Protection of Civilians in Time of War (1949), 75 UNTS 287

humanitarian assistance, due regard must be given to human rights - both civil and political rights, and economic, social and cultural rights - as the normative and universal way of categorising individuals' basic entitlements and needs.¹¹

(b) *The applicable law*

Despite its importance in current international affairs, uncertainty on the international law governing humanitarian assistance persists. One reason for this uncertainty is that the law, in its various forms, has for the most part ensued from the context-specific and fluid practice of states and of international organisations, governmental and non-governmental alike. Another feature, which contributes to the obfuscation of the legal dimension of humanitarian assistance, is that different legal regimes can apply to humanitarian operations. International humanitarian, human rights, refugee and UN law – and to a lesser extent environmental law - are all part of this normative framework. International humanitarian law instruments contain various provisions on the delivery of humanitarian assistance in the context of an armed conflict. Human rights law is especially important as it accords protection to such rights as non-discrimination, the right to life and economic and social rights, all of which can contribute to determining the legal nature of the entitlement to humanitarian assistance.¹² While at present the delivery of humanitarian assistance does not often take sufficient notice of human rights law, there can be no doubt that legally this should be the case and that a rights-based approach to humanitarian assistance must be promoted.

International refugee law constitutes an important framework for the provision of humanitarian assistance to persons that come under one of the refugee definitions.¹³

[hereinafter Geneva Convention I, III or IV]; Art. 69 (1), Protocol I Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflict (1977), 1125 UNTS 3; Art. 18 (2), Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (1977), 1125 UNTS 609 [hereinafter Protocol I or II to the Geneva Conventions].

¹¹ In *A Theory of Human Need* (1991), L. Doyal and I. Gough argue that needs to which economic and social rights (for example physical and mental health) correspond are essential to a person's well-being.

¹² On the right to receive humanitarian assistance, see *infra* 137 ff. (and references at note 36).

¹³ Convention relating to the Status of Refugees (1951), 189 UNTS 137, and the Protocol to the Convention relating to the Status of Refugees (1967), 606 UNTS 267 [the 1951 Convention as modified by the Protocol will be hereinafter referred to as '1951 Refugee Convention']; Organisation of African Unity: 1969 Convention on the Specific Aspects of Refugee Problems in Africa (1969), 1000 UNTS 46 [hereinafter the OAU Refugee Convention].

Furthermore, a process of fertilisation from the refugee area into the broader area of humanitarian relief has taken place, because refugees have traditionally been one of the main recipient groups of humanitarian assistance,¹⁴ and owing to UNHCR's operational and institutional expansion over the last decades. Another important category of displaced persons who can also be beneficiaries of humanitarian assistance are internally displaced persons (IDPs). While the experience of displacement is common both to refugees and to IDPs, they are legally distinct groups. In particular, there is no specific treaty regime for IDPs as there is for refugees. The status of IDPs is regulated by general international law, including most importantly human rights law, but increasingly also by a rich body of soft law.¹⁵

The law and practice of international organisation constitutes another source of legal regulation of humanitarian operations. The powers and functions of international organisations are primarily regulated by their constituent instrument, but progressive amendments of these instruments - and of the original mandates of the organisations - ,¹⁶ internal law-making, and 'implied' functions and powers have often reduced the actual importance of the constituent instrument in the case of most UN agencies. The practice of the organisations is another regulatory source of great importance, not least because the implied powers of an organisation 'have to be sought both in the Constitution and in the practice of the Organisation'.¹⁷

The specific agreement between the international organisation and the state concerning the implementation of a programme of humanitarian assistance in principle constitutes a source of legal regulation. It must be observed, however, that in practice there are examples of humanitarian operations carried out in the absence of any specific agreement with the government concerned, or with agreements that are ostensibly nebulous. Indeed, in some situations there is no government in effective control with which an agreement can be concluded (for instance, in most phases of

¹⁴ C. Skran, *Refugees in Inter-War Europe* (1995); B. Harrell-Bond, *Imposing Aid* (1986) and, by the same author, 'The Experience of Refugees as Recipients of Aid', in A. Ager (ed.), *Refugees: Perspectives on the Experience of Forced Migration* (1998) 136.

¹⁵ G. S. Goodwin-Gill, *The Refugee in International Law* (2nd ed., 1996) 264-268 . Quite interestingly, the provision of material assistance to IDPs is often carried out by the same institutions responsible for assisting refugees. UNHCR has, in fact, an IDP programme in some countries.

¹⁶ For instance on the evolution of the UNHCR mandate see Goodwin-Gill, *supra* note 15, at 8-18. See also Chapter I.5.

¹⁷ *Nuclear Weapons - WHO* case, at 172-224 (diss. op. of Judge Koroma) and at 199. On implied powers, see Chapter II.2.

the civil war in Liberia and in Somalia). In addition, maintaining a state of regulatory uncertainty can be advantageous for international organisations that will, thus, have a 'free hand' in the conduct of the humanitarian operation.¹⁸ Finally, an agreement may at times be deemed detrimental to the implementation of assistance programmes in those parts of the country that are under the effective control of insurgents.¹⁹

As a result of a conflation of legal regimes, uncertainty is a feature of the current law on the provision of humanitarian assistance. There are only a few examples of humanitarian assistance – such as that provided to prisoners of war –²⁰ which are regulated by the clear-cut resort to one of the legal regimes and to its specific provisions and rules. The vast majority of humanitarian emergencies are, on the other hand, characterised by elements that could warrant at least the partial recourse to one or more of these regimes. In addition, there is also a degree of conceptual fluidity with notions, categories and principles moving across these legal regimes, often accompanied by a process of partial re-definition and contextual adaptation. For instance, the role of private actors, the problem of accountability of humanitarian agencies, the question of enforcement, some of the most important legal standards, are all questions that cut across the fictitious conceptual boundaries of these legal regimes.

The provision of humanitarian assistance to persons fleeing an armed conflict in their country of origin illustrates how these different legal regimes and categories interplay. In fact, while everyone is entitled to respect for his/her human rights, refugees are entitled to the higher standard of protection that ensues from refugee status. In addition, if the host country is neutral, humanitarian assistance delivered to combatants who are still active may be regulated by Geneva Convention (III)²¹ and by

¹⁸ Human Rights Watch, 'Failing the Internally Displaced. The UNDP Displaced Persons Program in Kenya' (1997) at 89-90. In its correspondence with Human Rights Watch, UNDP explained its failure to reach a 'formal agreement' with the Government of Kenya in part 'because of the difficulty in reaching agreement with the Government' but also because of 'the uncertainty over funding that made it impossible for UNDP to enter into specific commitments that would have allowed it to call for reciprocal formal commitments from the Government' (*Ibid.* at 89 and 149).

¹⁹ In this respect, the practice developed by UNICEF's Operation Lifeline Sudan for the delivery of assistance to the civil war-ridden southern parts of the country is noteworthy. Central to such practice are tripartite agreements between the Government, UNICEF, and representatives of the insurgents - the Sudan People's Liberation Army. Exporting this model to other situations may not be so easy due to the likely reluctance of governments to enter into agreements with insurgents in their territory.

²⁰ Geneva Convention III.

²¹ Art. 4, B (2), Geneva Convention (III).

the Hague Convention (V), which oblige neutral states to intern active combatants and to provide humanitarian assistance to them as if they were prisoners of war.²²

Human rights law is the legal regime of more general and universal application, in that the state in which the humanitarian crisis has arisen is almost certainly bound by it, either because it has become party to human rights treaties or as a result of customary law. Refugee law appears to have at least in principle a well-defined ambit of application. However, the reality of mass exodus often makes the applicability of refugee law problematic due to the uncertainty of personal status.²³ International humanitarian law applies primarily to international armed conflicts, with the exception of a limited number of provisions on internal armed conflict (Art. 3 common to the four Geneva Conventions and Protocol II).²⁴

In order to determine the law that is applicable to the provision of humanitarian assistance in a given situation, a thorough analysis of the factual context is necessary. Some elements are of particular importance. Firstly, there is the cause of the humanitarian crisis - be it an international armed conflict, an internal armed conflict, a natural disaster or, more generally, government policies that constitute gross violation of human rights obligation (such as, for instance, a deliberately discriminatory economic policy aimed at driving members of a particular group to destitution). The place of delivery of the assistance must be considered, depending on whether assistance is distributed directly in the country where the humanitarian emergency

²² Art. 11, Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (1907), 1 Bevans 654 [hereinafter 'Hague Convention V']. Art. 12 obliges the state 'to supply the interned with the food, clothing, and relief required by humanity'. It must be observed that this Convention, like most international humanitarian law, applies to international armed conflict. Indeed, the very concept of state neutrality is one that is based on the factual premise of the occurrence of an international armed conflict. The type of obligation that a state has vis-à-vis belligerents from an internal armed conflict received in its territory does not encompass an obligation to intern. However, the receiving state still has a duty to 'refrain from organising or encouraging the organisation of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State' (GA Res. 2625 (XXV), 24 October 1970, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations).

²³ The OAU Refugee Convention (*supra* note 13) has tried to resolve some of the problems on the determination of refugee status by providing for the recognition *en masse* of groups of persons 'who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality' are compelled to seek refuge abroad (Art. 1, 2).

²⁴ In the *Nicaragua* case the ICJ held that Common Art. 3 reflects customary law (*Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. US), Judgment (Merits), ICJ Reports (1986) 14, at 113-114).

originates or whether it is delivered to persons who have crossed an international border. In addition, the consent, or lack thereof, of the government to the humanitarian operation is a material element for determining the question of the legality of the operation. Finally, the legal status of the beneficiaries has to be determined because, while everyone is entitled to respect for his/her human rights, some categories of persons (for example refugees and prisoners of war) are entitled to the specific protection granted to them under special instruments and provisions.

(c) *The Nicaragua case and the question of assistance without the consent of the affected State*

Nicaragua is so far the only case in which the World Court has considered some legal aspects of humanitarian assistance in conflict. The most important finding of the Court in this case was that the United States (US) violated the customary law prohibition of the threat or use of force, and the principle of non-intervention in the affairs of another state.²⁵ In particular, the Court found that the ‘support given by the United States, up to the end of September 1984, to the military and paramilitary activities of the *contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support²⁶ was in breach of the principle of non-intervention. As regards US support to the *contras* after October 1984, the Court took into account the decision of the Congress on that date to allocate funds to the *contras* only for ‘humanitarian assistance’.²⁷ Under US legislation, ‘humanitarian assistance’ was defined as:

the provision of food, clothing, medicine, and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death.²⁸

²⁵ *Id.* at 146-150.

²⁶ *Id.* at 124.

²⁷ It had been argued by Nicaragua that the US actually continued to help the *contras* even after this date in particular by providing intelligence information to help their operations, but the Court did not have any conclusive evidence in this respect and could not find against the US on the facts. However, the Court used this to make a statement on the law in this respect and, more specifically, on what assistance can be deemed truly humanitarian.

²⁸ *Nicaragua, supra* note 24 at 57.

The Court observed that ‘there can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law’.²⁹ The Court then specified that,

if the provision of humanitarian assistance is to escape condemnation as an intervention in the internal affairs, not only must it be limited to the purposes hallowed in the practice of the International Committee of the Red Cross (ICRC), namely “to prevent and alleviate human suffering” and “to protect life and health and to ensure respect for the human being”, it must also, and above all, be given without discrimination to all in need.³⁰

This wilfully general categorisation of the purposes of humanitarian assistance is not helpful for distinguishing humanitarian assistance from other forms of assistance. An essential feature of *truly* humanitarian assistance as identified by the Court is the fact that it ought to be delivered ‘without discrimination between the parties to the conflict’. One reason for referring to the practice of the ICRC is naturally that the Court was dealing with the provision of humanitarian assistance within an armed conflict. Reference to ICRC practice is not always appropriate in different circumstances.

Basing it on *Nicaragua*, *Oppenheim’s International Law* summarises the current legal position on humanitarian operations as follows,

... the objection [based on the principles of non-intervention and on the prohibition on the used of force] to humanitarian intervention does not apply to humanitarian assistance to those in need in another state; even in a situation of conflict within a state, humanitarian assistance will not constitute

²⁹ *Id.* at 124.
³⁰ *Nicaragua* case, at 125. The characteristics of humanitarian assistance are more specifically defined as those ‘indicated in the first and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross, that is: the prevention and alleviation of human suffering wherever it may be found; the protection of life and health; the ensurance of respect for the human being; and the promotion of mutual understanding, friendship, co-operation and lasting peace amongst all peoples’ (at 124-125). These purposes appear vague at a closer examination. The last principle in particular seems to broaden the spectrum of activities designated as ‘humanitarian’ beyond the proper meaning of this term.

intervention, so long as it is given (or perhaps is at least available) without discrimination between the parties to the conflict.³¹

Compared with the *Nicaragua* decision, perhaps not unsurprisingly the position emerging from the body of UN law on this matter – and more specifically the resolutions of the General Assembly on humanitarian questions – appears more conservative and essentially state-oriented. The General Assembly has asserted that, in delivering humanitarian assistance, ‘the sovereignty, territorial integrity and national unity of states must be fully respected in accordance with the Charter of the United Nations’ and that, as a consequence, ‘humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country’.³² Hence, the possibility of delivering humanitarian assistance without the consent of the interested state has been ruled out by the Assembly, at least as long as this assistance comes from states or governmental organisations. This position as stated by the General Assembly is in plain contrast with the Court’s decision in *Nicaragua* that had recognised the legality of the provision of humanitarian assistance without the consent of the state.

Which of these two positions is the correct one under international law? Was the Court right in saying that humanitarian assistance provided without the consent of the state cannot be regarded as contrary to international law? Or does the insistence of the General Assembly on the consent of the affected state express the lowest common denominator that states have agreed to? At first, the normative strength of the General Assembly resolutions may appear quite strong, particularly in light of the fact that these resolutions were passed with near unanimity.³³ The pronouncement of the

³¹ R. Jennings and A. Watts, *Oppenheim’s International Law* (9th ed., 1992) at 444.

³² GA Res. 46/182, 19 December 1991; GA Res. 43/131, 8 December 1988; GA Res. 45/100, 29 January 1991; GA Res. 51/194, 10 February 1997. See also the Agreed Conclusion 1998/1 in the Report of the Economic and Social Council for the Year 1998, Chapter VII ‘Humanitarian Affairs Segment’ (UN Doc. A/53/3). In addition, one of the most cited documents of international law of the ‘new world order’ era, a report submitted by the Secretary General to the General Assembly in 1992 (GA, Report of the SG on the Work of the Organisation, *An Agenda for Peace. Preventive Diplomacy, Peace-making and Peace-keeping*, UN Doc. A/47/277/S/24111, 17 June 1992) affirms that ‘... the UN will need to respect the sovereignty of the State... and humanitarian assistance must be provided in accordance with the principles of humanity, neutrality, and impartiality’ (p. 12-13).

³³ The Court’s decision on the question of the normative status of General Assembly resolutions has a more cautious nuance in *Legality of the Threat or Use of Nuclear Weapons* (GA Request), Advisory Opinion, ICJ Reports (1996) 226, at para. 70 ff. [hereinafter ‘*Nuclear Weapons*’] than in *Nicaragua* (at 99-100). In the *Nuclear Weapons* case, in particular, the Court concluded that the resolutions on nuclear weapons had

Court, on the other hand, appears weaker not only because of the lack of a doctrine of *stare decisis* in international law, but also because the Court did not really explain the reasons for its conclusion. Instead, it resorted to a well-established rhetorical device for eluding very controversial issues, that is pretending that no controversy exists. The Court thus asserted that ‘there was no doubt’ on the view it was taking.

The conclusion of the Court on the legality of humanitarian assistance without the consent of the affected state can still be justified with arguments based on human rights and humanitarian law, as well as general international law. First, in the *Corfu Channel* case, the Court referred to the existence of ‘elementary considerations of humanity’,³⁴ which, together with other principles, were found to be the source of a legal obligation incumbent upon Albania.³⁵ Second, although the explicit legal recognition of the right to receive humanitarian assistance is only a little beyond the proposal stage,³⁶ it can be argued that the legality of the provision of this assistance derives from the protection afforded to such fundamental rights as the right to life,³⁷ the right to an adequate standards of living, including adequate food, clothing and housing, the right to be free from hunger, the right to the enjoyment of the highest attainable standard of physical and mental health.³⁸ In this respect, it is also important to mention that in its General Comment to Article 6 of the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee included a social dimension involving positive obligations for states as part of the right to life.³⁹

often been adopted ‘with substantial numbers of negative votes and abstentions’ and that they fell short of ‘establishing the existence of an *opinio juris* on the illegality of the use of such weapons’ (at para. 71).

³⁴ *Corfu Channel Case* (UK v. Albania), Judgment (Merits), ICJ Reports (1949) 4, at 22. The so-called Martens Clause also contains a similar reference to ‘principles of humanity and dictates of public conscience’ (Art. 1 (2), Protocol I to the Geneva Conventions).

³⁵ It was held that Albania had been under an obligation to notify other states of the existence of a minefield in its territorial sea. In addition to ‘elementary considerations of humanity’, other relevant principles considered by the Court were the principle of the freedom of maritime navigation, and every state’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states.

³⁶ Domesticci-Met, ‘Propos sur le droit à l’assistance’, in M. Bettati *et al.*, *Law in Humanitarian Crises* Vol. II: *Access to Victims: Right to Intervene or Right to Receive Humanitarian Assistance?* (1995) 125; Domesticci-Met, *supra* note 6, at 122-123; Dupuy, ‘L’assistance humanitaire comme droit de l’homme contre la souveraineté de l’Etat’ in Kalshoven, *supra* note 6, 27.

³⁷ Art. 6, International Covenant on Civil and Political Rights (1966), 999 UNTS 171 [hereinafter ‘ICCPR’]. However, even the Convention on the Rights of the Child, GA Res. 44/25, 20 November 1989, has opted for a soft formulation regarding the entitlement of the refugee child to humanitarian assistance (Art. 12).

³⁸ Arts. 11-12, International Covenant and Economic, Social and Cultural Rights (1966), 999 UNTS 3 [hereinafter ICESCR].

States therefore - this argument would run - not only have a duty to provide humanitarian assistance to their own population, but they also have a duty to allow external actors to provide this assistance, if they are not capable of fulfilling their obligation.⁴⁰ Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) lends some support to this view by affirming that in order to implement the fundamental right to be free from hunger state parties will act individually and through international co-operation.⁴¹ It could be argued that an international humanitarian operation aimed at the alleviation of hunger comes under the scope of this provision. A solid legal basis for the position of the Court can be found in international humanitarian law.⁴² For instance, Article 59 of Geneva Convention IV obliges an occupying Power to agree to relief schemes on behalf of the occupied population, 'if the whole or part of the population of an occupied territory is inadequately supplied'.⁴³ Such relief schemes may be undertaken either by states or by 'impartial humanitarian organisations'. In internal armed conflict, however, Protocol II to the Geneva Convention does not oblige state parties to accept external humanitarian assistance.⁴⁴

This question of the consent of the affected state must also be approached from the angle of the responsibility of the international organisation. As discussed,⁴⁵ the International Law Commission has left out of its work the responsibility of international organisations, but there is general agreement that the rules of state

³⁹ Human Rights Committee, General Comment 14 (Art. 6).

⁴⁰ In particular, this argument is developed by Domestici-Met, *supra* note 6, at 122. See also: Draft Principles of International Relief in Natural Disaster Situations in Hardcastle and Chua, 'Humanitarian Assistance: towards a Right of Access to Victims of Natural Disasters', 325 *Int. Rev. R.C.* (1998) 589.

⁴¹ Art. 11, 2 ICESCR. See also Art. 2 (1) of the ICESCR and General Comment 12 (XX Session, 1999) adopted by the Committee on Economic, Social and Cultural Rights (UN DOC. E/C.12/1999/5).

⁴² Schindler, *supra* note 6, at 689-701. Bothe, *supra* note 6 at 91.

⁴³ Geneva Convention (IV). These relief consignments shall consist of 'foodstuffs, medical supplies and clothing'. Other provisions in international humanitarian law instruments that oblige states to accept external relief in certain circumstances are referred to by Schindler, *supra* note 6, at 696-697).

⁴⁴ Art. 3 (2) of Protocol II to the Geneva Conventions stresses that 'nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs' of the state. Art. 18 (2) asserts that 'if the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as food-stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken *subject to the consent of the High Contracting Party concerned* [emphasis added].

⁴⁵ Chapter II.6.

responsibility apply, *mutatis mutandis*, to international organisations.⁴⁶ Could it be argued that, although the international organisations mounted a humanitarian operation without the consent of the state, there were circumstances, such as necessity, that precluded the wrongfulness of its intervention? Two conditions must be met in order to invoke necessity as a ground for precluding wrongfulness. First, an essential interest of the state against a 'grave and imminent peril' must be at stake, the only way of safeguarding such interest being the commission of the wrongful act. Second, no essential interest of the aggrieved state must be 'seriously impaired'. Furthermore, if the act in question is in violation of a *jus cogens* obligation, then the state of necessity cannot be invoked.⁴⁷ Clearly, this definition of state of necessity is entirely state-centred, and adapting it to international organisations involves a Pindaric flight.

This rather confusing picture can be summarised as follows:

1. In the context of an international armed conflict, the provision of humanitarian assistance without the consent of the affected state is not in breach of international law – and, in particular, of the principle of non-intervention – so long as it is 'truly' humanitarian in nature (i.e. having regard to the nature, purpose and modalities of the assistance that is provided). This view is supported by a number of provisions contained in humanitarian law instruments and by the decision in *Nicaragua*, the former with reference to NGOs - the ICRC and other 'impartial humanitarian organisations' – and the latter in regard to the provision of humanitarian assistance by a foreign state. Despite their apparent clarity, the concrete application of these points of law is bound to give rise to difficulties. Suffice it to consider the complexity of an intervention/operation like that in Kosovo and the near impossibility of identifying the 'truly' humanitarian aspects of the operation/intervention.
2. In the context of an internal armed conflict, while the consent of the affected state to the provision of external humanitarian assistance is clearly required by Protocol

⁴⁶ Dinh, Daillier, Pellet, *supra* note 8 at 756, who underscore that *a fortiori* customary rules on responsibility should apply to international organisations too; M. Shaw *International Law* (4th ed., 1997) at 919-920.

II to the Geneva Conventions, the International Court of Justice (ICJ) in *Nicaragua* took a different view.

3. There is a vast range of situations in which a humanitarian crisis obtains outside an armed conflict.⁴⁸ Such situations include not only natural disasters, but also emergencies resulting from human intervention. In particular, it has been argued that there is a nexus between the widespread commission of human rights violations, including civil and political rights, and the occurrence of such humanitarian emergencies as famines.⁴⁹ Perhaps not unsurprisingly, existing soft law on humanitarian assistance focuses on natural disasters and chooses to ignore the role played by states, and by other authorities, in creating humanitarian disasters. In humanitarian crises that do not occur in the context of an international or internal armed conflict, the consent of the affected State to the provision of external humanitarian assistance is at present an indispensable legal requirement. However, developments in the area of humanitarian intervention are to be watched closely. Indeed, if it is true, as some authors argue, that international law is evolving towards the recognition of a right of humanitarian intervention,⁵⁰ this should lead *a fortiori* to the recognition of the right to adopt non-forcible measures to remedy a humanitarian crisis, such as the provision of humanitarian assistance without the consent of the affected state. It would also follow that this right could be exercised by state unilaterally or collectively through international institutions.
4. Excluding the wrongfulness of the act(s) part of the provision of humanitarian assistance to a state without its consent, invoking state of necessity, would be very problematic.

⁴⁷ Art. 25, Draft Articles on State Responsibility provisionally adopted by the Drafting Committee of the International Law Commission on Second Reading (2001), UN Doc. A/CN.4/L.602.

⁴⁸ The definition of internal armed conflict is at Art. 1, Protocol II to the Geneva Conventions.

⁴⁹ A. Sen, *Poverty and Famines* (1981). See also: A. de Waal, *Famine Crimes* (1997).

⁵⁰ See Greenwood, *supra* note 4, and Cassese, 'Ex Iniuria Ius Oritur: Are we Moving towards the International Legitimation of Forcible Humanitarian Counter-measures in the World Community?', 10 *EJIL* (1999) 23.

5. An intervention of the Security Council under Chapter VII could be determinative of the legality of the provision of humanitarian assistance regardless of these considerations.⁵¹

(d) *The development of the law on humanitarian assistance through the UN political organs*

The General Assembly has not limited itself to resolutions of a general nature on humanitarian assistance. It has also developed a rich practice on specific situations. The analysis of this practice of the General Assembly, and also, in the fewer cases in which it intervened, of the Security Council, can cast some light on the international law on humanitarian assistance as has been concretely applied to particular crises. However, these situation-specific resolutions do not offer a cohesive picture. While the vast majority of them lay great emphasis on the importance of the consent of states, in some instances they have mentioned the duty of the state to allow external humanitarian assistance. For example, the General Assembly has emphasised the need to secure 'humanitarian access' to the civilian population in Kosovo.⁵² Resolutions on the crisis in Sudan, on the other hand, stressed the importance of 'the full involvement of the Government of Sudan' in the conduct of the UN's main humanitarian operation, Operation Lifeline Sudan, reiterating that humanitarian activities 'should operate within the principle of national sovereignty'.⁵³

In its resolutions, the Security Council has often called for parties to the conflict to ensure the 'safe and unhindered access for humanitarian organisation to those in need'.⁵⁴ In a few cases, the Security Council has included these clauses in resolutions taken under Chapter VII. For instance, it demanded that Iraq 'allow immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq and make available all necessary facilities for their operations'.⁵⁵

⁵¹ See *infra* p. 144 ff.

⁵² GA Res. 53/164, 25 February 1999, at paras. 10 and 17.

⁵³ GA Res. 53/1 O, 11 January 1999. Operation Lifeline Sudan is supervised by the General Assembly, which has not specified the terms of reference of this operation.

⁵⁴ For the practice until 1990, see Ramcharan, 'The Security Council and Humanitarian Emergencies' 9 *Netherlands Quarterly of Human Rights* (1991) 19. Examples from more recent practice are: SC Res. 1231 (1999) on Sierra Leone; SC Res. 1233 (1999) on Guinea-Bissau; SC Res. 1234 and 1258 (1999) on the Democratic Republic of Congo; and SC Res. 1265 (1999), which did not deal with a specific situation but was adopted in a response to reports of the SG on the causes of conflict in Africa and on humanitarian assistance (respectively UN Doc. S/1998/318 and UN Doc. S/1998/883).

⁵⁵ SC Res. 688 (1991).

On occasion, the Council has included a clause in its resolution obliging a state to co-operate with humanitarian agencies, including NGOs. For instance, resolution 687 of 1991 bound Iraq, ‘in furtherance of its commitment to facilitate the repatriation of all Kuwaiti and third country nationals’, to ‘extend all necessary co-operation to the ICRC, providing lists of such persons, facilitating the access of the ICRC to all such persons wherever located or detained and facilitating the search by the ICRC for those Kuwaiti and third country nationals still unaccounted for’.⁵⁶ In resolution 1244 on Kosovo, acting under Chapter VII the Security Council emphasised that the Federal Republic of Yugoslavia had to allow ‘unimpeded access to Kosovo by humanitarian aid organisations and to co-operate with such organisations so as to ensure the fast and effective delivery of international aid’.⁵⁷ With these resolutions the Council has strengthened the already important role assigned by international humanitarian law to NGOs (the ICRC and other ‘impartial humanitarian organisations’).

A widely recognised milestone in the practice of the Security Council in the field of humanitarian assistance was resolution 794 of 1992 on Somalia, which established Operation Restore Hope. The Council determined that the ‘the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security’.⁵⁸ The use of force by its Members for avowedly humanitarian purposes was allowed by the Council.⁵⁹ Somalia offers an example of the escalation from a humanitarian operation to a forcible intervention on humanitarian grounds.

III.3. Neutrality and impartiality

The resolutions of the General Assembly and of the Security Council, and the decision of the ICJ in *Nicaragua* have one element in common: they view neutrality and

⁵⁶ SC Res. 1199 (1998) concerning the situation in Kosovo contains a similar clause but formulated in more general terms: the Federal Republic of Yugoslavia is asked to ‘facilitate, in agreement with the UNHCR and the International Committee of the Red Cross, the safe return of refugees and displaced persons to their homes’.

⁵⁷ SC Res. 1244 (1999). Earlier the Security Council had *inter alia* demanded that the Federal Republic of Yugoslavia ‘allow free and unimpeded access to humanitarian organisations and supplies’ – SC Res. 1199 (1998).

⁵⁸ See also para. 10 of that resolution in which the Council authorised ‘the Secretary-General and Member States ... to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia’ (para. 10).

impartiality as essential principles of humanitarian assistance.⁶⁰ Neutrality and impartiality can be traced to the practice and of the Statutes of the ICRC, and have been subsequently absorbed in international humanitarian law instruments.⁶¹ The original 'ethical' rationale for neutrality and impartiality has been at least in part superseded by a more 'pragmatic' rationale. These principles are now seen as an indispensable pre-condition for humanitarian organisations to be allowed access to those who need assistance in a conflict and, perhaps more importantly, for them to ensure the safety of their own staff.⁶²

When applied to humanitarian action, neutrality and impartiality are complementary terms: 'neutrality' requires an obligation not to take sides in a conflict (a duty 'not to do'), whereas 'impartiality' requires that, 'when it comes to action', humanitarian organisation intervene without giving any preference to any party to the conflict.⁶³ Humanitarian organisations are obliged not to take sides in the conflict, which entails a duty not to declare allegiance or support to, or to make public statements in favour of one party. Moreover, they are obliged to act without discriminating against any of the parties to the conflict. Neutrality and impartiality also encompass an obligation to determine the beneficiaries of the humanitarian assistance on no grounds other than

⁵⁹ Pontecorvo, 'Somalia e Nazioni Unite' in P. Picone (ed.), *Interventi delle Nazioni Unite e Diritto Internazionale* (1995) 201. Sorel, 'La Somalie et les Nations Unies', 38 *AFDI* (1992) 61, at 74.

⁶⁰ For instance, GA Res. 46/182, 19 December 1991, which contains an annex on the Guiding Principles of Humanitarian Assistance, asserts that such assistance must be provided in accordance with the principles of 'humanity, impartiality and neutrality'. In *Nicaragua*, the Court had affirmed that the characteristics of humanitarian aid 'were indicated in the first and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross', which included the giving of aid 'without discrimination to all in need in Nicaragua, not merely to the *contras* and their dependents' (*Nicaragua* case, at 124-125).

⁶¹ See Chapter I.2(d) and I.4.

⁶² The security of humanitarian personnel has become a real concern given the exponential rise in the numbers of UN and NGO officials killed in situations of conflict; 198 UN aid workers were killed between 1992 and 2000, and this figure would be much larger if NGO workers were included ('The Dangers of Trying to Help', *The Economist*, 10 March 2001). Such concerns have been partly addressed with the adoption of the Convention on the Safety of United Nations and Associated Personnel, GA Res. 49/59, 9 December 1994. Under the Statute of the International Criminal Court (Art. 8, 2, b), it is a war crime intentionally to direct 'attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict'.

⁶³ This is the analysis of the two terms that is offered by Denise Plattner ('ICRC Neutrality and Neutrality in Humanitarian Assistance', 311 *Int. Rev. R.C.* (1996) 161, at 165). Etymologically, 'neutrality' is the quality of an entity that is neither 'male' nor 'feminine' and, by extension, that is 'neither one thing nor the other'. 'Impartiality' is literally the attribute of an entity or person who is 'not party' to a particular question, dispute or contract. The two terms are synonymous. See, also, Weller, 'The Relativity of Humanitarian Neutrality and Impartiality', American Society of International Law - Proceedings of the 91st Annual Conference.

their need, and the attendant obligation to assist individuals in proportion to such need.⁶⁴ This approach is also consistent with the meanings given by the ICRC to the terms 'neutrality' and 'impartiality'.⁶⁵

Since the 1980s, the practice of humanitarian neutrality and impartiality has come under severe criticism from some NGOs. For example, Medecins sans Frontiers (MSF) has argued that 'impartial humanitarian aid distributed without discrimination openly and publicly to both parties is not appropriate if one of the parties does not simply aim at defeating the other, but at exterminating' a population.⁶⁶ Numerous experiences in so-called complex humanitarian emergencies confirm these concerns.⁶⁷ In Rwanda not only did the UN decide to disengage in the first few weeks of the genocide, it also repeatedly called for a cease-fire in order to allow negotiations between the parties and to facilitate the delivery of humanitarian assistance.⁶⁸ As has been correctly remarked, 'calling for a cease-fire is a political act' especially if it occurs in the midst of a genocide.⁶⁹ In addition, the Secretary General stressed the fact that the UN had to respect neutrality and support the lawful authorities in the country, although a number of international NGOs had established in early April 1994 that acts of genocide were being perpetrated in Rwanda.⁷⁰ Finally, 'keeping the appearances' of neutrality was achieved through a process of obfuscation of the events unfolding in Rwanda, aptly mis-represented as 'calamitous circumstances', 'convulsions', and as the

⁶⁴ Pictet, 'Les principes fondamentaux de la Croix-Rouge et la Paix', 746 *Int. Rev. R. C.* (1984) 79.

⁶⁵ At the 25th International Conference of the Red Cross in October 1986, it was concluded that humanitarian action ought to make 'no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress'. On neutrality, on the other hand, it was stated that 'In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature'. See also: the ICRC Statutes of 24 June 1998 (in 324 *Int. Rev. R.C.* 1998) and Plattner, *supra* note 63, 168.

⁶⁶ Domestici-Met, *supra* note 6, at 127.

⁶⁷ African Rights, 'Humanitarianism Unbound?', Discussion Paper No. 5 (November 1994).

⁶⁸ On this, see David, 'Aspects juridiques de la responsabilité des différents acteurs dans les événements du Rwanda (avril-juillet 1994)', Commission d'enquête parlementaire du Sénat concernant les événements du Rwanda, in Belgian Parliamentary Documents (*Doc. Parl.*), Sénat, 1997-98, 1-611/13, 6 dec. 1997, Annexe 6, 6-24.

⁶⁹ African Rights, *supra* note 67, at 32.

⁷⁰ SG Report to the SC of 20 April 1994 (UN Doc. S/1994/470). On the Rwandan genocide, see: African Rights *Death, Despair and Defiance* (1994); Human Rights Watch/Federation Internationale des Ligues des Droits de l'Homme (FIDH), *Leave None to Tell the Story: Genocide in Rwanda* (1999), at 625-628. On Rwanda, see the Report of the Report of the Independent Commission of Inquiry appointed by the UN (1999).

result of a 'frenzy of massacres' and of 'unruly elements responsible for the massacres'.⁷¹

Weller has observed that, in order to analyse humanitarian neutrality and impartiality, it is necessary to take into account the differing legal character of these principles, and the relativity of their content as a result of the operational context and of specific regulatory aspects concerning the operation or the organisation itself.⁷² Bearing these considerations in mind, some consequences of humanitarian neutrality and impartiality, highlighted by African Rights and by Alex de Waal, cannot be overlooked.⁷³ Firstly, material assistance can end up in the hands of one of the warring factions or of the authorities of a state responsible for systematic violations of human rights or humanitarian law. But it is not simply the diversion of aid to combatants and warring factions that is problematic, the distribution of aid through the authorities exercising control - a requirement frequently imposed by governments and insurgents to allow access to the victims - can also give rise to dilemmas, particularly if the authorities in charge decide to distribute aid in a discriminatory manner or to give access to humanitarian organisations selectively.

Relief to Ethiopia in the wake of the 1984-85 famine is an illustration of these processes. The neediest areas and groups were only marginally affected by the aid operation as a result of continued manipulation by the Ethiopian Government, which was treated as a partner by humanitarian organisations throughout the crisis. Closing an eye to the crimes committed by the Ethiopian forces in the course of that conflict and not reporting them was an implicit term in the 'gentlemen's agreement' between the Ethiopian authorities and the humanitarian organisations.⁷⁴ Humanitarian operations can result in an improvement in 'the legitimacy of the controlling authority', be it an insurgent rebel group or the government of the country, regardless of even widespread violations of human rights and humanitarian law that it may be committing.⁷⁵ Finally, another consequence of humanitarian neutrality and impartiality

⁷¹ Human Rights Watch/FIDH, *supra* note 70. See, for example, the report of the Secretary General presented to the Security Council on 13 May 1994, more than one month after the beginning of the genocide (UN Doc. S/1994/565).

⁷² Weller, *supra* note 63.

⁷³ African Rights, *supra* note 67. De Waal, *supra* note 49.

⁷⁴ De Waal, *supra* note 49, at 106-132.

⁷⁵ *Ibid.*, at 5. David Keen and Ken Wilson have noted that 'relief organisations have tended to conceptualise famines in terms of food shortages and needs, and accordingly to construct relief

is the indirect provision of strategic and logistical support to parties to the conflict, if 'the military or political objectives of the controlling authority or combatant force coincide with the logistical requirements of the humanitarian operation'.⁷⁶ In particular, this support consists of keeping lines of communication and transport facilities open.

There can thus be little doubt in the light of recent practice that the unswerving application of neutrality and impartiality can actually be an obstacle to the promotion of humanitarian ideals, and facilitate the commission of violations of human rights. Albeit normally unintended, these consequences of humanitarian operations cannot be ignored by humanitarian organisations, including the UN.⁷⁷ In some circumstances, it may be appropriate to re-visit the *modus operandi* based on neutrality and impartiality and face difficult dilemmas: can humanitarian organisations continue to be neutral and impartial in all situations, regardless of which state or groups they are dealing with? Given that humanitarian action can result in some kind of help for the authorities that are in control of the territory, should humanitarian organisations not renounce their neutrality and impartiality and treat states/authorities differently, depending also on their compliance with human rights and humanitarian law? One way of resolving the tension between extreme humanitarian impartiality and neutrality on the one hand, and respect for human rights on the other, is by assessing the relative strength of the obligations involved. The ICRC, for example, has to abide by its own constitutional requirement to be neutral and impartial. UN agencies and programmes are subject to different constitutional obligations, and for them extreme neutrality and impartiality may not be an option if these principles cannot be reconciled with their other legal obligations. An UN operational agency cannot choose to remain neutral and impartial in the course of a collective action under Chapter VII of the UN Charter, unless expressly authorised by the Security Council.⁷⁸ Moreover, because of the applicability of human rights and humanitarian law to its activities, an UN operation cannot purport to remain neutral and impartial when the authorities of the host state or

operations as logistical exercises. However, effective relief in conflict related famines depend on understanding the relationship between aid and the dynamics of conflict' (Keen and Wilson, 'Engaging with Violence: A Re-assessment of Relief in Wartime', in J. Macrae, A. Zwi (eds.), *War and Hunger: Rethinking International Responses to Complex Emergencies* (1994) 209).

⁷⁶ African Rights, *supra* note 67, at 4.

⁷⁷ See the discussion on complicity in Chapter II.6(a).

⁷⁸ For example, SC Res. 1333 (2000) expressly exempts humanitarian organisations from the ban on flights into and from Afghanistan as part of the sanctions against the Taliban (at para. 11-12).

insurgent groups are committing gross violations of humanitarian law and/or human rights.⁷⁹

An original solution to this clash of values and normative systems is to re-define the principles of neutrality and impartiality in accordance with the evolution of international law. As suggested by Weller, it is hardly conceivable that insistence on compliance with basic rules of international human rights and humanitarian law should still be regarded 'as an un-neutral or partial act'.⁸⁰ International law has eroded the space of neutrality and imposes choices on states and on other actors, including international organisations and NGOs. Given that traditional conceptions of neutrality and impartiality are so deep-seated in the attitudes and ethos of humanitarian workers, it is necessary to propagate this re-definition of neutrality and impartiality at the field level.

III.4. A Case-study: Non-discrimination in the Provision of Humanitarian Assistance to Afghanistan and to Afghani Refugees in Pakistan

(a) The history of relief to Afghanistan

The fact that gender issues ostensibly entered the centre of the arena in the Afghani conflict did not come as a complete surprise, given that, while 'it would be an exaggeration to say that the war in Afghanistan was fought over the status of women', this 'would not be wholly untrue'.⁸¹ There are three situations in respect of which the provision of humanitarian assistance by the UN and by other agencies operating in Afghanistan and in the Afghani refugee camps in Pakistan can be considered to have violated the principle of non-discrimination.

⁷⁹ See above Chapter II.6.A. on responsibility for complicity with the commission of an internationally wrongful act.

⁸⁰ Weller, *supra* note 63, at 9. My own interviews with senior officials of UNICEF's flagship programme of humanitarian assistance, Operation Lifeline Sudan (OLS), confirmed that according to the guidelines, OLS field staff has to report human rights and humanitarian law abuses to their superior, but that no action is normally taken either at field level or at the senior level because it is believed that this could endanger the future of the operation (Interviews conducted in Nairobi in April 1998).

⁸¹ Cammack, 'Gender Relief and Politics During the Afghan War', in D. Indra (ed.), *Engendering Forced Migration* (1999) 94, at 95. On the Taliban regime, see also: P. Marsden, *The Taliban: War, Religion and the New Order in Afghanistan* (1998) and W. Maley (ed.), *Fundamentalism Re-born? Afghanistan and the Taliban* (1998), particularly Nancy Dupree's chapter 'Afghan Women under the Taliban' 145.

One of these situations regards the employment of local staff by the UN in Afghanistan. Following pressure and even intimidation from the Taliban authorities, Afghani women hired as local staff members by the UN were dismissed shortly after the establishment of the new regime. An element of discrimination continues to characterise the UN's employment practices related to local staff in Afghanistan. In whichever way responsibility for these practices is allocated between the UN and the Afghani authorities, it cannot be overlooked that UN agencies have at the very least passively accepted the incorporation of discrimination into their own policies and practices.

The principle of non-discrimination was also breached in the provision of humanitarian assistance to Afghani refugees in the camps in Pakistan during the 1980s. In particular, assistance in the form of education and of employment opportunities offered by the UN often completely neglected women and girls. This can be explained with concerns about the opposition to such programmes by the mujahedeen leadership in the camps. At the operational level, in spite of some protest, UNICEF and UNHCR substantially caved in to the mujahedeen, who could rely on decisive political support from western countries throughout the 1980s. This failure to uphold the rights of Afghani refugee women in the camps in Pakistan is best illustrated by the comparative data on the education of refugee girls and boys in the camps. In the camps, the level of literacy was at 60% among the refugee boys, but it was as low as 6% among girls aged six to eleven and 3% in the group of girls aged eleven to seventeen.⁸² 'Culture' is used as a justification for explaining the UN's failure to uphold the rights of women in the provision of humanitarian assistance to Afghanistan. This argument is not only untenable legally and morally, but is also empirically flawed since literacy rates in Afghanistan in 1978, before the Communist take-over, while revealing an overall dismal picture, were also characterised by less gender imbalance than in the camps later (95% of women were illiterate, as opposed to 92% of men).⁸³

⁸² Total enrolment in 1988 was over 100,000 boys and less than 8,000 girls (figures cited in H. Charlesworth and C. Chinkin, *The Boundaries of International Law. A Feminist Analysis* (2000) at 266, fn 113).

⁸³ Cammack, *supra* note 81, at 104.

The final example in the Afghani context of humanitarian assistance in breach of human rights is the provision of such assistance by UN in Afghanistan after the Taliban came to power in 1996. The relationship between the Taliban government and aid agencies has been distraught since the onset, one of the main areas of friction being the status and rights of women. The UN is heavily involved in Afghanistan having allocated some \$ 100 million of humanitarian assistance to this country in 1998, about half of the total humanitarian aid to Afghanistan, while the rest is provided by NGOs.⁸⁴ To an even larger extent than in the camps, the delivery of various forms of humanitarian assistance to women by the UN has been systematically impaired, and even altogether halted.

While primary responsibility for the systematic gender discrimination practised in Afghanistan remains with the Afghani State both legally and politically, the practice of the UN has not been in accordance with international law. And it is surely disquieting from the point of view of international law that the UN not only failed to prevent, or to become an effective opponent of the gender policies of the Taliban regime, but that it actually incorporated discrimination against women in its humanitarian assistance, and in the recruitment of its local staff.

In analysing the UN reaction to the policies of the Taliban, it is important to distinguish three different levels in the response and practice of the organisation. Firstly, there is the practice of the political organs of the UN (the General Assembly, the Security Council, and the Secretary General), which remains the natural object of interest of legal scholars. Secondly, there is the practice of the institutional bureaucracy of the various departments and agencies of the UN, distinct from the practice of the political organs, and expressed in reports, positions and statements of policy bodies, of senior civil servants, and of country or regional representatives. This level of organisational practice will be here referred to as 'institutional practice'.⁸⁵ While this type of practice, which has grown over time and has come to acquire great importance, is not explicitly regulated by the Charter, some basis for it can be found in Chapter IX and Chapter XV of the Charter. Finally, the operational level, the way in

⁸⁴ World Food Programme, *Strategic Framework for the UN in Afghanistan* of 12 Sept. 1998, available at <http://www.wfp.org/OP/Countries/afghanistan/strat_framework.html>, visited March 27,2001.

⁸⁵ The term 'internal practice' was not opted for, because it would conceal the external effects of this practice.

which the UN concretely behaves on the ground, is highly significant. By analogy with state practice, which encompasses both what a state says it does and what it really does, the operational reality must be considered part and parcel of the overall practice of the organisation.⁸⁶

From the point of view of international law, it is the practice of the political organs of the UN that normally receives the greatest attention. In fact, it is also, and perhaps primarily, through the acts of such organs that international organisations, and the UN in particular, have historically contributed to the development of international law.⁸⁷ In particular, it is well-established that evidence of the practice and *opinio juris* of states can be sought 'by reflection' also in the acts of the organs of the international organisations, and of the UN in particular.⁸⁸ On the other hand, what has been here referred to as the institutional practice of the organisation is an expression of the more autonomous will of the organisation. This practice is not endowed with immediate legal consequences on the plane of international law.⁸⁹ For instance, this vast body of institutional practice is not normally seen as reflecting the will of states and is therefore not used as evidence of state practice, although one could argue that, through the supervisory role over operational programmes attributed to the General Assembly by the Charter,⁹⁰ states are actually not only aware of the institutional practice, but may also contribute to its development and consolidation.

Leaving aside the question of the legal relevance of institutional practice, a singular aspect is that this institutional practice can at times matter more than the practice of the political organs and can be determinative of the operational behaviour of the organisation, even when it is in contrast with an act or a series of acts of a political

⁸⁶ In a well-known passage of his dissenting opinion on the *Anglo-Norwegian Fisheries case*, Judge Read adopted the even more radical view that action can be 'the only convincing evidence of State practice' in *Fisheries Case (UK v. Norway)*, Judgment, ICJ Reports (1951) 116, at 191 (diss. op. of Judge Read).

⁸⁷ R. Higgins, *The Development of International Law through the Political organs of the United Nations* (1963).

⁸⁸ Chinkin, 'The Challenge of Soft Law: Development and Change in International Law', 38 *ICLQ* (1989) 850.

⁸⁹ It is acquiring growing significance. See, for example, the recent arbitration between Eritrea and Yemen, in which Yemen claimed that a hydrocarbon study of the Red Sea region carried out by the World Bank and the UNDP 'constituted recognition of Yemeni title by these international agencies, as well as expert evidence to the same effect', and 'evidence of Ethiopian acquiescence' to the Yemeni title (*The Eritrea-Yemen Arbitration, Phase I: Territorial Sovereignty and Scope of the Arbitration*, 114 ILR (1999) 1, at para. 59-60).

⁹⁰ Except for those operational programmes, including humanitarian programmes, that have been established by a resolution of the Security Council. On the supervisory powers of the General Assembly over operational programmes, see, in particular, Art. 60 of the Charter.

organ and with human rights law.⁹¹ This is a phenomenon of the utmost importance to international law, because it highlights a loss of institutional regulatory efficacy, and, at worst, a process of substantial dis-empowerment of the political organs of the UN. It also reveals that the 'softer than soft law' body of institutional practice can end up being more 'effective' - that is more capable of determining behaviour - than 'hard law' (including rules of *jus cogens*, as is arguably the case with the principle of non-discrimination), in spite of the hierarchical superiority and the avowed greater normative strength of the latter.

(b) *The practice of the political organs of the UN*

In October 1996, a few weeks after the Taliban militias had conquered Kabul, the Security Council adopted resolution 1076. Having expressed concern over 'the continuation and recent intensification of the military confrontation in Afghanistan which have caused civilian casualties and an increase in refugees and displaced persons, and which seriously endanger the stability and peaceful development of the region', the Council, then, called upon

'all Afghan parties immediately to cease all armed hostilities, to renounce the use of force, to put aside their differences and to engage in a political dialogue aimed at achieving national reconciliation and a lasting political settlement of the conflict and establishing a fully representative and broad-based transitional government of national unity'.⁹²

The cautious wording of the preamble appears to resemble more closely the wording of Article 33 rather than Article 39, but authors like Conforti view the request for an immediate cease-fire as a typical provisional measure under Article 40 of the Charter (Chapter VII).⁹³ But other authors, reflecting on the more recent practice of the Council, stress the current tendency to refer explicitly to Chapter VII.⁹⁴ Subsequent

⁹¹ Johan Kaufmann has recognised the importance of the institutional practice and of the acts of senior civil servants for the operational programmes of the United Nations (J. Kaufmann, *United Nations Decision-Making* (1980) 78-79).

⁹² SC Res. 1076 (1996).

⁹³ B. Conforti, *Le Nazioni Unite* (5th ed., 1994) 185.

⁹⁴ N.D. White, *Keeping the Peace* (1997) 36-42. Unlike Conforti, White considers a SC resolution on Armenia's invasion of Azerbaijan in which the Council had requested a cease-fire as taken under Chapter VI and as having only recommendatory value (at 72). In the past, the Council did act under

resolutions of the Council have adopted a stronger wording and referred to the 'Afghan conflict... (as) causing a serious and growing threat to regional and international peace and security'.⁹⁵ Finally, in 1999-2000 the Security Council explicitly referred to Chapter VII in two resolutions.⁹⁶

Resolution 1076 mentioned the violations of women's rights, but limited itself to simply 'denouncing' them.⁹⁷ The Council noted that these violations could have 'repercussions' on international relief, but then immediately – and rather contradictorily - proceeded to 'call upon all States and international organisations to extend *all possible* humanitarian assistance to the civilian population of Afghanistan' [emphasis added], and attached no condition on the provision of such assistance. In its following resolutions on Afghanistan, however, the Security Council added that humanitarian assistance must be provided to 'all in need' in Afghanistan. Most importantly, the Council strengthened its call to respect the rights of Afghani women, at first 'urging an end to all discrimination against girls and women and other violations of human rights',⁹⁸ and finally demanding an end to such discrimination.⁹⁹ It is important to emphasise that these resolutions of the Security Council were adopted unanimously, with Islamic countries like Pakistan, Iran and Bahrain voting in favour of them. When the Security Council finally decided to use its Chapter VII powers, it did 'reiterate' its 'deep concern' over the continuing discrimination against women and girls, but the real reason for its intervention was the alleged support of the Taliban to terrorist activities and their refusal to surrender Usama Bin Laden to the US. Again, the Council omitted to state clearly that humanitarian assistance would have to be provided without discriminating on grounds of gender.

Chapter VII without explicitly stating so, most notably in the case of Rhodesia (Alston, 'The Security Council and Human Rights: Lessons To Be Learned from the Iraq-Kuwait Crisis and its Aftermath', 13 *Austral. YBIL* (1992) 107 at 146).

⁹⁵ SC Res. 1193 (1998) and SC Res. 1214 (1998), both of which were adopted unanimously.

⁹⁶ SC Res. 1267 (1999) and 1333 (2000).

⁹⁷ See SC Res. 1076 (1996) at para. 11, where the Council 'denounces the discrimination against girls and women and other violations of human rights and international humanitarian law in Afghanistan, and notes with deep concern possible repercussions on international relief and reconstruction programmes in Afghanistan'.

⁹⁸ SC Res. 1193 (1998).

⁹⁹ SC Res. 1214 (1998).

The General Assembly has passed a number of resolutions on the situation in Afghanistan after the Taliban conquest.¹⁰⁰ The most detailed of these resolutions was resolution 52/145,¹⁰¹ which contained very specific requests to Afghanistan. In the part on gender discrimination, the General Assembly spelled out a series of measures that 'all Afghan parties' had to take in order 'bring an end without delay to discrimination on the basis of gender and the deprivation of human rights of women'. According to the General Assembly, such measures had to ensure

- (a) The effective participation of women in civil, cultural, economic, political and social life throughout the country;
- (b) Respect for the right of women to work, and their reintegration in employment;
- (c) The right of women and girls to education without discrimination, the reopening of schools and the admission of women and girls to all levels of education;
- (d) Respect for the right of women to security of person, and to ensure that those responsible for physical attacks on women are brought to justice;
- (e) Respect for freedom of movement of women and their effective access to the facilities necessary to protect their right to the highest attainable standard of physical and mental health;
- (f) Equal access of women to health facilities...¹⁰²

This is an important resolution, not because it adds anything to already existing standards, but because it applies these standards to a particular situation. The call to bring an end to discrimination 'without delay', thus, reiterates the absolute and non-derogable nature of the principle of non-discrimination.¹⁰³ Furthermore, the measures indicated by the General Assembly echo the language of the Convention on the

¹⁰⁰ See GA Res. 51/108, 12 December 1996; 51/195, 17 December 1996; 52/145, 12 December 1997; 52/211, 19 December 1997; 53/165, 9 December 1998; 55/174, 28 February 2001.

¹⁰¹ GA Res. 52/145.

¹⁰² GA Res. 52/145 at para. 6. This resolution also urged all Afghani parties to ensure that UN programmes 'are carried out without discrimination against women as participants or as beneficiaries'.

¹⁰³ The non-derogable nature of this principle in time of public emergency has been recognised by state parties to the ICCPR. Art. 4 of the Covenant forbids the adoption of emergency measures consisting that 'involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'. On the question of the more general non-derogability of the standard of non-discrimination in treaty relations between states, i.e. on whether this principle is part of *jus cogens*, see Charlesworth, Chinkin, 'The Gender of Jus Cogens', 15 *Hum. Rts. Q.* (1993) 63, at 67-70.

Elimination of All Forms of Discrimination Against Women (CEDAW), which at various points obliges states 'to take all appropriate measures' to eliminate different forms of discrimination.¹⁰⁴ Finally, the General Assembly's focus on those particular rights – right to work, to education, to health, to freedom of movement and to security of the person – that were – and still are - being violated in Afghanistan without distinction between civil and political rights, on the one hand, and economic and social rights, on the other, is consistent with the nature of the principle of non-discrimination as the fundamental principle underpinning *all* human rights.

Another difference between the practice of the Security Council and that of the General Assembly is that the General Assembly included an appeal to member states and to the international community in general to provide adequate humanitarian assistance 'on a non-discriminatory basis', whereas the Security Council had limited itself to a request that humanitarian assistance be provided to 'all in need'. It may appear to be only a nuance, but reference to the principle of non-discrimination as being legally part of the provision of humanitarian assistance is significant. Overall, it could be said that the General Assembly went a step further than the Security Council in its pronouncements.

The Security Council could be criticised not only for excessively cautious language, but also for having failed to adopt more serious measures to deal with discrimination against women in Afghanistan, such as 'measures not involving the use of armed force' under Article 41 or provisional measures under Article 40. In order to assess this criticism, it is important to consider the past practice of the Security Council in the area of human rights.¹⁰⁵ Before the more recent practice of this decade, the Security Council had dealt with situations that involved widespread human rights violations, and, in particular, racial discrimination, in the cases of South Africa and Rhodesia. Although in these instances the Council did reach a determination under Chapter VII that these situations constituted 'a threat to peace', it is important to note that human rights played only a minor role in this conclusion. In the case of Rhodesia the right of self-determination and the consequences of the unilateral declaration of

¹⁰⁴ E.g. Art. 3, Convention on the Elimination of All Forms of Discrimination against Women (1979), 19 ILM 33, [hereinafter CEDAW].

¹⁰⁵ Alston, *supra* note 94. Bailey, 'The Security Council', in P. Alston (ed.), *The United Nations and Human Rights* (1992) 304. Ramcharan, *supra* note 54.

independence constituted the most important issue, while the Council made clear that the arms embargo on South Africa was not only the result of apartheid, but also of South Africa's 'persistent acts of aggression against its neighbouring States'.¹⁰⁶ The early practice of the Council, thus, indicates that widespread discrimination has not in itself been considered a threat to the peace or a breach of the peace leading to the adoption of Chapter VII measures. However, Franck maintains that on Rhodesia and South Africa the Council might have acted also as a result of its perception that there was a 'historically demonstrable connection between the proscribed behaviour and a propensity to war'.¹⁰⁷ As predicted by Alston, the intervention of the Security Council in the Iraqi situation in 1990-91 – and, in particular, resolution 688 –¹⁰⁸ did in fact constitute a watershed in the practice of the Council on matters related to human rights.¹⁰⁹ An important trend has developed since then, signalling a greater involvement of the Council in human rights and humanitarian matters, often characterised by interventions under Chapter VII. White has also underscored 'the expansion of the concept of 'threat to the peace' in the 1990s into situations of starvation (Somalia), genocide and serious humanitarian crises (Rwanda, Burundi, and Zaire), and civil wars (Liberia and Angola), as well as its most controversial action to restore democracy (Haiti)'.¹¹⁰

It is also in the very recent practice developed in particular in regard to Albania in 1997¹¹¹ and Kosovo in 1998-99¹¹² that some arguments for a more robust intervention of the Council on the systematic discrimination against women in Afghanistan could be found. Following a letter of the Italian representative to the Secretary General, in

¹⁰⁶ SC Res. 418 (1977).

¹⁰⁷ T.M. Franck, *Fairness in International Law and Institutions* (1995) 231. The fact that there is a historical connection between racial discrimination and war cannot alone explain the practice of the Security Council. Religions, and religious persecutions, have been at least as much a generator of wars, and, as has been seen in the case of Afghanistan, the status and rights of women has been a real battleground even in that conflict, catalysing factions representing completely opposite views of society.

¹⁰⁸ SC Res. 688 (1991).

¹⁰⁹ Alston, *supra* note 94, at 116.

¹¹⁰ White, *supra* note 94 at 59.

¹¹¹ At the beginning of 1997 a financial crisis triggered off serious disorder in Albania. The central government had lost control of parts of the country and various armed groups emerged. As a result of this crisis and of the influx of thousands of Albanian asylum-seekers in neighbouring countries, especially Italy, the establishment of a multi-national force for Albania was proposed.

¹¹² Internal disorder and systematic repression has characterised the situation in Kosovo since the end of the 1980s. But later, as a result of the establishment of the Kosovo Liberation Army (KLA) and its military consolidation, the situation in Kosovo developed into an internal armed conflict, which is defined at Art. 1 of Protocol II to the Geneva Conventions. The Security Council mentioned the occurrence of violations of international humanitarian law in respect of Kosovo only in September 1998 – see SC Res. 1199 (1998).

which the establishment of a 'multinational protection force' for Albania to secure the delivery of humanitarian assistance had been proposed,¹¹³ the Security Council approved a resolution under Chapter VII authorising the member states participating in the force to conduct the operation in order 'to facilitate the safe and prompt delivery of humanitarian assistance, and to help create a secure environment for the missions of international organisations in Albania'.¹¹⁴ In the case of Kosovo, on the other hand, the Council decided to adopt 'measures not involving the use of armed force', consisting of an arms embargo binding all states 'for the purposes of fostering peace and stability in Kosovo'.¹¹⁵

In the cases of Albania and Kosovo, the Council explicitly acted under Chapter VII without elaborating on the grounds that led to the determination that these situations constituted a threat to the peace or a breach of the peace. The case of Albania represents, in some respects, a real novelty in the practice of the Council, given that, in spite of the unrest in this country as a result of a financial crisis, the situation could not be said to amount to an internal armed conflict.¹¹⁶ Furthermore, and rather unusually for an action under Chapter VII, the Albanian Government expressed its full support to the intervention and communicated that it was 'looking forward to the arrival of such force'.¹¹⁷ As far as Kosovo was concerned, the existence of a widespread policy of persecution against ethnic Albanians has been a salient feature of the situation there for the last decade. This persecution, then, began to be exacerbated through ethnic cleansing and was accompanied by the occurrence of violent internal disturbances, almost certainly amounting to an internal armed conflict, at least in some phases and particularly after the establishment Kosovo Liberation Army as a force on the ground.

¹¹³ UN Doc. S/1997/258, reproduced in: 52 *Com. Int.* (1997) 6 at 8.

¹¹⁴ SC Res. 1101 (1997).

¹¹⁵ SC Res. 1160 (1998) recalled also in SC Res. 1199 (1998), and SC Res. 1203 (1998). This is before SC Res. 1244 (1999) of 10 June 1999, which followed the NATO intervention.

¹¹⁶ For the definition of internal armed conflict see note 48. In the case of Somalia, the Council's determination that an internal armed conflict was taking place is revealed by the mention of 'widespread violations of international humanitarian law' in the preamble (SC Res. 814 (1993)).

¹¹⁷ UN Doc. S/1997/259, reproduced in *Com. Int.*, *supra* note 113 at 9. It is worthy mentioning that China was the only country to abstain in the vote on the resolution on Albania explaining that China has 'never been in favour of the Security Council frequently invoking Chapter VII of the Charter in authorising such actions' (*Ibid.*, at 8).

The situation in Afghanistan differs in some important ways from that in Kosovo and Albania and from other situations considered by the Council in its practice, and these factual differences can perhaps partially explain the Security Council's failure to take more robust action. However, the explicit determination under Article 39 that the systematic discrimination and persecution of women in Afghanistan constitutes a threat to the peace could have been made by the Council. The Council did rather belatedly recognise that the Afghani situation was 'causing a serious and growing threat to regional and international peace and security'¹¹⁸, but, as the preamble of Resolution 1214 clearly shows, it was on the armed conflict in Afghanistan, and not on the discrimination against women, that this determination was based. Later, when Chapter VII measures were adopted,¹¹⁹ the Council again did not use this opportunity to include a more pervasive condemnation of gender discriminatory practices in its resolutions and concurrently to adopt measures specifically targeted at improving the situation of women. It is quite likely that, were a conflict between different factions not occurring and were the Taliban not accused of offering sanctuary to Usama bin Laden, the Security Council would have altogether abstained from intervening in Afghanistan, since the persecution of women is arguably not perceived as likely to endanger peace, let alone to constitute a threat of the peace or breach of the peace.

While this may make *some* sense from the perspective of the existing legal framework regulating the interventions of the Security Council and of its established practice, from the point of view of the human rights of women, it leads simply to a no win situation: so long as discrimination against women is not perceived by the international community as affecting vital interests and values, states will not be prepared to react forcefully; so long as states do not react forcefully, no 'threat to the peace' or 'breach of the peace' can be said to ensue from even such widespread and systematic violations of women's rights as those occurring in Afghanistan. The response of the Security Council will, thus, be one without 'real teeth' and the system of collective security established by the Charter, which has been increasingly used to deal with gross violations of humanitarian law and of *some* human rights, appears to be basically unavailable to women living under regimes practising sexual apartheid.¹²⁰

¹¹⁸ SC Res. 1214 (1998).

¹¹⁹ See *supra* note 96.

¹²⁰ Sexual apartheid can be defined as

The Security Council in a sense does no more than reflect existing value systems of the international community, and it is exactly this intrinsic flaw that makes the intervention of the Council in questions related to the discrimination of women inevitably less vigorous than in other cases.¹²¹ It is also important to note that the existence of a relatively high threshold of acceptability of discrimination against women, as opposed to other types of discrimination, on the part of the international community is evidenced by other factors.¹²² It could be argued that the practice of the Council on other types of discrimination, such as for instance discrimination based on religion (for instance, in China or Iran) or language (for instance, in Turkey), has also been weaker than its action in the case of racial discrimination, and that even racial discrimination has been predominantly interpreted in a restrictive manner generally limited to the context of colonialism and post-colonialism, and to southern Africa. But it must be emphasised that the persecution against women in Afghanistan does not represent an 'ordinary' case of discrimination.¹²³ The type of discrimination that is

'the oppression of individuals, and their exclusion from equal enjoyment of human rights, on the ground that they are women. Sexual apartheid can be more subtle than racial apartheid because the forms of oppression are woven into the fabric of society. The agents of modern sexual apartheid consider the subordinate and domestically oriented role and status of women part of the natural order, and assume women's servitude as a condition of society itself. Sexual apartheid is invisible to them, since they have no vision of how a society could function in which women exercised full political, economic, spiritual and related leadership in the same as men' (R. Cook, 'The Elimination of Sexual Apartheid: Prospects for the Fourth World Conference on Women', Issue Paper on World Conferences No. 5, American Society of International Law (1995), at 3).

Paraphrasing the definition of racial apartheid contained in Art. 7 (2) (h) of the Statute of the International Criminal Court (signed on 17 July 1998, not in force), 37 ILM 999, sexual apartheid could also be defined as 'a regime of systematic oppression and domination' over women.

¹²¹ On this, see Charlesworth, Chinkin, *supra* note 103. The factual determination based on Art. 39 that underlies the use of Chapter VII powers is traditionally considered not to be susceptible to judicial review by the ICJ. On this point there was almost unanimous agreement in the *Lockerbie* case, the exception being Judge El-Kosheri. In his dissenting opinion, Judge Bedjaoui, while recognising the non-justiciability of the Security Council's determination under Art. 39, commented that 'no small number of people may find it disconcerting that the horrific Lockerbie bombing should be seen today as an urgent threat to international peace when it took place over three years ago'; see *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Order of 14 April 1992, ICJ Reports (1992) 3 at para. 21 (diss. op. of Judge Bedjaoui). On the judicial review of the acts of the Security Council, see below at Chapter V.5(a).

¹²² See Charlesworth, Chinkin, Wright, 'Feminist Approaches to International Law', 85 *AJIL* (1991) 613, at 634, who juxtapose the paucity of substantive reservations made to the Convention on the Elimination of All Forms of Racial Discrimination to the plethora of reservations entered by states to CEDAW, as further evidence of this approach. See also Charlesworth, Chinkin, *supra* note 103, at 68, commenting on the list of human rights norms considered part of *jus cogens* in the *Restatement (Third) of Foreign Relations Law of the United States*. On the bias of *jus cogens* in the human rights sphere, see also: Alston, Simma, 'The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles', 12 *Austral. YBIL* (1992) 82.

¹²³ Human rights law treats the different types of discrimination 'equally', but it is in the area of international criminal law that the gender bias of international law has become more manifest. The

practised, its systematic character, the fact that it results in loss of life ensuing, for instance, from the lack of access to health facilities, the central role that the oppression of women has in the ideological discourse of the Taliban government all suggest that the situation in Afghanistan is more comparable to that of apartheid in South Africa than to other examples of discrimination and persecution. In the case of South Africa, the development of the concept of apartheid and the progressive crystallisation of its prohibition and criminalisation under international law constituted a very powerful legal and political tool in the struggle against this form racial discrimination and oppression, but the case of sexual apartheid in Afghanistan has not thus far been followed by a similar movement within international law aiming at actualising 'those values that international law seeks to promote and protect'.¹²⁴

The Secretary General submitted various reports to the Security Council on the situation in Afghanistan, the first one on March 1997, five months after the Taliban forces had taken over Kabul.¹²⁵ The reports of the Secretary General find their legal basis in his power to 'bring to the attention of the Council any matter' which may threaten international peace and stability (Art. 99 of the Charter), or they can be prompted by a specific request contained in a resolution of the Security Council, or of the General Assembly.¹²⁶ It is important to point out that, although the Secretary General is one of the organs of the UN, its reports are in many respects a product of institutional practice, in that it is the staff of the Secretariat and the UN missions in the relevant countries that provide much of the substantive work behind them,

Charter of the Nuremberg Tribunal (Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 UNTS 280) only mentioned 'political, racial and religious' grounds of persecution as underlying crimes against humanity, but this was also due to the specific situation that the Charter was addressing (i.e. the particular type of racism and genocide practised by the Nazi regime). The Rome Statute of the International Criminal Court recognises apartheid as a self-standing crime against humanity - Art. 7 (1) (j). But persecution on various grounds, including gender, can amount to a crime against humanity only in connection with other acts, such as murder, extermination, enslavement, deportation, imprisonment or other severe deprivation of physical liberty, torture, and different forms of sexual violence - Art. 7 (1) (h). Hence, institutionalised forms of systematic gender persecution, not consisting of those acts, such as sexual apartheid in Afghanistan, may not constitute a crime against humanity under the definition of the Statute. On the other hand, with respect to sexual violence, both in the context of war crimes and crimes against humanity, the Statute has made some important steps forward as pointed out by Erb, 'Gender-based Crimes Under the Draft Statute for the Permanent International Criminal Court', 29 *Columbia Human Rights Law Review* (1998) 401.

¹²⁴ This expression is by Judge Higgins (*Nuclear weapons*, *supra* note 33, at 592 (diss. op. of Judge Higgins).

¹²⁵ In 1997: UN Doc. S/1997/482, UN Doc. S/1997/719, UN Doc. S/1997/894. In 1998: UN Doc. S/1998/222, UN Doc. S/1998/532, UN Doc. S/1998/913. In 1999: UN Doc. S/1999/362. In 2000: UN Doc. S/2000/1106, UN Doc. S/2000/875, UN Doc. S/2000/581.

including the recommendations. In addition to reporting to these organs, the Secretary General also convened meetings of 'concerned countries', at which, however, issues related to women's rights appear to have received limited attention.¹²⁷

The Secretary General's reports throughout 1997, while paying token attention to the violations of women's rights,¹²⁸ did not link the provision of humanitarian assistance to a particular stand on these issues, and did not propose that the provision of humanitarian assistance be made conditional upon respect for the basic rights of women. This would not have been a case of aid conditionality. In fact, the condition that is at stake here is that, for humanitarian assistance to be provided, discrimination against women ought not to extend to it. 'Traditional' conditionality, on the other hand, is a way of exerting pressure on states that violate human rights, making aid dependent upon improvements in their human rights record. In this case, instead, it is the Afghani Government that is making the continuance of the provision of humanitarian assistance by the UN conditional upon the incorporation of discrimination against women in such assistance. The suspension of humanitarian assistance in all those situations in which the principle of non-discrimination could not be upheld in the provision of such assistance would have been a reasonable measure, but was never put forward. On the other hand, the UN did not hesitate to suspend humanitarian assistance when the security of UN staff was perceived to be at stake.¹²⁹

To conclude on the practice of the political organs, it must be noted that the Economic and Social Council also intervened in the situation in Afghanistan. One of its resolutions is particularly important since the Economic and Social Council called on the UN, NGOs and donors operating in Afghanistan to formulate and co-ordinate their programmes 'in such a way as to promote and ensure the participation of women

¹²⁶ On these reports as an instrument of accountability, see Chapter V.4.

¹²⁷ See, for instance, the letter of the Secretary General to the President of the Security Council of 1 May 1997 (UN Doc. S/1997/347), in which the Secretary General summarised one of these meetings. The question of gross violations of women's rights received only one incidental mention in the second last paragraph of the letter: 'All participants voiced their distress at the continued plight of the Afghan people, with special attention drawn to women and girls'.

¹²⁸ In the last two reports of 1998 (UN Doc. S/1998/532, UN Doc. S/1998/913), the situation of women receives hardly any attention in the reports of the Secretary General. This may have to do with the fact that in May of 1998, the UN had reached an agreement with the Taliban authorities (see *infra*). Later on, attention began to be given again to the situation of women with the last report of 2000 (UN Doc. S/2000/1106) presenting some of the 'issues of principle' that affect the UN humanitarian operations in Afghanistan (at para. 52).

¹²⁹ UN Doc. S/1998/532, para. 39.

in those programmes, and that women benefit equally with men from such programmes'.¹³⁰ In addition to its competence in the area of human rights and, more broadly, international economic and social co-operation (Art. 60 and 62 of the Charter), the Economic and Social Council plays an important role also by co-ordinating the work of, making recommendations to, and obtaining information from UN specialised agencies.¹³¹

(c) *The other two levels of organisational practice: institutional practice and real conduct*

The response of the political organs can be criticised for having been belated and without real 'teeth', and for having at times failed to give adequate attention to women's rights in Afghanistan. However, the position taken by the General Assembly in its resolutions was 'principled', i.e. it was essentially based on the application of current legal standards on non-discrimination. At the level of institutional practice and real practice, on the other hand, the adoption of a 'principled' approach towards the Taliban authorities was not taken for granted as the normal and legally mandatory course of action. On the contrary it was called into question, undermined, and eventually rejected. One consequence of this is that, in spite of the ongoing outrageous policies of the Taliban government, the UN involvement in Afghanistan has tried steadily to increase its involvement in Afghanistan.¹³²

Before analysing the practice of the humanitarian programmes, it is important to refer briefly to the response of the UN human rights machinery to the events in Afghanistan. Even though Afghanistan is a state party to numerous human rights

¹³⁰ ECOSOC Res. 1998/9, 28 July 1998.

¹³¹ Does the ECOSOC Council in principle have the power to stop the provision of humanitarian assistance by an UN agency? In the case of the specialised agencies, this question can be solved primarily by looking at the specific agreement between the UN and the specialised agency concluded under Arts. 57 and 63 of the Charter. In the 1960s the attempts of the General Assembly to stop World Bank and IMF from assisting Portugal and South Africa were not successful, as the Bank claimed that it was not bound by the resolutions of the General Assembly. See D. Williams, *The Specialised Agencies and the UN: The System in Crisis* (1987) at 160 ff.; I. Shihata, *The World Bank in a Changing World* (1991) at 99 ff. At any rate, these considerations may not be so relevant in the context of Afghanistan, where most humanitarian assistance is actually provided by UNHCR and by the World Food Programme (WFP), which were established by General Assembly resolutions and act under its authority and, subordinately, under the authority of the Economic and Social Council.

¹³² For 1996, around 124 million USD were requested by the UN, in 1997 this figure stood at 133 million, and in 1998 at 157 million and for 1999 a record 182 million were requested (*available at <http://www.reliefweb.int/fts/fm98afg.html>*). Inter-agency appeals are launched by the Secretary General, and they are normally followed by a resolution of the General Assembly in which the Assembly calls upon all member states to respond to the appeal.

instruments,¹³³ it was not from the treaty-based human rights organs that the Afghani situation received most attention. This is in part due to the intrinsic limits of the periodic reporting system, and attendant difficulties faced by these treaty-based organs in engendering an 'emergency response' to a human rights crisis. The Charter-based human rights bodies, instead, reacted more swiftly, in particular with the adoption of a number of resolutions by the Human Rights Commission¹³⁴ and the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The language of the resolutions of the Human Rights Commission resembles that of General Assembly resolution 52/145. The resolutions of the Sub-Commission are particularly interesting because they acknowledge the existence of discrimination in the provision of humanitarian assistance,¹³⁵ appeal not to 'extend diplomatic recognition' to the Taliban, and urge commercial enterprises 'to refrain from entering into financial agreements' with the Taliban regime until the end of the discrimination against women.¹³⁶ The Special Rapporteur on human rights violations in Afghanistan, originally appointed in 1984,¹³⁷ presented reports to the Economic and Social Council and, via the Secretary General, to the General Assembly.¹³⁸

The institutional practice of the UN differs from that of the human rights bodies significantly. In the autumn of 1996, faced with the introduction of a policy of severe discrimination against women, the UN Office for the Co-ordination of Humanitarian Affairs (UNOCHA) released a policy document containing guidelines on the work of

¹³³ Afghanistan is a party to the ICCPR and the ICESCR; to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (GA Res. 39/46, 10 December 1984); to the International Convention for the Elimination of All Forms of Racial Discrimination (1965), 660 UNTS 195; to the Convention on the Rights of the Child, *supra* note 37, but it has only signed CEDAW. Afghanistan's reports to all the Committees established under these treaties for monitoring compliance are all overdue (this information was available on the website of UN High Commissioner for Human Rights in June 1999 at <http://www.unhchr.ch/tbs/doc.nsf>).

¹³⁴ Human Rights Commission Res. 1998/70, 21 April 1998 (UN Doc. E/CN.4/Res/1998/70) and Res. 1999/9, 23 April 1999 (UN Doc. E/CN.4/Res/1999/9).

¹³⁵ See, for instance, Sub-commission Res. 1998/17, 21 August 1998, in which the Sub-commission *inter alia* took note of the 'numerous reports dealing with the unprecedented and extremely difficult situation of women in Kabul and the other parts of Afghanistan controlled by the Taliban, in particular widows who cannot support themselves because they are not permitted to work or to benefit from humanitarian assistance, which is given only to men'.

¹³⁶ *Ibid.* On the Sub-Commission's response to allegations of human rights violations, see: Eide, 'The Sub-Commission on Prevention of Discrimination and Protection of Minorities', in Alston (ed.), *supra* note 105, 211, at 248-252.

¹³⁷ ECOSOC Res. 1984/37, 24 May 1984.

¹³⁸ The most recent report was submitted by Special Rapporteur Mr Kamal Hossain to the Economic and Social Council on 24 March 1999 (UN Doc. E/CN.4/1999/40). The situation in Afghanistan was also the object of some attention in the reports submitted by the thematic Special Rapporteurs, for

UN agencies in Afghanistan. This early example of institutional practice was characterised by a strict adherence to the fundamental principles governing the work of the UN and the provision of humanitarian assistance, such as the principle of non-discrimination.¹³⁹ This response changed radically as a result of a mission of the Department of Humanitarian Affairs (DHA) to Afghanistan in the spring of 1997. The Report that resulted from this mission is an important policy document, on which the subsequent operational response of the UN was based. This report is also a good illustration of how institutional practice operates and how human rights are diluted and even dismissed at this level.

The aim of the DHA mission was to devise a common approach for UN agencies vis-à-vis the Taliban authorities. After stating that 'beyond its commitment to the various issues such as gender, the environment and drug control, the dynamic of the UN engagement in Afghanistan relies on a continuum linking the objectives of the UN Charter and internationally recognised human rights, to the practices of the agencies under the constraints of the field',¹⁴⁰ in a telling passage, the authors of the report add:

The question remains to determine if the development of cooperation arrangements with the Taliban are worth the efforts. In our view, the UN system has no real choice. It has to invest reasonable efforts into promoting a substantive dialogue with the Taliban simply to manage the existing gap between their vision of Afghan society, and the international standards to be respected. Furthermore, one should acknowledge the Taliban's impact on the political landscape of Afghanistan, restructuring Afghan society on Islamic tenets and modelling a new identity for Afghanistan.

The UN system must relate with these phenomena, at a political and social level, even if, in some areas, it shall be only to express its deep concerns. This approach should be undertaken in a constructive, rather than confrontational mode, to avoid harsh response from the Taliban. Pressures must be

instance by the Special Rapporteur on torture (UN Doc. E/CN.4/1998/38) and by the Special Rapporteur on Extra-judicial and Summary Executions (UN Doc. E/CN.4/1998/68/Add. 1).

¹³⁹ UN Department of Humanitarian Affairs, *Afghanistan Weekly Update No. 191*, 6 November 1996.

¹⁴⁰ UN Department of Humanitarian Affairs, *Report of the DHA Mission to Afghanistan*, 15 June 1997, at Introduction.

maintained on the Taliban to allow, and participate in, constructive experiments in education and the role of women in society.¹⁴¹

The authors of the report examined three possible approaches that in their view represented the options available to the UN and humanitarian agencies in their dealings with the Taliban authorities. First, there is the 'principle-centred' approach, which aims at 'making assistance conditional upon changes of policies that are in conflict with the UN Charter and internationally recognised norms and principles'. The other approaches envisaged in this document are the 'tip-toe' approach – 'attempting pragmatic experiments on the ground hoping for the development of a practical arrangement with the Taliban authorities' – and the 'community empowerment' approach – 'developing community capacity to act as counterparts to the UN agencies, in the margin of the authorities wherever possible'.¹⁴² According to the DHA Report, only a combination of these approaches can ensure the success of the UN involvement, but, judging from the final recommendations, the 'principled' approach seems to have been sidelined in the end. Indeed, the report recommends that 'practical and realistic' objectives for a common position of the UN agencies on gender be identified, and that a 'UN team composed of male and female expatriates should ... elaborate a set of practical objectives for UN agencies to sensitise the authorities on the implications of their policies'. Would a similar recommendation to 'sensitise' the authors of a massive human rights violation even 'sound' acceptable when applied to other human rights violations, for instance to those responsible for the ethnic cleansing in the ex-Yugoslavia?

But the most sweepingly dangerous aspect of the recommendations of the report, and one that is reflected in the subsequent practice, is the reference to 'practical and realistic' objectives. It has already been observed by some authors and by human rights organisations that humanitarian action often resists talks of rights and entitlements.¹⁴³ Obligations and legal standards are perceived as 'academic',¹⁴⁴ or as emanating from an 'abstract, and sometimes dogmatic environment, centred on the

¹⁴¹ DHA Report, *supra* note 140, at 4.3.

¹⁴² DHA Report, *supra* note 120, at Executive Summary.

¹⁴³ B. Harrell-Bond, *Imposing Aid* (1986) and, by the same author, 'Humanitarianism in a Strait-Jacket', 84 (334) *African Affairs* (1985) 3. See also: African Rights, *supra* note 67.

principles'.¹⁴⁵ This is also the approach adopted in the DHA mission report, which formulates recommendations virtually regardless of international legal standards. Subsequent UN policy documents confirmed the adoption of this approach in the Afghani context.¹⁴⁶

The existence of different responses in the institutional practice of the UN and of NGOs to the sexual apartheid imposed by the Taliban authorities are revealed in the same DHA report, but, regrettably, such principled practice remained isolated. In the early months of the Taliban rule over parts of Afghanistan, both UNICEF and WFP had decided to suspend the delivery of assistance, respectively education and food, when they realised that such assistance could not be provided on a non-discriminatory basis.¹⁴⁷ In the case of WFP, its efforts were undermined 'by the increased food assistance of other organisations, such as the ICRC, that took over some of its programmes'.¹⁴⁸ Certainly, the failure to adopt a concerted approach based on principles strengthened the contractual position of the Afghani authorities who could then rely on some degree of 'divide and rule' of the different humanitarian agencies to ensure that their oppressive policies against women could continue.

Another important example of institutional practice is the report of the inter-agency mission on gender, which took place in November 1997 and was led by Angela King,

¹⁴⁴ Morris, 'Protection Dilemmas and UNHCR's Response: A Personal View from within UNHCR', 9 *IJRL* (1997) 492, at 494. My own criticism to this view in: Verdirame, 'Human Rights and Refugees: The Case of Kenya', 12 *J. Ref. St.* (1999) 54, at 75-76.

¹⁴⁵ DHA Report, *supra* note 140, at Introduction.

¹⁴⁶ For instance, the Strategic Framework for the UN in Afghanistan (*supra* note 84), which states that 'the overarching goal of the United Nations in Afghanistan is to facilitate the transition from a state of internal conflict to a just and sustainable peace through mutually reinforcing political and assistance initiatives' [emphasis in the text]. Having formulated the main goal of the UN action in this fashion, and consistently therewith, it is then accepted in the same document that compliance with the principle of non-discrimination in the provision of humanitarian assistance cannot be practically attained in the short term. Cassese has argued that

'in the current framework of the international community, three sets of values underpin the overarching system of inter-state relations: peace, human rights and self-determination. However, any time that conflict or tension arises between two or more of these values, peace must always constitute the ultimate and prevailing factor'. (*supra* note 50).

It is important to stress, however, that Cassese's observation is made in the context of inter-state relations. On the other hand, the argument that the UN involvement in Afghanistan has to be based on the pursuit of an agreement to end an internal armed conflict *at all costs*, including the sacrifice of fundamental values protected under the Charter and under human rights law, would not find support in the values of international community as understood by Cassese.

¹⁴⁷ See also: Marsden, *supra* note 81 at 110-111 and 115. Among NGOs, Save the Children the Fund (UK) and MSF took similar stances.

¹⁴⁸ DHA Report, *supra* note 140, at 3.4.1.

UN Special Adviser on Gender Issues and Advancement of Women.¹⁴⁹ This report was very critical of the lack of gender awareness and sensitivity in the UN system and, in particular, of the fact that ‘despite the attention paid to discrimination against women, and lip service to their importance in rehabilitation and development assistance, most programmes and projects ignore women at all stages of their design and implementation’.¹⁵⁰ While re-affirming the need for a principled approach to the question of humanitarian assistance to Afghanistan, the gender mission recommended the adoption of the field-oriented application as ‘the most fruitful way to implement the principle-centred approach’.¹⁵¹ The field oriented application was defined as a method of applying principles ‘within the context of a practical, people-centred approach to assistance’, in which equality is seen as a ‘process’ to be interpreted also on the basis of ‘circumstances and the creative implementation of assistance programmes’.¹⁵² The gender mission, thus, rejected the strict application of the principle-centred approach - characterised by the suspension of any assistance programme for which equal participation and benefit between men and women is prevented by the intervention of the local authorities - on two grounds. Firstly, it was arguably concluded that such strict application would be in contravention with the resolutions of the Security Council and of the General Assembly on Afghanistan, which had not explicitly allowed conditionality of assistance. Secondly, it was argued that the suspension of programmes, as a result of strict conditionality, would not benefit the Afghani population and, especially, the most ‘vulnerable’ groups, including many women.

In spite of some differences, both the inter-agency gender mission and the DHA essentially opted for the continuation of humanitarian operations in Afghanistan. To the extent that it allowed the suspension of humanitarian assistance in certain circumstances, the report of the gender mission adopted a more principle-centred approach than the DHA report. However, it still deemed a pure application of principle both unfeasible and counter-productive. The interpretation given by the gender mission to the resolutions of the political organs as preventing conditionality is questionable, particularly because, as observed, this is not a real case of conditionality.

¹⁴⁹ Report of the Inter-Agency Gender Mission to Afghanistan, 12-24 November 1997, posted online by the Division for the Advancement of Women.

¹⁵⁰ *Ibid.*, para. 50.

¹⁵¹ *Ibid.*, para. 19.

In addition, the argument based on the counter-productivity of the strict application of principles only considers the short term consequences of the suspension of assistance, and overlooks long term consequences such as: the legitimization of Afghani authorities by continued collaboration; the facilitation of their gender policies by allowing discrimination against women to be incorporated in the provision of UN humanitarian assistance; the inevitable loss of credibility of the UN as a promoter and advocate for respect for women's rights with severe consequences for future activities.¹⁵³

The real conduct of the UN vis-à-vis the gender policies of the Afghani authorities was based on these reports. The most significant example of UN operational practice is the framework agreement between the UN and the Afghani Government, signed in May 1998. Under the nomenclature Memorandum of Understanding between the Islamic Emirate of Afghanistan and the United Nations, this agreement contains 23 provisions that deal both with the privileges, immunities and obligations of the UN staff, and with aspects of the humanitarian operations of the UN.¹⁵⁴ After giving token endorsement to the principle-centred approach by asserting that both Afghanistan and the UN 'jointly commit that men and women shall have the right to education and health care and necessary development activities, based on international standards and in accordance with Islamic rules and Afghan culture' (Art. 12), the Memorandum blatantly contradicts itself and reneges on these undertakings. Indeed, Article 13 states:

¹⁵² *Ibid.*, para. 18.

¹⁵³ An illustration of how these compromises on basic standards can have negative repercussions in the longer term is offered by research on refugee rights that I conducted in Kenya. There, the UNHCR has been in charge of an anomalous refugee status determination procedure following the Kenyan Government's decision to suspend status determination. UNHCR's procedure for determining refugee status fails to respect international standards, for instance by rejecting applications for refugee status without giving any reasons (Verdirame, *supra* note 144, at 58-59 and 75-76). At present the Kenyan Government is planning to resume its own status determination. Attempts by UNHCR to ensure that this government procedure is consistent with procedural standards are now dismissed by the Kenyan Government, which reminds UNHCR of its own dismal record of compliance with these standards.

¹⁵⁴ In his first report to the Security Council after the conclusion of this agreement, the Secretary General summarised the contents of the Memorandum as follows:

The agreement lays out codes of conduct for both the United Nations and local authorities, sets up a mechanism for joint collaboration and resolution of problems and deals in a preliminary way with gender issues. As a result of the agreement, the United Nations decided, on 28 May, to lift the suspension of its programme in southern and south-western Afghanistan. The United Nations and other humanitarian organizations look forward to improved understanding by the Taliban of their responsibilities towards humanitarian personnel to enable needed assistance to reach their own people (UN DOC. S/1998/532, at para. 40; this report was presented to the Council on 19 June 1998).

The Authorities and the UN will make efforts to increase the participation of men and women in health, education – especially health education – and food security. Both parties acknowledge the economic difficulties and the specific cultural traditions that make this goal challenging. As a result, women’s access to and participation in health and education will need to be *gradual* [emphasis added].

This provision is a curious syllogism, or, rather, a paralogism. After the initial statement of principle, which is in itself abridged by the significant omission of words like ‘equality’ and ‘equal’, Article 13 affirms the existence of two obstacles (‘economic difficulties and specific cultural traditions’) towards the realisation of this principle. It, then, goes on to conclude that women’s access and participation will need to be gradual. However, ‘economic difficulties’ is a smokescreen, as available economic resources can in principle be distributed equally among men and women. The use of ‘cultural traditions’, on the other hand, serves an important legitimising function both for the Afghani authorities in justifying their sexual apartheid, and for the UN in justifying its role in Afghanistan. Underlying ‘specific cultural traditions’ there is a misrepresentation of culture as an ‘essentialist and homogenous body’.¹⁵⁵ This representation of culture as an immutable monolith conceals the frequent co-existence of different, even conflicting, interpretations of fundamental norms within a culture, as well as the fact that the prevalence of one interpretation over the other is contingent upon changeable internal and external factors.

Even in regard to the treatment of UN women employees, this agreement allows for discrimination. The Afghani authorities were not prepared to treat ‘female Muslim staff’ of the UN like other UN staff, in particular on the question of their freedom of movement. According to the Taliban’s interpretation of the Sharia, Muslim women have to be accompanied by *mahram* (a male member of the family, usually the husband, father or brother). Under Article 11 of the Memorandum, the possibility to treat Muslim women employees of the UN differently was implicitly recognised. Indeed, under this provision Afghanistan’s obligation is simply ‘to be ready to discuss with religious scholars from Islamic countries the movement of international female

¹⁵⁵ N. Yuval-Davis *Gender and Nation* (1997) at 38.

Muslim staff of the UN who are not accompanied by Mahram in order to reach a solution in accordance with Sharia’.

Various humanitarian NGOs working in Afghanistan were critical of this agreement, and of the way it dealt with women.¹⁵⁶ Probably due to the absence of international lawyers on the field working for these NGOs, who can help them articulate this criticism in legal terms, these critiques were essentially formulated in the soft language of policy rather than in more imperative legal terms.

What is the legal nature and what are the effects of the Memorandum of Understanding between the UN and the Afghan government signed in May 1998? Treaties between international organisations and states are governed, *mutatis mutandis*, by the law that applies to treaties between states.¹⁵⁷ No specific form is requested for the valid conclusion of a treaty,¹⁵⁸ and, thus, in order to determine if the Memorandum constitutes a treaty, or is of a legally non-binding nature, primary regard must be given to the real intention of the parties. In doing so, it is important to take into account the recent decision of the ICJ in the *Qatar v. Bahrain* case, in which the Court held that the minutes of a meeting were a treaty in spite of the clear lack of intent to enter into a treaty by at least one of the parties.¹⁵⁹ The legally binding nature of the Memorandum

¹⁵⁶ Human Rights Watch, *World Report 1999* (1999) at 164. Physicians for Human Rights, *Report on Afghanistan*, released on 5 August 1998. MSF was expelled from Afghanistan in July 1998, partly as a result of its tougher stance on non-discrimination. In a press release on the day of its expulsion, MSF once again voiced its criticism of the agreement between the UN and the Taliban: ‘This accord left such principles as non-discrimination wide open to interpretation. The failure of the UN to take a stronger position is disappointing. The memorandum considerably weakened the position of NGOs, which found themselves on the front line of having to defend humanitarian principles abandoned by the UN’ (MSF, Press release of 21 July 1998, available on <http://www.msf.org/pressrel/kabul1.htm>, June 1998).

¹⁵⁷ Jennings and Watts, *supra* note 31 at 1220. The Vienna Convention on the Treaties between States and International Organisations or between International Organisations (1986), 25 ILM 543, *not yet in force* [hereinafter the ‘Vienna Convention on Treaties between States and International Organisations’], was based on the Draft Articles prepared by the International Law Commission, but has not yet entered into force. See also: Gaja, ‘A ‘New’ Vienna Convention on Treaties between States and International Organisations and between International Organisations: A Critical Commentary’, 58 *BYBIL* (1987) 235; Morgenstern, ‘The Convention on the Law of Treaties between States and International Organisations or between International Organisations’, in Y. Dinstein (ed.), *International Law at a Time of Perplexity* (1989) 435.

¹⁵⁸ From the notorious ‘Ihlen Declaration’ - *Legal Status of Eastern Greenland* (Denmark v. Norway), (1924) PCIJ Reports Series A/B, No. 53 - to the joint communique at the end of a meeting between two Prime Ministers - *Aegean Sea Continental Shelf* (*Greece v. Turkey*), Judgment, ICJ Reports (1978) 3 - to the so-called Doha Minutes - the object of the *Qatar v. Bahrain* case, *infra* note 159, international law knows of numerous examples of agreements that were concluded very informally and that still constituted treaties.

¹⁵⁹ *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (Qatar v. Bahrain), Judgment (Jurisdiction and Admissibility), ICJ Reports (1995) 6. On this case and on the broader question of non-binding agreements, see: Chinkin, ‘A Mirage in the Sand? Distinguishing between Binding and Non-

of Understanding between the UN and the Afghan Government seems to be unquestionable and results from the wording of the Memorandum, its object, and, most importantly, from the clear intention of the parties. As far as the UN is concerned, its intention to enter into a legally binding agreement governed by international law is also manifest in the above-mentioned report of the Secretary General to the Security Council that treats this Memorandum as a treaty.¹⁶⁰

The power of the UN to enter into a treaty of the kind in question appears uncontroversial. The treaty-making powers of an international organisation derive from the type and scope of its legal personality. Indeed, according to Article 6 of the Vienna Convention on the Law of Treaties between States and International Organisations and between International Organisations, 'the capacity of an international organisation to conclude treaties is governed by the rules of that organisation', defined, under this Convention, so as to include 'the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organisation' (Art. 2). In UN practice, framework agreements for the provision of humanitarian assistance are normally concluded with the host state both by the UN as a whole and by its agencies and programmes separately. There can be little doubt that the power to conclude such agreements is part of the functional legal personality of the organisation, resulting from the Charter, from resolutions of its political organs, and, last but not least, from its established practice.¹⁶¹

As far as its validity is concerned, the Memorandum of Agreement between the UN and Afghanistan constitutes a *rara avis* for international lawyers: to the extent that it allows discrimination against women to be incorporated in the provision of humanitarian assistance, the Memorandum is simply void for conflicting with a

Binding Relations between States', 10 *Leiden J. Int. L.* (1997) 223; Aust, 'The Theory and Practice of Informal International Instruments', 35 *ICLQ* (1986) 787.

¹⁶⁰ In the Advisory Opinion on the *Interpretation of Agreement of 25 March 1951 between the WHO and Egypt*, the Court considered various agreements concluded by Egypt and the WHO between 1949 and 1951, including one that carried the nomenclature of Memorandum. While these documents could be 'regarded as distinct agreements or as separate parts of one transaction', there was no doubt that they established a 'contractual legal regime' between the parties (ICJ Reports (1980) 73, at 92).

¹⁶¹ Another example of treaties between the UN and host state in the framework of an intervention of a different nature are the Status of Force Agreements, providing the legal framework for a peace-keeping operation. On the Status of Force Agreements, see: Carlevaris, 'Recenti Sviluppi nella Prassi degli

peremptory norm of international law (*jus cogens*).¹⁶² The *jus cogens* nature of the principle of non-discrimination has been asserted by different authors, and can be based on various arguments, including the non-derogable nature accorded to non-discrimination in human rights instruments, analogy with racial discrimination and the fundamental nature of the standard of non-discrimination as a principle underpinning human rights.¹⁶³ In particular, if it is agreed that *jus cogens* entails at least *some* human rights, it is difficult to imagine how gender discrimination – and, indeed, any type of discrimination – could not be part of it. In addition to non-discrimination, the imposition of gender barriers on access to health can cause loss of life. To the extent that such practices are endorsed by the Memorandum, this treaty is also in violation of the human right to life, again viewed by many authors as part of *jus cogens*.¹⁶⁴ One can add that, in signing the Memorandum the UN disregarded the resolutions of the General Assembly and of the Security Council, which, as we have seen, were demanding an end ‘without delay’ to discrimination against women in Afghanistan, but the consequences of the failure to comply with these resolutions are far from clear both internally and in relation to third parties.¹⁶⁵

More than one year since the conclusion of the Memorandum of Understanding and in spite of the protest of *some* NGOs, humanitarian assistance continued to be provided within the framework laid in the Memorandum.¹⁶⁶ The Special Rapporteur on Human Rights echoed the pragmatic approach, commenting that there is a need

Status of Force Agreements per le Operazioni di Peace-Keeping delle Nazioni Unite’, 53 *Com. Int.* (1998) 667.

¹⁶² See *supra* note 103. The provision on *jus cogens* of the two Vienna Conventions on treaty law is identical and, in both Conventions, is located at Art. 53.

¹⁶³ See Charlesworth, Chinkin, *supra* note 103, who also refer to other authors who accept that non-discrimination is part of *jus cogens*, and Alston, Simma, *supra* note 122. Even an extreme statist and consensualist approach to the question of the status of the principle of non-discrimination in contemporary international law would find it hard to deny that at the very least this principle is part of customary law.

¹⁶⁴ Ramcharan, ‘The Concept and Dimension of the Right to Life’, in B. G. Ramcharan (ed.), *The Right to Life in International Law* (1985) 1, at 14-15.

¹⁶⁵ Art. 46, Vienna Convention on Treaties between States and International Organisations, states that ‘an international organisation may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organisation regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance’.

¹⁶⁶ As an example of more recent institutional practice confirming this approach, see the Strategic Framework, *supra* note 84.

for the UN to adopt a 'practical and workable policy' on discrimination against women and girls.¹⁶⁷

III.5. Conclusion: Justificatory Arguments

The case of Afghanistan exemplifies other dilemmas that can accompany the delivery of humanitarian assistance. Should the provision of humanitarian assistance have been suspended, given that continuing it required a compromise on such a fundamental standard as the principle of non-discrimination? Operationalising human rights in the provision of humanitarian assistance in extreme situations is bound to be an arduous process. However, allowing discrimination against women to be incorporated in the humanitarian assistance that is provided defies the very purposes of such assistance, as well as one of the goals of the UN. Principles and standards may be viewed as 'almost academic in deciding action' in extreme cases,¹⁶⁸ 'abstract and ideal',¹⁶⁹ but if internationally agreed legal principles and standards are not to be invoked in 'extreme cases' to offer guidance, what is their use?

In addition to their presumed ineffectuality, two more arguments are used to justify the UN's failure to comply with these fundamental standards during humanitarian operations. Firstly, it is argued that the humanitarian imperative to save lives at times imposes the sacrifice of other important principles. From a legal point of view, distress cannot be invoked as a circumstance precluding wrongfulness for violations of rules of *jus cogens*.¹⁷⁰ As an ethical argument it purports to derive the justness of the humanitarian action from an ideal of commutative justice, that is from the exchange between one set of rights and the other. Myron Weiner developed this position in the framework of neo-Aristotelian ethics,¹⁷¹ which views the ethical process not merely as a deductive one, condemns the 'tyranny of principles',¹⁷² opts for an approach to

¹⁶⁷ Special Rapporteur for Human Rights, *supra* note 138. In this report, the Rapporteur believed to have also 'observed some relaxation of the restrictions imposed on the rights of women, as a few women doctors and nurses were seen at work in a hospital attending to female patients (at para. 21)'.

¹⁶⁸ See *supra* note 144.

¹⁶⁹ Cain, 'The Rape of Dinah: Human Rights, Civil War in Liberia and Evil Triumphant', 21 *Hum. Rts. Q.* (1999) 265, at 297.

¹⁷⁰ See Chapter II.6 (c).

¹⁷¹ Aristotelian ethics was based on the concept of 'practical wisdom' (*phronesis*), which, unlike 'scientific knowledge' (*episteme*), does not involve universals. See A. C. MacIntyre, *Whose Justice? Whose Rationality?* (1988) 92. On the 're-discovery' of Aristotelianism in the ethical sphere, which in part results from Gadamer's hermeneutics – H. G. Gadamer, *Truth and Method* (1989), see e.g.: A. R. Jonsen, S. Toulmin, *The Abuse of Casuistry* (1988); C. A. Viano, *Teorie etiche contemporanee* (1990).

¹⁷² Jonsen & Toulmin, *supra* note 171 at 5.

ethical issues that is flexible and circumstantial including both deductive and inductive elements, and is based on adaptable maxims rather than immutable axioms.¹⁷³ But, as has already been mentioned, this ‘utilitarianism of rights’¹⁷⁴ disguises the longer term consequences of the assistance so provided, and is based on an oversimplification of the process of humanitarian assistance, conveniently de-contextualised and portrayed as the quick act of saving lives in the immediacy of danger. This is evident in Afghanistan, where the policy of engagement has blatantly failed and the victims of the Taliban state by now include not only women but also members of religious and ethnic minorities. Furthermore, both domestic laws and international law contain compromise solutions aimed at striking a balance between conflicting interests and principles. As far as non-discrimination is concerned, however, under current international law this standard, along with few others, is deemed so fundamental that no circumstances are envisaged in which its abridgement could be justifiable: it is, in other words, an absolutely non-derogable standard.¹⁷⁵

The other justificatory argument, which is also echoed in the Memorandum between the UN and Afghanistan, is that of respect for local culture. This argument rests on the fictitious juxtaposition between the heteronomy of human rights norms and the autonomy of local traditions and cultures. Supporting the ‘autonomy’ of cultures is presented as an intrinsically valuable and as the right moral choice.¹⁷⁶ This purposeful oversimplification of complex cultural meaning and multiplicity of voices obliterates the *social fact* that the women who were studying and teaching at Kabul University - where they constituted the majority of students and staff - were as much part of

¹⁷³ Weiner, ‘The Clash of Norms: Dilemmas in Refugee Policies’, Paper presented at the Conference on the Growth of Forced Migration, hosted by the Refugee Studies Programme at Wadham College, University of Oxford, 25-27 March 1998.

¹⁷⁴ See Robert Nozick’s definition of a ‘utilitarian of rights’ as one whose ‘goal is... to minimise the weighted amount of the violation of rights in the society... even through means that themselves violate people’s rights’ in: R. Nozick, *Anarchy, State and Utopia* (1974) 30.

¹⁷⁵ See *supra* note 103. Moreover, as already observed, the *jus cogens* nature of the standard on non-discrimination also has consequences on the plane of responsibility. In relation to state responsibility, Art. 33 of the Draft Articles on State Responsibility excludes the use of state of necessity by a state as a circumstance precluding wrongfulness ‘if the international obligation with which the act of the state is not in conformity arises out of a peremptory norm of international law’.

¹⁷⁶ Susan Sontag summarises Leni Riefenstahl’s work on the Nubas as a ‘lament for vanishing primitives’ (in her essay ‘Fascinating Fascism’, collected in S. Sontag *Under the Sign of Saturn* (1991) 86). Sontag argues that the rehabilitation of Riefenstahl since the 1960s as a result of her work on the Nuba is in part due to the continuing appeal exercised ‘by the primitivist ideal’; hers is ‘a portrait of a people subsisting in a pure harmony with their environment, untouched by “civilisation”’ (*ibid.*). Such ‘laments for vanishing primitives’ indeed underlie the ‘liberal’ defence at all costs of cultural identities, simplistically construed, against the perceived aggression of external forces, including the human rights discourse.

Afghani culture as those who at the same time were advocating different values. Far from being 'culturally neutral' intruders respectful of different traditions, international institutions in Afghanistan have, wilfully or not, intervened in the local culture and have lent their support to one interpretation against the other. And it need also be reiterated that, were this a case of racial discrimination and were 'culture' (mis)used to justify the practice of racism in a given society, there would hardly be even an audience for this argument.

International lawyers are likely to be disconcerted by the failure of a hierarchically superior body of international law to assert itself within the UN and to shape the operational practice of the organisation. In addition, the effective dis-empowerment of the key political organs of the UN is another essential factor that can account for this rather baffling state of affairs. In the case of Afghanistan, the resolutions of the General Assembly went unheeded, and the terms of the Memorandum are in open contrast with them. How is it possible that the UN can develop a practice that runs contrary not only to international legal standards, but also to the position expressed by two of its political organs, at least formally, the two most powerful ones? A thorough answer to this question would warrant an institutional study into the functioning of the UN, focusing on decision-making processes. In the case of Afghanistan, a certain institutional practice of the organisation, consisting of mission reports and policy statements, played a central role in determining the final terms on which the UN continued its engagement in Afghanistan. In this case, there has been an effective regulatory failure of the Security Council and of the General Assembly for various reasons. First, there is no clear independent monitoring machinery to ensure respect with principles, as well as decisions and policies laid down by these two organs. Second, even if the General Assembly decided to take a more proactive role and to monitor the operational practice of the organisation on the ground independently, it would still find it difficult within the current structure to enforce its findings efficaciously and swiftly. Third, both the General Assembly and the Security Council rely on the Secretary General to keep them updated with developments on the ground. Such arrangement is infelicitous because the Secretariat is obviously at the heart of the institutional/bureaucratic structure of the organisation.¹⁷⁷ Fourth, and crucially, the reaction of the political organs of the UN, and their efficacy, depends on

¹⁷⁷ See Chapter V.4.

what they perceive to be at stake: in the case of Afghanistan, the resilience of a gender bias, as part of a male-dominated institutional environment and culture, played an undeniably material role. In order to understand the importance of this aspect, suffice it to imagine the same situation as that of Afghanistan changing the type of discrimination, from sexual to racial, the latter form of discrimination, even in the narrow interpretation given to it in the post-colonial context, being characterised by a higher level of stigmatisation than gender discrimination.¹⁷⁸

Finally, the development of an institutional culture within the UN that, in the name of an ill-conceived pragmatism, looks down on human rights cannot be ignored, and, in a sense, comes as no surprise.¹⁷⁹ In fact, the essence of human rights is to put constraints on the exercise of power, still mainly identified as statist power. Those on whom constraints are placed are likely to express uneasiness, often in the hope to be able to act “boundlessly”. The development of such an institutional culture has, thus, predictably accompanied the organisational growth of the UN with its undertaking of operational missions on an ever larger scale. How a cosmopolitan and apparently liberal bureaucracy can end up being in practice less progressive on such a crucial issue as that of gender discrimination than bodies composed of representatives of states is a question that deserves an answer.

¹⁷⁸ In the first phase during the Soviet invasion, there were also political reasons, i.e. the support of Western countries for the mujahedeen, that can explain the decision to compromise at the operational level on what remains legally an absolute and non-derogable standard. At this point, however, the support of the western countries for the Taliban is certainly no longer there.

Another interesting hypothesis on the basis of the experience of the performance of UN agencies in Afghanistan and on the question of gender has to do again with institutional culture. Not only are there many women working for the UN, but, most remarkably, two of the agencies in question (UNICEF and UNHCR) were headed by women during the events in Afghanistan, and yet a decision to compromise on gender discrimination in the Afghani context must have been supported by them. Institutional culture seems to enjoy a high degree of resilience, and one that the physical presence of women – or members of other groups for that matter – cannot alone undermine.

¹⁷⁹ See, for instance, Sadako Ogata's comments on forced labour in the context of UNHCR's much criticised repatriation of the Rohingyas to Burma: 'Forced labour is an old tradition, it is something like a taxation, the poorer you are, the more often you are called in. I am not saying it is good or bad....'. Asked if forced labour does not constitute a human rights violation, she replied: 'It depends on how you define forced labour and how you define human rights violation. I think it has to be understood practically in the context of your community and their tradition, and then the limited choice these people have' (Transcript by Burma Centrum Nederlands of the Press Conference of Sadako Ogata, UN High Commissioner for Refugees, The Hague, 1 September 1998).

CHAPTER IV

Violations of Human Rights in the Exercise of Effective Control over Territory by the United Nations

IV.1. Introduction

It is axiomatic that human rights can be violated by the authorities that are in effective control of a territory and a population. It has been recognised that non-state actors, such as *de facto* authorities and multinational corporations, can develop the functional capacity to interfere with the fundamental rights of individuals.¹ In this chapter, it is submitted that, when the United Nations (UN) exercises territorial control, it can be responsible for violations of human rights. Firstly, this can happen in international administrations led by the UN. Although there are only a few such examples, it appears that the phenomenon of UN governance in post-conflict situations² may become more frequent. Secondly, there are situations in which the UN assumes administrative powers in the absence of an act formally conferring such powers on the Organisation. An example is the exercise of ancillary administrative functions by the UN as part of the provision of humanitarian assistance in complex emergencies and of peace-keeping. Another important and problematic example, on which the second part of this chapter focuses, is the exercise of *de facto* administrative powers in refugee camps.

The first instance in which an international organisation ruled over a territory was Saarland, which was placed under a mandate of the League of Nations at the end of the First World War.³ The League's administration of the Saarland was heavily

¹ See, for example, *Kadic v. Karadzic*, 70 F.3d 232, in which the US Court of Appeal for the Second Circuit found that the self-proclaimed Bosnian-Serb Republic was responsible for acts that might have been in violation of the laws of nation, specifically acts of genocide and war crimes. In *Doe v. Unocal*, a US district court held that multi-national corporation could be responsible for human rights violations in Burma (963 F. Supp. 880 at 892).

² Matheson 'United Nations Governance of Postconflict Societies' 95 *AJIL* (2001) 76.

³ The League of Nations had an administrative role in the City of Danzig on the basis of the Versailles Treaty. However, its administrative functions in Danzig were far more limited than in Saarland. The resident High Commissioner of the League in Danzig acted as court of first instance in disputes between Poland and Danzig, while appeals were considered by the Council of the League, which could in turn request an advisory opinion from the Permanent Court of International Justice (as it did in *Polish Postal Services in Danzig*, (1925) PCIJ Series B, No. 11).

criticised⁴ especially because of its support for the French attempts to ‘gallicise’ the overwhelmingly German population before the referendum on the final status.

The first UN administration of territory was established in West New Guinea (West Irian) in 1962-63 and stemmed from an agreement between Indonesia and the Netherlands.⁵ Other examples in more recent practice are: the UN Transitional Authority in Cambodia (UNTAC), based on the Cambodia Settlement Agreements and endorsed by the Security Council in resolution 668 (1990);⁶ the UN Mission in Bosnia and Herzegovina (UNMIBH), envisaged by the Dayton Peace Agreements and then regulated by Security Council resolutions 1031 and 1035 (1995); the UN Transitional Administration in Eastern Slavonia, Baranja and Western Sirmium (UNTAES) established in 1996 (SC Res. 1037), which completed its operations in January 1998; the international civil administration in Kosovo since 1999 – UN Mission in Kosovo (UNMIK) - under the terms of Security Council resolution 1244; and the UN Temporary Administration in East Timor (UNTAET) under Security Council Resolution 1272 (1999).⁷ The provisional international administrations in Saarland and West New Guinea were entrusted with the organisation of a referendum on the final status of those territories, although in West New Guinea this referendum took place only after the end of the international administration and the transfer of full administrative responsibility to Indonesia.⁸ UNTAC’s chief objective was also the organisation of free and fair democratic elections. UNMIK differs from its predecessors in that its main objective is not the organisation of a referendum or of elections. UNTAET, established some four months after UNMIK, represents another novelty in institutional practice in that it was set up after a referendum on independence had taken place with a view of implementing its results.

⁴ See Chapter I, note 85.

⁵ Agreement Concerning West New Guinea (West Irian) (Indonesia-Netherlands) (1962), reproduced in 57 *AJIL* (1963) 493 [hereinafter ‘Agreement on West New Guinea’].

⁶ With Res. 718 (1991), the Security Council then decided to establish an Advance Mission in Cambodia under its authority.

⁷ See also SC Res. 1264 (1999) and Report of the Secretary General on the Situation in East Timor, 4 October 1999, UN Doc. S/1999/1024.

⁸ Arts. 14-19, Agreement on West New Guinea. While purportedly concluded to uphold West New Guineans’ right to self-determination, the terms of this treaty clearly reveal that it was no more than a face-saving instrument for the Netherlands, which had by then accepted Indonesian rule over West New Guinea. Indeed, the people of West New Guinea were given the opportunity to exercise their ‘freedom of choice’ after the Indonesia authorities had taken over the administration from the UN and

International administrations are often based on a bicephalous constituent instrument: an international agreement between states (or an agreement between different factions within a state) on the one hand, and a resolution, or a series of resolutions, of the Security Council on the other. Since the terms of these resolutions are often vague, resort to the international agreement for answering questions on the mandate and the powers of the administration may be necessary.

The lack of a formal act transferring governmental functions in refugee camps to the offices of the UN High Commissioner for Refugees (UNHCR) at least in part accounts for the scant attention that the international legal implications of the establishment of camps have so far received. The *de facto* nature of UNHCR administration in camps warrants a socio-legal approach to its study. The type and extent of administrative powers exercised by UNHCR can vary from one refugee camp to the other. In some cases, governments administer camps in conjunction with UNHCR, but in most situations governments play a marginal role or no role at all in the administration of the camps. In addition, administrative powers in camps may be exercised by UNHCR alongside humanitarian non-governmental organisations, which are often sub-contracted by UNHCR to deliver particular services.⁹

An important difference between refugee camps and international administrations is that the former are in a sense 'beyond the rule of law'. They are established and administered in the absence of a clear legal framework with little or no involvement on the part of the administrative and judicial structure of the host country, and UNHCR and other agencies in charge make rules as they go along. Another difference is that international administrations have normally been established following territorial disputes between states or in the context of competing claims to independence from, or autonomy within, a given state. For example, in Kosovo, although the sovereignty of the Federal Republic of Yugoslavia (FRY) over this province has not been explicitly called into question,¹⁰ the status of the province within the FRY and the extent of its autonomy are still disputed. In refugee camps, on the other hand, with the important exception of the camps for Palestinian

were thus in a position to influence, and even manipulate, the results of the plebiscite directly (Van der Veur 'The United Nations in West Irian: A Critique', 18 *Int. Org.* (1964) 53).

⁹ On NGOs in emergency relief, see: B. E. Harrell-Bond, *Imposing Aid* (1986) at 64 ff.

refugees in the occupied territories, there is normally no dispute over the territory on which they are established and the nominal sovereignty of the host country is not subject to legal challenge.

IV.2. *De Jure* Exercise of Effective Control over a Territory by the UN: International Administrations

(a) The precedents

In the practice of the League of Nations and of the UN, international administrations have been established either by a treaty, subsequently endorsed and implemented by the Organisation, or by a resolution of the Security Council. The Versailles Treaty regulated the administration of the League of Nations in the Saarland,¹¹ whereas the establishment of the UN's Temporary Executive Authority (UNTEA) in West New Guinea (Irian) in 1962 was based on a treaty between the former colonial power, the Netherlands, and Indonesia. The UN administration in Cambodia, UNTAC, was regulated by the Agreement on a Comprehensive Political Settlement in Cambodia of 23 October 1991.¹² The terms of the international administration in Kosovo were laid down in resolution 1244, adopted by the Security Council under Chapter VII, but the Statement of the Ministerial Meeting of G-8, which paved the way to the adoption of the resolution, has also been used for interpreting controversial provisions in the resolution.¹³

The UN Charter, like the Covenant of the League of Nations, contained provisions regulating the now virtually defunct trusteeship system (the old mandate system under the League). The system for the administration and supervision of trust territories established under the Charter (Chapters XII-XIII) pivoted on the Trusteeship Council, which had extensive powers including the examination of petitions from the inhabitants of the territory in consultation with the administering state as well as the carrying out of visits under similar conditions (Art. 87). The Trusteeship Council

¹⁰ See, for instance, the Statement by the Chairman on the Conclusion of the Meeting of the G-8 Foreign Ministers held at the Petersberg Centre on 6 May 1999, *annexed to* SC Res. 1244 (1999).

¹¹ See Art. 49, Versailles Treaty (1919), 225 CTS 188.

¹² 31 ILM 183 [hereinafter Paris Agreements].

¹³ The possibility of establishing an 'international presence' in Kosovo had been discussed before resolution 1244, most notably at the talks in Rambouillet (S. D. Murphy, 'Contemporary Practice of the United States Relating to International Law', 93 *AJIL* (1999) 628 at 629 ff.). See also Statement of the G-8 meeting of Ministers, *supra* note 10.

could also take 'other actions in conformity with the terms of the trusteeship agreement' (*Ibid.*).¹⁴

The constituent instrument of international administrations creates a legal framework for the mandate and the functioning of the administration. The vested powers entail the functional capacity to take decisions and commit actions in breach of human rights, although the extent of this capacity varies from one administration to the other. For example, in Saarland the authority of the Governing Commission appointed by the Council of the League of Nations did not cover the exploitation of the most important natural resource in the region, the coal-mines. Under the Treaty of Versailles, the mines had been ceded to France 'in full and absolute possession, with exclusive rights of exploitation, unencumbered and free from all debts and charges of any kind' (Art. 45). The French also had troops, which could be used to restore public order.¹⁵ The Agreement on West New Guinea, on the other hand, did not spell out the functions and powers of UNTEA, but included an obligation, to guarantee the rights of the inhabitants, in particular 'free speech, freedom of movement and of assembly' (Art. XXII).¹⁶ These two administrations, however, operated in different historical contexts: the international administration of Saarland was one of the punitive conditions imposed on Germany for its responsibilities in the First World War. West New Guinea, on the other hand, like many territories in the late 1950s and 1960s, was going through a process of troubled decolonisation. The legal context was, in a sense, also different since by the time UNTEA was established the principle of self-determination had acquired central importance in international law. By rubber-stamping the Indonesian takeover, UNTEA could be accused of having aided and abetted the commission of a wrongful act, i.e. the suppression of the West Irian inhabitants' right to self-determination.¹⁷

UNTAC's historical and political context was that of the democratisation movement in the post-Cold War era. Unlike its predecessors, UNTAC assumed governmental

¹⁴ See the South West Africa cases: *South West Africa* (Ethiopia v. South Africa, Liberia v. South Africa), Judgment (Preliminary Objections), ICJ Reports (1962) 319 and Judgment (Merits), ICJ Reports (1966) 6; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports (1971) 16.

¹⁵ Allot, *Le Bassin de la Sarre. Organisation politique et administrative* (1924) 131.

¹⁶ An international administration was going to be established in the Free City of Trieste in the aftermath of the war, but the city was soon returned to Italy.

¹⁷ See *supra* note 8. On international responsibility for complicity, see Chapter II.6(a).

powers over the entire territory of a member state of the UN. The Security Council did not need to use its Chapter VII powers to establish UNTAC. Indeed, the exercise of administrative powers was delegated to the UN by the Supreme National Council, 'a *sui generis* entity' - itself created under the Agreement on a Comprehensive Political Settlement - which had been given 'a special status' by the international community 'in both a Security Council resolution and the Comprehensive Political Agreement'.¹⁸ Hence, although the constituent instrument of UNTAC is a treaty, the legal basis for the assumption of governmental functions is a delegation from an autochthonous body. UNTAC's primary goal was the organisation of free and fair elections. Its role in the electoral process was not simply one of supervision or monitoring as UNTAC was empowered to legislate on electoral matters.¹⁹

Despite what appears to have been the assumption of the International Court of Justice (ICJ) in the *Expenses* case,²⁰ some degree of territorial administration is exercised by the UN in the context of other operations, notably peace-keeping and Chapter VII enforcement actions. For example, under Security Council resolution 814 (1993), which established the UN Operation in Somalia II (UNOSOM II), 'UN entities, offices and specialised agencies' *inter alia* had 'to assist in the re-establishment of Somali police (...) at the local, regional or national level' and 'to assist in the restoration and maintenance of peace, stability and law and order'.

The UN mission in Haiti represented another major operation in the area of post-conflict peace-building that involved a significant measure of administration. In particular, under Security Council 940, the UN was entrusted with policing and

¹⁸ Ratner, 'The Cambodia Settlement Agreements', 87 *AJIL* (1993) 1, at 10.

¹⁹ 'UNTAC's mandate thus surpasses that of the United Nations in the four most recent instances of UN control of elections: Namibia, Nicaragua, Haiti and Angola' (*Ibid.*, at 21). The UN's mandate in the East Timor plebiscite under SC Res. 1236 (1999) was akin to that of UNTAC. Namibia is an example of success by the UN in difficult circumstances. Although the UN Transitional Assistance Group (UNTAG) 'was not called upon to provide international administration in the fullest sense', it did play 'a key role in Namibia's transition to independence' and the elections were generally accepted as free and fair (J. G. Merrills, *International Dispute Settlement* (1991) 200).

²⁰ The Court said that the first UN Emergency Force (UNEF) in the Middle East 'should have no rights other than those necessary for the execution of its function, in co-operation with local authorities. It would be more than an observers' corps, but in no way a military force temporarily controlling the territory in which it is stationed' (*Certain Expenses of the United Nations*, Judgment, ICJ Reports (1962) 151 at 171). These observations may apply correctly to UNEF, but not to other peace-keeping missions.

monitoring functions.²¹ Since October 1999, the UN Mission in Sierra Leone (UNAMSIL) has performed administrative tasks, although there is a democratically elected government in place.²² An important feature of the international intervention in Sierra Leone is that British forces are not part of the UN troops, although they are working to implement resolutions of the Security Council.

(b) *The UN Mission in Bosnia and Herzegovina (UNMIBH)*

The Dayton Peace Agreement²³ created an institutional arrangement for Bosnia-Herzegovina that is unique from the point of view both of constitutional law and of international law. The international community was assigned a special role in the implementation of the Agreement, especially through the Office of the High Representative whose task is 'to monitor the implementation of the peace settlement' and 'to maintain close contact with the Parties to promote their full compliance with the civilian aspects of the peace settlement'.²⁴ In addition, a variety of international institutions currently operate in Bosnia, 'many of these with overlapping mandates'.²⁵

The implementation powers of the High Representative have included legislative powers since 1997, when the Peace Implementation Council authorised him to 'issue interim laws when the national authorities are unable to reach agreement'.²⁶ This expansion of the powers of the main international organ in Bosnia-Herzegovina signals a failure in the process of building local institutions that are at the same time viable, and based on the rule of law and on respect of human rights. Indeed, whereas it had been originally envisaged that the international community, through its various institutions, would phase itself out, and that the administrative functions of UNMIBH would be progressively transferred to the Bosnian state, the opposite seems to have happened. David Chandler has argued that the main reason for this failure is that the Dayton Peace Agreement was based on the misjudged 'assumption that democracy can be taught or imposed by international bodies on the basis that some cultures are

²¹ SC Res. 940 (1994) and Report of the Secretary General on the United Nations Mission in Haiti, 15 July 1994, UN Doc. S/1994/828.

²² SC Res. 1270 (1999). The mandate of this Mission was later expanded under SC Res. 1289 (2000).

²³ General Framework Agreement for Peace in Bosnia and Herzegovina [hereinafter 'Dayton Peace Agreement'], signed in Paris, 14 December 1995, 35 ILM 75.

²⁴ Art. 2, Annex 10, Dayton Agreement.

²⁵ Ni Aolain 'The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis', 19 *Mich. J. Int. L.* (1998) 957 at 993.

²⁶ Cox 'The Dayton Peace Agreement in Bosnia and Herzegovina: A Study of Implementation Strategies', LXIX *BYBIL* (1998) 201 at 206.

not rational or civil enough to govern themselves'.²⁷ He has submitted that these democratisation policies include a 'regulatory and dis-empowering content' hidden behind the language of 'rights protection, multi-ethnic governance, open media and civil society building'.²⁸

Whether one accepts or rejects this political analysis, the experience of UNMBIH constitutes at least a legal oddity. International administrations are postulated on the premise that the UN, normally together with other international institutions, exercises administrative functions on a temporary basis, and in the process of transition to a new order in which the rule of law based on state sovereignty will be restored. Therefore, the extent of UN administrative powers normally declines over time, seldom stays the same, but, in principle, ought not to increase.

The increasingly interventionist role of UNMBIH manifests itself in two principal ways. Firstly, 'whenever a key international policy goal is blocked within one of the institutions, pressure is brought to bear on the offending parties'.²⁹ This kind of intervention can result in a vicious circle: the Dayton Peace Agreement created a weak state but set ambitious goals; when these goals are not met, the "frustrated" international community intervenes from above thus weakening the Bosnian state further. In addition to this surreptitious exercise of power, the interventionist role of UNMBIH has been made possible by the expansion of the powers expressly attributed to it. As mentioned, the High Representative can dismiss public officials, including elected ones – over 70 such decisions were taken between March 1998 and June 2001 –³⁰ and can override legislative or administrative acts which he deems to be inconsistent with the Dayton Peace Agreement, including the central human rights component of the Agreement. Cox has noted that these new powers of the High Representative can only rest 'on an extremely broad interpretation of the High Representative's powers of interpretation under Annex 10' of the Agreement.³¹ An interesting development is the possibility of judicial scrutiny over the acts of the High Representative. Such possibility has been admitted in principle by the Constitutional

²⁷ D. Chandler *Bosnia: Faking Democracy After Dayton* (1999) at 3.

²⁸ *Ibid.*

²⁹ Cox, *supra* note 26 at 214.

³⁰ See www.ohr.int/decisions.htm.

³¹ Cox, *supra* note 26 at 214.

Court of Bosnia and Herzegovina, although no act of the High Representative had been declared unconstitutional by June 2001.³²

(c) *UNMIK and UNTAET*

The international administrations in Kosovo and East Timor are the most important to be set up by the UN since the establishment of UNTAC and UNMBIH. The constituent instrument of both these administrations is a resolution of the Security Council adopted under Chapter VII, resolution 1244 (1999) on Kosovo and resolution 1272 (1999) on East Timor. Both administrations were initially established for a limited period, but the Security Council has regularly extended their term.

One of the distinctive features of the Kosovo mission is the coexistence of a civilian component (UNMIK) with a security one - the Kosovo Force (KFOR) led by the North Atlantic Treaty Organisation (NATO). These two components – or ‘presences’ in the language of the Security Council - are mandated to ‘operate towards the same goals and in a mutually supportive manner’.³³ KFOR is responsible mainly for the enforcement of the cease-fire, border-monitoring, the demilitarisation of the Kosovo Liberation Army (KLA), and for securing public order and safety in order to facilitate the work of the international civil presence and the provision of humanitarian assistance. The ‘international civil’ presence is responsible for ‘performing basic civilian administrative functions’, including the promotion of self-government and autonomy, the maintenance of civil law and order through international police forces pending the establishment of a local police force, the protection and promotion of human rights, and the assurance of safe and unimpeded return of refugees and displaced persons. Security Council 1244 envisaged that some of the responsibilities of the ‘international security presence’ would be progressively transferred to the ‘international civil presence’.

The hierarchical relation between UNMIK and KFOR is unclear. Resolution 1244 simply requests ‘the Secretary General to instruct his Special Representative to coordinate closely with the international security presence’. In principle, the Security Council, acting under Chapter VII, could revise the terms of the security presence or

³² *Request for the evaluation of constitutionality of the Law on State Border Service of Bosnia and Herzegovina*, Case U 9/00 (3 November 2000). This decision of the Constitutional Court is discussed at Chap. V.6.

³³ SC Res. 1244 (1999).

even decide its termination, but in practice there is no intermediate body that can actualise the legal authority of the Council over KFOR in the implementation phase. The inter-play between civilian and military components is thus left simply to co-ordination between actors on the ground, and to the nebulous regulatory framework of resolution 1244. As a result, the adoption of conflicting measures by UNMIK and KFOR is possible. An example is the establishment of the Kosovo Protection Corps. Under UNMIK Regulation 8, they have to include 'at least ten percent of both active and reserve members from minority groups' (Art. 2.1), but the Statement of Principles signed by KFOR and the KLA provided that Kosovo Protection Corps would be 'recruited and based on multi-ethnic non-sectarian principles' without applying any 'specific religious, ethnic or gender quotas'.³⁴

In East Timor, the terms for the deployment of the Australia-led multinational force are set out in resolution 1264 (1999), while resolution 1272 deals with the UN administration. The responsibilities of UNTEA include the establishment of an effective administration, the development of civil and social services, and the coordination and delivery of humanitarian and development assistance. In East Timor, but not in Kosovo, it is understood that the administration is mainly there to prepare the territory for independence, and indeed supporting capacity-building for self-government is indicated as another main task of UNTEA. Another difference with Kosovo is that, since the withdrawal of the Australia-led multinational force in February 2000, the military component that has replaced it has been part of UNTEA.

Both UNMIK and UNTAET are given legislative and executive powers, including the administration of the judiciary.³⁵ In Kosovo, three main offices were soon established within the administration, the Police Commissioner, an Office for Civil Affairs and an Office for Judicial Affairs.³⁶ Later, the Kosovo Corps were instituted as 'a civilian emergency agency' responsible for the provision of disaster response, humanitarian assistance in isolated areas, rebuilding infrastructure and de-mining.³⁷ In East Timor, a

³⁴ Art. 3, Statement of Principles signed by the Commander KFOR and a representative of the KLA, June 1999.

³⁵ Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo, 12 July 1999, UN Doc. S/1999/779, and UNMIK Regulation No. 1999/1. On UNTAET: Report of the Secretary General, *supra* note 7, and UNTAET Regulation 1999/1.

³⁶ Report of the Secretary-General pursuant to Paragraph 10 of Security Council Resolution 1244 (1999), 12 June 1999, UN Doc. S/1999/672.

³⁷ Sec. 1, UNMIK Regulation 1999/8.

National Consultative Council, later renamed National Council, was instituted 'to provide advice to the Transitional Administrator on all matters related to the exercise of the Transitional Administrator's executive and legislative functions'.³⁸ A Transitional Judicial Service Commission was also set up to recommend candidates for judicial and prosecutorial offices and to advise on the removal from office of judges.

Resolution 1244 and resolution 1272 did not address the question of the applicable law in the administered territories. A corollary of the recognition of the sovereignty and territorial integrity of the Federal Republic of Yugoslavia is the obligation to continue to apply Yugoslav law in Kosovo. However, UNMIK must disregard local law if it conflicts with human rights standards. In line with this approach, the Secretary General indicated that 'UNMIK will respect the laws of the Federal Republic of Yugoslavia and of the Republic of Serbia insofar as they do not conflict with internationally recognised human rights standards or with regulations issued by the Special Representative [of the Secretary General]'.³⁹ Indeed, the first of these regulations provides that 'the laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict' with internationally recognised human rights standards,⁴⁰ with the fulfilment of the mandate under Security Council resolution 1244, and with UNMIK's own regulations.⁴¹ Subsequent regulations have, however, provided that the applicable law is the law in force in Kosovo on 22 March 1989, the date when the autonomy of the

³⁸ Sec. 1, UNTAET Regulation 1999/2; UNMIK Regulation 2000/24.

³⁹ Report of the Secretary General, *supra* note 35, at para. 36.

⁴⁰ Reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols is made in a number of UNMIK documents, including in the oath to be undertaken by the members of the Joint Advisory Council on Provisional Judicial Appointments (Art. 3, UNMIK Emergency Decree No. 1999/1). The Federal Republic of Yugoslavia is not a state party to the European Convention, while it is a party to the International Covenant on Civil and Political Rights (ICCPR) (1966), 999 UNTS 171, and to the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), 999 UNTS 3. It was thus appropriate that UNMIK subsequently (UNMIK Regulation 1999/24 and 2000/59) and UNTAET from the beginning included reference to a broader range of human rights instruments, such as the ICCPR, the ICESCR, the Convention on the Elimination of all Forms of Discrimination against Women (1979), 19 ILM 33 and the Convention on the Rights of the Child (1989), 1577 UNTS 3. It is regrettable that, in countries where a great part of the population has experienced exile, the Refugee Convention is not one of the instruments mentioned in these regulations (Convention Relating to the Status of Refugees (1951) 189 UNTS 137 [hereinafter '1951 Refugee Convention']).

⁴¹ Sec. 3, UNMIK Regulation 1999/1. Before the appointment of Dr Bernard Kouchner as Special Representative of the Secretary General in Kosovo and the 'normalisation' of the work of the interim administration, a number of emergency decrees were issued by the temporary Special Representative, Mr Sergio Vieira de Mello.

province was repealed; the legislation which entered into force thereafter can be applied on condition that the organ required to implement it has determined that it is not discriminatory or otherwise contrary to international human rights standards.⁴²

In East Timor, the Special Representative also decided for the continued application of 'laws applied in East Timor prior to 25 October 1999... insofar as they do not conflict' with human rights standards, as it would not have been advisable to create a legal vacuum by abrogating laws before new ones are enacted. Although the protection and promotion of human rights did not feature as one of the responsibilities of UNTAET under resolution 1272, the need for offering training to UNTAET staff in human rights and humanitarian law and the establishment of an independent East Timor human rights institution were expressly mentioned.

Building and reforming local institutions is by far the biggest challenge for UNMIK or UNTAET, although in East Timor it is clear that this is part of a state-building process whereas in Kosovo there is still uncertainty as to the final outcome of the process. In Kosovo, a Joint Advisory Council on legislative matters was appointed by the Special Representative and asked to review legislation in force. A working group on criminal law began to prepare drafts for a new criminal code and for a code of criminal procedure, although the opportunity, and even the legitimacy, of engaging in such wide-ranging legislating activity can be disputed. While a review of legislation to ensure compliance with human rights standards is in keeping with Security Council resolution 1244, a systematic law-making process could go beyond the purview of an administration that is still in principle provisional. In addition, in spite of the attempt to include Serbs in the Joint Advisory Council, the Serb lawyers who had been appointed to the Council participated only in the first meeting but, as a result of continued insecurity, some of them appear to have sought refuge in the FRY thereafter.⁴³

⁴² UNMIK Regulation 1999/24, and 2000/59. As a result of the abrogation of all legislation introduced after 1989, the applicable criminal law is currently based on the old Kosovo Criminal Code as opposed to the Yugoslav Criminal Code, although the latter makes provision for crimes against humanity and war crimes. See Lawyers' Committee for Human Rights, 'A Fragile Peace: Laying the Foundations for Justice in Kosovo' (October 1999) Sec. II, a.

⁴³ Lawyers' Committee for Human Rights 'Kosovo: Protection and Peace-Building' (August 1999) at note 17.

The task of establishing a multi-ethnic judiciary proved difficult in Kosovo.⁴⁴ An Administrative Department of Justice 'responsible for the overall management of matters relating to the judicial system and the correctional service' was established in March 2000.⁴⁵ Lay judges are appointed by the Special Representatives upon a recommendation of the Advisory Judicial Commission, which can also hear complaints on their conduct.⁴⁶ International judges and prosecutors have been appointed since the beginning of 2000, although the regulation on their appointment and removal does not guarantee their tenure conferring on the Special Representative the power to remove them at his discretion.⁴⁷

If in Kosovo the main challenge is to modify existing judicial and administrative structures and practices in order to secure respect for human rights, in East Timor such structures have for the most part to be built from scratch. During the brutal occupation to which this territory was subjected for over two decades not only were hundreds of thousands killed, the iron fist of the military also made the development of local institutions impossible. Poverty, the yet unresolved displacement of thousands, and the activities of the militias are other factors that make the process of institution-building in East Timor one of the most difficult tasks ever to be undertaken by the UN. The Transitional Administrator has adopted regulations on the organisation of courts,⁴⁸ on the establishment of panels with exclusive jurisdiction over serious criminal offences⁴⁹ and on rules of criminal procedures⁵⁰ in order to break the cycle of impunity and begin to assert the rule of law. A difficult balance of conflicting interests and needs has to underlie this intensive law-making activity: on the one hand, it might be appropriate to leave law-making to elected East Timorese bodies once these are established; on the other hand, there is a pressing need to put an end to the anarchy and to create a solid legal and institutional basis for independence. The election of a Constituent Assembly will solve this dilemma; the

⁴⁴ For example, two of the six Serb judges appointed by UNMIK fled Kosovo before taking office. Report of the Secretary General on the United Nations Interim Administration in Kosovo, 16 September 1999, UN Doc. S/1999/987 at para. 32.

⁴⁵ Art. 1.2, UNMIK Regulation 2000/15.

⁴⁶ UNMIK Regulation 1999/18.

⁴⁷ UNMIK Regulation 2000/6.

⁴⁸ UNTAET 2000/11.

⁴⁹ UNTAET 2000/15.

⁵⁰ UNTAET 2000/30.

Transitional Administrator has now adopted legislation to regulate the electoral process and to define the powers of the Assembly.⁵¹

In Kosovo, pending the adoption of a constitutional framework expected some time in 2001, a Joint Interim Administrative Structure has been in place since January 2000. It comprises the Kosovo Transitional Council and the Interim Administrative Council both of which have an essentially consultative role. At the local level, municipal boards are headed by a UNMIK Municipal Administrator.⁵² In addition to these fledgling local institutions, UNMIK – including other UN agencies, the Organisation for Security and Co-operation in Europe (OSCE) and the European Union (EU) –⁵³ KFOR, and non-governmental organisations (NGOs) all exercise administrative powers in Kosovo, whether on a *de facto* or on a *de jure* basis.⁵⁴ Finally, although Security Council resolution 1244 did not confer an administrative role on the KLA, in the early months KLA appointed administrators acted as ‘a *de facto* government’.⁵⁵ The civilian administration is under the authority of the Special Representative,⁵⁶ but in practice different UN agencies and humanitarian NGOs⁵⁷ and offices often operate independently of each other. This is not simply due to lack of co-ordination, but also to diverse *modi operandi*, to the often fierce institutional independence of different international institutions, and, occasionally, to internal rivalries. Humanitarian actors play a *de facto* administrative role since they provide essential services, such as shelter, water and sanitation, food aid, education, and decide on the allocation of scarce resources, functions that are in many ways typically ‘governmental’. After the initial chaos, NGOs are now the object of a UNMIK regulation.⁵⁸

⁵¹ UNTAET 2001/2.

⁵² UNMIK Regulation 2000/1.

⁵³ The EU and OSCE are responsible respectively for institution-building and reconstruction.

⁵⁴ To these one may also add, especially in the initial phase, the administrative and bureaucratic structure inherited from the FRY. There have been staff changes in this administration in order to address the ethnic imbalance of the last decade of Yugoslav rule.

⁵⁵ Lawyers Committee, *supra* note 42.

⁵⁶ SC Res. 1244 (1999), at para. 6.

⁵⁷ Humanitarian NGOs ‘flooded’ Kosovo in the aftermath of the conflict. For example, several NGOs would often provide the same services to returnees in one region. UNHCR, which co-ordinated much of the relief effort, especially towards returnees, saw this as a mixed blessing: on the one hand, the availability of resources and services was a much welcome change from other humanitarian emergencies, but, on the other hand, this proliferation of humanitarian actors also resulted in wasteful use of resources, lack of a co-ordinated policy and ‘amateurish’ interventions.

⁵⁸ UNMIK Regulation 1999/22.

IV.3. Human Rights in UN Administrations⁵⁹

It is beyond dispute that the UN 'was intended to possess sufficient personality to exercise jurisdiction and control over territory'.⁶⁰ Indeed, the Charter explicitly recognises that the UN may assume administrative powers in trust territories (Art. 81). In addition, the wide powers of the Security Council under Chapter VII include the exercise of governmental functions by the UN in the context of an enforcement action against a threat to the peace, breach of the peace or act of aggression. The legal personality of the UN to administer territory in administrations constituted by treaty (UNTEA and UNTAC) derives from one of its purposes – the maintenance of peace and security (Art. 1, 1).

As the experience of the UN administration in Kosovo shows, the identification of the law applicable in the administered territory can be fraught with difficulties. The constituent instrument of the administration normally contains some indication of the applicable law, but general international law also needs to be used. Human rights law is of particular significance, since human rights are by definition constraints on the exercise of power, and of governmental functions. While the constituent instruments of recent international administrations have included human rights in their mandate, their language conceals the fact that the principal duty-holder of human rights obligations in such cases ought to be the UN itself, as the entity exercising *de jure* control over the territory.⁶¹

Far from being a point of purely academic interest, the question of the compliance of UN administrations with human rights has been raised in the context of the activities of every international administration. As has been seen, the League of Nations was already severely criticised for the ways in which it administered the Saarland in the

⁵⁹ On the applicability of human rights law to the UN see Chapter II.

⁶⁰ Lauterpacht, 'The Contemporary Practice of the UK in the Field of International Law: Survey and Comment', 5 *ICLQ* (1956) 405 at 411. See also Brownlie, I. *Principles of Public International Law* (1998) 172-173.

⁶¹ Thus for example UNTAC's responsibilities in the human rights area were 'to implement a human rights education effort, to conduct general human rights oversight and to investigate and act upon human rights complaints' (Ratner, *supra* note 18, at 25). However, while Art. 1 of the Agreement, *supra* note 12, guaranteed respect for human rights, it did not expressly mention that the corresponding obligations were incumbent on all authorities, including the UN. is accompanied by an obligation, incumbent on all authorities, to respect these rights. The human rights component of UNTAC had 'a miniscule staff (one officer in each of Cambodia's provinces)', M. W. Doyle, *UN Peace-Keeping in Cambodia: UNTAC's Civil Mandate* (1995) at 30.

inter-war period.⁶² The experience of UNTEA in West Irian in 1962-63 was also beleaguered by allegations of abuses of human rights, in particular the right to self-determination of the inhabitants of West Irian, and their freedom of speech and association.⁶³ UNTAC, on the other hand, failed to assert its control over the civil administration as foreseen by the Agreement on the Political Settlement.⁶⁴ Violations of human rights, which continued throughout the UN mandate in Cambodia, were perpetrated primarily by the various factions; they can be attributed to UNTAC only to the extent that they resulted from institutional and administrative failures and, as such, might constitute a violation of the obligation to ensure human rights.⁶⁵ There have also been reports about actions in breach of human rights directly committed by UNTAC in the exercise of its administrative and judicial powers.⁶⁶

In Kosovo, it was reported early in the course of the mission that the human rights of the Serb and Roma minorities were violated.⁶⁷ The lack of security was mainly attributed to the KLA, which, as mentioned, was assigned a key role by UNMIK and KFOR in the first months. The response of UNMIK and KFOR to these threats to the security of Serbs and Roma was often 'belated and uneven'.⁶⁸ As a result of KLA pressure and of the ethnic bias of the judiciary appointed and salaried by UNMIK, the right to fair trial of Serbs accused has been reportedly violated.⁶⁹ According to Amnesty International, delays in bringing detainees before the judicial authority are frequent, especially in the context of the unrest in Mitrovica in 2000.⁷⁰ On at least one occasion, Amnesty issued an urgent appeal on the prolonged detention without

⁶² See *supra* note 4.

⁶³ Van der Veur, *supra* note 8, at 69-71.

⁶⁴ Doyle, *supra* note 61, at 34.

⁶⁵ Chapter II.6(a).

⁶⁶ For instance, Doyle reports that the first two prisoners to be detained by UNTAC in its prison 'were held without habeas corpus and without trial' (*supra* note 61 at 47).

⁶⁷ See Human Rights Watch, 'Abuses against Serbs and Roma in the New Kosovo' (August 1999) 1.

⁶⁸ In *Osman v. UK* (No. 23452/94), 29 EHRR 245, the European Court of Human Rights held that state parties might be held responsible for the violation of the right to life resulting from the actions of private individuals when they could and should have prevented their commission.

⁶⁹ Amnesty International, 'Federal Republic of Yugoslavia (FRY)/ Kosovo: Risk of serious miscarriage of justice in trial of Serbs', Press release of 20 April 2000; Lawyers' Committee, *supra* note 42. See also: 'Amnesty and UN Staff Accuse Kosovo War Crimes Tribunal of Ethnic Bias', *The Guardian*, 20 June 2001.

⁷⁰ Amnesty International, 'Setting the standard? UNMIK and KFOR's response to the violence in Mitrovica' (2000). This power has at times been conferred even upon peace-keeping operations, such as the UN Operation in Congo (ONUC). In that case, a problem that emerged was the detention of mercenaries. The position of the UN was that mercenaries detained by its forces would be surrendered to the Congolese authorities only if it could 'satisfy itself ... that Government is able and

charge of an Albanian activist.⁷¹ The trafficking of persons, especially of women for the purposes of sexual exploitation, has prompted the adoption of a specific regulation by the Special Representative to increase sanctions on human traffickers,⁷² but the problem, which the existence of a “sex market” for the thousands of soldiers stationed in Kosovo has only made worse, remains serious. At present, courts do not have jurisdiction over KFOR and UNMIK, and the only available remedy to potential victims is the ombudsperson institution, which, however, not only possesses limited powers but has also been given no jurisdiction over KFOR and its sub-contractors.⁷³

In East Timor, the lack of security and of a fair and efficient criminal justice system is one of the main human rights issues. As in Kosovo, the delegation of powers from UNTAET to the insurrectional movement - the National Council of East Timorese Resistance (CNRT), and to the former guerrilla army, Falintil - has at times resulted in human rights abuses. In particular, many individuals suspected of collaboration with the Indonesian authorities during the occupation, especially ‘members of the country’s Muslim, Protestant, and ethnic Chinese minorities’,⁷⁴ have been targeted, as have some of the returnees from West Timor after being “screened” by the CNRT and Falantil. According to Human Rights Watch, ‘the U.N. police lacked the capacity and often the will to prevent such abuse’.⁷⁵ Individuals responsible for the heinous crimes perpetrated during the Indonesian occupation, and in particular in its final weeks, have not been brought to justice. Investigations were slow, and, with less than 4 per cent of the local police force being made of women and only ‘a handful of women investigators’, investigations on rape cases were almost ‘non-existent’.⁷⁶

Patterns of human rights violations differ a great deal from one administration to the other, depending *inter alia* on such factors as the extent of administrative powers vested in the UN, the size and effectiveness of the security machinery, the size and

willing to treat such personnel humanely’ and in accordance with Common Article 3 of the Geneva Conventions (*UN Jur. YB* (1962) 241).

⁷¹ Amnesty International, ‘Amnesty International Protests the Unlawful Detention of Afrim Zeqiri’, Press release, 12 February 2001.

⁷² UNMIK Regulation 2001/4.

⁷³ On the UNMIK and KFOR’s immunities from legal process in Kosovo and on the ombudsperson, see Chapter V.4(d) and V.6(d).

⁷⁴ Human Rights Watch, *World Report 2001* (2001), also available on the web at www.hrw.org. See also: Amnesty International, ‘East Timor: UNTAET, justice and refugees one year after the ballot’ (August 2000).

⁷⁵ *Ibid.* (Human Rights Watch).

⁷⁶ *Ibid.*

presence of civilian administrators seconded by member states,⁷⁷ and the role of non-state actors, including not only NGOs but also insurgents. Acts of UN administrations in breach of human rights can be distinguished based on the type of obligation that has been breached. Hence, the administration can be directly responsible for a certain act in breach of human rights standards, for example by arresting and detaining an individual without formulating charges against him/her promptly (obligation to respect). It can also be responsible in certain circumstances for failing to ensure human rights in the territory it controls, for instance by conniving at the breaches of human rights by non-state actors, or by not taking prompt action to restore security and order or to adopt measures against violence against women.⁷⁸ If the administration fails, on the other hand, to take steps that are necessary for the future fulfilment of human rights, such as, for example, institution- and capacity-building, it could be responsible for a violation of the obligation to fulfil.

The UN has an important role to play in post-conflict situations, as part of its broader functions in the maintenance of peace and security. In particular, the Secretary General has emphasised that the UN must work to promote and facilitate post-conflict peace-building - which includes 'demilitarization, the control of small arms, institutional reform, improved police and judicial systems, the monitoring of human rights, electoral reform and social and economic development'.⁷⁹ The assumption of temporary administrative responsibilities in a territory can be one of way of fulfilling this role, but this should happen with the awareness that in this new role the UN administrations, like any other authority, have an obligation to respect human rights and to offer a remedy when a violation has occurred.⁸⁰

It is important to emphasise that the challenges faced by the UN in these instances are enormous, especially since international administrations are normally established in territories that have been torn by conflict and have witnessed gross human rights violations. Any administrator, state or international organisation, would face a difficult

⁷⁷ In Kosovo and East Timor, the number of such administrators is considerable. British administrators have also been seconded to Sierra Leone as part of a bilateral agreement between the UK and Sierra Leone, although UNAMSIL is primarily a peacekeeping operation.

⁷⁸ On the different types of wrongful acts in the human rights sphere and international institutional responsibility, see Chapter II.6.

⁷⁹ The Secretary General did not expressly mention international administrations in this listing. Report of the Secretary General on the Work of the Organisation: *Supplement to an Agenda for Peace*, UN Doc. A/50/60 - S/1995/1, at para. 47.

task in these circumstances. In addition, understaffing and lack of adequate financial resources have often undermined UN administrations. For example, in Cambodia, scarce funds and insufficient staffing accounted for the inability of the human rights component of UNTAC to have an impact on the exercise of administrative and legislative powers by all the different *de facto* and *de jure* authorities in control in Cambodia, including, to a limited extent, UNTAC itself.

An additional difficulty for the UN is that the agendas of states are often divergent with the mandate of a given UN administration, and the Organisation has to withstand constant attempts by states to interfere with its operations. Kosovo illustrates this phenomenon vividly. The UN civil administration works closely with the NATO-led 'security presence'; the latter, although legally based on resolution 1244, is still the expression of a military alliance with its own agenda and methods. Similar considerations apply to relationship between the UN, and the European Union (EU) or the Organisation for Security and Co-operation in Europe (OSCE). The solution to such disputes should be found by applying the terms of resolution 1244, although this is easier said than done. In practice, powerful member States often have the capacity to influence the conduct of the UN on the ground more than the legal mandate of an operation. In addition, the terms of the mandate, as is the case with resolution 1244, can at times be purposefully nebulous and leave a regulatory space of uncertainty that can be easily filled by sheer political power.

Another problem is that the UN often lacks, not only the resources, also the capacity and experience required for territorial administration, which is after all a function typical of states. Its assumption of administrative powers ought to be temporary and exceptional. Furthermore, the constituent instruments of international administrations make only oblique reference to the applicability of human rights obligations to the activities of UN administrators. The assumption seems to be that human rights violations are committed by others and that all the UN can do is to train, to monitor or to educate. The existence of at least a *risk* of UN administrations acting in breach of human rights should be clearly recognised; the UN administration should be explicitly bound by human rights standards; and individuals should be granted remedies against administrative, judicial or legislative acts of UN authorities in

⁸⁰ In Chapter V.6. the question of the immunity of the UN is discussed.

breach of their fundamental rights. If the situation is such as to warrant derogation from some of the human rights standards, a system for permissible derogations could be instituted under the constituent instrument.⁸¹

Underlying many of the difficulties faced by UN administrations there is ‘the assumption that democracy can be taught or imposed by international bodies on the basis that some ‘cultures’ are not ‘rational’ or ‘civil’ enough to govern themselves’.⁸² This assumption is often shared by international NGOs and foreign observers. The belief that ‘a transitional lack of sovereignty and the denial of self-government’ is necessary in these situations underpins the establishment of these UN ‘protectorates’.⁸³ While it may be too early to draw conclusions on the long-term impact of the UN interventions in Cambodia, Bosnia, Kosovo and East Timor, it does appear that these administrations have too often been characterised by the exercise of effective control by the UN and by other international actors in a manner that is not sufficiently accountable and respectful of the rights of individuals.

IV.4. De Facto Exercise of Administrative Functions: UNHCR and Refugee Camps

(a) The administrative structure of refugee camps: ‘perfect city’ representations and dystopian realities

In the triptych of refugee experience according to UNHCR, refugee camps are the central panel – flight being the first, and repatriation the last.⁸⁴ In many, if not all, refugee camps, the local offices of UNHCR exercise some administrative functions. Administrative, legislative and judicial powers are not formally transferred by host governments to UNHCR either on the basis of an international law agreement between UNHCR and the state, or on the basis of the domestic law of the host state. In fact, the Memoranda of Understanding concluded by UNHCR (or by the UN) with host governments do not normally provide a basis for the transfer of administrative and legislative powers; as a rule they only entrench certain guarantees

⁸¹ It should reflect the law on derogations that is found in human rights treaties (Art. 4, ICCPR), and, in particular, it should entrench the existence of non-derogable rights.

⁸² Chandler, *supra* note 27 at 3.

⁸³ Chandler, *supra* note 27 at 65.

⁸⁴ Thus representations of refugees in UNHCR’s web site are normally based on this triptych (see, for example: <http://www.unhcr.ch/images/images.htm>; and the online documentary on refugees in Mauritania, *infra* note 115).

for the staff of the UN, such as immunity from the jurisdiction of domestic courts.⁸⁵ Despite this, wide-ranging administrative and at times even judicial powers are *de facto* exercised by UNHCR in refugee camps.

No single administrative structure is applied to every refugee camp. As a result of the protean nature of administrative solutions, the exercise of governmental functions by UNHCR in refugee camps does not lend itself to the same generalisations as UN administrations of territory established under a treaty or under a Security Council resolution. Furthermore, in most situations, 'camp authorities' also delegate some functions to refugee communities, the extent of this delegation varying from place to place. The type of administration that is set up in a particular camp depends on various factors, including power relations between the humanitarian agencies on the one hand, and the host government and local authorities on the other; the location of the camp and its distance from judicial and other authorities of the host country; the willingness or reluctance of local civil society to become involved in refugee matters; and the attitude of the field offices of the humanitarian agencies, and of UNHCR in particular. Finally, in a situation characterised by the lack of a formal legal framework for identifying the responsibilities of different actors, personalities also end up playing an important, if not decisive, role.⁸⁶ On the other hand, law, both domestic and international, plays a surprisingly minor role in the assumption and exercise of these powers by UNHCR.

Defining 'refugee camps' can be problematic. There is probably *some* difference between refugee camps and other types of refugee settlements, such as agricultural settlements,⁸⁷ although nomenclature is often misleading. For the purposes of this chapter, refugee camps are essentially defined, and differentiated from other settlements, in terms of their 'separateness'. In fact, camps are instituted and administered as spaces separate from the legal and social environment of the host

⁸⁵ A web of agreements between UNHCR and other UN agencies also exists. These Memoranda of Understanding (MoU) regulate co-operation among various UN agencies involved in the same operation. The activities that are 'typically addressed in MoU include, joint contingency planning, joint needs assessments, development of standards and guidelines and sharing of information. Public information aspects and fund-raising issues, which can be of a joint or agency-specific nature, are also addressed' (Executive Committee of UNHCR, 'Memoranda of Understanding', UN Doc. EC/47/SC/CRP.51, at paras. 29-30). See also ECOSOC Res. 1995/56.

⁸⁶ Verdirame, 'Human Rights and Refugees: The Case of Kenya', 12 *J. Ref. St.*(1999) 54 at 54-55.

⁸⁷ For example settlements for Sudanese refugees in Uganda, see Black, 'Putting Refugees in Camps', 2 *FMR* (1998) 4.

state. Although the degree of 'separateness' varies from one camp to the other, parallel systems for settling disputes and separate health and welfare structures are normally established in camps.⁸⁸ In this sense, the lack of integration of refugees in the host country is not merely a consequence of camps, but the very essence of these institutions.

The following analysis is based for the most part on research conducted in Kenya in 1997-98.⁸⁹ The purpose of this analysis is not to offer a full account of the findings of that research, but only to highlight the fact that administrative powers are *de facto* exercised by UNHCR in refugee camps, and that, as a result, human rights can be violated in a variety of ways. The main camps in Kenya are Kakuma and Dadaab, which host, according to UNHCR, approximately 200,000 refugees.⁹⁰ Kakuma, located in the Turkana province in north-western Kenya, hosts almost 70,000 refugees, mainly Sudanese and Somalis, but including also some refugees from the Great Lakes region (Rwanda, Burundi, Democratic Republic of Congo), and from Ethiopia. Dadaab, in Kenya's North-Eastern Province, comprises three camps (Dagahaley, Ifo, Hagadera). Refugees in Dadaab are for the most part Somalis and Ethiopians, but also some Ugandans, including the 'prophetess' Alice Lakwena, leader of the Holy Spirit Movement, a rebel movement active in Uganda in the late 1980s.

Refugee camps in Kenya are characterised by such a high degree of separateness that they are practically, albeit not in principle, beyond the application of Kenyan law. In these camps, UNHCR and its partner NGOs exercise a wide range of administrative and judicial, or quasi-judicial and semi-judicial, powers. UNHCR's primary roles are

⁸⁸ When UNHCR and aid agencies are not present, this integration into existing local facilities and resources may occur spontaneously and a certain degree of self-sufficiency may be reached by the refugee population in a relatively small amount of time. Upon their arrival, UNHCR and the aid agencies swiftly introduced the 'registration = food aid logic' accompanied by the establishment of refugee camps (van Damme, 'How Liberian and Sierra Leonean Refugees Settled in the Forest Region of Guinea (1990-1996)', 12 *J. Ref. St.*(1999) 36). See also van Damme, 'Do Refugees Belong in Camps? Experiences from Goma and Guinea' 346 *The Lancet* (1995) 360; and Harrell-Bond, *supra* note 9.

⁸⁹ Some of the findings of this project have been published in Verdirame, *supra* note 86, and will appear in B. E. Harrell-Bond and G. Verdirame *Rights in Exile: Janus-Faced Humanitarianism* (forthcoming). On the Kenyan camps, see also: J. Hyndman, *Geographies of Displacement: Gender, Power and Culture in UNHCR Refugee Camps* (PhD Thesis, University of British Columbia, 1996), now published as *Managing Displacement* (2000); Wilde, 'Quis Custodiet Ipsos Custodes? Why and How UNHCR Governance of "Development" Camps Should be Subject to International Human Rights Law' 1 *Yale H. R. Dev. L. J.*(1998) 5.

⁹⁰ UNHCR's country information on Kenya (available on the internet in November 1999 at: <http://www.unhcr.ch/world/afri/kenya.htm>). Estimates of the numbers of refugees living in a camp are notoriously unreliable. UNHCR's own figures are normally based on head-counts, see below (b).

supervision and standard-setting for its implementing partners, policy co-ordination, responsibility for the overall administration, and facilitating or securing international protection. Kenyan police are present in the refugee camps in Dadaab and in Kakuma, but, although there is no formal allocation of responsibilities, the involvement of the police in maintaining public order in the camp is as a rule negotiated with UNHCR or with one of the main implementing NGOs sub-contracted by UNHCR, the Co-operative for Assistance and Relief Everywhere (CARE) in Dadaab and the Lutheran World Federation (LWF) in Kakuma.

The presence of NGOs in camps – for the most part international humanitarian agencies – could *prima facie* be seen as providing checks and balances on the exercise of power by UNHCR. But NGOs are actually part and parcel of the power structure of refugee camps. Normally sub-contracted by UNHCR for the provision of particular services in the camp, NGOs' dependence on UNHCR funding affects the already limited capacity of northern NGOs to respond to the claims and interests of beneficiaries in the south.⁹¹ The Gramscian view of civil society as the 'private hegemonic apparatus of the State'⁹² is well-suited to describe the role of NGOs in the administration of camps, bearing in mind that power in these institutions is not for the most part exercised by the State but by UNHCR.

Kenyan law is not normally applied either for solving disputes in the refugee camps or for punishing certain crimes perpetrated by refugees. Decisions, which can affect human rights, are taken "informally" either by the humanitarian agencies or by the 'customary courts',⁹³ which apply the customs of particular communities as interpreted by those who have assumed power in exile. In the case of Sudanese Dinka refugees, who constitute the largest group in Kakuma refugee camp, it is the Sudan People's Liberation Army (SPLA) that has assumed this power.⁹⁴ The 'customary

⁹¹ On humanitarian NGOs, see Harrell-Bond, *supra* note 9, and, by the same author, 'Humanitarianism in a Strait-Jacket', 84 (334) *African Affairs* (1985) 3.

⁹² A. Gramsci, *Quaderni del Carcere* (1977, edited by Valentino Gerratana, Einaudi), Vol. II, at 801. See also Chapter V.3.

⁹³ The terms 'customary court' and 'customary law' are used with respect to the dispute settlement mechanisms and the substantive rules of traditional communities in Africa.

⁹⁴ Thus the Dinka community have been allowed to establish 'courts' to solve disputes and to hear criminal cases concerning certain offences like theft, but also 'customary' offences like adultery. During my first visit to Kakuma refugee camp in April 1997, a woman with mental problems and two children were the residents of the prison facilities that UNHCR had built for the Dinka community. During a later visit to Kakuma in April 1998, Barbara Harrell-Bond found out that plans for a new, bigger and 'better' prison were on the way.

courts' are given some jurisdiction over criminal matters, although under Kenyan law state courts have exclusive criminal jurisdiction.⁹⁵ The extent of criminal jurisdiction of these 'courts', or indeed that they should exercise any such jurisdiction at all, is not specified in any document. It is thus a *de facto* exercise of jurisdiction, not simply endorsed, but also actively encouraged and funded by the UNHCR.

One of the obstacles to the involvement of Kenyan courts in the administration of justice in the camps is the location of camps. For example, the closest Kenyan court to Kakuma refugee camp is the magistrate court in Lodwar, some 100 kilometers away. The local magistrate, like the police, also depends on UNHCR or on NGOs for transport. In practice, the magistrate court in Lodwar tends to deal only with the cases of refugees 'caught' outside the camp in Lodwar, while on their way to Nairobi or while engaging in some business in Lodwar. These refugees are sometimes charged with 'unlawful presence in the country'. Judicial access to the camps in Dadaab, some 200 kilometers from Garissa where the closest Magistrate Court is situated, is compounded by poor roads and by the activities of bandit groups present in the area. However, to some extent Dadaab illustrates a different approach aiming at integrating refugee matters in the legal system of the host country. In fact, after international human rights NGOs had documented the widespread occurrence of rapes and sexual assaults in Dadaab in the early 1990s,⁹⁶ the Kenya Chapter of the International Federation of Women Lawyers (FIDA) initiated an advocacy project in 1993 and promoted the establishment of a 'mobile court', funded by UNHCR, which would periodically hear cases in the camps, particularly cases of rape and sexual violence. The 'mobile court' began to operate in 1998 and dealt with a handful cases involving both refugees and locals.⁹⁷ Despite the limited number of cases it considered, this court constitutes an example of how humanitarian assistance to refugees can be used to develop local institutions rather than to create separate systems that engender

⁹⁵ 'Customary courts', including the Islamic Court, have civil jurisdiction on matters related to divorce, dowry and inheritance (R. Kuloba, *Courts of Justice in Kenya* (1997) 38 and T. Jackson, *The Law of Kenya: An Introduction* (2nd ed., 1986) 23).

⁹⁶ Human Rights Watch, 'Seeking Refugee, Finding Terror - The Widespread Rape of Somali Women Refugees in North Eastern Kenya' (1993); African Rights 'The Nightmare Continues...Abuses Against Somali Refugees in Kenya' (1993).

⁹⁷ The first case heard by the mobile court concerned a Somali refugee woman... accused of assaulting a policeman who had tried to disrupt her small business in one of the camps. This did not bid so well for a court that was originally set up to deal with cases of women victims of rape and assault. However, the woman was acquitted and the policeman received a reprimand.

resentment in the local population, weaken local institutions and undermine the possibility of integrating refugees in the host society.⁹⁸

Concepts of 'indirect rule' and 'decentralised despotism'⁹⁹ can be useful, *mutatis mutandis*, for representing the power structure and the administration of camps. While UNHCR relies both on NGOs and on refugee leaders to administer camps, the transfer of power from the administering agencies to the refugee communities, as the experience of self-management in Dadaab shows, is normally more apparent than real. In addition, the power of the refugee leaders in the camps is negotiated with the administering agencies, and fundamental rights of refugees are often treated as exchangeable commodities in this process of negotiation.

The negotiability of the human rights of refugees is a distinctive trait of refugee camps. In fact, the convenience of establishing a viable administrative structure, at least in part reliant on the co-optation of refugee leaders, is deemed a worthy enough goal to justify the abridgement of the rights of refugees. In principle, however, while only a few human rights are absolutely non-negotiable,¹⁰⁰ the negotiability of human rights is subject to strict limitations.¹⁰¹ Notwithstanding the existence of these prescriptions, in Kakuma refugee camp – for example - the leaders of the Dinka community, most of whom are self-confessed officers in the SPLA, have been given large powers that include, as mentioned, the exercise of criminal jurisdiction in certain

⁹⁸ Harrell-Bond, 'The Experience of Refugees as Recipients of Aid', in A. Ager, *Refugees: Perspectives on the Experience of Forced Migration* (1998) 136 at 146-149 and 155-157.

⁹⁹ 'The decentralised arm of the colonial state was the Native Authority, comprising a hierarchy of chief (M. Mamdani, *Citizen and Subject. Contemporary Africa and the Legacy of Colonialism* (1996) at 52). According to the colonisers, 'the first step in building a regime of indirect rule is to endeavour to find a man of influence as chief, and to group under him as many villages and districts as possible, to teach him to delegate powers, and to take an interest in his 'Native Treasury', to support his authority, and to inculcate a sense of responsibility' (Lord Lugard, cited by Mamdani, at 53).

¹⁰⁰ These are the non-derogable rights, including the principle of non-discrimination, the prohibition of torture, slavery and forced labour, the right to life, freedom of thought, conscience and religion, and the prohibition of non-retroactive penal legislation (Art. 4, ICCPR).

¹⁰¹ That some human rights are 'negotiable' does not mean that they can be exchanged for any other good or value, or that any person can dispose of them. On the conceptual aspects of the negotiability of human rights, see N. Bobbio, *L'età dei diritti* (1990) 39 ff. (English Translation: *The Age of Rights* (1996)). Human rights can be negotiated with other human rights when there is a conflict between opposing prescriptions, or when limitation or derogation clauses are applicable. For example, under the ICCPR, freedom of expression can be subject to restrictions, only if these restrictions are provided by law and are necessary 'a) for respect of the rights or reputation of others, b) for the protection of national security or of public order, or of public health or morals' (Art. 19). In addition, 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed' (Art. 4), States can adopt measures derogating from their obligations to respect and to ensure freedom of expression.

cases in breach of international human rights law as well as of Kenyan law. For UNHCR the 'gentlemen's agreement' with the SPLA leaders is expedient as it facilitates the administration of the camp. In exchange for this, the agencies are prepared to tolerate the diversion of some food aid to SPLA fighters and the forced recruitment and military training of many refugees in the camp, including children.¹⁰²

One of the most interesting case studies of the administration of camps is the introduction of 'self-management' in the Dadaab camps since 1995, which was observed at its inception by Jennifer Hyndman. Self-management goes hand in hand with the idea of empowerment, one of the most popular terms in humanitarian and development circles. In Dadaab, CARE International, the principal administering agency, devised a system aimed at redistributing 'decision-making power by increasing refugee participation and decreasing the role of agencies in determining priorities and projects in the camps'.¹⁰³ As noted by Hyndmann, this approach was conceptually flawed as it was based on the misconception that a 'refugee camp can, or does, operate as a village or civil society, and employs community development principles - such as self-governance and democratic decision-making'.¹⁰⁴ In addition, Hyndmann pointed out that the proposed transfer of power from administering agencies to community leaders would necessarily leave out the management of economic resources and would marginalise certain groups of refugees, especially women. In spite of these cautionary remarks, self-management was implemented in Dadaab.

Developments after Hyndmann's departure from Dadaab proved that her criticism was correct. According to CARE and UNHCR, refugees had 'wrongly' assumed that self-management would involve a 'progressive phasing out of the agencies' and a transfer of power to refugees and their communities.¹⁰⁵ When it became clear that power was not actually being transferred, tension between refugees and the agencies began to soar. Furthermore, as a result of budget cuts in 1997-98, refugees employed by UNHCR and by other agencies had to be persuaded to continue working on a

¹⁰² The existence of these practices is confidentially admitted by NGO officials, but publicly denied by UNHCR (Interviews conducted in Kakuma refugee camp, March and July 1997).

¹⁰³ Hyndman, PhD Thesis *supra* note 89, at 86.

¹⁰⁴ *Ibid.*, at 87.

¹⁰⁵ Interview with Mr Hussain, Focal Point for the Implementation of Community Self-Management for CARE International, Dadaab, 29 April 1998.

voluntary basis without receiving the so-called 'incentives'.¹⁰⁶ At a time when such difficult decisions had to be taken, the agencies re-claimed all the power that had apparently been transferred to refugee communities for themselves, and 'self-management' was re-defined in a way that could no longer be threatening for them.

Hyndmann uses the Foucaultian concept of governmentality¹⁰⁷ to analyse power in refugee camps,¹⁰⁸ observing that 'UNHCR meticulously orders the field through exercises of counting, calculating, and coding refugees', and often represents refugees 'as statistical and moral deviations' in its official reports.¹⁰⁹

Governmentality is not the only tool in the array of concepts and analyses developed by Foucault that can help unravel some of the intricate features of camps. In particular - and in addition to Hyndmann's observations - useful insight can be drawn from Foucault's genealogical study of the prison and from his observations on the 'plagued city'. Foucault noted that the camp model is the basis for such apparently diverse social spaces as industrial towns, hospitals, hospices, prisons, re-educational centres, and that the underlying principle of the camp is the 'spatial concatenation of hierarchical surveillances'.¹¹⁰ In refugee camps, control over refugees is often achieved

¹⁰⁶ On incentives, see (c). According to UNHCR and CARE International, there was no alternative to dismissing some refugees as a result of budget cuts. This downsizing of the refugee workforce in the camp was portrayed as a healthy process by NGO workers who claimed that 'refugees would have a chance to learn about the realities of life' and would be better prepared for repatriation since 'they will go back without a dependency syndrome' (Interview, *supra* note 105)... as if dependency on aid and 'dependency' on a salary in exchange for work were the same thing.

¹⁰⁷ Governmentality is the capacity of power to order 'across the boundaries of family and economy, public sector and private sector' (T. L. Dumm, *Michel Foucault and the Politics of Freedom* (1996), at 133). Governmentality is closely linked to the emergence of bio-power, 'a technology of power that does not exclude surveillance, but incorporates it and integrates it' (M. Foucault, "*Bisogna Difendere la Società*" (1998, Italian Edition, Feltrinelli) at 208). Bio-politics is principally concerned with population 'as a scientific and political question, as a biological question, and as a question of power' (*Ibid.*, at 212); at the outset, its 'objects of knowledge and its objectives of control ... were ... birth, mortality and longevity' (*Ibid.*, at 209). Such common practices of modern states as social security, individual and collective insurance, environmental regulation and the various forms of assistance are considered by Foucault offspring of bio-politics.

¹⁰⁸ Although Foucault never included refugee camps in his analyses of space and power, few institutions lend themselves to a Foucaultian analysis as well as refugee camps.

¹⁰⁹ Hyndman, *supra* note 89, at Chapter VII 'Reporting the Field'. Hyndman refers extensively to the UNHCR Country Operation Plan (1995) for Kenya as an example of a UNHCR report in which governmentality and technologies of surveillance transpire. In this report, UNHCR announced that it had 'addressed the intractable problem of discrepancies between feeding figures, registered numbers, and total populations, by camp site as well as by overall caseload and nationality, through physical headcounts and registration of refugees in the camps. These discrepancies are due to acts of refugee sabotage'. Subsequent UNHCR Country Operation Plans - for example in 1997-98 - use similar terms.

¹¹⁰ M. Foucault, *Sorvegliare e punire* (1976, Italian Edition, Einaudi) at 188. For analysing camps, one of Foucault's most interesting writings is 'Of Other Spaces', a lecture which he delivered in 1967 but did

through such archetypal means of social control as head-counts.¹¹¹ The controllability of refugees, and their powerlessness, is enhanced by their almost complete dependence for survival on the food distributed by the administering agencies.¹¹² In most refugee camp situations, the humanitarian agencies corroborate this complete dependency by sanctioning the sale of food rations or their exchange for other commodities.¹¹³ These sanctions are also a way of preserving the fundamental 'separateness' of refugee camps and their institutionalisation as administrative spaces forcibly isolated from the host community.

Representations of camps by the administering agencies are important – as is the case with any 'self-representation' of power – for comprehending how camps are administered. In strident contrast to the painful reality of encampment, there is an almost joyful representation of the camp 'as the utopia of the perfectly governed city... permeated with hierarchies, surveillances, controls, delegations, and immobilised by the functioning of a pervasive power which operates differentially on individual bodies'.¹¹⁴ Representations of the camp as utopia, as the perfectly administered city feature in various ways in much of the official literature of UNHCR and other UN agencies: in some cases, life in camps is represented as an idyll,¹¹⁵ and,

not publish until 1984. He distinguished between two main types of space - utopias and heteropias - and spent some time analysing 'heteropias of crisis' and 'heteropias of deviance' (M. Foucault, *Archivio Foucault: Interventi, colloqui, interviste*, Vol. III 1978-1985 (1998, Italian Edition, edited by A. Pandolfi, Feltrinelli) 307). See also: Dumm, *supra* note 107, at 34-46. Both utopias and heteropias are useful paradigms for analysing refugee camps.

¹¹¹ 'Head-counts' are also expressions of bio-power (see *supra* note 107).

¹¹² Harrell-Bond, *supra* note 98. In some cases, a higher degree of self-sufficiency is reached in refugee camps, depending on their location and on the availability of arable land. This is not the case in the refugee camps in Kakuma or Dadaab in Kenya situated in semi-desertic regions. In addition, the economy of these regions does not have industry or services in which refugees could seek paid employment. The main source of income for some refugees comes from working for the agencies.

¹¹³ Food rations do not normally include fundamental items like milk. Refugees make 'rational choices' by deciding to trade part of their ration for other commodities that are not distributed. In his novel *La Tregua (The Truce)* (1971), recounting his experiences after the Red Army liberated Auschwitz, Primo Levi recollected that one of the first decisions he took after liberation was to sell bread in order to buy shoes: since without shoes he would not have been able to walk and look for food, he realised that sacrificing the little food he had was necessary for his survival in the longer term. Refugees have to make this sort of decisions in camps, but sanctions are imposed on them if they trade or barter food rations, in some cases the ration card can be even withdrawn. UNHCR, and other humanitarian agencies, argue that they cannot allow the creation of a trade in goods that are distributed for humanitarian reasons.

¹¹⁴ M. Foucault, *supra* note 110 at 216. Foucault referred these remarks to the plagued city.

¹¹⁵ See, for example, UNHCR's online documentary *Road to Refuge 2: Into the Sahara* about a refugee camp for Tuaregs in Mauritania (http://www.unhcr.ch/witness4/III_Stans/html/toc/toc_set.html); and UNICEF, *Children of War: Wandering Alone in Southern Sudan* (1994), where it is also claimed that since they arrived in Kakuma camp the thousands of Sudanese unaccompanied minors could 'resume 'normalcy' again (at 21-22).

in nearly all cases, the life of refugees and events in camps 'are reduced to a compilation of statistics'¹¹⁶ in order to convey the scientific perfection of the administration. Most poignantly, visitors in camps are also regularly treated to these utopian representations.¹¹⁷ In fact, as part of this induction and briefing upon arrival, they are usually driven around the camp in an air-conditioned four-wheel drive vehicle, with a UNHCR staff member as guide contentedly pointing to the well-ordered components of the camp-mosaic and outlining its perfectly tessellated social structure.¹¹⁸ Such utopian representations could not be more distant from the perceptions of refugees – and of those visitors, and UNHCR and NGO workers prepared to lift the veil of utopia – for whom camps are probably closer to dystopias.¹¹⁹

The mis-representation of camps is a powerful *lie* that serves many purposes; not least it causes any criticism of camps directed at UNHCR to rebound.¹²⁰ In fact, UNHCR and NGO personnel will normally be prepared to acknowledge that there are some tesserae in the 'perfect' mosaic that still need improvement, emphasising that they are striving towards realising the ideal of the 'perfect refugee camp'. Bio-political techniques of control provide UNHCR and NGO officials with a precise and detailed list of minimum measurements in health, nutrition, shelter, etc that should be satisfied and by which the success of their operation will be measured. The camp administrators, however, will seldom question the underlying assumption of camps

¹¹⁶ N. Farah, *Gifts* (1999) at 194. Taariq, one of the characters in this novel, writes an essay on aid to Africa in which he employs this expression.

¹¹⁷ Even the visits of the High Commissioner are carefully planned and imbued of utopian representations. They are carefully staged events, which resemble the visits of heads of states: a show is organised with refugee dances and music, and she receives little presents by refugees.

¹¹⁸ I was often offered briefing and induction tours of this kind. Controlling outsiders' access to camps is an essential part of UNHCR's rule. I was often told that I needed 'authorisation' from UNHCR to visit a camp in Kenya, although my research had been regularly cleared by the Office of the President and I had been authorised to collect data anywhere in the country. Expressions like 'authorisation', 'seeking clearance from UNHCR', 'detailed programme and purpose of the visit' were commonly used. In Kakuma in July 1997, I borrowed a bicycle for transport so that I could be independent of UNHCR or NGO 'lifts'. I was told that I had to inform UNHCR about my movements every day and give them a programme of my intended visits and interviews. On another occasion in the same camp, in March 1997, together with other researchers, we were denied 'permission' to visit the camp at night 'for our own security'.

¹¹⁹ Camps are, for example, described as 'an absolutely inhuman place... where people spend their days like prisoners sieged by wind and dust', or 'as a place of great suffering where life stops' (respectively: written testimony of KM, Congolese refugee in Kakuma, written on 27 April 1998; and interview with WG, Nairobi, April 1997, a Burundi refugee who ran away from the camp). See also James Appe's short story 'A Visit to Kala Settlement' (*Flight and Other Stories* (1987)) - at the end of the visit 'you will breathe a sigh of relief or pity'.

(after all, who would not like to live in the ‘perfect city?’), and they will be unlikely to accept that there is something irremediably wrong with forcing individuals to live like inmates in segregated, isolated and highly regulated spaces, depriving them of basic freedoms.

In this respect, the attempts in humanitarian circles to improve refugee camps by devising minimum standards that ought to be respected in the establishment and administration of refugee camps – and in general in humanitarian emergencies – continue to elude the main point, i.e. that encampment is a human rights violation in itself, and the starting point for systematic violations of the rights of refugees. The reason for adopting humanitarian charters and minimum standards, such as the Sphere Project, is purportedly ‘to improve both the effectiveness of assistance and accountability to the stakeholders’.¹²¹ One of the proposed methods for improving camps is site planning and selection. UNHCR has already adopted guidelines on space requirement and planning,¹²² but the guidelines of the Sphere Project contain a wide array of even more precise and always measurable criteria that, according to its authors, will make a ‘good camp’ or settlement. These guidelines stress the fact that ‘the social structure of the displaced population should be reflected in the planning of the temporary settlement’ and ‘cluster planning should be used in order to support self-policing by the displaced population’.¹²³

Although such proposals are often regarded in humanitarian circles as the way towards the establishment of a better humanitarian regime, it is argued that they are for the most part futile and dangerous. Indeed, international law already knows of long and detailed regulations of spaces. In particular, the Geneva Convention III on prisoners of war contains an exhaustive, even obsessive, regulation of the confinement of a human group in a restricted space. The Convention makes meticulous provision for every aspect of the life of prisoners of war in a camp,

¹²⁰ It can probably also explain certain attitudes among staff members, in particular the tendency to ‘de-humanise’ refugees and reduce to statistical entities (See, for example, *infra* note 134).

¹²¹ Sphere Project, *Humanitarian Charter and Minimum Standards in Disaster Response* (1998), Chapter I, at 1. The Sphere Project is probably the most important current example of a humanitarian charter. It is the result of a collaborative effort of different NGOs – including Oxfam, CARE, the International Committee of the Red Cross (ICRC), Médecins sans Frontiers, LWF, Caritas – and departments for international developments of donor countries.

¹²² For example UNHCR estimates that each refugee needs 45 squared metres, including ‘a small space for kitchen gardening’ (*Ibid.*, Ch. V, at 33).

¹²³ *Ibid.*, at 32 and 35.

including registration, hygienic standards, provision of food, clothing, underwear and footwear, frequency of health inspections, types and standards of shelter, religious, intellectual and physical activities, the wearing of badges, correspondence, etc.¹²⁴ The results of the Sphere Project bear a striking similarity to the legal regulation of camps for prisoners of war, and to this extent such endeavours are pointlessly replicative.

These approaches are dangerous because they end up promoting a treatment of refugees - and of other beneficiaries of humanitarian assistance - that is *au par* with the treatment reserved to prisoners of war and that is essentially based on their encampment in controllable and accurately disciplined spaces. Since these approaches are believed to represent 'good practice' and the 'way forward', the obvious needs to be reiterated: refugees, but also other beneficiaries of humanitarian assistance such as internally displaced persons, are legally entitled to a treatment that has nothing to do with that of prisoners of war. If an encampment-based treatment is proposed for refugees that is in all respects similar to the international legal regulation of camps for prisoners of war, something has clearly gone wrong, not in the implementation phase of humanitarian work but in the thinking behind it.

This regressive soft law of codes of conduct, of regulation and control, of measurements and discipline – often originating from NGOs, and (alas) academics - constitutes one of the most serious threats to the refugee regime. Deaf to the perceptions of refugees and to the overwhelming evidence against camps,¹²⁵ these endeavours aim at putting the finishing touches to the ideal model of refugee camp, a Platonic form of eternal perfection for real camps in the perceptible world to resemble. They also encapsulate the tendency to reduce human rights to statistical figures, measurable – and thus *controllable* – entities. Glaucon's polemical outburst in Plato's *Republic* should be heeded: after hearing Socrates explain which staples would be part of the diet of the dwellers in Plato's ideal city, Glaucon remarks that the same approach and measurements could be used 'if you were founding a city for pigs'.¹²⁶

¹²⁴ Arts. 21-76, Geneva Convention III Relative to the Treatment of Prisoners of War (1949) 75 UNTS 135.

¹²⁵ Some of the relevant academic literature is discussed in Harrell-Bond, *supra* note 98.

¹²⁶ Plato, *Republic II* in Plato, *Complete Works* (1997, edited by J. M. Cooper, Hackett), at 1011.

(b) *Human rights in refugee camps*¹²⁷

Already on a *prima facie* basis, refugee camps constitute a violation of one human right, freedom of movement. Owing to the dearth of socio-legal scholarship on refugee camps and of analyses of the functioning of camps as institutions, however, it is often wrongly believed that freedom of movement is the only human right at stake in these situations. Responsibility for such violations lies for the most part with the administering agencies, and in particular with the local offices of UNHCR.¹²⁸

Both the 1951 Refugee Convention (Art. 26) and the International Covenant on Civil and Political Rights (ICCPR) (Art. 12) protect freedom of movement, defined as encompassing the right to choose one's place of residence and the right to move freely within the territory of the state.¹²⁹ Under human rights law, freedom of movement is not a right of 'citizens', but a right of 'every individual' (Art. 12, African Charter on Human and Peoples' Rights) or of 'everyone lawfully within the territory of the State' (Art. 12, ICCPR). A problem with viewing refugee camps as affecting exclusively the freedom of movement of refugees is that freedom of movement can be subject to limitations and to derogations in times emergency.¹³⁰ For example, under Article 12(3) of the ICCPR, restrictions to freedom of movement which are 'provided by law, necessary to protect national security, public order, public health or morals or the rights or freedoms or others' are allowed, and Article 26 of the 1951 Convention contains a similar limitation clause. The confinement of refugees in camps is often justified with scarcity of resources, a ground that cannot be easily subsumed under the permissible grounds for limitation under Article 12 (3). Furthermore, the establishment of camps has been shown to be uneconomical and to undermine local health and social welfare structures.¹³¹ Although national security is

¹²⁷ The empirical data on the violations of human rights in camps discussed in this section refer for the most part to refugee camps in East Africa. See *supra* note 89.

¹²⁸ See Chapter II.6(b).

¹²⁹ See also Human Rights Committee, General Comment 15 ('The Position of Aliens under the Covenant') at para. 8; and Art. 12, African Charter on Human and Peoples' Rights (1981), 21 ILM 58 [hereinafter 'African Charter']. The ICCPR provisions are normally referred to in this chapter, although some human rights feature in other human rights treaties, too.

¹³⁰ The derogability of freedom of movement can in part explain why human rights organisations have not denounced the policy of encampment. While probably recognising that camps represent an infringement of freedom of movement, confinement in camps is at the same time justified because of difficult circumstances in host states (mass influx, problems of public order, scarcity of resources). This approach ignores other human rights issues in camps. Another reason for the dearth of reports by human rights organisations on the situation in refugee camps is that an international institution rather than the state has primary responsibility for what happens.

¹³¹ Harrell-Bond, 'Camps: Literature Review' 2 *FMR* (1998) 22.

sometimes invoked for justifying the confinement of refugees in camps,¹³² the threshold set under Article 12 (3) is high, requiring a particularly serious threat to the security of the state.

Although context is often used within a cultural relativist approach in order to undermine human rights, it is necessary to contextualise the acts of UNHCR and of NGOs in order to determine whether they amount to a human rights violation or not. Unless they are aware of the importance of the context, observers can be easily misled into believing that particular actions and policies of the administering agencies do not actually constitute a breach of human rights. The practice of head-counts and the case of a Sudanese refugee in Kakuma camp illustrate these points.¹³³

Head-counts are periodically conducted by UNHCR not only to determine the camp population, but also as a 'revalidation exercise' to re-issue ration cards.¹³⁴ The practice of head-counts is almost universally perceived as debasing and humiliating by refugees and refugees have often protested, at times violently, against it.¹³⁵ In order to count them, UNHCR places refugees in enclosures surrounded by barbed wire, where they are normally left to wait for many hours (this is to ensure that nobody is counted twice and receives two ration cards). UNHCR uses special ink to mark a part of the body, normally the arm, to identify those refugees who have already been counted. The sign is only visible under fluorescent light and is indelible for twenty-four hours.

UNHCR maintains that refugees protest against head-counts, because they are trying to ensure that those carrying two or more ration cards will not be discovered. This is

¹³² See Human Rights Watch, 'Tanzania - In the Name of Security. Forced Round-ups of Refugees in Tanzania' (July 1999). The same argument to justify encampment was given to me during interviews with government officials in Kenya (1997) and Tanzania (August 2000).

¹³³ Harrell-Bond, Voutira and Leopold 'Counting the Refugees: Gifts, Givers, Patrons and Clients', 5 *J. Ref. St.* (1992) 205.

¹³⁴ Another reason is that 'maintaining reliable and accurate population figures and demographic data is to assure continuation of donors' funding for the Programme' (Presentation of Mr Malik in preparation for the head-count, Dadaab, 29 April 1998; Mr Malik is UNHCR's senior regional registration officer, or 'head of the head-counts'). It is probably true that there is some donors' pressure on UNHCR in this sense. However, far from challenging these perceptions among donors, UNHCR's entire policy of encampment seems to reinforce them.

¹³⁵ Protests against head-counts took place in both the Kakuma and the Dadaab camps in Kenya, but it is far from unknown to other camps: in Uganda, evidence of similar protest in Nakivale camp has been collected by Mary Byrne in Uganda (E-mail from Mary Byrne to me, 27-11-1999). I was also told of analogous incidents in the refugee camps in Vahun and Kolahun, Liberia, hosting Sierra Leonean refugees, when I conducted a fact-finding mission there on behalf of the Lawyers' Committee for Human Rights in July–August 1998.

not a plausible explanation of social behaviour. Indeed, it is hardly conceivable that a mass protest would take place to protect the privileged few who have managed to obtain more than one ration card. On the contrary, unfairness in rationing is likely to engender resentment or even revolt among the unprivileged ones.¹³⁶ Why would refugees be prepared to protest in order to ensure a few extra rations for *a few* among them, whereas they seldom stage similar protests about the poor quality and the insufficient quantity of food that is distributed to *all*? In Kakuma refugee camp in 1996-97, refugees often complained that rations were grossly inadequate, but no organised protest took place, although malnutrition had reached preoccupying levels.¹³⁷ The harsh measures taken by UNHCR on previous occasions to suppress refugee protest may have deterred the organisation of a protest or a revolt. But another reason may need to be sought in the sociology of obedience and revolt. It has been argued that in different societal contexts revolts occur when there is a clear perception that a certain punishment or treatment is essentially inhuman, and that 'the punishments that are rejected vary in accord with varying conceptions of humanity'.¹³⁸

In order to understand why it is expressly against head-counts that refugees decide to revolt, it is necessary to examine the significance of this practice in its socio-cultural context.¹³⁹ Firstly, there is a strong cultural resistance among different groups to

¹³⁶ Even inmates in Nazi concentration camps did not protect individuals who received bigger rations, and often reported them to the guards. Such episodes are recounted both by Primo Levi – *Se Questo e' un Uomo* (1986) (*If This is a Man*), and by Bruno Bettelheim, *The Informed Heart* (1986). On social revolt originating from concepts of distributive justice, see: Barrington Moore Jr., *Injustice. The Social Bases of Obedience and Revolt* (1978) 37 ff.

¹³⁷ See Letter submitted by Dr Guluma to *The Lancet*, 4 October 1997, unknown whether published or not, *on file with the author*.

¹³⁸ Barrington Moore Jr., *supra* note 136 at 29. The proposition that conceptions of humanity are historically determined and culturally variable does not entail an acceptance of cultural relativist positions. On the contrary, the existence of notions of 'cruelty', 'inhumanity' and 'pain' that are *to some extent* variable can contribute to fleshing out human rights norms when applied to different cultural contexts. For example, Talal Asad has observed that, in order to apply the prohibition of torture to different contexts, 'we need ethnographies of pain and cruelty which can provide us with a better understanding of how relevant practices are actually conducted in different traditions' (Asad, 'On Torture, or Cruel, Inhuman or Degrading Treatment', in R. A. Wilson, *Human Rights, Culture and Context: Anthropological Perspectives* (1997) 111 at 128).

¹³⁹ But this will not explain another, perhaps more interesting question: why do refugees not normally revolt against bad and insufficient food in camps, or indeed against human rights abuses in camps? In order to answer this question, an *ad hoc* empirical investigation would be necessary. One reason for the lack of revolt could be that claiming rights normally entails a risk for the individual, since it involves a challenge to the authorities. On the other hand, the benefits deriving from this challenge are not certain and, in any way, would only produce themselves in the future. In places where physical survival is imperative, where there is no network of judicial and institutional guarantees, and where the sheer prospect of impartial justice appears remote, it can hardly surprise that most refugees decide to

censuses.¹⁴⁰ Secondly, the way in which ‘head-counts’ in refugee camps are conducted is particularly debasing: the fact that refugees are forced in enclosures ‘like cattle’,¹⁴¹ often have to wait in the scorching sun for many hours, and that the whole process is managed in a cold, impersonal and bureaucratic manner, creates a feeling of humiliation. Thirdly, using markings on the body, albeit not indelible, adds to the feeling of aggravation and debasement. For individuals who have already suffered a loss of social status and whom aid has made ‘powerless’, an imprinted symbol of humiliation can feel unbearable, as a definite stigma. It is certainly no coincidence that the Geneva Convention IV explicitly prohibits ‘identification by tattooing or imprinting signs or markings on the body’ (Art. 100).¹⁴² Placed in its social and cultural context, the practice of head-counts constitutes ‘a conduct of a certain level of severity which lowers the victim in rank, position, reputation or character in his own eyes or in the eyes of his people’,¹⁴³ or one in which an individual is ‘treated as an object in the power of the authorities’.¹⁴⁴

The other example that illustrates the importance of contextualising the acts of UNHCR is the case of Sarah Aruol, a Sudanese refugee woman in Kakuma refugee camp.¹⁴⁵ To punish her for opposing the forced recruitment of her child in the SPLA, the local community leaders – who, as has been mentioned, are SPLA officers – condemned her to ‘social ostracisation’: her friends and other Sudanese refugees in the camp were not to speak to her, not to alleviate her daily hardships, and not to give her any form of social recognition or acceptance.¹⁴⁶ There were also times when she was pushed to the end of the queue for food distribution. Her attempts to bring her case to the attention of the camp authorities did not yield any results, and, after

acquiesce to the abuses and to poor food rather than revolt. In addition, as is shown by the example of the Ethiopian refugee who offered human rights education, UNHCR deals with any activity considered seditious in an expeditious and summary manner.

¹⁴⁰ Such opposition to the idea of being counted is particularly strong among pastoralists (E. E. Evans-Pritchard, *The Nuer* (1969) 20), but it is not foreign to western societies. Censuses are also prohibited under the Jewish Torah (*Exodus*, 30, 11-13).

¹⁴¹ Refugees interviewed both in Kakuma and in Dadaab used this expression.

¹⁴² Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949) 75 UNTS 287.

¹⁴³ *East African Asians v. UK* (No. , 3 EHRR 76, at para. 189).

¹⁴⁴ *Tyrer v. UK*, 2 EHRR 1, at para. 33.

¹⁴⁵ Interviews with Sarah Aruol (*not her real name*), Kakuma, July 1997.

¹⁴⁶ Ostracising, or threatening to ostracise women who defy gender discrimination is by no means a rare practice. Martha Nussbaum refers to an example of such ostracisation in Bangladesh (M. C. Nussbaum, *Sex and Social Justice* (1999) at 82). On the use of psychological sanctions in traditional dispute settlement, see, for example, Köbben, ‘The Cottica Dyuka of Surinam’, in L. Nader (ed.) *Law in Culture and Society* (1969) 117 at 130.

camping outside the UNHCR compound, she decided to leave the camp and risk the journey to Nairobi. When I discussed this case with the UNHCR field officer in Kakuma, I was told that nobody could be forced to help, or to be 'nice' to anybody else. It would be difficult to argue that 'social ostracisation' amounts to cruel, inhuman or degrading treatment in most social situations, but in refugee camps reliance on social networks and family ties is often indispensable for survival, especially for a single mother with three children.

(c) *The imposition of collective punishment and other human rights violations in camps*

Perhaps the most blatant breach of human rights standards in the Kenyan refugee camps was perpetrated when the distribution of food was suspended on two separate occasions in Kakuma, and, on one occasion, in Dadaab. In these cases, food distribution was suspended after refugees had protested against 'head-counts', and, on one of these occasions, against the introduction of a new method for distributing food.¹⁴⁷ In Kakuma, UNHCR sent a memorandum to the leaders of the refugee communities, explaining that 'incentives'¹⁴⁸ would also be suspended and that their resumption would depend:

'on the co-operation on the part of refugees during the re-construction of the destroyed facilities, recovering all the looted properties and providing the names of the culprits responsible for the damages. This will be evaluated by my office and our implementing partners shortly after this reconstruction

¹⁴⁷ The food rations are made available by WFP and distributed by UNHCR and the other agencies operating in the camp. There are various reasons why food distribution often engenders protest by refugees. Firstly, it highlights the refugees' dependency on external help and 'gifts' for their survival, and thus their 'powerlessness'. Secondly, it is conducted in a way that is often profoundly debasing and humiliating. It almost seems that there is an inverse relationship between order in the camps as constructed by the administering agencies and the dignity of refugees: indeed, the more 'orderly' ways of distributing food introduced by the agencies normally involve the use of enclosures, strict surveillance, meticulous controls over the rations distributed to each refugee, etc. Thirdly, the food that is distributed is normally lacking both in quantity, quality and variety.

The 1951 Convention contains a provision on food rationing that shows the extent to which the reality of assistance to refugees has departed from the legal standards. Under Art. 20 of the 1951 Convention, 'where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals'. The preoccupation of the drafters was thus that refugees may be excluded from food distribution in situation of generalised hardships and this provision was meant to ensure the integration, in the sense equal treatment, of refugees in any rationing measure.

¹⁴⁸ Refugees employed by UNHCR and other humanitarian agencies in camps are said to receive 'incentives' rather than salaries, because they are not considered workers but volunteers.

starts... anyone whose performance proves to be unsatisfactory will be dismissed without prior warning'.¹⁴⁹

In the same incident, an Ethiopian refugee, who had started a human rights education programme in Kakuma, was forcibly relocated to one of the Dadaab camps. UNHCR justified this decision in these terms:¹⁵⁰

... UNHCR has taken the decision to transfer you to the Dadaab area. UNHCR has noted your unwillingness to be transferred ... but regrets to inform you that there are no viable options at the moment. Once in Dadaab, you will be expected to refrain from any conduct likely to disrupt public order in the camp, including the organisation of such lectures as you conducted in Kakuma Refugee Camp. *It is the view of UNHCR that the series of human rights lecture was a direct cause for the wave of tension and disruption of public order in the camp* [emphasis added].¹⁵¹

The culprit was a scapegoat, since his series of lectures had only begun a week after the 'disruption of public order' in Kakuma had taken place. In justifying its decision, UNHCR referred to 'Art. III of the 1969 OAU Convention and to the Geneva Convention', under which refugees are required 'to conform with laws and regulations as well as with measures taken for the maintenance of public order' in the host country. The relocation of the Ethiopian refugee however is a measure that cannot be imputed to Kenya, as it was taken and implemented by UNHCR, and was not based on Kenyan laws and regulations. His forcible transfer to another refugee camp, away from his network of family and friends, was carried out shortly after this letter was sent. This decision was in breach of this refugee's freedom of expression¹⁵² and right to a fair trial.

¹⁴⁹ UNHCR Sub-Office in Kakuma, Memorandum from the Officer In-Charge to Refugees Working for NGOs in Kakuma, 4 April 1996 (*on file with the author*).

¹⁵⁰ Senior Protection Officers are in charge of the promotion of respect for the rights enshrined in the 1951 Convention and other rights to which refugees are entitled under human rights law. In every country where UNHCR operates there is normally a Senior Protection Officer who heads the legal office.

¹⁵¹ Letter from the Senior Protection Officer, James Lynch, to Assefa Teferi Woldekidan, 19 July 1994 (*on file with the author*, and UNHCR ref. KEN/NRB/PT/94/IC/0794).

¹⁵² Violations of the refugees' freedom of expression in the Tanzanian and Kenyan camps amongst others are examined in Article 19, 'Voices in Exile' (2001) written by R. Carver and G. Verdirame.

In places like Kakuma, located in one of the most arid regions in Kenya with virtually no arable land, the refugee population is entirely dependent on food distribution for its survival. In Dadaab, the situation is slightly better because refugees are at least allowed to keep poultry. Both in Dadaab and in Kakuma, there are hardly any prospects for local employment.¹⁵³ As empirical research in Kakuma has shown, the 'incentives' paid to a few hundred refugees working for the UNHCR and the NGOs constitute one of the principal ways of integrating the meagre food rations.¹⁵⁴ 'Incentives' were suspended together with food distribution on these occasions. Given that confinement in camps is involuntary, there can be little doubt that suspending food distribution in these circumstances amounted to a violation of the right to life. Other human rights blatantly violated by this decision are the right to an adequate standard of living, including adequate food under Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the right to the enjoyment of the highest attainable standard of physical health (Art. 12, ICESCR), and the right to be free from cruel, inhuman and degrading treatment (Art. 7, ICCPR).¹⁵⁵ Furthermore, trying to extort the names of the 'culprits' under conditions of unequivocal duress constitutes a violation of fair trial guarantees (Art. 14, ICCPR). It is noteworthy that, under Article 26 of the Geneva Convention III, 'collective disciplinary measures affecting food are prohibited' even in camps for prisoners of war.¹⁵⁶ Although the Geneva Conventions on the Laws of War are not applicable to refugee camps in Kenya, the fact that collective punishments are proscribed under humanitarian law *a fortiori* shows the illegality of these practices in refugee camps.

The example of collective punishment also illustrates the extent of the power bestowed upon the agencies. Deportations, the extortion of confessions under threat, and the imposition of collective punishments are archetypical manifestations of unfettered power. Furthermore, the exercise of punitive rights, the reference to the

¹⁵³ According to UNHCR and to the local authorities, refugees should not take up employment. However, a very limited number of them find occasional work in the informal economy, or *jua kali*, in Kakuma village.

¹⁵⁴ See Boudreau, Lawrence, King, 'Household Food Economy Assessment of Kakuma Refugee Camp' (1996).

¹⁵⁵ Cassese has argued that the infliction of particular socio-economic conditions can amount to inhuman and degrading treatment (Cassese, 'Can the Notion of Inhuman and Degrading Treatment Be Applied to Socio-Economic Conditions?' 2 *EJIL* (1991) 141).

¹⁵⁶ See also Art. 100, Geneva Convention IV, which prohibits the reduction of food rations for internees.

maintenance of public order, normally a prerogative of states, reveal that the administering agencies have taken the place of the state in many respects.

The system of 'incentives' denotes the violation of another fundamental right, the right to work. Under this system, refugees, employed by the agencies as drivers, teachers, administrators, doctors, nurses, security guards, et al., receive less remuneration than nationals for the same work. This practice is in breach of 'the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular (...) fair wages and equal remuneration for work of equal value without distinction of any kind' (Art. 7, ICESCR). Violations of the prohibition on forced labour may also occur. For example, in Dadaab in 1997-8 the administering agencies decided to phase out 'incentives' and to replace them with a system of non-remunerated work; in Kakuma, they dismissed large numbers of individuals who had been receiving 'incentives' for some time, often for years. In April 1998, UNHCR and CARE International, estimating that at least *some* refugees would refuse to continue to work without remuneration, were considering the imposition of sanctions, including the individualised suspension of food distribution.¹⁵⁷

Rights of refugees in camps can also be violated by acts of private security officers employed by the agencies in the field. These security officers comprise both locals and refugees and, at times, personnel from private security companies. The chief security officer normally works under UNHCR supervision, although he is an employee of the main administering agency sub-contracted by UNHCR (respectively LWF and CARE International). Security guards in practice act as an interface between refugees, and UNHCR and NGO staff, filtering the claims of refugees who, for various reasons, try to see a UNHCR or NGO official. In fact, refugees do not have easy access to the offices of UNHCR and of NGOs, which are located in a 'safe' compound, surrounded by barbed wire, with security guards at the entrance gate.¹⁵⁸ Refugees complain that the behaviour of these guards and their decisions are completely arbitrary. The support of a security officer can often make the difference

¹⁵⁷ Interviews with UNHCR officials and CARE International Manager, Dadaab, 27 April – 1 May 1998).

¹⁵⁸ In Dadaab there are, as has been mentioned, three different refugee camps, and in each one of them there is a UN and NGO compound. The main compound is located in the village of Dadaab. In Kakuma, all members of staff reside within the compound, except for the person working for Don Bosco, a small Italian NGO.

between a prompt response to a refugee complaint, and complete lack of action or swift dismissal of the case. Given that security officers are chosen by UNHCR in conjunction with community leaders, they tend to support the claims of refugees who are close, or at least not inimical to the leaders of the community, whereas at best they neglect others. As a result of the role assigned to community leaders and security guards as a spring-board for protection cases, many women and minors,¹⁵⁹ members of minority clans and groups, opponents, and in general individuals with feeble social networks are often excluded from protection.¹⁶⁰

The customary settlement of disputes in refugee camps, in particular settlement through adjudication in customary courts,¹⁶¹ can give rise to violations of rights. The customary norms that are normally applied by these courts are the result of a complex process of transformation, reflecting in part the experience of exile, and in part power relations in camps, including relations between community leaders and the *de facto* authorities, i.e. UNHCR and NGOs. As a result of these transformations, customary law in exile often loses its 'subtle, adaptable and situational' nature.¹⁶² In Kakuma, the SPLA leaders have assumed control of the process of dispute settlement, and as a result individuals like Sarah Aruol¹⁶³ whose dispute is *against* the SPLA are basically defenceless. In addition, as has been seen, in the camp Sarah Aruol could not rely on those kinship and social ties that often act as a shield protecting individuals against abuses in the process of dispute settlement. Had her case arisen in her home town in southern Sudan, it is reasonable to hypothesise that her kinship and social ties would have played an important role and the outcome of the case

¹⁵⁹ In Kakuma there are some 7,000 Sudanese unaccompanied minors, mainly young men and male adolescents. They reached Kakuma in 1991 after fleeing Sudan where many of them had become orphans or refused to be forcibly recruited in the SPLA. Before arriving in the camp, they had been in refugee camps in Ethiopia, where the group had been decimated by Menghistu's army and by starvation. On relationship between these boys and the Dinka community, see (d).

¹⁶⁰ 'With the current system of work by the protection service of UNHCR, which consists in visiting delegates or chairmen of each community every Wednesday, and notice that only chairmen of community are called to submit different cases settled in their communities, I AM FALLING in THE TOTAL HOPELESS MARGINALISATION BECAUSE MINE WILL NOT GET CHANCE TO BE read one day' (Written testimony of B D, Burundi refugee in Kakuma, April 1998).

¹⁶¹ Negotiation is another important way of solving disputes (Gulliver, 'Case-Studies of Law in non-Western Societies' in Nader, *supra* note 146, 11 at 17), but this section deals predominantly with adjudication in the customary courts.

¹⁶² O. Harris (ed.), *Inside and Outside the Law* (1996) 3. On 'mandatory traditional customs' in camps, see Harrell-Bond, *supra* 9, at 293 ff. On the adaptability of Nuer custom and its historical evolution, see S. Hutchinson, *Nuer Dilemmas: Coping with Money, War and the State* (1996) at 217 ff.

¹⁶³ See *supra* note 145.

could have been more favourable to her.¹⁶⁴ But the breakdown of social structures and the fact that for most refugees these ties are not so extensive as in their countries of origin mean that, in this respect too, the application of customary law in camps is not subject to the necessary limitations.

The imprisonment of individuals found 'guilty' by a customary court in cells, which are built by UNHCR and NGOs,¹⁶⁵ constitutes a violation of the right to liberty and security of person (Art. 9, ICCPR) and of the right to a fair trial (Art. 14, ICCPR). Contrary to widespread belief, subjecting refugees to the application of customary norms in the manner described – far from being a practice respectful of the cultural rights of refugees – is actually in breach of cultural rights, primarily defined as the right of an individual to 'freely take part in the cultural life of his community'.¹⁶⁶ The jurisdiction of the 'customary courts' in refugee camps includes criminal matters, and is significantly broader than is allowed under Kenyan law, and than would be allowed under the law of most countries in Africa.¹⁶⁷ In addition, non-state courts in Kenya have an obligation to respect the principle of non-discrimination, particularly in the collection and evaluation of evidence, whereas a similar restriction is not imposed on similar courts dispensing 'justice' in refugee camps. Finally, the exercise of jurisdiction by these 'courts' in refugee camps cannot be reconciled with the 1951 Refugee Convention. Indeed, the establishment of parallel dispute settlement systems in camps, including the exercise of criminal jurisdiction, undermines the access of refugees to national courts, although Article 16 of the 1951 Convention accords significant protection to the refugees' right to 'free access to the courts of law'. This right occupies a special position in the system of the Convention, as, together with only a handful of other provisions, it cannot be the object of a reservation by state parties.¹⁶⁸

¹⁶⁴ E.g. see Gulliver, 'Dispute Settlement Without Courts: The Ndendeuli of Southern Tanzania', in Nader, *supra* note 146, 24 at 59 ff.

¹⁶⁵ On these cells, see *supra* note 94.

¹⁶⁶ Art. 17, 2, African Charter. See also: Art. 27, Universal Declaration of Human Rights; Art. 15, ICESCR.

¹⁶⁷ See *supra* note 95. A UNHCR Protection document ('Implementing Protection', prepared by the Protection Assistant in Kakuma Sub-Office, no date) states that 'refugees have their own traditional courts chaired by an appointed judge with assistance from community leaders who pass judgement on offences related to their cultural norms' [emphasis added].

¹⁶⁸ In addition to access to courts (art 16), other provisions to which no reservation is permissible under Art. 42 of the 1951 Convention include the refugee definition (Art. 1), the principle of non-discrimination in the application of the Convention (Art. 3), freedom of religion (Art. 4), the principle of non-refoulement (Art. 33) and the dispute settlement clause (Art. 38). Under this last provision,

In both Kakuma and Dadaab the incidence of sexual violence was dramatic. In Dadaab UNHCR had come under considerable pressure following reports of human rights organisations on the plight of Somali women.¹⁶⁹ A lawyer from FIDA was hired in 1994 for a short period to initiate proceedings against those responsible for the violence. The FIDA lawyer also started the mobile court programme, which was described above. Unfortunately, once her short-term contract terminated, these initiatives foundered. In yet another example of a grotesque operationalisation of an originally progressive idea, UNHCR maintained that 'gender issues' had been 'mainstreamed' and that there was no need for a separate programme. In 1998, a newly appointed Senior Protection Officer revived the mobile court programme and insisted that those accused of committing sexual violence be brought to justice. However, there was still little acknowledgement of the fact that forcing refugee women to reside in camps like Kakuma and Dadaab was in itself exposing them to the risk of becoming victims of sexual violence. Various progressive-labelled, donor-pleasing and consultant-enriching activities were organised, including gender awareness seminars, sensitisation activities and peace education seminars.¹⁷⁰ The fact remains that the gender imbalance in many "communities",¹⁷¹ the high proportion of former combatants, the inactivity of the entire population, the complete isolation, the oppressive and inescapable intimacy, the absence of law enforcement and the presence of armed bandits in the region, and, for many women, the absence of male relatives were the main factors that caused sexual violence, and these were not addressed.

Malnutrition, especially among children, has been particularly high both in Kakuma and in Dadaab.¹⁷² The fact that refugees are confined against their will in camps where

disputes 'relating to the interpretation or application' of the Convention shall be referred to the ICJ. However, to date no case under the 1951 Convention has been brought to the ICJ.

¹⁶⁹ See *supra* note 97.

¹⁷⁰ The foreign consultant in charge of the UNHCR peace education programme in Kenya in 1997-98 hired as one of her aides a Somali elder in Dadaab who had been accused of causing his under-age wife to nearly bleed to death on the first night of marriage. She said the relatives of the woman and this man had settled the dispute, and she needed him because he was 'very articulate' (Interview, Dadaab, October 1997).

¹⁷¹ For example, the Sudanese community includes only a small proportion of women. In Kakuma, the majority of men amongst Sudanese are the 'walking boys', *supra* note 159.

¹⁷² Boudreau *et al.*, *supra* note 154; Verdirame, *supra* note 86; Letter of Dr Guluma, *supra* note 137. On malnutrition in refugee camps outside Kenya, see: Harrell-Bond, *supra* note 9, at 276 ff.

they cannot achieve self-reliance means that those responsible for the confinement – host states and UNHCR – are obliged to provide them with essential necessities, including food, shelter and water. Keeping refugees on low rations is thus a breach of Article 11 of the ICESCR – the right to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions – and, when loss of life ensues from malnutrition, of the right to life (Art. 6, ICCPR).

UNHCR's defence that sufficient resources are not available echoes the argument of states that scarcity of resources would prevent them from implementing economic and social rights, including the right to food. However, this argument does not reflect the nature of the obligations of state parties to the ICESCR. The Committee on Economic, Social and Cultural Rights, established under the ICESCR, has distinguished three different levels of obligations vis-à-vis the right to food: the obligations *to respect*, *to protect*, and *to fulfil* – the latter comprising both an obligation *to facilitate* and an obligation *to provide*. In refugee camps, UNHCR is responsible for a violation of the first of these obligations – the obligation to respect. Indeed, the obligation to respect imposes a negative duty, requiring states '*not* to take any measures that result in preventing' access to food.¹⁷³ Confining refugees to camps, depriving them of the possibility to seek employment and to secure livelihood through their own means are measures that prevent, or at least significantly reduce, access to any food other than food aid.¹⁷⁴

The Committee on Economic, Social and Cultural Rights has added that:

food aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets, and should be organized in

The standard set under Art. 26 of Geneva Convention III, *supra* note 124, is often higher than what is concretely made available to refugees: 'The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. Account shall also be taken of the habitual diet of the prisoners'.

¹⁷³ Committee on Economic, Social and Cultural Rights, General Comment 12 on Art. 12 ('The Right to Adequate Food'), UN Doc. E/C.12/1999/5, para. 14-15.

¹⁷⁴ Not all camps are the same: in some, like Dadaab, refugees are allowed to keep poultry; in others, they may even be allowed to cultivate some land; in the worst cases, like Kakuma, refugees have access to no food other than what is distributed by the agencies fortnightly. But, in general, refugees' own ability to gain access to food is at least limited as a result of encampment.

ways that facilitate the return to food self-reliance of the beneficiaries. Such aid should be based on the needs of the intended beneficiaries. Products included in international food trade or aid programmes must be safe and culturally acceptable to the recipient population.¹⁷⁵

In substance the Committee views the right to adequate food in terms almost antithetic to the practice of UNHCR and of the World Food Programme (WFP) in the Kenyan camps, and emphasises that this right 'shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients'.¹⁷⁶ However, these 'narrow and restrictive' interpretations of the right to food are predominant not only in the practice of UNHCR and NGOs in camps, but also in the conceptualisation that precedes this practice. Methodical and accurate measurements of the nutrients that need to be intaken to keep the body of the refugee healthy are in fact part and parcel of the 'utopia of the perfectly governed city', and of the reduction of refugees and their human rights to statistical entities. And, to make matters even worse, even these measurements - which would still fall short of 'measuring' freedom, rights, happiness or welfare - are in practice seldom respected, partly because of WFP's policy of reducing food aid automatically after two years, since, according to its *model*, two years is the maximum duration of the emergency and continuing food aid would discourage self-reliance. Thus, both in Kakuma and in Dadaab, food aid was progressively reduced regardless of the fact that self-reliance was not attainable by refugees in those circumstances.

In addition, the refugees' own coping strategies are often undercut by such UNHCR policies as the prohibition of trade in food rations – another example of a violation of the 'obligation to respect'. As has been observed,¹⁷⁷ rations do not include all necessary nutrients, and refugees trade them for other necessities (including milk for infants, staples when these are not distributed, or non-food necessities like clothing and footwear). Although UNHCR blames donor pressure for this, in most refugee camps it still opposes trade in food rations, and at times sanctions this practice with the confiscation of the food.

¹⁷⁵ General Comment 12, *supra* note 173 at para. 39.

¹⁷⁶ *Ibid.*, para. 6.

¹⁷⁷ See *supra* note 113.

Because of scarce resources, most developing countries are not able to fulfil their obligation *to provide* such economic and social rights as the right to food, to health and to shelter. States, and *de facto* authorities like UNHCR in refugee camps, have an obligation at least not to hinder – as part of their obligation *to respect* - but at best *to protect* and *to facilitate* the establishment of independent networks of mutual help by refugees. In fact, social solidarity often acts as a private substitute for state action in the area of food, shelter, education or health, when states are unable or unwilling to intervene. In refugee camps, however, there is far less room for solidarity of this kind, and therefore even this avenue of implementing rights is too often denied to the refugees. Harrell-Bond has observed that the process of re-defining social responsibility in exile is often painfully slow, and that the extent to which a refugee in a camp can rely on help from others normally continues to depend on the extent of his/her kinship ties.¹⁷⁸ My findings also suggest that, in spite of the availability of only little aid for refugees outside camps, one reason why refugees normally prefer to live outside camps is that they can establish more effective social networks.¹⁷⁹ This may be a consequence of the ‘hard truth’ that ‘forced intimacy may be an enemy of solidarity and co-operation’,¹⁸⁰ but also of the fact that, owing to the lack of prospect of employment or education, camps are places where no one can really ‘make it’ and where offering help seems often pointless.¹⁸¹

(d) *The smokescreen: cultural relativism*

The arguments that were developed in Chapter III on the regressive and instrumental use of anything ‘cultural’ - identities, processes and rights – by the UN in Afghanistan are germane to refugee camps. These arguments will not be re-proposed here in their entirety, except to highlight how this discourse on culture has actually little to do with the existing positive law on cultural rights.

In Chapter III it was argued that one of the justificatory arguments used by the UN in the context of the provision of humanitarian assistance to Afghanistan hinges on

¹⁷⁸ Harrell-Bond, *supra* note 9, at 283-284 and 293 ff.

¹⁷⁹ At least this is what interviews with refugees in Nairobi have elicited.

¹⁸⁰ Barrington Moore Jr, *supra* note 136, at 67.

¹⁸¹ On the other hand, I was amazed at the number of refugees in Nairobi who managed to find sponsorship for short courses from churches, relatives, friends and acquaintances, or other networks. In camps, there are some economic disparities, but there is no sizeable group of individuals that can afford to be generous to others. The scope for solidarity is thus limited.

the construction of culture 'as an essentialist and homogenous body of traditions and customs'.¹⁸² Hence the continued involvement of the UN in Afghanistan, and the incorporation of discrimination against women in UN programmes of humanitarian assistance are justified *inter alia* with an apparently cultural relativist argument. This argument assumes that the Taliban are the true interpreters of Afghani culture, and implicitly removes any cultural representational prerogative from other Afghan groups and individuals, for example the women who constituted 60% of the staff of Kabul University and were dismissed by the Taliban. This regressive construction of culture, and the distortion of the attendant discourse on cultural rights, prejudices the position of those within a culture who challenge dominant interpretations.

In refugee camps, the idea of culture is sub-served to the exigencies of UNHCR and NGOs. The establishment of customary courts, the organisation of refugees in communities,¹⁸³ and the concession of wide and arbitrary powers to community leaders are part of the system of indirect rule that is instituted in camps. Far from being neutral and respectful of cultural identities and processes, UNHCR in this way fixates and corroborates one particular interpretation of a given culture, and intervenes in cultural processes siding with one party (normally the strongest one), giving it much-needed legitimacy and funds, and helping in the suppression and marginalisation of other voices and interpretations.

In this respect, the example of the Sudanese Dinka refugees in Kakuma is telling. As has been discussed, SPLA officers are the self-appointed leaders of this 'community'. In the camp, they are tacitly allowed both to forcibly recruit minors and young men in the SPLA, and to divert some food aid to the rebels in southern Sudan. They are treated as the sole legitimate voice of the Dinka community, whereas dissident individuals and groups are not given any recognition. Indeed, when tension arises between the Sudanese leaders and sectors of their community, UNHCR usually espouses the cause of the leaders, at times actively, more often simply by remaining inert and omitting to intervene even when an intervention is required under the

¹⁸² N. Yuval-Davis *Gender and Nation* (1997) at 38.

¹⁸³ As noted by Hyndman, in spite of so much rhetoric to the contrary, 'a refugee camp is not a community ... (it) is an institution organized as a temporary solution to displacement', and in which refugees 'are the subjects of a tacit and unsatisfactory policy of containment by which camps are enforced 'colonies', not communities defined by voluntary association... In exchange for temporary

UNHCR's mandate. For example, a frequent source of inter-community tension in Kakuma has been the presence of thousands of Sudanese boys¹⁸⁴ - for the most part Dinkas - who have spent the better part of their formative years separate from their community of origin, and who have developed autonomous sets of prohibitions and permissive rules in exile. For instance, these boys often refuse to undergo military training; they reject much Dinka custom on marriage and sexual relations, and practise homosexuality.¹⁸⁵ UNHCR's policy on the Sudanese boys in Kakuma (usually still referred to as the 'unaccompanied minors' although most of them are no longer minors) has been to deny the acceptability, let alone the legality, of the practices that did not conform to Dinka traditional custom as interpreted by the SPLA-controlled leadership in Kakuma, and to encourage their forced assimilation into their 'community' of origin. The (sub-)culture developed by these boys is thus considered unworthy of protection, because of its differences with recognised Dinka custom. The SPLA-dominated group of Sudanese refugees in Kakuma, like their counterparts in Nairobi, has traditionally relatively easy access to the staff of UNHCR and of other UN agencies. A consequence of the policy of identifying 'authentic' representatives of certain communities is that UNHCR can at all time claim to be 'in contact with the Sudanese community', or to be 'aware of the claims' of the Sudanese refugees simply by having relations with one group of Sudanese refugees while neglecting the claims of others ('unaccompanied minors', women, draft-dodgers, mixed couples, political or cultural dissidents, etc.).

A misrepresentation of cultural rights and the correspondent obligations of states underlies these UNHCR policies and attitudes. At the field level, UNHCR officers often see themselves as the defenders of endangered cultures.¹⁸⁶ As part of this self-righteous mission to save cultures, they support, encourage and fund practices that are in breach of human rights. In addition, such practices also constitute a violation of the cultural rights they purport to protect as they interfere in a cultural process by

asylum and the provision of basic needs, refugees forfeit a number of entitlements' (Hyndman, *supra* note 89, at 'Simulating Community: Refugee Self-Management').

¹⁸⁴ See *supra* note 159.

¹⁸⁵ Particularly unacceptable to the Dinka leaders is the fact that a number of Sudanese boys 'take other boys as their wives' (Interview with Deng Dau, leader of the Sudanese Dinka community, July 1997).

¹⁸⁶ On the institutional ethos of humanitarian workers, see M. Walkup *Policy and Behavior in Humanitarian Organizations: The Institutional Origins of Operational Dysfunction* (PhD Thesis, University of Florida, 1997). See also Susan Sontag's essay on Leni Riefenstahl and the imagery of self-appointed defenders of engendered 'native', in *Under the Sign of Saturn* (1991) 86.

giving legitimacy, as well as powers and funding to the strongest voices. As has been mentioned, human rights law does not recognise the right of groups to exact compliance with cultural practices (or certain interpretations thereof) from individuals; instead, it enshrines the right of the individual 'to opt out' of his/her own culture, or, as so many people choose to do, to embrace its norms and customs selectively. Finally, the use of mandatory customary practices in refugee camps also relies on the ill-conceived and pre-Freudian belief that individuals are always happy to adhere to the cultural norms of their groups.¹⁸⁷

The idea of cultural rights as represented in refugee camps, on the other hand, reinforces existing power relations and enhances the oppressive potential of *any* culture over its member individuals. In fact, it is a sociological and historical truism that cultures are open to challenges from within and from outside, that they normally accommodate a variety of often conflicting interpretations and voices, and that they constantly undergo processes of social transformation and adaptation. These processes can go as far as to overcome a particular custom. Those who are in power naturally perceive this potential for change as a threat. As observed by Pascal, who also saw this as a risk rather than a value, any custom may be overcome from within once its arbitrary nature is unmasked.¹⁸⁸ By promoting the forced membership of individuals in rigidly defined groups and their subjection to the 'cultural' norms of these groups, UNHCR thus suppresses this intrinsic potential for change and reform, and promulgates the immutable authenticity of certain interpretations of a culture.

(e) *Refugee status determination conducted by UNHCR*

UNHCR conducts refugee status determination in many Asian and African countries.

¹⁸⁹ This practice constitutes an anomaly since states are normally responsible for legal processes within their territory that affect the status and rights of individuals.

¹⁸⁷ In *Civilisation and Its Discontents* Freud argued that subjection to social and cultural norms is often a source of discontent (S. Freud, *Il Disagio della Civiltà* in S. Freud *Opere* (It. ed., Boringhieri, 1978, Vol. X) 557).

¹⁸⁸ B. Pascal, *Pensées* (ed. Garnier Frères, 1961) at 152-153 (pensée n. 294): 'The art of opposition, of revolt against States is to undermine established customs, reaching to their foundations in order to unveil their lack of authority and justice... and they [the people] should not realise the fact of appropriation; the law, introduced once without reason, has become reasonable; it must continue to be regarded as authentic, eternal, and its origin must be concealed, unless we want it to come to an end'.

UNHCR maintains that it embarks upon status determination only in exceptional circumstances, but the number of these 'exceptions', for the most part concentrated in countries in the south, is significant. In most of these situations, UNHCR has determined refugee status for a significant period of time – over a decade in Kenya –¹⁹⁰ and has normally taken over this process from states once large numbers of refugees arrived. Hence, although there are no definitive statistics of the numbers of asylum-seekers whose applications are considered by UNHCR, it is not far-fetched to hypothesise that the majority of asylum applications in the south, and probably in the whole world, are actually decided by UNHCR rather than states. Most of the refugees recognised by UNHCR are then requested to reside in refugee camps.

It has been observed that UNHCR's practice on refugee status determination in Asian countries often fails to comply with international human rights standards - in particular with requirements of procedural fairness - and that its procedure in Kenya falls short 'of the very guarantees and principles set out in its *Handbook on Status Determination*'.¹⁹¹ It hardly needs emphasising that status determination is so important for the lives of refugees that it cannot brook sloppy or even unfair procedures. Indeed, asylum-seekers whose claim has been wrongly assessed and who have been rejected are at risk of being returned to a country where they face persecution. Even if they manage to remain in the country of asylum, they will not enjoy the 'privileged' status of refugees, and the international protection that in principle ensues thereupon. Getting the refugee status determination right is, in other words, the first logical step in a truly rights-based refugee regime. It is therefore the more disquieting to discover that rights of asylum-seekers are systematically violated when UNHCR is in charge of this process.

¹⁸⁹ Alexander, 'Refugee Status Determination Conducted by UNHCR', 11 *Int. J. Ref. L.* (1999) 251 at 251. On the basis of my own research or experience, in Africa, UNHCR conducts refugee status determination in Kenya, the Central African Republic, Ivory Coast, Liberia, Egypt, and Uganda.

¹⁹⁰ In some countries, UNHCR has determined status for an even longer period of time. For example, in Egypt it has been in charge of the status determination process since 1955.

¹⁹¹ Verdirame, *supra* note 86 at 58. As has been mentioned, other data pointing to similar findings was collected in Uganda by Barbara Harrell-Bond, Zachary Lomo and Pamela Reynell. Fact-finding missions conducted by the Lawyers Committee for Human Rights in west, east and central Africa as part of a project on the exclusion clauses in the 1951 Convention, often highlighted inconsistencies and breaches of minimum requirements of fairness in status determination procedures by UNHCR. On the Lawyers' Committee's project, see the Special Supplementary Issue, 12 *Int. J. Ref. L.* (2000).

An unwonted ally of UNHCR could be the view that refugee status determination, as well as immigration decisions, do not constitute a 'suit at law' for the purposes of the right to fair trial.¹⁹² Australia has explicitly endorsed this position.¹⁹³ UNHCR's failure to put in place procedures that comply with minimum standards of fairness could therefore be justified with the argument that these standards do not apply to refugee status determination. It would be a misjudged apology. Firstly, there is ultimately no persuasive reason for excluding refugee status determination from fair trial provisions, particularly since, in many ways, refugee status determinations is so unequivocally a 'suit at law' for determining an individual's rights and obligations (Art. 14, ICCPR). Secondly, the protection regime for refugees cannot be effective if the underlying determination is improperly conducted thus increasing the probabilities of wrong decisions. Finally, when the practice on a particular aspect of refugee law differs, UNHCR ought to promote the best practice, which is the practice that is most respectful of the rights of refugees and is consistent with the 1951 Convention.

IV.5. Conclusion

This chapter has analysed the exercise of administrative powers by the UN, or by a UN specialised programme. Direct international governance is presumably here to stay but there are important differences between international administrations – that is exercise of administrative functions *de jure* – and refugee camps – where wide powers are assumed and exercised on a *de facto* basis. Perhaps the most important difference, however, is that international administrations can be improved, refugee camps cannot. By making international institutions accountable and by creating a clear legal framework for their operation, international administrations can play an important role in phases of post-conflict reconstruction and transition to a new autochthonous order. UNHCR's administration of refugee camps, on the other hand, is not simply tainted by the lack of a legal basis for such administration. Its 'original sin' is the restriction of the freedom of movement of refugees, whence violations of the other human rights flow. A rights-based refugee regime is not compatible with the forced encampment of refugees.

¹⁹² Art. 14 (ICCPR).

¹⁹³ Alexander, *supra* note 189.

CHAPTER V

Mechanisms for accountability

V.1. Notions of accountability

The idea that 'power entails accountability, that is the duty to account'¹ for its exercise is a deeply rooted one in the context of contemporary liberal democracies. Demands for accountability are intertwined with the processes of bureaucratisation and institutionalisation that, as Weber explained, characterise the evolution of rational-legal forms of power in modern societies.² Various mechanisms have been developed by modern liberal states to ensure that bureaucracies are subjected to the rule of law, and act as instruments for its promotion, without turning into uncontrollable or even oppressive leviathans. With a few exceptions,³ the impact of the process of bureaucratisation on the functioning of international institutions has not formed the object of systematic analysis. On the plane of accountability, this process has two main consequences. On the one hand, it renders the international civil service less permeable to the influence of states. On the other, the establishment of complex and autonomous bureaucratic structures often allows institutions to act 'unbound' by any control or guidance.

On the international stage, the struggle to make international institutions accountable for the exercise of their power is relatively novel. It was not until the 1980s that, following the exponential expansion of international organisations in quantitative and qualitative terms, some attention to the question of their accountability was, somewhat belatedly, given. Before then, the predominant view was that international institutions had a role to play in ensuring the accountability of states by monitoring their compliance with international law and by setting standards for their conduct (sometimes referred to as 'active accountability'),⁴ but the question of the

¹ Committee on Accountability of International Organisations – International Law Association, 'Second Report presented at the London Conference, July 2000', at 4.

² M. Weber, *Wirtschaft und Gesellschaft* (1922). Italian edition: *Economia e Società* (1999, Edizioni di Comunità), Vol. I, 207-220.

³ Barnett and Finnemore, 'The Politics, Power and Pathologies of International Organizations', 53 *Int. Org.* (1999) 699.

⁴ International organisations are thus sometimes referred to as having a function of control, see Valticos, 'Contrôle', in Dupuy, R. J. *A Handbook on International Organizations* (1998) 461.

accountability for the way in which they exercised their powers ('passive accountability') was overshadowed by the need to secure their presence in a world that was perceived to be completely dominated by states.

Accountability is a semantically broad term. When applied to international organisations, a frequent use of the term confines the scope of accountability to financial questions. Donor countries often use the term 'accountability' in this narrow sense. In addition to financial probity, another aspect that is commonly associated with accountability is transparency in the decision-making process. Transparency involves the full participation of all members in the decision-making process, public access to information about the position of various actors in this process, and rules and controls on confidential and informal decision-making.⁵ Broader notions of accountability encompass reporting on and evaluating institutional performance, as well as the monitoring of compliance, within clear parameters.⁶

As far as financial probity and transparency are concerned, there is room within existing international institutional law for making progress, and some progress has arguably already been made since the 1990s with the establishment of different and more sophisticated mechanisms of administrative control.⁷ Such progress is the result of a number of factors. Firstly, the anachronism of an 'unbound' exercise of power cannot but stride with the 'rights culture' that has gained strength after the fall of totalitarian regimes in many countries in the late 1980s, and the affirmation of the liberal democracy as the unchallenged model of political organisation. Secondly, scrutiny into the work on the ground of international organisations has noticeably increased, and has led to the publication of various exposés by journalists and academics.⁸ Finally, in some of the major powers, and especially in the United States

⁵ ILA Committee, *supra* note 1 at 11; Woods, 'Good Governance in International Organizations', 5 *Global Governance* (1999) 39 at 44.

⁶ *Ibid.*, at 14.

⁷ See below at 243 ff.

⁸ The list of these exposés would be too long. Path-breaking in the academic arena were B.E. Harrell-Bond, *Imposing Aid* (1986) and W. Shawcross, *The Quality of Mercy: Cambodia, Holocaust and Modern Conscience* (1984). Critiques of humanitarianism have become a bestseller genre with the publication of G. Hancock, *Lords of Poverty* (1989). In the period 1998-April 2001, the *Financial Times* reported on alleged mismanagement in respect of at least two international organisations – UNHCR and the UN Office for Drug Control and Crime Prevention (UNDCP) – denouncing lack of accountability for the use of funds. In the case of UNHCR, the reports were the result of an investigation of the paper (See 'Refugees' Agency Lost in Wilderness of Bungling and Waste', *Financial Times*, 29 July 1998; 'UN Probe Raises Concern over Drug Programme', *Financial Times*, 26 April 2001).

(US), the management of the United Nations (UN) has featured in the domestic political agenda, although this was often in order to promote a rather populist agenda of disengagement from international institutions.

When one extends the notion of accountability to include the duty to account to member states *and* to individuals, international institutional law shows its limits. Any effective system of accountability to individuals must rely on a combination of sanctions and remedies: sanctions on the officials or offices responsible for the violative conduct, and remedies to the individual(s) or groups aggrieved by such conduct. However, as evidenced in many of the cases and situations discussed in the previous chapters, sanctions are not normally imposed and remedies are seldom available to victims. As a result, the ability of the institution to modify its conduct when similar circumstances arise in the future is quite limited. These three interlocked criteria (sanctions, remedies, impact on future behaviour) will be frequently referred to in this chapter when assessing different mechanisms of accountability. It is also important to discuss *whose* accountability (the individual, the office or department, or the institution as a whole) can be promoted and through which route. National laws offer various avenues for pursuing the individual official responsible for a violative conduct, ranging from administrative remedies to tort law and even criminal sanctions. In the case of the “rogue” UN official, whose conduct is not sanctioned by the institution, this combination of remedies and sanctions is not available in the same measure. Administrative remedies based on the internal law of the UN are not normally available to third parties, and tort and criminal remedies cannot be used because of the personal immunity of the official.⁹ The accountability of the office responsible for a certain violative conduct is also difficult to pursue for similar reasons. As regards the accountability of the institution as a whole, again, remedies available to an individual are very limited and controls by states and by the organs of the institutions remain deficient or erratic.

Ensuring the accountability of international institutions within the current structure of international law thus presents real challenges and requires, in a sense, a stretch of the

⁹ In some cases of suspected corruption, however, the UN has encouraged prosecution by national authorities (see below on the role of OIOS).

imagination in order to find new and innovative ways of using existing mechanisms and rules to pursue a goal for which they were not originally created.

This chapter examines various routes through which accountability of an organisation can be pursued, highlighting respective strengths and weaknesses. At present, there is hardly any role for national courts to play, because of the immunities and privileges of international organisations. This constitutes a severe limit, particularly since the role of courts as guarantors of respect for the rule of law is central in the liberal democratic state. The argument that the jurisdictional immunity of international organisations should be reconsidered in the light of the enlarged functions they have come to exercise is considered. The international judicial system is embryonic, and still overall ineffective when the rights of individuals are at stake. Internal, administrative and political remedies have some potential, but their impact on the rights of third party individuals is so far quite limited.

V.2. Accountability through Member States

Member states of an international organisation have a right to ensure that the organisation complies with its constituent instrument and with general international law. To some extent, they also have an obligation to do so, given that they can in principle bear responsibility for the acts of international organisations of which they are members. Moreover, generalising the *Matthews* approach, this obligation derives from the states' duty to ensure that their international legal obligations, in particular those under human rights treaties, are 'secured' when they transfer competences to international institutions.¹⁰ The function of control and monitoring of the activities of the international organisation, which member states can exercise chiefly by putting into effect their rights under the constituent instrument and their membership of key organs, should not be viewed as an optional element in a system of accountability, but as one of its essential components.

The plenary organ of the organisation - the General Assembly in the UN and variously named organs in the specialised agencies - represents one of the main fora where

¹⁰ On *Matthews v. UK*, see Chapter II.3.

member states can exercise this function.¹¹ The semi-autonomous agencies – the UN Children’s Fund (UNICEF), the UN High Commissioner for Refugees (UNHCR), the UN Development Programme (UNDP), and the World Food Programme (WFP) - established as subsidiary organs, lack a plenary body.¹² In principle, their plenary organ ought to be the parent organ which established them – the General Assembly, and the General Assembly and the Food and Agriculture Organisation (FAO) Conference in the case of WFP. Plenary organs are in principle endowed with large powers, but whether they exercise them or not depends on the member states. So, for example within FAO, states could use the biennial Conference of the organisation to raise questions of accountability, relying on the powers of the Conference to determine the policy of the organisation and to review the decisions of any other organ of FAO.¹³

The executive organs of the specialised agencies and semi-autonomous programmes exercise significant powers and play an important role in the formulation of the policy of the institution.¹⁴ These organs have a more limited membership, and normally meet only a few times a year. As is the case with the plenary organs, member states could, if they so wished, use the executive organs to monitor institutional performance and promote accountability. Such practice would be entirely consistent with the responsibilities of these organs, which in some cases have been established with a ‘watch-dog’ and compliance-monitoring function. For example, WFP’s Executive Board has a duty of ‘intergovernmental supervision and direction of the management’, and an obligation to ensure that ‘the activities and operational strategies are consistent with the overall policy guidance set forth by the General Assembly and the FAO Conference, as well as the Economic and Social Council and the Council of FAO’.¹⁵ A possible, and seemingly unexplored route for enhancing the accountability

¹¹ World Health Assembly (WHO), the General Conference of Representatives (ILO), the FAO Conference.

¹² See Chapter. II. 2.

¹³ Art. 4, Constitution of FAO.

¹⁴ For example: UNHCR has an Executive Committee (established under GA Res. 1166(XII), 26 November 1957, whose membership has been enlarged to 57 states to be elected by the Economic and Social Council (GA Res. 54/143, 16 February 2000); UNICEF’s Executive Board (GA Res. 57 (I), 11 December 1946) has a membership of 36 states, also elected by the Economic and Social Council. WFP’s organ equivalent to UNICEF’s Executive Board and UNHCR’s Executive Committee was called Committee on Food Aid Policies and Programmes, it was re-named Executive Board in 1995 (GA Res. 50/8, 1 November 1995). As for the specialised agencies, these organs are regulated by the constituent instrument: the ILO has a Governing Body (Art. 7, ILO Constitution), FAO has a Council with forty-nine member states (Art. 5, FAO Constitution), WHO has an Executive Board with thirty-two members (Art. 24, WHO Constitution).

¹⁵ Art. 6, General Regulations of WFP as revised by GA Res. 50/8, 1 November 1995.

of the institutions and for improving operational performance would be to bring a complaint to one of these executive organs.

In addition to the plenary body and the executive organ, international institutions normally have a range of committees and commissions with different tasks. These committees are for the most part established as subsidiary bodies by the plenary or the executive organ, and they tend to comprise international civil servants rather than representatives of states. FAO is an important exception, since the establishment of a number of committees to assist the FAO Council is provided for in the FAO Constitution, and state representatives have usually sat as members of these committees, allowing states to exercise direct control over the organisation even at this level.¹⁶

States can seek to make an international institution accountable for its conduct by exercising diplomatic protection on behalf of their citizens who claim to have been aggrieved by the act of an international institution. Although the definition of diplomatic protection is often limited to the intervention on behalf of a citizen who has been aggrieved by the actions of another state, other broader definitions refer to actions of 'subjects of international law',¹⁷ encompassing both the exercise of functional protection by international organisations on behalf of their employees and the exercise of diplomatic protection by states against an international organisation. An important example of state practice in this area is the conclusion of the Settlement Agreement between the UN and Belgium for the claims brought by Belgian citizens against the UN Operation in the Congo (ONUC).¹⁸ Belgian citizens had brought claims in Belgian courts with a view of making the UN jointly and severally liable with the Belgian state for damages to their property resulting from the UN intervention in

¹⁶ Art. 5 (6) and 6, FAO Constitution.

¹⁷ International Law Commission, 'First Report on Diplomatic Protection by John Dugard, Special Rapporteur', UN Doc. A/CN.4/506 at paras. 36-38.

¹⁸ Exchange of Letters Constituting an Agreement Between the United Nations and Belgium Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgian Nationals, 20 February 1965, *UN Jur. YB* (1965) 39. Similar agreements were concluded with other third party states, such as Italy (18 January 1967, 588 UNTS 197), Greece (20 June 1966, 563 UNTS 3) and Switzerland (3 June 1966, 564 UNTS 193). In 1996, Bosnia Herzegovina submitted a request for compensation for damages allegedly caused by the UN during its operations in its territory (Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage', 94 *AJIL* (2000) 406 at 410, fn 24).

Congo, but with no success.¹⁹ With the settlement agreement Belgian citizens had access to some form of compensation. For Congolese citizens, who suffered the brunt of the conflict, no such fund was created, partly because of the failure of their authorities to advocate their case. Furthermore, the exercise of diplomatic protection is not available to refugees who feel aggrieved by the acts of the organisation mandated to 'protect' them, UNHCR.²⁰

In the practice of some states, the withdrawal of funding has been used avowedly as a means to bring an international institution into compliance, or according to a more cynical view as a punitive measure against an international institution that did not bend over to the requests of the contributing state. In the 1980s and 1990s, the US, in particular, maintained that its failure to pay contributions to the UN was due to the lack of accountability and to the poor management of the organisation.²¹ Congressional leaders made the payment of arrears dependent on reform of the UN system.²² In the end, the compromise reached by the Clinton administration in November 1999 did make the continued payment of the arrears dependent upon the UN satisfying certain 'reform criteria' over a period of five years. These criteria included parameters of accountability, although essentially only in connection to financial issues, such as opening the programs, offices and activities of the UN 'to auditing by the national auditing and inspecting agencies of its member states', and securing adequate funding for the Office of Internal Oversight'.²³ It is a condition, for the US payment of its arrears to continue in 2004, that the UN will have 'approved and implemented system-wide structural reform, entailing a significant reduction in staff, that would eliminate all outdated activities and program duplication and would encompass all relevant United Nations specialized agencies'.²⁴

¹⁹ *Manderlier v. Organisation des Nations Unies and Etat Belge* 45 ILR 446.

²⁰ See Chapter IV on the administration of refugee camps.

²¹ Alvarez, 'Legal Remedies and the United Nations *à la Carte* Problem', 12 *Mich. J. Int. L.* (1991) 229; Nelson, 'International Law and the US Withholding of payments to International Organizations', 80 *AJIL* (1986) 973.

²² Murphy, 'Contemporary Practice of the United States Relating to International Law', 94 *AJIL* (2000) 348 at 349.

²³ Sec. 2 (2) (A), United Nations Reform Act of 1999.

²⁴ Sec. 2 (2) (E), United Nations Reform Act of 1999. It can be surmised that the US Congress, and other national parliaments, would be reluctant to make payments to the UN for compensating victims of violations of human rights perpetrated by the Organisation.

Notwithstanding this state practice,²⁵ Article 17 of the Charter unequivocally obliges states to bear the expenses of the Organization ‘as apportioned by the General Assembly’. Moreover, Article 19 imposes sanctions on the use of this extreme method for pursuing accountability: the loss of voting rights in the General Assembly is to be inflicted on states that fail to pay. An exception can be made when ‘failure to pay is due to conditions beyond the control of the Member’, which seems to apply only to cases of extreme financial hardships in which a noncompliant state could still be allowed to retain its voting rights. Besides these cases, it has been persuasively argued that ‘Member States retain the right to resist assessed contributions when they have a *bona fide* claim that the act or the operation to be financed entails a violation of the Charter or of international law’.²⁶ In this case, member states would violate a provision of the Charter – the obligation to contribute to the expenses of the Organisation – in order to ensure respect for other Charter provisions or principles of international law and thus avoid becoming accessories in their violation. This is the position, albeit developed in the context of different obligations, supported by Judge Lauterpacht in his separate opinion in the Order in the Bosnia case. He argued that the member states of the UN had become ‘free to disregard’ Security Council resolution 713 (1991), which established the arms embargo, because its operation, by penalising the Bosnian Muslim population and contributing to its helplessness, ‘began to make Members of the United Nations accessories to genocide’.²⁷

This approach would considerably limit the range of situations in which this extreme measure can be resorted to, while maximising its potential as an instrument of control over institutional compliance. Were the practice of withholding payments to be accepted as a way for member states to pursue a generic agenda of institutional

²⁵ The US was not the only state in arrear with its payment to the UN. One out of four member states was either unwilling or unable to pay its dues in 2000 (‘Surprising News on UN Dues’, *The Forward* available on the internet at <http://www.unwatch.org/pbworks/adsurprising.html>). Other examples of defaults in payment of contributions are referred to in H. G. Schermers, N. M. Blokker, *International Institutional Law* (3rd ed., 1999) at 631-635.

²⁶ Francioni, ‘Multilateralism á la Carte: The Limits to Unilateral Withholdings of Assessed Contributions to the UN Budget’, 11 *EJIL* (2000) 43 at 58. Alvarez is also prepared to accept the legality of the withholding of contributions in response to *ultra vires* acts but as ‘last resort, to be taken only after the complaining member has given the organization the opportunity to correct any error’ (Alvarez, ‘Financial Responsibility’, in C. C. Joyner (ed.) *The United Nations and International Law* (1997) 409 at 424).

²⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), Order of 8 April 1993, ICJ Reports (1993) 325 at 441 (sep. op. of Judge Lauterpacht). The fact that member states of the UN were becoming accessories to genocide by complying with SC Res. 713 (1991) was viewed by Judge Lauterpacht as an “unintended consequence”

reform, the main contributing states would be in a position effectively to blackmail the institution, a power that the Charter does not accord to any state, and which would constitute a derogation from the principle of sovereign equality of states. However, Article 19 only applies to the financial contributions that are made to meet 'the expenses of the Organisation' (Art. 17).²⁸ An argument could be made that compensation for wrongful acts committed in the course of an operation are 'expenses of the Organization'. However, Article 19 would continue not to cover the system of voluntary contributions on which the semi-autonomous agencies and the specialised agencies alike rely for much of their work.²⁹ Within these institutions, donor states can use their contributions to influence operational activities, and to promote greater accountability without incurring any sanction.

Recent state practice also includes the use of less antagonistic means of monitoring the performance of international institutions. Noteworthy is the growing involvement of national parliaments in matters relating to the accountability of international institutions. For example, the Select Committee on International Development of the House of Commons examined the institutional performance of UNHCR and of the UN Office for the Co-ordination of Humanitarian Affairs (OCHA) in the emergencies in Kosovo (1999) and Mozambique (1999-2000), crises in which the UK government had a significant stake having committed funds and resources.³⁰ In addition, in one of its reports, the Select Committee also addressed the questions of democracy and transparency within the World Trade Organisation.³¹ Quite importantly, in the data collection phase, the Committee heard evidence from officials working for the UN and the World Bank, including the heads of UNICEF, UNDP and the World Bank. By the beginning of 2001, the Select Committee could list

of the resolution. Furthermore, the extreme gravity of the situation and the particular importance of the obligations involved – the obligation to prevent genocide – were material to this conclusion.

²⁸ In *Certain Expenses*, the ICJ clarified that the locution 'expenses of the Organisation' does not refer only to the regular expenses and includes expenses for operations for the maintenance of peace decided by the General Assembly (*Certain Expenses of the UN*, Advisory Opinion, ICJ Reports (1962) 151).

²⁹ For example, on UNHCR, see: Väyrynen, 'The Dilemma of Voluntary Funding: Political Interests and Institutional Reforms', Paper presented at the International Conference 'Commemorating UNHCR at 50: Past, Present and Future of Refugee Assistance', Columbia University, New York, May 16-18, 2000.

³⁰ International Development Committee (House of Commons), 'Kosovo: The Humanitarian Crisis', 15 May 1999, Third Report – Session 1998-99 (HC 422); International Development Committee (House of Commons), 'Mozambique: Report and Proceedings of the Committee, Minutes of Evidence and Appendices', 3 May 2000, Fifth Report – Session 1999-00 (HC 326).

‘scrutiny into multilateral development agencies’ as part of its regular work and state that

Not only is this the first time that a Committee of this House has considered in such detail the work of these multilateral development agencies, it has also become clear that these bodies are unused to such scrutiny from national parliaments. It has been gratifying to see their willingness to appear before the Committee — in almost every case there were initial concerns about giving evidence since these bodies are not directly accountable to national parliaments. These concerns were allayed...³²

This practice is not limited to the UK. The Sub-Committee on International Operations and Human Rights, under the Committee on International Relations at the US Congress, has also heard evidence from heads of UN agencies, although not always with a view of assessing their performance but as part of fact-finding on regional conflicts.

Scrutiny by national parliaments is likely to intensify in the future both because of public pressure on governments to account for tax-payers’ money spent through international institutions and because of the emergence of a more disenchanted view among the public on the work of the UN. The idea of UN officials appearing before parliamentary committees and commissions may generate images of international civil servants ‘bullied’ by national politicians eager to score points in front of their audiences. However, given that powerful states already attempt to influence the work of international institutions behind the scenes, parliamentary control at least offers the benefit of being public and adversarial in nature. One problem is rather that current practice is essentially limited to UN officials appearing before the parliaments of influential states – and important donors – like the US and the UK. Again, this avenue may prove an effective a way of promoting accountability only for the strong countries. There is no reason however why this good practice should not be extended

³¹ International Development Committee (House of Commons), ‘After Seattle—The World Trade Organisation and Developing Countries’, 29 November 2000, Tenth Report – Session 1999-00 (HC 227).

³² International Development Committee (House of Commons), ‘First Special Report’, 24 January 2001 (HC 82).

to the national parliaments of the countries in which the operation takes place, with the exception, for various reasons, of failed states.

Accountability through member states can be especially effective in peace-keeping operations, since the governments of the countries of nationality of the various contingent normally retain at least some measure of control over their forces. In these cases, 'piercing the intergovernmental veil'³³ and pursuing accountability in domestic fora may be appropriate and expedient, as demonstrated by the investigations in Canada, Belgium and Italy in the aftermath of the mission in Somalia.³⁴ Despite some exceptions, however, the states are still reluctant

V.3. Accountability through NGOs

According to Charnovitz, it was before the First World War and during the inter-war period that NGOs exercised the most significant influence at the international level.³⁵ He reaches this conclusion measuring the impact of NGOs on international life on the basis of two criteria: their 'degree of penetration' into intergovernmental meetings or international organisation, and the degree of influence that they exerted on the agenda of governments. Applying these criteria nowadays can perhaps allay some of the precipitate enthusiasm that characterises much debate on NGOs. Indeed, although we may have entered a cycle in which the influence of NGOs is in the ascendant,³⁶ their 'degree of penetration' in international organisations remains limited and their powers within the organisations are still based on the constitutional arrangements negotiated in the 1940s and 1950s.

In theory, NGOs could act as 'watch-dogs' of multilateral institutions by spearheading international public interest litigation; in practice, the rules on *locus standi* and on the submission of *amicus curiae* briefs curb NGO participation in international judicial proceedings.³⁷ Interestingly, the Permanent Court of Justice had a more liberal

³³ The expression is John Cerone's, 'Outlining KFOR Accountability in Post-Conflict Kosovo', *ASIL Insight* (October 2000) at www.asil.org/insights/htm.

³⁴ For example, parliamentary enquiries followed the publication of allegations on the behaviour of UN troops in Somalia. See Lupi, 'Report by the Enquiry Commission on the Behaviour of Italian Peace-Keeping Troops in Somalia', 1 *YB Int. Humanit. L.* (1998) 375.

³⁵ Charnovitz, 'Two Centuries of Participation: NGOs and International Governance', 18 *Mich. J. Int. L.* (1997) 183.

³⁶ Charnovitz claims that the impact of NGOs on international life is 'cyclical'.

³⁷ This is mainly true of the ICJ. NGOs have been involved in cases before the European Court of Justice, the Inter-American Court of Human Rights, and, subject to more restrictions, before the

approach to the submission of briefs on the part of NGOs than its successor.³⁸ In fact, there is only a very small number of cases of the International Court of Justice (ICJ) in which non-governmental actors played some role, namely the 1950 *South West Africa* case,³⁹ the two advisory opinions on *Nuclear Weapons*,⁴⁰ and *Gabčíkovo-Nagymaros*,⁴¹ although much of their participation had to remain 'behind the scenes'. Even so, their indirect involvement was not unanimously welcomed. In the *Nuclear Weapons* opinion, Judge Guillaume questioned whether the requests could really be regarded as 'emanating from the Assemblies that had adopted them' and whether it would not have been appropriate for the Court to declare the requests 'inadmissible'.⁴²

An interesting development is the establishment of the World Bank Inspection Panel, to which requests for inspection can be presented by 'an affected party in the territory of the borrower which is not a single individual (i.e., a community of persons such as an organization, association, society or other grouping of individuals)'.⁴³ The Inspection Panel provides an 'unusual window for members of the public to access quasi-legal processes and norms'⁴⁴ vis-à-vis an international institution, but it is not a judicial organ, and even as a non-judicial body still represents a starting point rather than a point of arrival.⁴⁵

NGO presence in UN organs is overall trifling. The Charter simply concedes that 'the Economic and Social Council may make suitable arrangements with non-governmental organisations which are concerned with matters within its competence'

European Court of Human Rights. Shelton, 'The Participation of Non-governmental Organisations in International Judicial Proceedings', 88 *AJIL* (1994) 611.

³⁸ Charnowitz, *supra* note 35 at 216-217 (especially footnote 294) and at 279; Shelton, *supra* note 37 at 623.

³⁹ *International Status of South-West Africa*, ICJ Reports (1950) 128.

⁴⁰ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (WHO Request), Advisory Opinion, ICJ Reports (1996) 66 and *Legality of the Threat or Use of Nuclear Weapons* (GA Request), Advisory Opinion, ICJ Reports (1996) 226.

⁴¹ *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment, ICJ Reports (1997) 7.

⁴² *Nuclear Weapons* (GA Request), Sep. Op. of Judge Guillaume at para. 2. Judge Oda also appeared to frown upon the involvement of NGOs (*Id.*, diss. Op. of Judge Oda at para. 8).

⁴³ IBRD Res. 93-10 and IDA Res. 93-6 'The World Bank Inspection Panel' at para. 12. Thus, for example, in two cases in 2000, a local Ecuadorian NGO had submitted the request for an investigation in *Ecuador: Mining Development and Environmental Control Technical Assistance Project* (Report of 16 May 2000); the International Campaign for Tibet was behind the request in *China: Western Poverty Reduction Project Investigation Report* (Report of 28 April 2000). See: I. Shihata *The World Bank Inspection Panel* (2nd ed., 1999).

⁴⁴ Bissell, 'Recent Practice of the Inspection Panel of the World Bank', 91 *AJIL* (1997) 741 at 744.

⁴⁵ See below at 243 ff.

(Art. 71).⁴⁶ By March 2001 such arrangements had been made with nearly 2000 NGOs. ECOSOC Resolution 1996/31, which contains a detailed regulation of this status, fails even to protect an NGO's basic freedom from state interference by providing that an organisation which engages 'in a pattern of acts contrary to the purposes and principles of the Charter of the United Nations including unsubstantiated or politically motivated acts against Member States of the United Nations incompatible with those purposes and principles' shall have its consultative status withdrawn or suspended. States use these provisions to have the status of NGOs hostile to their policies suspended or withdrawn. For example, Cuba successfully lobbied for the suspension of an NGO of Cuban exiles, and Russia secured a majority of votes in the Committee on Non-Governmental Organizations in favour of its proposal to suspend the Transnational Radical Party, which had been critical of Russian policy in Chechenya.⁴⁷

Not only is the status of NGOs within the Economic and Social Council – the UN organ in which they are more 'visible' – precarious, their rights are also limited. NGOs can make written submissions to the members of the Economic and Social Council via the Secretary General, and can make oral presentations only upon a recommendation of the Committee on Non-Governmental Organisations and with the approval of the Council.⁴⁸ NGOs are virtually absent from UN organs other than the Economic and Social Council. However, practice is cautiously evolving and NGOs may be allowed to make submissions to other organs in some circumstances, for example some NGOs 'made a presentation to the Security Council on the crisis in Africa's Great Lakes region'.⁴⁹ Within these constraints, it is not surprising that, in spite of the rhetoric about UN-civil society partnership,⁵⁰ NGOs have not had a real

⁴⁶ The provisions applying to NGOs contained in the statutes of specialised UN agencies normally replicate Art. 71. See Lagoni, 'Article 71', in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (1994). UNHCR's Statute mandates the High Commissioner to keep 'in close touch with ... inter-governmental organisations concerned, establishing contacts in such manner as he may think best with private organisations dealing with refugee questions, facilitating the co-ordination of the efforts of private organisations concerned with the welfare of refugees'.

⁴⁷ 'Report of the Committee on Non-Governmental Organizations on the first and second parts of its 2000 session', 13 July 2000 (UN Doc. E/2000/88 (Part II)). The final decision on the suspension is taken by the Council, but a recommendation of the Committee normally anticipates a decision to suspend.

⁴⁸ ECOSOC Res. 1996/31 at paras. 30-32.

⁴⁹ Chamovitz, *supra* note 35 at 278.

⁵⁰ Gramsci is credited with coining the term 'civil society' or, at least, with its diffusion. However, the Gramscian dismal analysis of civil society, in particular the emphasis on its hegemonic nature and on

opportunity to make what could be one of their most significant contributions to international society, i.e. monitoring the work of states and international institutions and adding pressure to ensure their accountability for violations of human rights and humanitarian law.

A theoretical problem with viewing NGOs as promoters of the accountability of international institutions is that 'NGOs themselves need to be subjected to standards of accountability and good governance'.⁵¹ In many situations, NGOs' vested interests coincide with those of the very international institutions or states which they ought to monitor. In the humanitarian field, for example, NGOs often are 'implementing partners' or subcontractors of international institutions. If competition exists, it is normally over funds rather than over standards. The case of refugee camps, examined in Chapter IV, demonstrates that, far from attempting to make UNHCR accountable for the violations of human rights it commits, NGOs too often decide at best to acquiesce to them, and for the most part to be zealous executors. In many instances, especially when the relationship between UN agencies and international NGOs is concerned, it seems that the current phase mirrors 'the fourth moment in the history of the relationship between civil society and the state' in Africa, which was characterised by the 'collapse of an embryonic indigenous civil society, of trade unions and autonomous civil organisations, and its absorption into political society (...) it is the time when civil society – based social movements became demobilised and political movements statised'.⁵² This is, in other words, the phase of co-optation.

Although the general picture on the role of NGOs as 'watch-dogs' of international organisations is not encouraging, some interesting practice is emerging. First, albeit this is not the rule, there are examples of humanitarian NGOs that maintain their integrity and have, on some occasions, challenged the actions of international organisations.⁵³ Secondly, in the 1990s human rights NGOs published reports in which they criticised the conduct of various UN organisations and of peacekeeping

the social interests that civil society represents, seem to have been entirely forgotten. Gramsci can be a good anti-body to the current pandemic excitement about the role of NGOs.

⁵¹ Woods, *supra* note 5 at 45.

⁵² Mamdani, *Citizen and Subject* (1996) at 21.

⁵³ Médecins Sans Frontiers has often been critical of the way particular humanitarian operations have been conducted. On at least four occasions (Ethiopia 1984-86, Eastern Congo 1994-96, Afghanistan 1996-97, Sudan 1998), it broke ranks with other humanitarian agencies even deciding to suspend its operations because it believed that fundamental principles were neglected.

operations, certainly contributing to pressure for accountability.⁵⁴ Monitoring by human rights NGOs is an example of good practice that can yield positive results, although one has to hope that human rights NGOs will resist co-optation rather more ably than their counterparts in the humanitarian sphere. In the environmental and developmental arena, much of the pressure for change on international financial institutions has been exerted through the concerted action of transnational coalitions of NGOs. Such coalitions are based on a partnership between NGOs in the north, which have easier access to funds and can lobby and campaign in donor countries,⁵⁵ and NGOs in the south, which have a direct knowledge of the situation on the field and can mobilise local support.⁵⁶

V.4. Accountability through the political organs of the organisation and through administrative control

The existence of a wide gap between principles, as laid down both in general international law and in the acts of the political organs of the UN, and the practice of many an operation of the UN has been highlighted in Chapter III. It would follow from that analysis that a way of containing the erosion of standards within the UN – that grows steadily as one moves from the top (the Security Council, the General Assembly and the Economic and Social Council, the Secretary-General) to the bottom (field operations) - could consist of reinforcing existing mechanisms of top-to-bottom political control, and of establishing new ones. One problem with this approach is that it assumes the willingness on the part of the political organs to exercise their supervisory role in a rigorous manner. On the contrary states, which dominate the political organs, might not always have a real interest in promoting the operational accountability of the UN. They limit themselves to adopting resolutions in the General Assembly and of the Security Council with a purposefully righteous tone in order to give legitimacy to the UN operation and to secure consensus. As a result, in some instances the political organs appear more capable of taking a progressive and principled stance on very controversial issues - such as the continued provision of

⁵⁴ On UNHCR, Human Rights Watch, 'Uncertain Refuge' (1997); on UNDP, Human Rights Watch, 'Failing the Displaced: The UNDP Displaced Persons Program in Kenya' (1998); on peacekeeping operations, African Rights, 'Somalia: Human Rights Abuses by the United Nations Forces' (July 1993), and Amnesty International, 'Peacekeeping and Human Rights' (January 1994).

⁵⁵ J. A. Fox, L. D. Brown (eds.) *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements* (1998).

⁵⁶ Importing this experience into the area of humanitarian assistance may not be so simple, since humanitarian NGOs are often part and parcel of the humanitarian power structure.

humanitarian assistance to the Taliban authorities discussed in Chapter III - than the bureaucracy of international institutions putatively composed of a well-educated, forward-thinking and open-minded cosmopolitan elite.

At present, the extent to which the political organs of the UN exercise control over the organisation tends to vary significantly from one type of operation to the other. For example, the operations of the specialised programmes, such as UNICEF, UNDP, UNHCR, WFP, are not normally subject to pervasive scrutiny on the part of the political organs of the UN. The peculiar legal status of these programmes – subsidiary bodies in principle, but autonomous organisations in practice – has undoubtedly been instrumental to their lack of accountability to the parent organs. The parent organs in turn acquiesced to this situation without activating powers that they legally possess. As for administrative control over the specialised programmes by the Secretariat, their quasi-autonomous status makes them impermeable to this form of control. The reason for this is political rather than legal: the ‘feudal’ structure⁵⁷ of the UN with its relatively weak centre and its various principalities and fiefdoms reflects a delicate balance of power within the Organisation. The Secretary General could use some of his legal powers more imaginatively to promote the accountability of the specialised programmes, but is unlikely to do so within the current inter-institutional equilibrium.

The administrative and political control of peace-keeping, peace-making and peace-building operations⁵⁸ raises different problems, for the most part related to the fact that the practice of the UN has developed in a context that was different from that originally envisaged by the Charter; which is not to say that such practice is automatically *ultra vires*. Depending on which organ established the operation, it is either the General Assembly or the Security Council to which ultimate responsibility appertains.⁵⁹ A common pattern since the ‘leave it to Dag’ policy that characterised the

⁵⁷ The comparison with feudal institutions is Paul Szasz’s (‘The Role of the UN Secretary General: Some Legal Aspects’, 24 *New York University Journal of International Law and Politics* (1991) 161).

⁵⁸ On the different types of peace operations, see Chapter I.6(c).

⁵⁹ The report of the Secretary General, *An Agenda for Peace* (UN Doc. A/47/277, S/24111) introduced the distinction between preventive diplomacy, peace-keeping and peacemaking. Preventive diplomacy mainly involves the good offices intervention of the Secretary General to prevent or contain a conflict. Peace-keeping and peacemaking normally involve an operational dimension, frequently on a multi-agency scale. The *Supplement to An Agenda for Peace* (UN Doc. A/50/60, S/1995/1) introduced the category of post-conflict peace-building. Peace-keeping missions can be established both by the Security Council and by the General Assembly, since the competence of the Council in this area is primary but

UN Emergency Force in the Middle East (UNEF) and ONUC has been the conferral of wide powers of implementation and interpretation of the mandate of the operation on the Secretary General.⁶⁰ The Secretary General submits periodic reports to the Security Council on the implementation of each mission. Some resolutions expressly state the number of reports that the Secretary General has to submit every year,⁶¹ while others simply request the Secretary General 'to report to the Council at regular intervals' or 'to provide periodic reports'.⁶² In the case of at least one peace-keeping mission - the UN Military Observer Group in India and Pakistan (UNMOGIP) - no regular reporting to the Council or the Assembly has taken place.⁶³ The reports submitted by the Secretary General on the UN Mission in Kosovo (UNMIK), on the other hand, have been detailed and rich with information, and, for instance in the period June 1999-April 2001, have included the text of the over 100 regulations issued by the Special Representative of the Secretary General.

(a) *The reports of the Secretary General*

The reports of the Secretary General constitute the main official channel for keeping the Security Council, and less frequently the General Assembly, informed about the implementation of the mandate. The importance of these reports could hardly be underestimated. It has been pointed out that, particularly when a Chapter VII operation is concerned, the exercise of delegated powers by the Secretary General is subjected to limitations, including the good faith use of discretionary powers and the preservation of a decision-making process that is independent of UN member states.⁶⁴ To these limitations, it is necessary to add the duty to keep the delegating organ, the

not exclusive (*Certain Expenses*, *supra* note 28 at 162), but non-consensual missions require the use of the Chapter VII prerogatives of the Council. As mentioned, many operations of the UN do not have a clear mandate of one of the political organs (Chapter I.6).

⁶⁰ N. White, *Keeping the Peace* (1997) 230; D. Sarooshi, *The United Nations and the Development of Collective Security* (1998) 50 ff. For the Secretary General these powers have been 'a sword and ... a shield' (G. Abi-Saab, *The United Nations Operation in the Congo 1960-1964* (1978) 194). On at least one occasion - the UN Emergency Force (UNEF) - the Secretary General could decide its withdrawal from Egypt in 1967 without reference to the General Assembly, which had established it in the first place (R. Higgins, *United Nations Peace-keeping 1946-1967 I: The Middle East* (1969) 273).

⁶¹ After the initial report to be submitted within three months of the deployment of the UN troops, SC Res. 1272 (1999) on East Timor requests the Secretary General to submit one report every six months; SC Res. 1289 (2000) on Sierra Leone requests a report every 45 days;

⁶² SC Res. 1244 (1999) on Kosovo and SC Res. 1312 (2000) establishing the UN Mission in Ethiopia and Eritrea (UNMEE).

⁶³ R. Higgins, *United Nations Peace-keeping 1946-1967 II: Asia* (1970) 352.

⁶⁴ Sarooshi, *supra* note 60, at 55-57. Reviewing a judgment of the UN Administrative Tribunal, the ICJ endorsed the conclusion that the Secretary General's discretionary powers to extend the period of appointment of an employee were not 'unfettered' and could not be exercised in an 'arbitrary and

Security Council, accurately informed about the exercise of the delegated powers as well as about relevant factual developments. The existence of this duty was indirectly recognised by the ICJ in the *Certain Expenses* case. Rejecting the Russian argument that the Secretary General had acted *ultra vires* in determining the size and composition of ONUC, the Court emphasised that there existed a ‘record of reiterated consideration, confirmation, approval and ratification by the Security Council ... of the actions of the Secretary General’, and that it was clear that, under these circumstances, the Secretary General could not have ‘usurped or impinged upon’ the prerogatives of the Council.⁶⁵ For the ‘consideration, confirmation, approval and ratification’ of the Security Council to be informed, the Secretary General has to provide detailed information about his activities, and of his staff on the ground.

The reports of the Secretary General are normally prepared by the staff at the Secretariat on the basis of drafts on the various issue areas submitted by the field staff. The problem of their being erratically submitted could be easily fixed if the Security Council developed a more consistent practice and requested the Secretary General to submit reports at the same interval for each mission, making exceptions only if the situation on the ground warrants more frequent assessments. However, one argument against intensifying the submission of these reports is that they require a considerable investment of staff time and resources at the field level.⁶⁶

The main advantage of entrusting the implementation of peace-keeping operations with the Secretary General is that their management is not in the hands of states, but is in the hands of an avowedly impartial office. A problem, however, is that states will continue to try to influence certain aspects of these operations but will do so in the backrooms. It is also rather simplistic to assume that the Secretary General is really *super partes*. Another major disadvantage with this role of the Secretary General is, as the head of the institutional bureaucracy, s/he is not always interested in promoting

capricious’ manner (*Application for Review of Judgment 333 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Report (1987) 18 at 57-58).

⁶⁵ *Certain Expenses*, *supra* note 28 at 175.

⁶⁶ During a fact-finding mission in Sierra Leone in July 1998 on behalf of the Lawyers’ Committee for Human Rights, we were told that many of the senior officials were extremely busy in those days and were not going to be able to meet us, because of the imminent deadline for sending their drafts to headquarters. The Secretary General was about to present his first report on the UN Observer Mission in Sierra Leone (UNOMSIL) to the Security Council (UN Doc. S/1998/750), and another one was due after only two months.

the accountability of his/her staff, particularly an 'effective' accountability, which, as mentioned, ought to entail a sanction against the responsible individual/office, and a remedy to the aggrieved person(s).

In order to make reporting more effective as a means of accountability, members of the Security Council could use the submission of the report of the Secretary General as an opportunity to ask questions about the conduct of the operation. Direct and intense questioning is one of the instruments that is used by national parliaments to exercise control over the executive, and there is no reason why it could not be adapted to international institutions. In order to perform this function effectively, it would be important for the Security Council to rely on different sources of fact-finding, without limiting itself to information made available by Secretary General. The submission of reports by NGOs and other interested parties, particularly from the affected area, should be encouraged.⁶⁷ Under existing rules, the Council can allow the direct participation of NGOs or experts, for example by means of oral presentations.⁶⁸ Representatives of weaker countries in the Security Council would especially benefit from this opening of the sources of information, since they cannot normally rely on the detailed briefings, including information from intelligence sources, to which more powerful states – most notably, but not exclusively, the five permanent members – have access. The proposed changes would not necessitate any reform of the Charter; on the contrary, they would probably serve to further compliance with the Charter. They would however involve a considerable change in *modus operandi*.

(b) *Control by the Security Council*

Another tool with potential applications in the area of accountability is the fact-finding mission of a delegation of the Security Council. In 2000 alone, five such missions were conducted in different crisis areas.⁶⁹ In three cases the mission of the Security Council focused on political aspects (Sierra Leone, Congo, Ethiopia), but in at least two

⁶⁷ In the practice of the Security Council the participation of non-member states and of representatives of UN subsidiary agencies is well-accepted and has occurred with some frequency (for examples, see UN Department of Political Affairs, *Repertoire of the Practice of the Security Council. Supplement 1981-1984* (1992) UN Doc. ST/PSCA/1/Add. 9 and *Supplement 1985-1988* (2000) UN Doc. ST/DPA/1/Add. 10). The participation of individuals or private institutions is almost unknown (see *supra* p. 241).

⁶⁸ Rule 39 and Appendix A and B, Provisional Rules of Procedure of the Security Council, UN Doc. S/96/Rev.7, also available at www.un.org/Docs/sc/scrules.htm.

⁶⁹ They are listed at www.un.org/Docs/sc/missionreports/scmissions.htm. The relative reports are: S/2000/1105 (on East Timor); S/2000/992 (on Sierra Leone); S/2000/416 (on Congo); S/2000/413 (on Ethiopia and Eritrea); S/2000/363 (on Kosovo).

instances (East Timor, Kosovo) the review of the implementation of the resolutions of the Council and fact-finding about the conduct of the UN operation on the ground constituted the main focus of the mission. The East Timor mission, in particular, dealt with operational aspects and made a series of recommendations on security, refugees and justice. Missions of the Security Council to review the operational implementation of its resolutions could become an important institutional check on the performance of the UN. In the existing practice the gist of these missions has been predominantly political as a way of exerting pressure on various parties to overcome obstacles to the implementation of a resolution, or of facilitating an ongoing political process. The Security Council ought to include, however, an element of accountability and of performance-monitoring in its missions. Human rights should not simply be paid token respect to, but form part of the fact-finding of the Council which could rely on independent experts to accomplish this. An indication of the considerable impact that fact-finding missions could have on improving accountability is the lively public debate that ensued from the publication of a report of a UK parliamentary delegation which was critical of the operational performance of UNHCR in Kosovo.⁷⁰

In some instances, the Security Council has appointed *ad hoc* commissions of enquiry. For example, the Council instructed the Secretary General to establish an *ad hoc* panel of experts to investigate the illegal exploitation of natural resources and other forms of wealth in the Congo.⁷¹ The panel's report to the Council in April 2001 aroused severe criticism from Rwanda, Burundi and Uganda, which the report accused of plundering resources in eastern Congo.⁷² It was far from predictable that the panel would reach this conclusion, given the level of international support that these countries, particularly Rwanda and Uganda, have enjoyed since the mid-1990s. The use of 'independent' commissions of enquiry to investigate aspects of an international conflict could constitute an important step forward in making Security Council action accountable, in particular by ensuring that the factual determinations underlying the action of the Security Council – *e.g.* that a certain state is an aggressor, that a threat to

⁷⁰ See *supra* V.2.

⁷¹ Statement by the President of the Security Council, 2 June 2000, UN Doc. S/PRST/2000/20.

⁷² Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, 12 April 2001, UN Doc. S/2001/357; UN OCHA Integrated Regional Information Network for Central and Eastern Africa (IRIN-CEA), Weekly Round-up 68, 20 April 2001.

peace exists in a given region, or who is to blame for a crisis – are less coloured by political bias.

The Security Council has also set up committees and advisory boards for monitoring the implementation of resolutions that impose sanctions or embargoes. Although the effectiveness of ‘sanctions committees’ is disputed,⁷³ with the appropriate modifications this could be another useful model for enhancing accountability through political bodies. *Ad hoc* committees could be established to monitor the performance of UN agencies and bodies working under a Security Council mandate. In order to achieve optimal efficacy, these committees should preserve the leanness that characterises sanctions committees.

In earlier practice, ‘advisory committees’ were established to assist the Secretary General in the implementation of a peace-keeping operation. For example, the General Assembly established an Advisory Committee on UNEF I to be chaired by the Secretary General.⁷⁴ An Advisory Committee for ONUC, comprising representatives of the states that were contributing troops to the mission, was created as a result of the personal initiative of the Secretary General, Dag Hammarskjöld. The ONUC Advisory Committee met regularly and assisted both Dag Hammarskjöld and U Thant in handling the Congo crisis and in the strategic management of ONUC.⁷⁵ In the 1990s, these advisory committees reappeared albeit under a different denomination and in a less structured format: now referred to as “Friends of the Secretary General”, informal groups comprising representatives from contributing member states have been ‘created on an *ad hoc* basis to support the Secretary-General in the discharge of peacemaking and peace-keeping mandates entrusted to him’.⁷⁶

The executive committee that was established by the Secretary General shortly after the inception of UNMIK differs from advisory committees of peace-keeping missions. The committee was required ‘to assist the Special Representative in fulfilling his responsibilities’, and to act as ‘the main instrument through which he will control

⁷³ Boudreau, ‘Creating a United Nations Sanctions Agency’, 4 *International Peace-keeping* (1997) 115, argues that sanctions committees are largely ineffective and that a sanctions agency should be established.

⁷⁴ GA Res. 1001 (ES-I), 7 November 1956.

⁷⁵ See R. Higgins, *United Nations Peace-keeping 1946-1967 III: Africa* (1980) 64 ff.

⁷⁶ *Supplement to An Agenda for Peace*, *supra* note 59 at paras. 83-84.

the implementation of UNMIK's objectives'.⁷⁷ However, membership of this Committee was essentially 'bureaucratic' without any representative of Security Council members, and including only the special representative, his/her deputy, and the heads of the four main components of the mission – the UN (civil administration), UNHCR (humanitarian assistance), the Organisation for Security and Co-operation in Europe (OSCE) (institution-building) and the EU (reconstruction).

(c) *Ex post facto measures*

As a result of the failures of the UN in the 1990s, a number of *ex post facto* instruments of accountability were established. These instruments consisted of reports of independent commissions of enquiry (Rwanda), special reports of the Secretary General (Srebrenica), as well as the establishment of special evaluations units – sometimes known as 'lessons learned' units - within UN organisations and departments. The Rwanda report was the result of an initiative of the Secretary General,⁷⁸ which was endorsed by the Security Council.⁷⁹ The three members of the commission of inquiry were appointed by the Secretary General. The final report of this commission⁸⁰ is severely critical of the conduct of the UN in Rwanda during the 1994 genocide. However, although it constitutes an important document for ascertaining numerous key facts on the conduct of the UN in Rwanda, it may not be as efficacious as a means of securing accountability for wrong-doing. Indeed, the combination of sanctions and remedies that were mentioned above as necessary components of an effective mechanism of accountability is lacking. Although the terms of the inquiry were essentially limited to fact-finding and to the formulation of recommendations, and did not expressly include the indication of remedies or sanctions, the panel could have decided to include them in its recommendations. Instead, the only remedy that was recommended was feeble, i.e.

The United Nations should acknowledge its part of the responsibility for not having done more to prevent or stop the genocide in Rwanda. The Secretary-General should seek actively ways to launch a new beginning in the

⁷⁷ Report of the Secretary General on the UN Interim Administration Mission to Kosovo, 12 July 1999, UN Doc. S/1999/779.

⁷⁸ Letter from the Secretary General to the President of the Security Council, 18 March 1999, UN Doc. S/1999/339.

⁷⁹ Letter from the President of the Security Council to the Secretary General, UN Doc. S/1999/340.

relationship between the United Nations and Rwanda, recognising the failures of the past but also establishing a commitment to cooperation in the future.⁸¹

Within politically accountable domestic institutions the results of similar inquiries would often result in a political sanction, i.e. the resignation, or even dismissal, of officials whose conduct was found to be unsatisfactory. However, although senior officials of the UN were not spared criticism in the final report,⁸² no consequence appears to have flowed from such criticism.

Unlike the Rwanda report, the report on the fall of Srebrenica was not prepared by an independent panel of experts, but by the Secretary General following a request of the General Assembly.⁸³ Perhaps not surprisingly, this report is more cautious than the Rwanda report in identifying responsibilities within the UN both at the level of member states of the Security Council and at the field level, although it is hardly disputable that in this crisis it was the lack of political will on the part of the key members of the Security Council to intervene that caused the fall of Srebrenica.⁸⁴

Evaluation and 'lessons learned' units can play an important role in promoting debate and changes within institutional cultures that are often still impervious to scrutiny and assessment. Reports evaluating specific projects and policies have been available in the public domain since the 1990s.⁸⁵ While this certainly advances accountability and transparency, it is arguable whether the impact of such evaluation activity on the field

⁸⁰ 'Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda' (15 December 1999), available at <www.un.org/News/ossg/rwanda_report.htm>.

⁸¹ *Ibid.* at recommendation no. 14.

⁸² For example, Kofi Annan, who was Under-Secretary General for Peace-keeping Operations at the time of the genocide, was criticised for not briefing the Secretary General about a telegram in which General Dallaire, Force Commander of UNAMIR, alerted the headquarters about information he had received on the planning of the genocide in Rwanda. Arguably, the career of a politician in a democratic country found to be responsible for a failure of this gravity would not have survived.

⁸³ Report of the Secretary General pursuant to General Assembly Resolution 53/35: *The Fall of Srebrenica*, 15 November 1999, UN Doc. A/54/549; and GA Res. 53/35, 30 November 1998.

⁸⁴ The report does recognise that there was a failure on the part of the Secretariat 'to fully comprehend the extent of the Serb war aims' (*Id.* at para. 496 and 501). In his account of those troubled years, former Secretary General Boutros Boutros-Ghali lays the blame squarely with the US administration for the failures of the international community in Bosnia and for assigning an impossible task to the UN (B. Boutros-Ghali *Unvanquished: A U.S.- U.N. Saga* (1999)).

⁸⁵ For example: the reports of UNHCR's Evaluation and Policy Analysis Unit can be found at <http://www.unhcr.ch/evaluate/main.htm>; the reports of UNICEF's Division of Evaluation, Policy and Planning are available at <http://www.unicef.org/reseval/>; the Lessons Learned Unit of the Division of Peace-keeping Operations are at <<http://www.un.org/Depts/dpko/lessons/>>.

is considerable and whether lessons are really 'learned'. On the contrary, lessons that are prematurely and optimistically considered 'learnt' are too often quickly forgotten.

(d) *Ombudsman offices*

An example of a lesson 'learnt but soon forgotten' is the proposal to establish ombudsman offices 'to consider grievances registered by the local population against the United Nations' for peace-keeping operations. This proposal was contained in the report on UNOSOM of the Lessons Learned Unit at the Division of Peace-keeping, where it was argued that

Without such a mechanism, the United Nations was perceived by many in Somalia to be "above the law", which undercut its efforts to promote human rights. Likewise, UNOSOM's attempts to promote an open and free political process in the country was partially handicapped by an apparent lack of transparency in its own political operations.⁸⁶

These proposals for a peace-keeping ombudsman were not followed up. They were not discussed in the 'Brahimi' report - the most important review of UN peace-keeping practice in the last years - which also took surprisingly little notice of matters of accountability and compliance with the mandate in peace-keeping operations.⁸⁷

In the humanitarian sector, proposals for the creation of an ombudsman have been receiving increasing attention mainly as a result of the Humanitarian Accountability Project – an initiative of various NGOs which inter-governmental organisations have not joined.⁸⁸ The proposed humanitarian ombudsman would represent a step forward in mechanisms of accountability because of its envisaged direct accessibility to the beneficiaries of a humanitarian programme and because of its jurisdiction *ratione personae* which would include at least NGOs. At present, the only avenue that is available to beneficiaries who claim to have been aggrieved by a specific decision or

⁸⁶ 'The Comprehensive Report on Lessons Learned from United Nations Operation in Somalia (UNOSOM), April 1992 - March 1995' at para. 57 (date of release not clear) available at <<http://www.un.org/Depts/dpko/lessons/somalia.htm>>.

⁸⁷ Report of the Panel on United Nations Peace Operations ("Brahimi Report"), 21 August 2000, UN Doc. A/55/305, S/2000/809.

⁸⁸ See <http://www.oneworld.org/ombudsman/>, in particular Beyani, 'The Legal Framework for an International Humanitarian Ombudsman' (October 1999), and Apthorpe, Mayhew, 'A Possible Model

policy of a humanitarian agency is to resort to local courts. However, national judicial remedies are not available vis-à-vis UN agencies because of their immunity.⁸⁹ Even vis-à-vis NGOs are these remedies often available only on paper, either because the judiciary is not operative or because international NGOs have managed to secure for themselves a *de facto* immunity from administrative and judicial interventions. The litmus test for a humanitarian ombudsman is again determined by the type of remedies and sanctions that it could mete out.⁹⁰

The UN experience in Bosnia and Herzegovina is an interesting case study because various human rights bodies, including ombudsman offices, featured among the web of institutions created under or in the wake of the Dayton Peace Agreement.⁹¹ The most important of such bodies is the Commission on Human Rights, which comprises two distinct offices, the Office of the Human Rights Ombudsman – which later renamed itself Office of the Human Rights Ombudsperson – and the Human Rights Chamber.⁹² While both the Ombudsperson and the Chamber can hear individual complaints, their jurisdiction *ratione personae* is limited to the parties to Annex 6 of the Dayton Peace Agreement, i.e. the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska.⁹³ As a result, they would have to reject as inadmissible a complaint against the UN Mission in Bosnia and Herzegovina (UNMBIH) or the International Stabilisation Force (SFOR), unless the complaint was presented against one of the parties to Annex 6 for failing to prevent UNMBIH or SFOR from violating a certain right. Indeed, while no case against the UNMBIH or SFOR appears to have been brought before the Ombudsperson,⁹⁴ the

for a Humanitarian Ombudsman: Report on Action Research in Kosovo' (September 1999). The latter is based on a thorough field study of the feasibility of a humanitarian ombudsman in Kosovo.

⁸⁹ See below V.6.

⁹⁰ This is so assuming that the ombudsman would have the essential features that normally define this office (impartiality and independence, accessibility to individuals, promptness, etc.).

⁹¹ General Framework Agreement for Peace in Bosnia and Herzegovina [hereinafter 'Dayton Peace Agreement'], signed in Paris, 14 December 1995, 35 ILM 75.

⁹² *Id.* at Annex 6.

⁹³ The Ombudsperson and the Chamber can consider only cases where the violation 'is alleged or appears to have been committed by the Parties, including by any official or organ of the Parties, Cantons, Municipalities, or any individual acting under the authority of such official or organ' (*Id.* at Art. 2, Annex 6). The substantive human rights law that they can apply includes 'the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the other international agreements listed in the Appendix to this Annex' (*Id.* at Art. 1).

⁹⁴ Inadmissibility decisions are known as 'decisions not to open an investigation' under the Human Rights Ombudsperson. Although the Office of the Ombudsperson did not deal with complaints against UNMBIH, some reported decisions not to open an investigation were taken in cases brought against non party states (*Arnautovic Fehim v. Germany*, Application No. 285/97; *Delic Said v. Sweden*, Application

Human Rights Chamber declared an application inadmissible for lack of jurisdiction *ratione personae* since the applicant alleged that his right to a fair trial had been violated by SFOR.⁹⁵ The fact that the Dayton Peace Agreement granted such a restrictive jurisdiction *ratione personae* to the Commission on Human Rights signifies an inherent contradiction, given that the same agreement created the basis for the exercise of extensive powers in Bosnia and Herzegovina by international authorities, i.e. UNMBIH and SFOR. It is also at variance with the need to ensure the protection of the human rights, especially the rights of women, in the private sphere. Although there is no doubt that the vast majority of human rights violations that need to be addressed in Bosnia are related to violations committed by the Bosnian federal authorities or by one of the republics, it is still ironic that the plethora of human rights bodies⁹⁶ that have been set up in Bosnia and Herzegovina do not provide a mechanism for ensuring accountability for violations of fundamental rights perpetrated by the international authorities - those very authorities entrusted with the promotion of respect for the rule of law in this war-ridden country.

The experience in Kosovo signals a step forward in this respect. The ombudsperson institution, established in June 2000, can 'receive and investigate complaints from any person or entity in Kosovo concerning human rights violations and actions constituting an abuse of authority by the interim civil administration or any emerging central or local institution'.⁹⁷ The ombudsperson, who cannot be a citizen of any of the states that made the former Yugoslavia or of Albania (Sec. 6.1), is given wide

No. 246/96; *S.S. v. Federal Republic of Yugoslavia and Mr S. K.*, Application No. 176/96). See also the information on how to complain (point 3: 'about which authorities can a complaint be made?') in the web-site of the Office of the Ombudsperson (at <<http://www.ohro.ba/index.htm>>).

⁹⁵ *Drasko Radić v. International Stabilisation Force in Bosnia and Herzegovina (SFOR)*, Case No. CH/00/4194.

⁹⁶ In addition to the Commission on Human Rights and its two distinct offices, other human rights bodies of a governmental or inter-governmental nature operative in Bosnia and Herzegovina include: the Human Rights Office within UNMBIH and the International Police Task Force (IPTF) responsible for the implementation of UNMBIH's human rights mandate under SC Res. 1088 (1996) and divided into four units (Special Response Team; Human Rights Investigations Desk; Local Police Registry Section; and the Housing Action Team); the Federal Ombudsman established under the Constitution of the Federal Republic of Bosnia and Herzegovina; the Human Rights Ombudsman of the Republika Srpska, created by legislation passed in the National Assembly of the Republika; the Commission for Real Property Claims of Refugees and Displaced Persons (under Annex 7 of the Dayton Peace Agreement); the OSCE human rights department with its 28 field offices (under Article 10, Annex 6 of the Dayton Peace Agreement); the field presence of the UNHCHR; and the Human Rights and Rule of Law Department at the Office of the High Representative (under Annex 10 of the Dayton Peace Agreement), where the Human Rights Co-ordination Centre - an inter-agency initiative that also involves OSCE, UNHCR, UNMBIH, and UNHCHR - is also based. Since April 2000, there has also been a Ministry for Human Rights and Refugees.

⁹⁷ Sec. 3.1, UNMIK Regulation 2000/38.

powers of investigation. She/he has ‘access to and may examine files and documents of the interim civil administration and of any emerging central or local institution’ (Sec. 4.7). Reasons for denying access to such files have to be stated by the Special Representative, in which case the ombudsperson ‘may draw such inferences as he or she sees fit’ (*ibid.*). The ombudsperson is also granted the right to have access to any person deprived of his/her liberty (Sec. 4.8). The ombudsperson’s powers of enforcing his decisions are however comparatively weak. She/he can make recommendations to the competent authorities ‘that disciplinary or criminal proceedings be initiated against any person’ (Sec. 4.10). If the authorities fail to act, the ombudsperson may draw the Special Representative’s attention to the matter or make a public statement. Another limit is that he/she cannot investigate complaints on the actions of the Kosovo Force (KFOR) led by the North-Atlantic Treaty Organisation (NATO).

The Inspection Panel of the World Bank is another example of a semi-judicial body which can receive complaints from third parties, individuals and groups, affected by a project of the Bank. By March 2001 the Panel had received nineteen formal requests for an inspection, and had delivered twelve reports on as many complaints. The fact that its reports are public represents an important step forward in the direction of much-needed greater transparency. However, in addition to the fact that its reports are not binding, another limit of the Inspection Panel is that its ability to make important findings of law is constrained not only by its membership – which does not include lawyers and makes it essentially a fact-finding body – but also by the requirement that the Panel seek the advice of the Bank’s legal department.⁹⁸

Ombudspersons and other semi- and quasi-judicial bodies, especially those that have a mixed local and international membership and are field-based, can become effective mechanisms of accountability in UN post-conflict operations. They can be distinctly more effective than internal mechanisms of inspection. Indeed, unlike inspectors’ offices, which are often located within the hierarchical structure of the institution,⁹⁹

⁹⁸ Bradlow, ‘International Organizations and Private Complaints: The Case of the World Bank Inspection Panel’, 34 *Virg. J.Int.L.* (1994) 553 at 594. See also Shihata, *supra* note 43.

⁹⁹ For example, in UNICEF and UNHCR the Inspector General is in the office of the Executive Director and the High Commissioner respectively.

ombudsmen are not staff members of international institutions,¹⁰⁰ and can exercise independent and impartial oversight over the activities of international authorities. Their semi-judicial nature also gives them power to indicate remedies for individuals, which internal inspectors normally do not possess, and ensures a rights-based approach to accountability questions rather than one restricted to financial accountability and accountability to donors.

(e) *Internal mechanisms of oversight*

Despite their significant limits, internal mechanisms of oversight should not completely be discounted. As would be the case in any bureaucracy or large company, UN agencies and departments normally have different bodies with an oversight or performance monitoring function, and some time even a smaller section within the organisation may have its own oversight unit.¹⁰¹ Within UNHCR, for example, there is an Inspector General's Office located within the High Commissioner's Executive Office and to whom the Inspector reports. Inspections are an

internal oversight and management tool that provide the High Commissioner and her senior managers with a broad review of the functioning of her field representation at all levels. Not less importantly, inspections provide UNHCR's field offices with an independent and objective review of their performance...¹⁰²

UNHCR's Inspector General is also responsible for investigations in case of wrongdoings.¹⁰³ A separate office is the Evaluation and Policy Analysis Unit,¹⁰⁴ which reports to the Assistant High Commissioner, and often relies on external consultants to conduct its evaluations. Within the Office of Internal Oversight Services (OIOS) at

¹⁰⁰ There are exceptions. For instance, the Compliance Advisor/Ombudsman of the International Finance Corporation (IFC) is a staff member of the organisation.

¹⁰¹ A comprehensive review of the oversight mechanisms in the operational agencies was undertaken by the Office of Internal Oversight Services (OIOS) and was submitted to the General Assembly (Report of the Secretary General to the General Assembly on Enhancing the Internal Oversight Mechanisms in Operational Funds and Programmes, UN Doc. A/51/801; see also the update report submitted in 2001, UN Doc. A/55/826).

¹⁰² Executive Committee of the High Commissioner's Programme, 'UNHCR's Organization Oversight and Performance Review Framework', 18 September 2000, UNHCR Doc. EC/50/SC/INF.6, at para. 7.

¹⁰³ The investigation teams normally consist of UNHCR staff, or staff of the OIOS at the UN Secretariat.

¹⁰⁴ See *supra* note 85.

the Secretariat there is a UNHCR unit that provides auditing services. The Oversight Committee, chaired by the Deputy High Commissioner, is responsible for the co-ordination of oversight activities. While they all have an oversight function, these various offices are responsible for different aspects of oversight, namely audit, evaluation, monitoring, inspection, investigation, and co-ordination.¹⁰⁵

The most important central mechanism of internal oversight in the UN is OIOS headed by an Under-Secretary General and established by General Assembly Resolution 48/218B in 1994. In this resolution the General Assembly, having expressed its concern 'at the inadequate implementation of General Assembly mandates in some cases and the undertaking of non-mandated measures in other cases', decided to establish 'an additional independent entity... to enhance oversight functions, in particular with regard to evaluation, audit, investigation and compliance'.¹⁰⁶ The Under-Secretary General who heads OIOS is appointed by the Secretary General subject to the approval of the General Assembly. The General Assembly reviewed OIOS' work in 2000,¹⁰⁷ emphasising *inter alia* that in the course of investigations the Office 'shall provide procedures to protect individual rights of staff, including those of staff members making reports to the Investigations Section, and to regulate due process and fairness for all parties concerned', and that the 'operational independence of the Office of Internal Oversight Services is related to the performance of its internal oversight functions'.¹⁰⁸

The link between OIOS' independence and its operational effectiveness is evident in the case of T.H.¹⁰⁹ A former employee in UNHCR's finance section (Division of the Controller for Management Services), Mr T.H. maintains that he was contacted by OIOS after it found out that Mr T.H.'s report on accounting practices within the organisation had been suppressed and that, as a result of it, Mr T.H.'s contract of employment had not been renewed as expected. However, the information Mr T. H. provided to OIOS, as well as its source, were disclosed to UNHCR, causing UNHCR to stiffen its attitude and to refuse to review the negative appraisal of Mr T.H.'s performance. After his contract had not been renewed, Mr T.H. had begun to search

¹⁰⁵ See report, *supra* note 101.

¹⁰⁶ GA Res. 48/218B, 23 December 1993 at paras. I.A.1 and II.9.

¹⁰⁷ GA Res. 54/244, 31 January 2000.

¹⁰⁸ *Id.* at para. 16 and 18.

for another job, but the negative appraisal was making it impossible. It was therefore a pressing concern of his to have this negative appraisal reviewed. The Joint Appeals Board, to which a case for unfair dismissal was submitted, found in his favour, but its final report is not binding. In addition, OIOS' alleged breach of its mandate to protect Mr T.H. as an informant could not form part of his complaint to the Joint Appeals Board – and, later, to UNAT – since neither of them has jurisdiction over OIOS.

Since its inception, OIOS has conducted various investigations on allegations of corruption or mis-handling of funds. Although it is difficult to gauge the overall effectiveness of OIOS and assess the claim that it recuperates far more money than it spends for its activities,¹¹⁰ it has had some impact on oversight within the UN leading to dismissals and even arrest of staff.¹¹¹ Partly as a result of the public attention that some of its reports have received, reform has often ensued from OIOS intervention, as was the case, for example, with the International Criminal Tribunal for Rwanda severely criticised in one of OIOS' early reports.¹¹² In the audit sector, OIOS has achieved important results not only by conducting audits for some UN programmes and departments, but also by spearheading the establishment of resident and field audit units in peace operations.¹¹³ OIOS, as an accountability mechanism, thus scores well on at least two fronts (impact on the future behaviour of the organisation and sanctions), but it still fails to offer a remedy to aggrieved persons, apart from a likely improvement in the future behaviour of the examined organisation/programme. Moreover, its approach to accountability is mainly premised on a notion of accountability that focuses on financial probity and proper management rather than a rights-based approach from the point of view of the beneficiaries. Other central bodies with an oversight function are the Joint Inspection Unit and UN Board of Auditors. Both were established by the General Assembly¹¹⁴ and are responsible

¹⁰⁹ Joint Appeals Board decision No. 322.

¹¹⁰ See the introductory page of OIOS' web-site at <<http://www.un.org/Depts/oios/abtoios1.htm>>.

¹¹¹ 'UN Rocked by Flood of Fraud Cases', *The Observer*, 3 September 2000. In the period from July 1999 to June 2000, '22 cases were recommended for criminal prosecution by national law enforcement authorities' (Report of the Office of Internal Oversight Services for the Period from July 1 1999 to June 30 2000, UN Doc. A/55/436 at para. 156).

¹¹² Report of the Office of Internal Oversight Services on Audit and Investigation of the International Criminal Tribunal for Rwanda, UN Doc. A/51/789.

¹¹³ OIOS Report, *supra* note 111.

¹¹⁴ GA Res. 74 (I), 7 December 1946. An External Board of Auditors was instituted later (GA Res. 1438 (XIV), 5 December 1959). The Joint Inspection Unit was created by GA Res. 31/192, 22 December 1976.

respectively for conducting investigations on the management of funds and on efficiency, and for auditing the accounts of the organisation.

Examining the performance of political and administrative mechanisms of accountability within the UN, it is difficult to resist the temptation to become sceptical and even cynical. With the few exceptions and qualifications considered above, the standard *modus operandi* of such mechanisms appears reflects this sequence: a committee or commission of enquiry is (at times) established to examine a particular problem; a report is published and ceremoniously forwarded to the Security Council and the General Assembly, which inexorably 'welcome' the findings of the report and invite the Secretary General to follow up; various committees, groups, and task forces are created to deal with the follow up and produce endless reports, feeding on each other's information; focal points and units (often endowed with a generous consultancy budget) are created at the field level to promote 'awareness' and report to the superiors. This system may have produced some positive results in some areas, but its overall efficacy is dismal. Suffice it to make once again the example of gender discrimination.¹¹⁵ Notwithstanding the proliferation of gender awareness programmes within the UN, conferences, gender focal points in the field offices of virtually all programmes, the incidence of rape in the Kenyan refugee camps administered by UNHCR remain scandalously high and the policies adopted grotesquely ineffective,¹¹⁶ and a treaty which endorsed discrimination against women *was* entered into by the UN in Afghanistan.

In order to enhance the effectiveness of their action, administrative and political organs ought to adopt measures that are not simply cosmetic. Measures should include, when necessary, disciplinary sanctions against staff and redress for victims. Moreover, these organs should enlarge their composition to include truly impartial experts. Some organs could also take on a proactive role. In particular, the Security Council, the General Assembly and the Economic and Social Council could use parliamentary committees as a model for their work to monitor the work of the subsidiary programmes on a regular basis. Another model for political control

¹¹⁵ See Chapter III.

¹¹⁶ Chapter IV.4.

features, after all, in the Charter itself. The Trusteeship Council comprised various members, including a representative for each of the five permanent members of the Security Council, and had extensive powers in supervising the conduct of administering authorities in trust territories.¹¹⁷ Although the trusteeship system cannot apply to 'territories which have become members of the United Nations' (Art. 78) and could not thus be directly activated for the UN administrations that we have examined in Chapter IV, it could still provide a model for the role that political organs ought to be expected to perform in similar circumstances. They have manifestly fallen short of performing anything close to that role. Finally, other Charter-based bodies that could play a great role both in standard-setting for and in monitoring UN operations are the human rights bodies, whose silence on these matters is baffling.

V.5. Accountability through the international judiciary

International courts should constitute a natural avenue for ensuring the compliance of international institutions with international law, and for promoting their accountability. Yet, the role of the international judiciary in this area is marginal, and will remain so until the jurisdiction of these courts is not expanded to include claims brought against international organisations by states or by individuals.

At present, the only international judicial body that has been granted the power to annul decisions of the organs of an international organisation is the European Court of Justice.¹¹⁸ The system of judicial review of European Community acts is far from optimal, because of the restrictive rules on *locus standi*, and because of the limited grounds on which an action for annulment can be brought. Such grounds comprise lack of competence, infringement of a fundamental procedural requirement, infringement of the Treaty, and misuse of powers, but do not include violation of a fundamental right. The European Court of Justice has attempted to remedy this situation by making 'the material provisions of the European Convention *de facto* binding on the Community' despite the silence of the European treaties.¹¹⁹

¹¹⁷ Chapter IV.2(a).

¹¹⁸ Arts. 230-233, Treaty establishing the European Community as amended by the Treaty of Amsterdam (Before the Treaty of Amsterdam, these were Arts. 173-176). See A. Albros-Llorens, *Private Parties in European Community Law: Challenging Community Measures* (1996).

¹¹⁹ Alston and Weiler, 'An Ever-Closer Union in Need of a Human Rights Policy', 9 *EJIL* (1998) 658 at 700.

As for *locus standi*, Article 230 of the European Community Treaty distinguishes between various categories of applicants. While member states and the executive organs of the Community (the Commission and the Council) can always request the annulment of a Community act, the European Parliament, the Court of Auditors and the European Central Bank can bring this action only 'for the purpose of protecting their prerogatives' (Art. 230, 3). The rules on *locus standi* are even stricter in the case of natural or legal persons. Proceedings can be instituted only 'against a decision addressed to that person or against a decision which, although in the form of a resolution or a decision addressed to another person, is of direct and individual concern to the former' (Art. 233, 4).¹²⁰ These rules on *locus standi* significantly limit the individual's capacity to protect his/her fundamental rights against acts of the Community. This state of affairs is particularly problematic if one considers the extensive and ever expanding powers of the organs of the Community. Seen in this light, the jurisprudence of the German Constitutional Court that affirms its prerogative to challenge Community acts if they violate fundamental human rights has some justification.¹²¹

If the system of remedies against breaches of human rights by organs of the European Communities is still in need of improvement, no comparable system is in place for other international institutions. The ICJ and its predecessor - the Permanent Court of International Justice - have given important contributions to the development of international institutional law but have paid very little attention all to the question of the accountability of international institutions, and of the UN in particular, for violations of human rights, or indeed of other rules of international law. The paucity of case-law should not be a surprise given that, under the current system of advisory jurisdiction, international organisations are likely to seek the advice of the court when their rights, rather than their obligations and eventual responsibility, are at stake.¹²²

¹²⁰ The jurisprudence of the European Court of Justice on *locus standi* and public interest litigation has been conservative and rather inconsistent. See S. Weatherill and P. Beaumont *EC Law* (1995, 3rd ed) 253 ff.

¹²¹ See below V.6.

¹²² See Chapter II for a discussion of the case-law of the World Court on international institutional law.

(a) *Judicial review of the acts of the Security Council*

An area on which there has been great debate is the question of judicial review of acts of the Security Council by the ICJ.¹²³ This question is still under the consideration of the Court in the *Lockerbie* case.¹²⁴ As a general rule, the Court has affirmed that it does not have unlimited powers of judicial review of the resolutions of the Security Council,¹²⁵ but has also asserted that it is not hierarchically inferior to the Security Council and is not precluded from adjudicating on matters which form the object of resolutions of the Council.¹²⁶

That the Charter did not intend to create a Security Council that is completely 'unbound' is clear from Article 24.¹²⁷ After conferring 'primary responsibility for the maintenance of international peace and security' (Art. 24,1) – thereby making the Council the most powerful UN organ - the Charter provides that in the discharge of its duties the Council 'shall act in accordance with the Principles and Purposes of the

¹²³ See, for example, Alvarez, 'Judging the Security Council', 90 *AJIL* (1996) 1; Franck, 'The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?' (in Editorial Comment), 86 *AJIL* (1992) 519; Gowlland-Debbas, 'The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case', 88 *AJIL* (1994) 643; Martenczuk, 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie', 10 *EJIL* (1999) 517; White, 'To Review or not to Review? The Lockerbie Cases before the World Court', 12 *Leiden J. Int. L.* (1999) 401.

¹²⁴ The Order in response to the Libyan request for provisional measures and the Judgment on preliminary objections have touched upon this issue, but the judgment on the merits is not out yet. See: *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom), Judgment (Preliminary Objections), ICJ Report (1998) 9. On *Lockerbie*, see also the Order of 14 April 1992, ICJ Reports (1992) 3. A substantially identical judgment was delivered in the homonymous case between Libya and the US, ICJ Report (1998) 115.

¹²⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports (1971) 16 at 45. See also *Lockerbie* Order *supra* note 124, diss. op. of Judge Weeramanthry at 50. Judge El-Kosheri, however, dissenting from the majority, found that SC Res. 748 (1992) was *ultra vires* (*Lockerbie* Order, diss. op. of Judge El-Kosheri, *supra* note 124 at 105 ff.). In his separate opinion in the Bosnia Order, *supra* note 27, Judge Lauterpacht, unlike Judge El-Kosheri, did not argue that the Security Council resolution at stake was *ultra vires*, but he submitted that its continued operation was causing member states to become accessories to the genocide perpetrated by the Federal Republic of Yugoslavia and the Republica Srpska.

¹²⁶ That the Court is not prevented from adjudicating on matters of great political relevance is a principle well-established in its jurisprudence. This is so even if the Security Council is simultaneously dealing with the question under Chapter VII. See *United States Diplomatic and Consular Staff in Tehran* (United States v. Iran), Judgment, ICJ Reports (1980) 3; *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States), Judgment (Jurisdiction and Admissibility), ICJ Reports (1984) 391 esp. at 432; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina c. Yugoslavia), Judgment (Preliminary Objections), ICJ Reports (1996) 595. See also *Prosecutor v. Tadić* (IT-94-1), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber) at paras. 23-25.

United Nations' (Art. 24, 2).¹²⁸ The Charter does not contain a similar provision on the General Assembly, and it is reasonable to conclude that the specific mention of the duties of the Council is not casual, especially since it comes immediately before the provision that obliges member states 'to accept and carry out the decisions of the Security Council' (Art. 25). The conferral on the Security Council of wide powers was thus balanced with its express subjection to the principles of international law. It is not reasonable, however, to infer from this fact alone that the ICJ has unlimited powers of judicial review.¹²⁹ Indeed, it is difficult to believe that such a "revolutionary" power could have been implied. Moreover, had the Charter and the Statute of the Court intended to grant this power to the Court, they would have also introduced rules allowing states to request the judicial review of acts of the Security Council.

If the Charter alone does not solve this question conclusively, a broader evaluation of policy considerations is not much more helpful. The very argument in favour of judicial review – that it would strengthen the rule of law and erode the sphere of self-interested political decisions – can also be used against it. Indeed, the success of the Security Council in the most difficult task with which it is entrusted, the maintenance of peace and security, hinges upon the fact that it reflects the balance of power among states. A Security Council whose resolutions were subjected to judicial review by an international judicial organ could gain in legitimacy, but judicial review might also act as an incentive for states to revert to unilateralism.¹³⁰ Some states could simply prefer to prevent the Council from producing any act on certain matters rather than risk the judicial annulment of the resolution, thus undermining the effectiveness of the Security Council as the central organ in our system of collective security.

¹²⁷ In the *Tadić* case, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia stated that '... neither the text nor the spirit of the Charter conceives the Security Council as *legibus solutus* (unbound by law)', *supra* note 126 at 28.

¹²⁸ On Art. 24 see Judge Lauterpacht's separate opinion in the *Bosnia Order*, *supra* note 27 at para. 101.

¹²⁹ According to Judge Schwebel, Art. 24, 2 cannot imply the conferral of a power of judicial review on the ICJ, and 'the subjection of the acts' of the Security Council to the law 'relies not upon judicial review, but on self-censorship' (*Lockerbie Judgment*, *supra* note 124, diss. op. of Judge Schwebel 64 at 76).

¹³⁰ The fear that the inconsistency of a resolution of the Security Council with a judgment of the ICJ might weaken the Council rather than strengthen it was prominent in the *Lockerbie* case (e.g. *Lockerbie Order*, *supra* note 124, diss. op. of Judge Bedjaoui at para. 7, and sep. op. of Judge Lachs), as was the consideration of the impact of the decision on future cases involving UN action (*Lockerbie Judgment*, *supra* note 124, diss. op. of Judge Jennings 99 at 113). See also *Aegean Sea Continental Shelf* (Greece v. Turkey), Judgment, ICJ Reports (1976) 3 at 33 (sep. op. of Judge Tarazi): 'The Court, if the

The ICJ can review the legality of acts when it is expressly requested to do so by the organ from which the act in question emanated, provided obviously that the organ has the capacity to request an advisory opinion. When the Assembly of the Intergovernmental Maritime Consultative Organisation (IMCO) requested an opinion from the ICJ on the validity of the constitution of the Maritime Safety Committee, the Court held that, by excluding Liberia and Panama from the Maritime Safety Committee, the Assembly had violated the provision in its Statute that prescribed that the eight countries with the largest commercial fleet be represented in the Committee.¹³¹ The Court did not indicate what the consequences of the invalid constitution of the Committee ought to be.¹³² The IMCO Assembly decided to reconstitute the Committee without declaring the nullity of the acts of the irregularly constituted Committee.

The main difference between *Lockerbie* and the *Maritime Safety Committee* is therefore that in *Lockerbie* the Court's judicial review would be incidental to the resolution of an inter-state dispute, and the organ whose acts would be reviewed – the Security Council – has not expressed its intention to subject the legality of its acts to the jurisdiction of the Court. The fact that the Security Council has far greater powers and responsibilities than the Maritime Safety Committee can only complicate matters further. Nonetheless, various authors have argued that the Court has powers of incidental judicial review,¹³³ while suggesting that, as in the decision in *Maritime Safety Committee*, this power could be attenuated by excluding the nullity *ab initio* of the *ultra vires* act.¹³⁴

(b) *Other international judicial bodies*

Given this complex and problematic debate on judicial review of Security Council acts by the ICJ, Alvarez is certainly right in observing that 'it is ironic that the first international judicial body actually to do so [to review the legality of an act of the

circumstances so require, ought to collaborate in the accomplishment of this fundamental mission' of the Security Council in the maintenance of world peace and security.

¹³¹ *Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organisation*, Advisory Opinion, ICJ Report (1960) 150.

¹³² As a general rule courts pronounce on the *thema decidendum* that has been brought to them by the parties (*ne eat iudex extra petita partium*).

¹³³ E.g.: Martenczuk, *supra* note 123 at 525-528; Gowlland-Debbas, *supra* note 123 at 670-671; Lauterpacht, 'The Legal Effect of Illegal Acts of International Organisations', in R. Y. Jennings (ed.), *Essays in Honour of Lord Mc Nair* (1965) 88 at 95-96 (and Judge Lauterpacht's Separate Opinion in the Bosnia case, *supra* note 27).

Security Council], in a binding context, is an ad hoc war crimes tribunal established by the Council itself.¹³⁵ In the early stages of the proceedings of the *Tadic* case, the defendant challenged, *inter alia*, the legality of the establishment of the International Criminal Tribunal for the Former Yugoslavia by the Security Council. The Trial Chamber stated that 'it is not for this Chamber to judge the reasonableness of the acts of the Security Council', but contradicted itself by adding that 'it is without doubt that, with respect to the Former Yugoslavia, the Security Council did not act arbitrarily'.¹³⁶ The Trial Chamber proceeded to examine in some detail the arguments on the unlawfulness of the Tribunal that the defence had submitted. The decision of the Appeals Chamber also concluded that the Tribunal had been properly established, and contained an even more detailed refutation of these arguments. The Appeals Chamber argued that 'a narrow concept may, perhaps, be warranted in a national context but not in international law', which 'lacks a centralized structure' and 'does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others'; as a result, 'in international law, every tribunal is a self-contained system'.¹³⁷ Persuasive as these arguments might be, the self-validation of the Tribunal remains problematic especially given that, once it had decided to pronounce on the matter, its conclusion was foregone. It might have been more cogent for the Tribunal to dismiss this part of the motion.¹³⁸

Human rights arguments were used before the European Court of Human Rights in a series of cases concerning employees of international institutions. Given that the European Court could not exercise jurisdiction directly vis-à-vis international institutions, these cases were brought by the applicants against their state of nationality. The Court has maintained that when transferring responsibilities and powers to international organisations, state parties have to ensure that the fundamental rights enshrined in the Convention continue to be secured, and receive 'equivalent protection'.¹³⁹ As a result, in a series of cases in which it was argued that

¹³⁴ Gowlland-Debbas, *supra* note 123 at 673.

¹³⁵ Alvarez, 'Nuremberg Re-visited: The *Tadic* Case', 7 EJIL (1996) 245 at 249.

¹³⁶ *Prosecutor v. Tadic* (IT-94-1), Decision on the Defence Motion on Jurisdiction (Trial Chamber) at para. 16.

¹³⁷ *Tadic* (Appeals Chamber), *supra* note 126 at para. 11.

¹³⁸ This was Judge Li's position. *Id.*, sep. op. of Judge Li at para. 2-4.

¹³⁹ See, in particular, *Matthews v. United Kingdom* (No. 24833/94), Judgment (Merits), 18 February 1999, discussed in Chapter II.3. 'Equivalent protection' is a locution used by the Court in *Lenzing AG v.*

the unavailability of recourse to national courts for employment disputes constituted a violation of Article 6 (1) of the European Convention on Human Rights, the Court has actually examined the procedure for settling disputes offered by the international organisation and assessed it in the light of the Convention. However, so far the alternative process available to applicants has been deemed to offer equivalent protection, and no violation of Article 6 (1) has been found as a result of the jurisdictional immunities of international organisations.¹⁴⁰ One case in which the Court did find that a violation of a protected right had taken place was *Matthews*. Although this case did not concern the treatment of an employee of an international organisation or its immunity, it was submitted by Denise Matthews, a resident in Gibraltar, that her right to participate in free elections (Art. 3, First Protocol to the European Convention on Human Rights) had been violated by the EC Act that limited the franchise for the elections of the European Parliament to the United Kingdom excluding Gibraltar. The Court found in her favour and awarded her costs and expenses.¹⁴¹ *Matthews*, like the cases brought by former employees, is an example of “oblique” adjudication of the conduct of an international organisation: it is always the state’s responsibility for transferring powers to international organisations without securing corresponding rights that is considered. This approach might be difficult to apply to areas other than the right to a fair trial in employment disputes, and is less likely to work vis-à-vis an international organisations with a much broader membership, such as the UN and its specialised agencies.

Other international judicial bodies that could in principle become mechanisms for accountability include the International Criminal Court (not yet in force),¹⁴² and the two *ad hoc* Tribunals for Rwanda and for the Former Yugoslavia. Although there is no precedent to this effect, these courts could in principle put on trial a UN official

Germany (No. 00038817/97), Decision on admissibility, 9 September 1998, and was originally used by the Commission in *M. and Co. v. Federal Republic of Germany* (No. 13258/87), Decision on Admissibility, 9 February 1990. See Chapter II.3 and II.6.

¹⁴⁰ *Waite and Kennedy v. Germany* (No. 26083/94), Judgment (Merits), 18 February 1999, at paras. 66 ff., and *Beer and Regan v. Germany* (No. 28934/95), Judgment (Merits), 18 February 1999, at paras. 54 ff., both noted by Reinisch at 93 *AJIL* (1999) 933. See also: *Lenzing*, *supra* note 139; *A.L. v. Italy* (No. 41387/97), Decision on Admissibility, 11 May 2000.

¹⁴¹ In *Matthews*, as in the other cases, the European Court of Human Rights did not give much importance to the question of justiciability. In the United Kingdom and the US, courts would have most probably considered non-justiciable a question such as the one put to the Court by Denise Matthews. The view that the European Court of Human Rights should have proceeded in a similar manner is taken by Canor, ‘*Primus Inter Pares: Who is the Ultimate Guardian of Fundamental Rights in Europe*’, 25 *ELR* (2000) 3 at 13.

accused of committing a crime over which they can exercise jurisdiction *ratione loci*, *temporis* and *materiae*. However, peacekeeping operations and peace-enforcement missions are the only operations in which the realistic possibility of the commission of these crimes exists. In humanitarian assistance operations and in *de jure* or *de facto* administration of territory, while human rights violations can occur, the possibility that such violations entail international crimes is remote.

The judicial review of acts of the Security Council could undoubtedly enhance the rule of law in respect of the UN, and offer safeguards against the *ultra vires* acts of the Council.¹⁴³ However, should the existing rules on *locus standi* before the World Court remain unmodified, these safeguards would be of limited benefit, and available only to states. In addition, an entire category of acts of international acts – those ‘of a kind which could also be committed by states’ including ‘denial of justice, misuse of territory’¹⁴⁴ could not form the object of judicial review. As a mechanism for ensuring the accountability of the UN for violations of human rights, judicial review as presently construed and applied is of very limited impact.

The role that international courts should play to ensure UN compliance with international law is not, however, limited to the judicial review of the legality of the acts of political organs. For example, international judicial bodies should play a role in UN administration of territory. The “silence” of the ICJ on international administrations is surprising if compared with the experience of its predecessor. The Permanent Court of International Justice delivered five advisory opinions on various legal questions inherent to the administration of the Free City of Danzig, which was subject to a regime of partial international administration, ranging from the capacity of the City to join the International Labour Organisation (ILO),¹⁴⁵ to the constitutionality

¹⁴² Statute of the International Criminal Court (1998) 37 ILM 999.

¹⁴³ The Court could thus act as a ‘restraining factor in tracing the limits of Security Council action in terms of both the Charter and of international law’, Gowlland-Debbas, *supra* note 123 at 662.

¹⁴⁴ Lauterpacht ‘The Legal Effect’, *supra* note 133 at 89. The ‘other class of unlawful acts... which can arise only in the context of international organisation’, includes, for example, the consistency of certain acts with the constituent instrument. These acts are more likely to form the object of a request of judicial review or of incidental judicial review.

¹⁴⁵ *Free City of Danzig and International Labour Organisation*, Advisory Opinion, (1930) PCIJ Series B, No. 18.

of legislation in criminal law and criminal procedure,¹⁴⁶ to administrative questions including appeals against decisions of the High Commissioner of the League of Nations.¹⁴⁷ Although the Permanent Court had been assigned a specific role under the Versailles Treaty, the ICJ could still play an active role in international administrations within the constraints of the Charter and of its Statute if, for example, the General Assembly empowered, under Art. 96 (2) of the Charter, UN organs involved with the administration to request advisory opinions.

V.6. Accountability through national courts

The main obstacle to the use of national courts as a mechanism for the accountability of the UN is the jurisdictional immunity bestowed upon the Organisation and its officials. Immunity 'does not free the organization from any obligation', but it 'may frustrate the enforcement of the law'.¹⁴⁸ Although the provision on immunity in the Charter is worded in such a manner as to lend support to the functional approach to the immunity of the UN and its officials,¹⁴⁹ the General Convention on Privileges and Immunities of the UN¹⁵⁰ and the General Convention on Privileges and Immunities of the Specialised Agencies¹⁵¹ appear to signal a move towards absolute immunity. State practice, including judicial decisions, has for the most part endorsed absolute immunity.

The General Convention makes the UN, 'its property and assets wherever located and by whomever held' immune from 'every form of legal process' (Art. II, Sec. 2). In addition to the Organisation's immunity, personal immunity is conferred on certain categories of individuals connected with the Organisation: representatives of member states, UN officials and experts on missions. This immunity is of particular

¹⁴⁶ *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, (1935) PCIJ Series A/B, No. 65. On the other hand, the Permanent Court itself did not deal with the Saarland where the League exercised wider administrative powers than in Danzig.

¹⁴⁷ *Polish Postal Services in Danzig*, Advisory Opinion, (1925) PCIJ Series B, No. 11; *Jurisdiction of the Courts of Danzig*, Advisory Opinion, (1928) PCIJ Series B, No. 15; *Treatment of Polish Nations and Others Persons of Polish Origin or Speech in the Danzig Territory*, (1932) PCIJ Series A/B, No. 44.

¹⁴⁸ Schermers and Blokker, *supra* note 25 at 1008.

¹⁴⁹ Art. 105 (1 and 2) reads:

'The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization'.

¹⁵⁰ (1946) 1 UNTS 15 and *corrigendum* 90 UNTS 327.

¹⁵¹ (1947) 33 UNTS 261.

importance in the context of accountability since the imposition of sanctions on the individual(s) responsible for the violation is an essential component of an effective mechanism for accountability. Under the General Convention, UN officials are 'immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity' (Art. V, Sec. 18).

(a) *The waiver of immunity*

The UN can waive its immunity, but 'it is ... understood that no waiver of immunity shall extend to any measure of execution' (Art. II, Sec. 2). The power to waive the immunity is vested in the Secretary General, whereas 'executive directors of semi-independent programmes have no such power'.¹⁵² As far as personal privileges and immunities, these are granted 'in the interests of the United Nations and not for the personal benefit of the individuals themselves'. In respect of the immunities of officials and experts on missions, the Secretary General has 'the right and the duty' to waive their immunity 'in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations' (Art. V, Sec. 20; Art. VI, Sec. 23).¹⁵³

According to some, these provisions refute the thesis that the General Convention is in contradiction with the Charter, and demonstrates that the Convention subscribes to the functional necessity approach.¹⁵⁴ However, clear criteria for the waiver of immunity are set out only for the immunity of officials but not for the immunity for the Organisation. Moreover, under the Convention, there is no adequate remedial mechanisms for all those cases in which the Secretary General wrongly denies the waiver of immunity. In practice, the Secretary General enjoys almost complete discretion in the exercise of this power as his decision to refuse to waive immunity cannot be appealed to another organ by an individual or by an affected state. Such discretion appears incompatible with the fact that, at least as far as the immunity of officials is concerned, the Secretary General has a duty to waive it in certain circumstances. The conduct of the Secretary General can be reviewed only if a request

¹⁵² *UN Jur. YB* (1969) 225.

¹⁵³ The immunity of representatives of members can be waived by the state (Art. IV, Sec. 14).

¹⁵⁴ This is Brower's view. Brower, 'International Immunities: Some Dissident Views on the Role of Municipal Courts', 41 *Virg. J. Int. L.* (2000) 1 at 27. Schermers and Blokker support the functionality principle (*supra* note 25 at 358-360), as do A. Reinisch, *International Organizations Before National Courts*

is put to the ICJ by a competent organ of the UN or of a specialised agency under Article VIII, Secs. 29-30 of the General Convention.¹⁵⁵ In the two cases arising out of a dispute under the General Convention that the ICJ has so far considered,¹⁵⁶ the requests were submitted by the Economic and Social Council. Both cases concerned the immunity of experts on mission, but the question of the exercise of the Secretary General's duty to grant a waiver of immunity in some circumstances has not yet formed the object of an advisory opinion of the Court.

The example of the imposition of collective punishment on the entire population of a refugee camp in Kenya¹⁵⁷ can illustrate how ineffective this procedure would be. The refugees in Kakuma refugee camp had in principle a clear-cut case for bringing a lawsuit against the UNHCR officials who had decided to suspend food distribution.¹⁵⁸ The Secretary General would have been under a duty to waive the immunity of the officials responsible for the decision in order not to impede the course of justice.¹⁵⁹ If, as is likely, he had denied the waiver, his decision could not have been reviewed by the Kenyan courts. The refugees would have had to persuade the Kenyan government to exercise diplomatic protection on their behalf by putting forward a resolution in an international organ to request an advisory opinion of the Court.¹⁶⁰ This situation would have also been sadly ironic: refugees, on whose lack of diplomatic protection from their countries of nationality the regime of international protection is premised, would have had to seek the improbable diplomatic protection of their country of asylum against the acts of their 'international protector'. At any rate, their chances of

(2000), and P. Bekker, *The Legal Position of Intergovernmental Organizations* (1994), but they all seem to understand functionality differently from Brower.

¹⁵⁵ The Convention on the Privileges and Immunities of the Specialised Agencies contains a more detailed regulation of the consequences of the advisory opinion of the ICJ. It allows the affected state to withhold the immunity or privilege that has been abused (Art. 24). Amerasinghe argues that this procedure 'may be adequate to take care of abuse of all kinds' although it is 'likely to be a long drawn-out one' (C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (1996) 403).

¹⁵⁶ *Applicability of Article 6, 22 of the Convention on the Privileges and Immunities of the United Nations* [hereinafter 'Mazilu case'], Advisory Opinion, ICJ Reports (1989) 177; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the UN Commission on Human Rights* [hereinafter 'Cumaraswamy case'], Advisory Opinion, ICJ Reports (1999) 62.

¹⁵⁷ Chapter IV.4.

¹⁵⁸ *Cumaraswamy* opinion, *supra* note 156 at 89, concludes with the rather sibylline *dictum* of the Court that UN officials 'must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations'.

¹⁵⁹ Brower argues persuasively that the waiver of immunity, when granted, covers not only the officials but also the Organisation (Brower, *supra* note 154 at 31-32).

¹⁶⁰ 'A State may exercise diplomatic protection in respect of an injured person who is stateless and/or a refugee when that person is ordinarily a legal resident of the claimant State' (Art. 8, Draft Articles on

success would have been almost inexistent given the role of the Kenyan authorities, if not in this specific episode, in introducing and enforcing the policy of encampment of refugees.¹⁶¹

As for the likely outcome of the opinion of the Court, it would be difficult to foretell since the Court has never been seized with a case that deals with such grave breaches by UN officials. In the *Cumaraswamy* case, one judge did note the Court's reluctance to examine the consistency of the conduct of the Special Rapporteur with the terms of his mandate.¹⁶² That case dealt, at most, with incautious utterances by an expert on mission, and not with violations of human rights, and it can be surmised that such reluctance would not have featured to the same extent in a case involving a human rights violation.

Unchecked powers often lead to abuses, and the almost complete lack of accountability for the exercise of the Secretary General's prerogative to waive immunity can in part explain the manifestly unjust practice that has developed in spite of the requirements of the General Convention. At present, immunity is normally waived when an investigation conducted by OIOS gathers evidence of theft of UN property committed by an official.¹⁶³ OIOS also seeks the prosecution of individuals external to the Organisation who have committed a crime – fraud or theft for the most part – of which the UN has been a victim. In cases of corruption and forgery, the sanction against UN staff is often only a disciplinary one, or consists simply of the dismissal of the officials in question; prosecution by national authorities is seldom sought in such cases.¹⁶⁴ In cases brought by individuals, including former staff, against the UN, there is still enormous reluctance to waive immunity. The UN does not

Diplomatic Protection, in International Law Commission, 'First Report by John R. Dugard', *supra* note 17).

¹⁶¹ Another example that illustrates the limits in the enforcement of the Secretary General's duty to grant an immunity waiver is the lawsuit brought by two Rwandan survivors against the UN. 'The UN Faces Genocide Suit', *The Age*, 10 January 2000; 'Genocide Lawsuit Against the UN', *The Guardian*, 11 January 2000.

¹⁶² *Cumaraswamy*, *supra* note 156 at 121 (diss. op. of Judge Koroma).

¹⁶³ Report of the Office of Internal Oversight Services on the Investigation into Allegations of Theft of Funds by a Staff Member of the United Nations Conference on Trade and Development, UN Doc. A/53/811; Report of the Office of Internal Oversight Services for the Period between 1 July 1997 and 30 June 1998, UN Doc. A/53/428 at paras. 151 ff.; Report 1999-2000, *supra* note 111 at para. 49. OIOS' rules do not specify when an investigation would result in criminal prosecution by national authorities - Report of the Secretary General on the Rules and Procedures to be applied for the investigation functions performed by the Office of Internal Oversight Services, 11 October 2000, UN Doc. A/55/469 at paras. 21-22.

generally waive immunity even for traffic violations, although these are usually insurable.¹⁶⁵

(b) *National judicial practice*

Courts have for the most part upheld the principle that 'under the [U.N.] Convention the United Nations' immunity is absolute, subject only to the organization's express waiver thereof in particular cases', and that, as a result, the distinction between *acta jure gestionis* and *acta jure imperii* does not apply to the immunities of international organisations.¹⁶⁶ There are, however, some exceptions. In particular, the Italian Court of Cassation has maintained that the application of the doctrine of restrictive immunity should be extended to international organisations, and that, as a result, they should not enjoy immunity for acts *jure gestionis*.¹⁶⁷ In the US, even in the cases in which the traditional position has prevailed, courts have often been careful not to exclude, as a matter of principle, the applicability of restrictive immunity to international organisations.¹⁶⁸ There have also been pronouncements contrary to the prevailing trend. In a case, which did not turn out to be precedent-setting, a court in New York held that a driver employed by the UN who had exceeded the speed limit was not entitled to immunity because

To recognize the existence of a general and unrestricted immunity from suit or prosecution on the part of the personnel of the United Nations (...) even though the individual's function has no relation to the importance or the success of the Organization's deliberations, is carrying the principle of immunity completely out of bounds. To establish such a principle would in effect create a large preferred class within our borders who would be immune to punishment on identical facts for which the average American would be

¹⁶⁴ *Id.* (Report 1997-98) at paras. 75 and 143-144.

¹⁶⁵ Schermers and Blokkers, *supra* note 25 at 361.

¹⁶⁶ *Boimah v. UN General Assembly*, 664 F. Supp. 69 at 71; *Ashkir et al. v. United Nations*, Civ. No. 97-2266 (TFH).

¹⁶⁷ *FAO v. Inpdai* (1982) 87 ILR 1, but in *FAO v. Colagrossi*, 101 ILR 386, the Court of Cassation appears to have departed from its own precedents. On the dispute between FAO and Italy, see Reinisch, *supra* note 154 at 131-134. Morgenstern sees the Italian reservation to the General Convention as the starting point of the dispute (F. Morgenstern, *Legal Problems of International Organizations* (1986) 6 ff.).

¹⁶⁸ See *Askir v. Boutros Ghali et al.*, 933 F. Supp. 368, in which the District Court for the Southern District of New York did not find it necessary to pronounce in favour of absolute or restrictive immunity because 'because even if the more limited restrictive immunity doctrine applied, the claims in this case do not arise out of commercial activity by the United Nations'. See also *De Luca v. UN*, 841 F. Supp. 531; *Boimah*, *supra* note 166.

subject to punishment. Any such theory does violence to and is repugnant to the American sense of fairness and justice and flouts the very basic principle of the United Nations itself, which in its preamble to its Charter affirms that it is created to give substance to the principle that the rights of all men and women are equal.¹⁶⁹

In another case, originating from a lawsuit brought by a private company against the Organisation of American States, the distinction between *acta jure gestionis* and *acta jure imperii* was applied by a US Court.¹⁷⁰

In the US, an argument for the restrictive immunity of international organisations could be based on statutory provisions. Under the International Organizations Immunities Act, international organisations are granted ‘the same immunity from suit and every form of judicial process as is enjoyed by foreign governments’;¹⁷¹ it could thus be argued that the exceptions under the Foreign Sovereign Immunities Act¹⁷² to the general jurisdictional immunity of foreign states ought to apply to international organisations too. It might not be too long before a lawsuit against the UN, based on a restrictive approach to immunity, is successfully brought in US courts. Such a case could rely on these statutory provisions, but also on the language of the Charter, and in particular the fact that the Charter excludes immunity for acts that are not necessary for the fulfilment of its purposes, and, *a fortiori*, for acts, such as violations of human rights, that are contrary to the fulfilment of its purposes.

As far as the immunity of officials is concerned, the *Pinochet* case could be used to bring a case against a former UN official for acts such as torture, which, according to the House of Lords, could not be interpreted to fall within the concept of “official” acts for which a former head of State enjoyed immunity.¹⁷³ Even if the question of immunity were to be solved in this manner, another bar to the exercise of jurisdiction by national courts could be the doctrine of non-justiciability since ‘it might be protested that were such arguments to succeed, they would involve a municipal court

¹⁶⁹ *Westchester County on Complaint of Donnelly v. Ranollo*, 67 N.Y.S. 2d 31 at 34.

¹⁷⁰ *Dupree Associates Inc. v. Organization of American States and the General Secretariat of the Organization*, 63 ILR 92.

¹⁷¹ 22 USCS §288a.

¹⁷² 28 USCS §1605.

¹⁷³ *R. v. Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [1999] 2 All ER 97.

in determining a question of UN law (i.e. as to the scope of the purposes of the UN).¹⁷⁴

Courts have been reluctant to lift the immunity of an international organisation on the basis of an implied waiver. In *Mendaro v. World Bank*, the appellant argued that a provision in the Articles of Agreement of the World Bank amounted to an implied waiver of immunity.¹⁷⁵ However, the US Court of Appeals for the District of Columbia Circuit, affirming the decision of the District Court to reject the claim, held that immunity must be 'narrowly read in light of both national and international law governing the immunity of international organizations'.¹⁷⁶

In some cases the plea of immunity was rejected, because it plainly fell outside the scope of the General Convention. For example, in *Kadic v. Karadic*, the defendant's argument that, as an invitee of the UN, he was entitled to immunity under the Headquarters Agreement was dismissed.¹⁷⁷ In another case, *Mushikiwabo et al. v. Barayagwiza*, the plaintiffs sought damages for the defendant's involvement in the genocide in Rwanda and for the key role he allegedly played in the murder of some of their relatives.¹⁷⁸ The defendant maintained that he enjoyed immunity because he was attending a session of the UN when he was served with the summons. The Government of Rwanda sent a note officially to waive immunity, although this was not probably necessary. Neither *Kadic* nor *Mushikiwabo* concerned cases brought directly against either the UN or UN officials. However, Louise Mushikiwabo later attempted to bring a case against the Organisation for its failure to protect the persons, including many of her relatives, who had sought refuge in the Ecole Technique Officielle in Kigali in the early days of the genocide.¹⁷⁹

¹⁷⁴ Wickremasinghe, Verdirame 'Responsibility and Liability for Violations of Human Rights in the Course of UN Field Operations', in C. Scott *Torture as Tort* (2001) 465 at 478. See also Reinisch, *supra* note 154 at 96 ff. and 118 ff.

¹⁷⁵ *Mendaro v. World Bank*, 717 F.2d 610. A comment on *Mendaro* is in Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns', 36 *Virg. J.Int. L.* (1995) 53. For a discussion of sexual harassment cases brought by women employed by international institutions, see H. Charlesworth, C. Chinkin *The Boundaries of International Law: A Feminist Analysis* (2000) 187-189.

¹⁷⁶ *Id.* at 611. Waivers of immunity are traditionally interpreted narrowly in the context of state immunity too, e.g.: *A Company Ltd v. Republic of X*, 87 ILR 412.

¹⁷⁷ *Kadic v. Karadic*, 70 F.3d 232.

¹⁷⁸ *Mushikiwabo et al. v. Barayagwiza*, 94 Civ. 3627 (JSM).

¹⁷⁹ See *supra* note 161, and Chapter II note 188.

Human rights arguments to limit the scope of immunity of international organisations have been used only sporadically, and, so far, unsuccessfully. In *Manderlier v. UN*, the Belgian Civil Tribunal upheld the immunity of the UN, despite the plaintiff's argument that his rights under the Universal Declaration of Human Rights, in particular his right to an effective remedy under Article 8, had been infringed upon.¹⁸⁰ The Court of Appeal in Bruxelles reached the same conclusion but admitted that the fact that there was no court to which the appellant could submit his dispute with the UN 'may be deplored', and 'does not appear to conform to the principles proclaimed in the Universal Declaration of Human Rights'.¹⁸¹ The *Manderlier* decisions, which date back to the 1960s, arose out of a dispute between a Belgian citizen and UN troops in Congo during ONUC. Even if the Belgian courts had accepted Manderlier's arguments, it would have still been impossible to give execution to their judgment because of the UN's absolute immunity from execution.

(c) *The jurisprudence of the German Constitutional Court*

The principle of 'equivalent protection' - developed, as we have seen, by the European Court of Human Rights - as the yardstick for gauging whether immunity results in a violation of human rights has not affirmed itself in national judicial decisions. However, although the European Court did not expressly acknowledge this, the German Constitutional Court is to be credited - or blamed, depending on the point of view - with pioneering some of those arguments.¹⁸² The German Court did not accept the position of the European Court of Justice according to which Community legislation remains valid even if it infringes fundamental rights protected under national constitutions, because, were this not so, the unity and efficacy of Community law would be harmed.¹⁸³ The German Constitutional Court maintained instead that its role as guarantor of the fundamental human rights enshrined in the German Constitution does not stop when functions are transferred to international institutions. On this basis, the German Constitutional Court concluded that it could review the consistency of European legislation with the Bill of Rights in the German

¹⁸⁰ 45 ILR 446 and 69 ILR 139 (respectively first instance and appeal decision). The Universal Declaration is GA Res. 217A (III).

¹⁸¹ 69 ILR 139 at 143.

¹⁸² "*Solange I*", Federal Constitutional Court, (1974) 37 BverfGE 271, [1974] 2 CMLR 540; "*Solange II*", Federal Constitutional Court, (1986) 73 BverfGE 339, [1987] 3 CMLR 225. Weatherill and Beaumont, *supra* note 120 at 443 ff.

¹⁸³ Case 11/70, *Internationale Handelsgesellschaft mBh. v. Einfuhr- and Vorratstelle für Getreide und Futtermittel*, [1972] CMLR 255.

Constitution. In *Solange II*, however, the Court added an important qualification stating that,

so long [“*solange*”] as the European Communities and particularly the case law of the European Court generally ensure an effective protection of fundamental rights as against the sovereign powers of the Community which is to be regarded as substantially similar to the protection required unconditionally by the German Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the German Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community law.¹⁸⁴

With this decision, the Court did not thus renounce its prerogatives, but it simply decided to waive them ‘as long as the Community protection can be equated with that provided under the Grundgesetz’ (Constitution).¹⁸⁵ The German courts’ antagonism toward the supremacy of EC law re-emerged in the 1990s, at first, with a decision of the Constitutional Court on the Maastricht treaty and, later, with the decisions in the banana litigation cases.¹⁸⁶ These judgments have been criticised on various grounds: that they vilify ‘the idea of fundamental rights’ protection’ by transforming it ‘into a tool for the protection of the property rights of special groups’,¹⁸⁷ that they are inspired by a Schmittian and nationalistic conception of law.¹⁸⁸ However, even if its reasoning has suffered from a lack of consistency and its tone, particularly in the *Maastricht* decision, was rather infelicitous, the fundamental concern of the German Constitutional Court remains valid. Far from representing an anachronism, these decisions epitomise the dilemmas faced by national judges entrusted with the

¹⁸⁴ *Solange II*, *supra* note at 227.

¹⁸⁵ Crossland, ‘Three Major Decisions Given by the Bunderverfassungsgericht (Federal Constitutional Court)’, 19 *ELR* (1994) 202 at 205.

¹⁸⁶ *Maastricht* case, Federal Constitutional Court, 89 BVerfGE 155, [1994] 1 CMLR 57 at 79 and 81. On the banana litigation, see Reich ‘Judge-made ‘Europe à la carte’: Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation’ 7 *EJIL* (1996) 103.

¹⁸⁷ See Reich, *supra* note 186 at 110.

¹⁸⁸ Zuleeg, ‘The European Constitution under Constitutional Constraints: The German Scenario’ 22 *ELR* (1997) 19.

protection of fundamental rights when they have to deal with the transfer of powers to international subjects.¹⁸⁹

(d) *National judicial control over de jure administrations*

In *de facto* or *de jure* administration, the checks and balances that are at least present within the legal order of the European Union are not normally in place.. In these circumstances, it is even more difficult for national courts to abstain from exercising their judicial function, especially when fundamental rights are at stake. A decision of the Constitutional Court of Bosnia and Herzegovina exemplifies these problems. A group of members of the Federal Parliament requested a review of the constitutionality of a law enacted by the High Representative.¹⁹⁰ Although the request did not adduce human rights as one of the grounds of unconstitutionality, the decision of the Court is important because, on the one hand, it recognised that ‘the powers of the High Representative... as well as his exercise of those powers are not subject to review by the Constitutional Court’;¹⁹¹ on the other hand, the Court affirmed that in this case the High Representative ‘had intervened in the legal order of Bosnia and Herzegovina substituting himself for the national authorities’ thus acting ‘as an authority of Bosnia and Herzegovina’.¹⁹² The law which he had enacted had to be regarded as a law of Bosnia and Herzegovina, and, as such, it could be subject to review of constitutionality. The Court used the locution ‘functional duality’ to describe certain acts of the High Representative, which are at the same time acts of an international entity and acts the national authorities.¹⁹³ The Court then went on to examine the substance of the request and found that the law in question was not inconsistent with the Constitution.

¹⁸⁹ Courts in other member states of the EU have occasionally been reluctant to accept the supremacy of community law over the national constitutional provisions on fundamental rights, but the German Constitutional Court is the judicial body that has regularly upheld this position. In *Frontini v. Ministro delle Finanze*, Corte Costituzionale, [1974] 2 CMLR 372, the Italian Constitutional Court state that ‘limitations of sovereignty [including the transfer of powers to the EC] cannot go beyond a certain limit and bite into the fundamental rights of the citizens and the fundamental principles of the state structure’ (at 381).

¹⁹⁰ Under Art. VI, 3 of the Constitution, the Constitutional Court of Bosnia and Herzegovina can receive requests submitted, *inter alia*, by one fourth of the members of either chamber of the Parliamentary Assembly. The law-making powers of the High Representative are regulated under Annex 10 of the Dayton Peace Agreement, *supra* note 91.

¹⁹¹ *Request for the evaluation of constitutionality of the Law on State Border Service of Bosnia and Herzegovina*, Case U 9/00 (3 November 2000) at para. 5.

¹⁹² *Ibid.*

¹⁹³ The concept of ‘functional duality’ in this decision of the Constitutional Court of Bosnia is discussed in some detail by Wilde, ‘The Complex Role of the Legal Adviser when International Organizations Administer Territory’, *American Society of International Law – Proceedings of the 95th Meeting* (2001).

As a result of this decision, the constitutionality of the normative acts of the High Representative in Bosnia and Herzegovina can be challenged if such acts are believed to be inconsistent with the Bill of Rights in the Constitution. It is not clear, however, whether constitutional review could also cover other international bodies, or other powers of the same High Representative, and, if so, to what extent. Although it was not perhaps explained in the best possible way, the reasoning of the Court appears very sound: when an international institution behaves like a national authority, then a constitutional court should consider itself entitled to exercise jurisdiction for the purposes of constitutional control. This position is also consistent with the rules on state responsibility on the basis of which ‘the conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law’.¹⁹⁴

The decision of the Constitutional Court of Bosnia and Herzegovina would not have been possible in Kosovo, where there is no local supreme court that can derive its legitimacy from an international agreement and the regulations of the Special Representative take precedence over any other law.¹⁹⁵ One of these regulations concerned the ‘Status, Privileges and Immunities of KFOR and UNMIK and their personnel in Kosovo’.¹⁹⁶ Under this regulation, the Special Representative, various high-ranking officials and others ‘as may be decided from time to time by the Special Representative (...) shall be immune from local jurisdiction in respect of any civil or criminal act performed or committed by them in the territory of Kosovo’ (Sec. 3.2). The regulation also provides that ‘UNMIK personnel, including locally recruited personnel, shall be immune from legal process in respect of words spoken and all acts performed by them in their official capacity’ (Sec. 3.3). Most controversially, the regulation declares that ‘UNMIK and KFOR contractors, their employees and sub-contractors shall not be subject to local laws or regulations in matters relating to the terms and conditions of their contracts’ (Sec. 4.1). Immunity from legal process in respect of ‘their official activities’ is granted to ‘KFOR contractors, their employees and sub-contractors’. Although the regulations reproduces the provision of the

¹⁹⁴ Art. 5, Draft Articles on State Responsibility provisionally adopted by the Drafting Committee of the International Law Commission on Second Reading (2000), UN Doc. A/CN.4/L.600. See Chapter II.6.

¹⁹⁵ See Chapter IV.2(c).

General Convention on the 'right and duty' of the Secretary General to waive immunity when it would impede the course of justice, its conditions remain overall draconian. However, although Kosovo courts are barred from exercising jurisdiction over UNMIK, the Ombudsperson, as discussed,¹⁹⁷ can receive complaints on abuse of authority by the interim civil administration.

(e) *National judicial decisions on peacekeeping operations*

National courts have exercised jurisdiction vis-à-vis members of the armed forces who served as peacekeepers abroad. In these cases, the question of immunity has not been raised because no one doubts that members of the armed forces remain subject to the jurisdiction of their country of origin while they serve as peacekeepers, although they have immunity from the jurisdiction of the state in which they are sent on mission. Canadian courts have heard cases concerning the conduct of Canadian members of the armed forces in the course of the UN peacekeeping mission in Haiti¹⁹⁸ and in Somalia.¹⁹⁹ In Italy and Belgium, the conduct of troops in Somalia was the object of mainly administrative enquiries, although some cases also ended up in court. In one case concerning two members of the Belgian contingent in Somalia who had been accused of threatening and beating up Somali minors at a checkpoint, the accused were acquitted by the Military Court in Brussels (Cour militaire de Bruxelles) on the ground that the Geneva Conventions and the Protocols did not apply to the conflict in Somalia.²⁰⁰ Despite patently flawed decisions such as this one, the exercise of jurisdiction by national courts, in particular by military courts, can constitute a mechanism for accountability that is not available in other UN operations. An important limitation, however, is that this mechanism has not so far offered remedies to the victims, and has mainly acted as a sanction for the perpetrator, as well as, presumably, as a deterrent. Furthermore, in these cases national courts cannot take cognisance of the level of institutional responsibility. Command responsibility would

¹⁹⁶ UNMIK Regulation 2000/47. See also UNMIK Regulation 2000/44 on the privileges and immunities of the World Bank and its officials.

¹⁹⁷ Chapter V.4(d).

¹⁹⁸ R. c. *Lauzon*, 8 Admin. LR. (3d) 33.

¹⁹⁹ R. v. *Brocklebank*, Court Martial Appeal Court (1996) 134 DLR. (4th) 377; R. v. *Seward*, Court Martial Appeal Court (1997) 45 Admin. LR (2d) 148.

²⁰⁰ Cour militaire, Bruxelles, 17 décembre 1997, *Journal des Tribunaux* (4 avril 1998) 286. On the cases in Italy, see Lupi, *supra* note 34.

also be unattended, when such responsibility appertains to members of the armed forces of another state, or to a UN official.²⁰¹

(f) *What role for national courts?*

Brower's argument that the current system already adheres 'to the functional necessity doctrine, but gives international officials the primary authority for making immunity determinations'²⁰² is not satisfactory, since we have seen that the UN has not granted a waiver even in cases in which it was plainly under an obligation to do so. Brower also submits that 'the expansion of municipal court jurisdiction is unlikely to make international organizations significantly more accountable because international law already requires international organizations to minimize their reliance on immunity and to provide claimants with alternatives to municipal court litigation'.²⁰³ Again, this position seems far removed from the reality of the power of international institutions. There can be little doubt that impartial and accessible adjudication could only be to the benefit of justice.

Other arguments against a greater involvement of national courts are more difficult to brush aside. Cases such as *Cumaraswamy* and *Mazilu* certainly bespeak the importance of maintaining a regime of immunity for the UN.²⁰⁴ The fact that, notwithstanding the provisions on immunity, UN personnel are still arrested and attacked is another indication that immunity serves an important function.²⁰⁵ International organisations also need to be protected from other types of governmental interference, as the screening of US employees in the UN by their government vividly demonstrates.²⁰⁶ In this sense, it is difficult to disagree with the European Court of Human Rights when it

²⁰¹ The International Criminal Court, once in force, could solve many of these problems.

²⁰² Brower, *supra* note 154 at 8.

²⁰³ *Ibid.*

²⁰⁴ See *supra* note 156. The *Mazilu* case concerned a Romanian member of the Sub-Commission on Prevention of Discrimination and Protection of Minorities who had been requested to prepare a report on human rights and youth. Mr Mazilu later complained that the Romanian Government forced him to retire, and prevented him from submitting his report or otherwise participating in the works of the Sub-Commission. The *Cumaraswamy* case, on the other hand, arose from an interview given to the press by the Special Rapporteur on the Independence of Judges and Lawyers, in which he commented on commercial litigation in Malaysian courts. Two Malaysian companies argued that the article was defamatory and filed a lawsuit for damages. In both cases the position of the UN was supported by the ICJ. It is clear, however, that, while the *Mazilu* case had to do with the unacceptable interference of a government with an expert on mission, the *Cumaraswamy* case dealt with the third parties who considered themselves aggrieved by the words of the Special Rapporteur. The conclusion of the Court was correct in this case, too, since it would have been excessive to qualify his statements as 'unofficial' simply by virtue of their being rather incautious or inopportune.

²⁰⁵ Brower, *supra* note 154 at 38 ff.

states that ‘the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments’.²⁰⁷

A difficult balance needs to be struck between the needs of the Organisation and the rights of individuals who are directly affected by the UN. The shield of absolute immunity is one that the UN cannot keep for too long, particularly if it intends to maintain and increase its operational role. Courts have generally treaded cautiously and have avoided a blanket application of restrictive immunity. Absolute immunity, however, jars stridently with a world in which judicialisation and legalisation grow exponentially, and in which even former head of states can stand trial. A reformulation of the law of immunity of international institutions is called for. At the very least, in cases where the immunity is not waived, the individuals who have brought the case against the UN should be offered to opportunity to seek a review of the decision of the Secretary General by an impartial organ to which they have easy access. The risk of not intervening promptly is that national courts might decide to take the situation in their own hands leading to the development of an erratic case-law.

Clear rules governing the immunity in complex operations such as Bosnia are particularly needed. The Constitutional Court of Bosnia and Herzegovina was right in deciding that it can strike a law enacted by the Special Representative as unconstitutional. The promotion of the rule of law through development of local institutions, including courts, is one of the objectives of the “international community” in Bosnia and Herzegovina, and indeed in operations of post-conflict peace-building in general.²⁰⁸ How can the rule of law be credibly promoted if its international promoters are not prepared to subject themselves to it? In the future, the mandate of these UN operations could spell out which acts of the UN would not be immune from the jurisdiction of the courts, identifying at least cases in which immunity would contradict the very purpose of the mission.

²⁰⁶ See Chapter I.6.

²⁰⁷ *Beer and Regan*, *supra* note 140 at para. 53.

²⁰⁸ *Supplement to An Agenda for Peace*, *supra* note 59 at paras. 47 ff.

V.7. Conclusion

Existing mechanisms for accountability do not offer a combination of adequate sanctions and remedies when fundamental rights have been directly violated by an act of the UN. While administrative mechanisms are those that can better protect the public interest of ensuring that the future conduct of international institutions is modified, they are not easily accessible to the victims who often live in refugee camps or in countries ridden with civil strife and conflict. Moreover, in current practice administrative reports have seldom resulted in either sanctions on the officials responsible for the violative conduct, or in an indication of remedies to the aggrieved individuals. The concept of accountability that still underpins mechanisms of internal oversight is limited to financial probity and transparency. This concept needs to be expanded, and a rights-based approach must be developed for internal mechanisms to be able to display their full potential as instruments for the promotion of institutional accountability. As regards political organs, there is still significant room within the boundaries of existing international institutional law for expanding their control function. The General Assembly could monitor the activities of the specialised programmes (UNHCR, WFP, UNDP), whilst the Economic and Social Council could take the lead in monitoring the activities of the specialised agencies.

The exercise of diplomatic protection by states of nationality vis-à-vis the international organisation is another mechanism that should be explored further, and the use of which should be encouraged when appropriate. It must also be noted that in practice, however, states are not likely to use the often significant resources needed to mount a legal challenge against an international institution on behalf of certain categories of individuals, most notably refugees. As for NGOs, they also have a role to play, but it is important to deconstruct the civil society rhetoric, and to analyse the power relations between NGOs, on the one hand, and international institutions and the state, on the other, that obtain in each specific situation. In some cases, mainly in the context of the provision of humanitarian assistance, NGOs depend on international institutions for funding, and undertake contractual obligations with them. This inevitably reduces their ability, and willingness “to stand up to” an international organisation that commits wrongful acts. On the other hand, when NGOs maintain their funding and operational independence, one can assume that they will be more

prepared to advocate in favour of individuals or groups aggrieved by the acts of the UN.

The role of the adjudication in national and international courts needs to be expanded. No other mechanism can substitute a judicial or arbitral remedy in terms of the independence and impartiality of the process and of the perception of justice that it creates, as was implicitly recognised by the ICJ in the *Effect of Awards* case.²⁰⁹ Existing judicial bodies, the ICJ in particular, can play an important role, but at present individuals cannot bring a lawsuit against an international organisation in the Court, and individual states cannot seek the advisory opinion of the Court on matters of institutional law. At the very least the advisory jurisdiction of the Court should be expanded so that the Court could be seized of cases concerning institutional duties and compliance.

Accessibility to potential victims is an essential requirement for an international judicial body to be effective. *Ad hoc* field-based judicial and semi-judicial organs could be instituted as part of multifunctional operations, especially administrations of territory. In this respect, the ombudsperson recently established in Kosovo, despite his/her weak powers of enforcement, represents an interesting novelty because he/she has power to investigate abuses committed by the interim civil administration. When national courts are operative and offer guarantees of impartiality and lack of prejudice, they could also become involved. For this to happen in a manner that will not damage the independence of the UN, it would be important that a reformulation of the immunities and privileges of the Organisation is proposed by the UN itself abandoning its anachronistic claim to absolute immunity.

²⁰⁹ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports (1954) 47 at 57.

Conclusions

The transfer of power from states to other actors, such as multinational corporations, non-governmental organisations (NGOs) and international organisations, is an 'essential aspect of globalisation.'¹ The consolidation of a diffuse form of power - vested in non-state actors and in intergovernmental entities - may conceal the emergence of a new Leviathan, bigger and perhaps more powerful than the state, and also less visible and more mercurial than the state. While it is primarily for sociologists and political scientists to conduct innovative analyses of power in this new globalised environment, it is for international lawyers to examine the legal implications of this phenomenon, identifying in particular the international obligations incumbent on non-state players and ways of ensuring their compliance with international law.

By focusing on a specific aspect of this 'power shift' from states to other international actors - the legal obligations of the United Nations (UN) in the sphere of human rights and its accountability for breaching them - this thesis has also called into question the disassociation of the pre-dominant international legal paradigm - which views states as the primary, if not the exclusive, duty-holders of international human rights, refugee and humanitarian law - from an international reality in which the statist 'absolutes of the Westfalian system are all dissolving'.² It has been shown that human rights can be violated in the course of UN operations and it has been argued that international rules, albeit applicable in principle to the UN, often cannot be enforced in practice.

Although I examined some of the worst failures of the UN, I did not purport either to demonise this Organisation, or, worse, to advocate its abolition, or even to give ammunition to some of its self-interested enemies. While it is probably time to shatter the common perception that 'international institutions, and international culture [are] necessarily emancipatory',³ it cannot be forgotten that international institutions are key players in the management of the process of socio-economic globalisation and can

¹ 'Until recently, international organisations were institutions of, by and for nation-states. Now they are building constituencies of their own and, through NGOs, establishing direct connections to the peoples of the world' (Mathews, 'Power Shift', 76 *Foreign Affairs* (1997) 50).

² *Ibid.*

³ Orford, 'Locating the International: Military and Monetary Interventions after the Cold War', 38 *Harv. Int. L. J.* (1997) 443 at 444.

become agents of social change and progress: refugees *need* an international organisation that makes up for the lack of diplomatic protection of their state of nationality or origin, and that advocates their rights in a principled and efficient manner; and humanitarian assistance *can* secure the survival of millions of persons affected by armed conflict or natural disaster. International institutions, however, cannot escape the rule of law, and in particular respect for the basic code of humanity enshrined in human rights law. Chapter V has shown that within the existing normative and institutional framework room for change is limited and the applicability of international human rights law to the UN is destined to remain inconsequential. Revitalising existing procedures and encouraging the development of a progressive practice are only short-term answers; in the longer term, the introduction of new procedures might be inevitable. Furthermore, there are areas of substantive law that still await clarification, chiefly the law of institutional responsibility, on which the efforts of the International Law Commission should soon be directed. The application by analogy of the rules on state responsibility has limits, and, in some cases, does not offer plausible solutions to questions of institutional responsibility.

It has also been suggested in chapter V that it is time to review the UN's anachronistic claim to absolute immunity. National courts should be allowed to exercise jurisdiction vis-à-vis the UN at least in *de jure* administrations. The waiver of immunity must be re-examined and an accessible and impartial procedure needs to be put in place to ensure that the duty of the Secretary General to waive immunity in certain circumstances can actually be enforced.

A challenge for international lawyers is to embark upon studies of UN practice that are not confined to the practice of the political organs, since, as chapter III in particular has illustrated, the real practice of the Organisation might differ substantially from official practice. If the rules and the machinery for accountability are to have an impact, it is important that international lawyers, on whom the task of interpreting rules and devising new procedures will fall, examine institutional practice closely.

The struggle for the accountability of the UN⁴ and of other international institutions is only at its beginning. It will need a concerted effort of academics and practitioners to succeed, let alone the political will to bring about far-reaching changes. It would be unimaginably damaging for many individuals the world over, as well as for multilateralism itself, if international institutions, as they are entrusted with ever more powers, were to remain 'unbound'.

⁴ The expression is taken from J. A. Fox, and L. D. Brown (eds.) *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements* (1998).

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