excellence not only for its own sake, but for the sake of illumination, in the belief that in knowledge and understanding lies the path to a better world. He will be remembered as the nicest of persons, whose wisdom and gentleness touched all who were privileged to know and work with him.

I remember Jacobson for his quiet determination and uncanny ability to make complex situations easier to manage. As he embarked on what turned out to be his last journey in August (returning home from a workshop cosponsored by the ASIL and the Academic Council on the United Nations System), we stood for a moment in the glorious sunshine outside the departure terminal of Windhoek Airport in Namibia. He reflected on what an interesting place this new African country must be and what a pity it was that he did not have more time to explore it.

Many others will have personal remembrances of Harold Jacobson. We mourn his loss, but we are inspired by his life and work to foster collaboration, to continue exploration, and to pursue a passion for the discipline, honesty, and knowledge that contribute to the advancement of humankind. As we face the questions presented by the attacks of September 11, 2001, on New York and Washington, we will need his kind of gentle wisdom.

CHARLOTTE KU

DEVELOPING HUMAN RIGHTS AND HUMANITARIAN LAW ACCOUNTABILITY OF THE SECURITY COUNCIL FOR THE IMPOSITION OF ECONOMIC SANCTIONS

The end of the Cold War has led the United Nations Security Council to intensify its use of economic sanctions. The generally accepted purpose and emphasis of such sanctions lies in modifying behavior, not in punishment.[1] However, their increased use has also brought to light various shortcomings and problems. Apart from the decades-old debate on their effectiveness, which depends, of course, on such factors as the policy goals set for sanctions, the criteria for measuring their success, the economic development of the target state, and the level of its economic relations with others,[2] a few facts are relatively certain.

Thus, economic sanctions "theory" maintains that economic pressure on civilians will translate into pressure on the government for change, but the targeted leaders, sometimes expressly intended to be ousted by their outraged peoples, have managed to continue pursuing their policies and to stay in power. Part of the reason for this effect derives from the leaders' ability to "retranslate" the message of sanctions into punishment and retribution against the country, which enhances popular support for the regime in "rally round the flag" fashion.[3]

Further, sanctions have unintentionally contributed to the emergence of black markets, creating huge profit-making opportunities for ruling elites and their collaborators.[4] Worst of all, economic sanctions tend to hit the wrong targets; instead of the regime, the population at large and in particular the weakest in society become the true victims.[5] A par-

[1] SUPPLEMENT TO AN AGENDA FOR PEACE, UN Doc. A/50/60–S/1995/1, para. 66 (1995).

[2] There is a vast literature on these issues. *See, e.g.,* MARGARET P. DOXEY, INTERNATIONAL SANCTIONS IN CONTEMPORARY PERSPECTIVE (2d ed. 1996); DANIEL W. DREZNER, THE SANCTIONS PARADOX: ECONOMIC STATECRAFT AND INTERNATIONAL RELATIONS (1999); GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT, & KIMBERLY ANN ELLIOTT, ECONOMIC SANCTIONS RECONSIDERED (2d ed. 1990).

[3] SUPPLEMENT TO AN AGENDA FOR PEACE, *supra* note 1, para. 70.

[4] *See* MILLENNIUM REPORT OF THE SECRETARY-GENERAL OF THE UNITED NATIONS, "WE THE PEOPLES": THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY at 50, UN Sales No. 00.I.16 (2000).

[5] Nico Schrijver, *The Use of Economic Sanctions by the UN Security Council: An International Law Perspective, in* INTERNATIONAL ECONOMIC LAW AND ARMED CONFLICT 123, 156 (Harry H. G. Post ed., 1994).

ticularly irritating consequence of the use of nonmilitary coercive measures like economic sanctions—as opposed to traditional means of military force, which are specifically targeted at soldiers—is that they almost exclusively affect the civilian population. These unintended negative consequences of economic sanctions have stimulated the quest for "smart" sanctions, more targeted and selective forms of economic coercion.[6]

In some cases the maintenance of economic sanctions has resulted in outright humanitarian disaster. That the sanctions against Iraq had such an effect[7] has been recognized not only by various health scientists, human rights activists, and nongovernmental organizations (NGOs),[8] but even by some UN institutions.[9] Thus, criticism concerning the effect of economic sanctions is no longer limited to NGOs and humanitarian organizations. The UN Human Rights Commission through its various sub-commissions has equally voiced concern about the adverse consequences of economic sanctions on the enjoyment of human rights,[10] as have some of the UN treaty-monitoring institutions such as the Committee on Economic, Social and Cultural Rights.[11] The Secretary-General himself, in his *Supplement to an Agenda for Peace*, called economic sanctions a "blunt instrument"[12] and demanded, inter alia, that more effective preimposition impact assessment be devised, as well as enhanced instruments for providing humanitarian assistance to vulnerable groups.[13] Some scholars have even spoken of an "outright human rights paradox," i.e., that since the end of the Cold War the cause for human rights has increasingly become the reason for the imposition of UN sanctions, while the United Nations—in adopting such sanctions—more and more disregards these same human rights principles.[14]

This increasing degree of critical self-awareness of the United Nations has itself resulted from an interesting political process. At first, the General Assembly took the lead in passing resolutions questioning unilateral economic sanctions[15] such as the United States–imposed

[6] The so-called Interlaken Process, named after two seminars held in Interlaken, Switzerland, on March 17–19, 1998, and March 29–31, 1999, and various other seminars, conferences, and research projects have focused on targeted economic, in particular, financial sanctions. Use of smart sanctions was endorsed by the Secretary-General. MILLENNIUM REPORT OF THE SECRETARY-GENERAL OF THE UNITED NATIONS, *supra* note 4, at 49; *see* George A. Lopez & David Cortright, *Financial Sanctions: The Key to a 'Smart' Sanctions Strategy*, 72 DIE FRIEDENS-WARTE 327 (1997).

[7] *See, e.g.*, ANTHONY H. CORDESMAN, THE IRAQ CRISIS: BACKGROUND DATA (1998); David Cortright & George A. Lopez, *Are Sanctions Just? The Problematic Case of Iraq*, J. INT'L AFF., Spring 1999, at 735; Alan Dowty, *Sanctioning Iraq: The Limits of the New World Order*, WASH. Q., Summer 1994, at 179; Eric Hoskins, *The Humanitarian Impacts of Economic Sanctions and War in Iraq, in* POLITICAL GAIN AND CIVILIAN PAIN 91 (Thomas G. Weiss ed., 1997).

[8] Alberto Ascherio, et al., *Effect of the Gulf War on Infant and Child Mortality in Iraq*, 327 NEW ENG. J. MED. 931 (1992); Elias Davidsson, *The Economic Sanctions Against the People of Iraq: Consequences and Legal Findings*, *at* <http://www.juscogens.org>, <http://www.lancs.ac.uk/ug/greenrd/project/elias.htm> (visited May 30, 2001).

[9] FOOD AND AGRICULTURE ORGANIZATION, EVALUATION OF FOOD AND NUTRITION SITUATION IN IRAQ (1995); Report to the Secretary-General on Humanitarian Needs in Kuwait and Iraq in the Immediate Post-Crisis Environment, UN Doc. S/2236 (1991); WHO/UNICEF TEAM REPORT: A VISIT TO IRAQ (World Health Organization & United Nations Children's Fund eds., 1991).

[10] Sub-Commission on the Promotion and Protection of Human Rights, The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights, UN Doc. E/CN.4/Sub.2/2000/33, para. 6 [hereinafter Working Paper].

[11] Committee on Economic, Social and Cultural Rights, General Comment 8: The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights, UN Doc. E/C.12/1997/8; UN Committee on Economic, Social and Cultural Rights, General Comment 14: The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4.

[12] SUPPLEMENT TO AN AGENDA FOR PEACE, *supra* note 1, para. 70.

[13] *Id.*, para. 75.

[14] Hans Köchler, *Ethische Aspekte der Sanktionen im Völkerrecht: Die Praxis der Sanktionspolitik und die Menschenrechte, in* NEUE WEGE DER DEMOKRATIE 109, 119 (Hans Köchler ed., 1998); Joy K. Fausey, Comment, *Does the United Nations' Use of Collective Sanctions to Protect Human Rights Violate Its Own Human Rights Standards?* 10 CONN. J. INT'L L. 193 (1994); *see also* 26th International Conference of the Red Cross & Red Crescent, *The Humanitarian Consequences of Economic Sanctions* (Sept. 15, 1995) (stating that the imposition of sanctions can result in a "contradiction" by causing threats to peace or violations of human rights while intending the opposite), *at* <http://www.icrc.org> [hereinafter *Red Cross Statement*].

[15] Since 1989 the General Assembly has passed resolutions entitled "Unilateral Coercive Economic Measures." GA Res. 44/215 (Dec. 22, 1989), 46/210 (Dec. 20, 1991), 48/168 (Dec. 21, 1993), 50/96 (Dec. 20, 1995), 52/181 (Dec. 18, 1997), 54/200 (Jan. 20, 2000).

Cuba embargo,[16] and in particular their extraterritorial effects; meanwhile, however, various UN bodies have become rather outspoken in criticizing multilateral sanctions imposed by the Security Council.[17] This trend culminated most recently in a working paper prepared for the Sub-Commission on the Promotion and Protection of Human Rights that qualified the UN sanctions regime against Iraq as "unequivocally illegal under existing international humanitarian law and human rights law."[18]

Such findings are based not only on a factual assessment of the sanctions, but also on the legal requirement that the Security Council is bound to comply with international humanitarian law and human rights law. This latter aspect is at least implicitly assumed, and sometimes even more or less explicitly suggested, in the above-mentioned reports. Together with the concomitant issue of the possibility of remedies for individuals hurt by such sanctions, the question of the Council's legal obligation forms the central issue of this discussion. At the same time, it should be noted that the debate about the human rights conformity of Security Council sanctions is not an isolated incident of public criticism of UN action but, rather, an important aspect of a broader and increasingly important debate on the accountability of international organizations.[19]

I. THE OBLIGATION OF THE SECURITY COUNCIL TO RESPECT HUMAN RIGHTS AND HUMANITARIAN LAW IN ADOPTING ECONOMIC SANCTIONS

Remarkably, most commentators, with very few exceptions,[20] simply assume that the Security Council is obligated to respect human rights or humanitarian law rules when designing economic sanctions, and do not analyze the origin, scope, and existence of the obligation in any detail.[21]

Since 1996 the General Assembly has also passed resolutions entitled "Human Rights and Unilateral Coercive Measures," rejecting, inter alia, "unilateral coercive measures with all their extraterritorial effects as tools for political or economic pressure against any country, in particular against developing countries, because of their negative effects on the realization of all the human rights of vast sectors of their populations, in particular children, women and the elderly." GA Res. 51/103 (Dec. 12, 1996), 52/120 (Dec. 12, 1997), 53/141 (Dec. 9, 1998), 54/172 (Dec. 17, 1999).

[16] The General Assembly has passed resolutions entitled "Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba" since 1992. GA Res. 47/19 (Nov. 24, 1992), 48/16 (Nov. 3, 1993), 49/9 (Oct. 26, 1994), 50/10 (Nov. 2, 1995), 51/17 (Nov. 12, 1996), 52/10 (Nov. 5, 1997), 53/4 (Oct. 22, 1998), 54/21 (Nov. 18, 1999). These resolutions express concern, inter alia, "about the adverse effects of such measures on the Cuban people."

[17] In August 2000, the Sub-Commission on the Promotion and Protection of Human Rights appealed to the Human Rights Commission

> to recommend . . . to the Security Council that, as a first step, it alleviate sanctions regimes so as to eliminate their impact on the civilian population by permitting the import of civilian goods, in particular to ensure access to food and medical and pharmaceutical supplies and other products vital to the health of the population in all cases.

Sub-Comm'n Res. 2000/1, Human Rights and Humanitarian Consequences of Sanctions, Including Embargoes, UN Doc. E/CN.4/Sub.2/RES/2000/1, op. para. 1.

[18] Working Paper, *supra* note 10, para. 71.

[19] *Exploring the Evolution of Purposes, Methods and Legitimacy: Accountability of Intergovernmental Organizations,* 94 ASIL PROC. 204 (2000); *The Accountability of International Organizations to Non-State Actors,* 92 ASIL PROC. 359 (1998). The International Law Association (ILA) recently established a Committee on Accountability of International Organisations, which was officially convened for the first time at the 68th ILA Conference in Taipei in 1998. 68 ILA, CONFERENCE REPORT 584 (1998); *see also* 69 ILA, CONFERENCE REPORT 875 (2000).

[20] *See* Dorothee Starck, Die Rechtmäßigkeit von UNO-Wirtschaftssanktionen in Anbetracht ihrer Auswirkungen auf die Zivilbevölkerung (2000), a recent German dissertation that appeared after this paper was written, and thus could scarcely be taken into account.

[21] Hans-Peter Gasser, *Collective Economic Sanctions and International Humanitarian Law: An Enforcement Measure Under the United Nations Charter and the Right of Civilians to Immunity: An Unavoidable Clash of Policy Goals?* 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZaöRV] 871, 880 (1996); René Provost, *Starvation as a Weapon: Legal Implications of the United Nations Food Blockade Against Iraq and Kuwait,* 30 COLUM. J. TRANSNAT'L L. 577, 616 (1992); W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes,* 9 EUR. J. INT'L L. 86 (1998); Anna Segall, *Economic Sanctions: Legal and Policy Constraints,* 81 INT'L REV. RED CROSS 763, 764 (1999); Felicia Swindells, Note, *UN Sanctions in Haiti: A Contradiction Under Articles 41 and 55 of the UN Charter,* 20 FORDHAM INT'L L.J. 1878, 1960 (1997).

Public International Law Limits on Security Council Measures

The first point to be made is that international organizations in general, and the United Nations in particular, are not parties to the 1949 Geneva Conventions (or the 1977 Additional Protocols) or to any human rights treaties.[22] Thus, they are not bound by any humanitarian law or human rights obligations as a matter of treaty law.

Nevertheless, there may be convincing reasons why it is incumbent upon the United Nations and therefore also upon one of its main organs, the Security Council (including its subsidiary bodies established to administer UN sanctions regimes, the so-called sanctions committees),[23] to respect the rules of humanitarian and human rights law. Indeed, one finds it surprising that this very basic question has not been discussed more frequently or thoroughly before. The increased activity of the Security Council since 1990 has spurred an intensified debate on possible limitations on the Council when it acts to maintain or restore international peace and security.[24]

Although not frequently addressed, the question whether international organizations must observe conventional rules when they are not parties to the treaties containing them has gained prominence in two sets of circumstances: the deployment of UN forces and the Geneva Conventions,[25] and the activities of European Community (EC) organs and the European Convention on Human Rights (European Convention).[26] In the first case, the question of observance of humanitarian law has arisen when UN peacekeepers have become involved in combat action that harms members of other forces or third parties. In the second context, most cases have resulted from the investigative enforcement powers of the EC Commission under European competition law, where fundamental (mainly procedural)

[22] While the Red Cross institutions have repeatedly called for the formal adherence of the United Nations to the Geneva law, the official UN view has always been that

> the United Nations is not substantively in a position to become a party to the 1949 Conventions, which contain many obligations that can only be discharged by the exercise of juridical and administrative powers which the Organization does not possess, such as the authority to exercise criminal jurisdiction over members of the Forces, or administrative competence relating to territorial sovereignty. Thus the United Nations is unable to fulfil obligations which for their execution require the exercise of powers not granted to the Organization, and therefore cannot accede to the Conventions.

Legal Opinion of the Secretariat of the United Nations, Question of the Possible Accession of Intergovernmental Organizations to the Geneva Conventions for the Protection of War Victims, 1972 UN JURID. Y.B. 153, para. 3.

In 1999, however, the Secretary-General unilaterally promulgated "fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control." Bulletin on the Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13 (1999), *reprinted in* 81 INT'L REV. RED CROSS 812 (1999), 38 ILM 1656 (1999). *See generally* Daphna Shraga, *UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage*, 94 AJIL 406 (2000).

[23] *See* PAUL CONLON, UNITED NATIONS SANCTIONS MANAGEMENT: A CASE STUDY OF THE IRAQ SANCTIONS COMMITTEE, 1990–1994 (2000); Paul Conlon, *Lessons from Iraq: The Functions of the Iraq Sanctions Committee as a Source of Sanctions Implementation Authority and Practice*, 35 VA. J. INT'L L. 633 (1994/95); Hans-Peter Kaul, *Die Sanktionsausschüsse des Sicherheitsrats*, 44 VEREINTE NATIONEN 96 (1996); Martti Koskenniemi, *Le Comité des sanctions (créé par la résolution 661 (1990) du Conseil de sécurité)*, 1991 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 121; Michael P. Scharf & Joshua L. Dorosin, *Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee*, 19 BROOKLYN J. INT'L L. 771 (1993).

[24] See the literature cited *infra* in note 112.

[25] *See generally* D. W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY OF UNITED NATIONS PRACTICE (1964); MOSHE HIRSCH, THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES 31–38 (1995); FINN SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR (1966). See also the early discussion in Report of Committee on Study of Legal Problems of the United Nations, *Should the Law of War Apply to United Nations Enforcement Action?* 46 ASIL PROC. 216 (1952); and the Resolution, Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in Which United Nations Forces May Be Engaged, [1971] 2 INSTITUT DE DROIT INTERNATIONAL, ANNUAIRE 465.

[26] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 221 [hereinafter ECHR]. *See generally* ANDREW CLAPHAM, HUMAN RIGHTS AND THE EUROPEAN COMMUNITY: A CRITICAL OVERVIEW (1991); EUROPEAN UNION: THE HUMAN RIGHTS CHALLENGE (Antonio Cassese, Andrew Clapham, & Joseph Weiler eds., 1991); THE EU AND HUMAN RIGHTS (Philip Alston ed., 1999); E. A. Alkema, *The EC and the European Convention of Human Rights—Immunity and Impunity for the Community?* 16 COMMON MKT. L. REV. 501 (1979).

rights of private individuals and business firms may have been infringed,[27] and from the legislative powers of the Community institutions whose exercise may also encroach upon individual rights.[28] On the one hand, the possible duty of the United Nations to respect humanitarian law is mainly based on the argument that the rules of the Geneva Conventions are generally declaratory of customary international law, which in turn directly binds the Organization; and, alternatively, that the United Nations has unilaterally agreed to respect these rules by referring to them in its force regulations and in some of the agreements with participating states. On the other hand, the European Court of Justice elaborated upon the idea that the human rights guarantees of the European Convention are basically an expression of the common constitutional traditions of the EC member states and thus are binding on the EC organs as general principles of law.[29]

In asking whether there are any specific humanitarian and/or human rights limits to the exercise of the Security Council's power to impose economic sanctions, one has to focus on whether—in the absence of any treaty obligations—general international law (custom or general principles) binds the United Nations and thus one of its main organs, the Security Council. To put this question into perspective, consider the apparently widespread acceptance of the proposition that international organizations are largely bound by general international law.[30] While the United Nations is certainly an international organization, its special status and responsibilities, coupled with the specific functions and powers conferred on it by the Charter, have cast doubt on whether this proposition also holds true for the Organization itself.[31]

Does the Security Council enjoy unfettered discretion as a political organ? The most prominent theory, which "liberates" the Security Council from any legal constraints, is based on the argument that the Council, as the main "executive" organ of the United Nations, was deliberately exempted from legal limits when fulfilling its major task of securing world peace and security. According to this view, that exemption "conform[s] with the general tendency which prevailed in drafting the Charter; the predominance of the political over the legal approach."[32] This approach maintains that its peace-preserving and peace-restoring function can be carried out best when the Council freely decides if, when, against whom, and how to react to threats to and breaches of world peace and security.[33] This consideration is reinforced by the fact that the Security Council is not a "law enforcement" organ. The UN Charter conceives of the Security Council's powers and tasks as those of a political organ enjoying a wide margin of discretion regarding how "to maintain or restore international peace and

[27] *See, e.g.,* Walter B. J. van Overbeek, *The Right to Remain Silent in Competition Investigations*: *The* Funcke *Decision of the Court of Human Rights Makes Revision of the ECJ's Case Law Necessary,* 15 EUR. COMPETITION L. REV. 127 (1994).

[28] See, for example, the Community landmark cases of Nold v. Commission, Case 4/73, 1974 ECR 491, and Hauer v. Land Rheinland-Pfalz, Case 44/79, 1979 ECR 3727, where applicants claimed that their fundamental rights had been violated by Community legislation.

[29] See also the "codification" of this judicial approach in Article 6(2) (ex-Art. F(2)) of the TREATY ON EUROPEAN UNION, Feb. 7, 1992, 1992 O.J. (C 224) 1, *as amended by* TREATY OF AMSTERDAM, Oct. 2, 1997, 1997 O.J. (C 340) 1: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

[30] *Cf.* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §223 (1987) (stating: "Subject to the international agreement creating it, an international organization has . . . (b) the rights and duties created by international law or agreement.") [hereinafter RESTATEMENT]; *see also* D. W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 366 (4th ed. 1982); PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC 143 (4th ed. 1998); HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW 824 (3d rev. ed. 1995). See, however, the more cautious approach of Albert Bleckmann, *Zur Verbindlichkeit des allgemeinen Völkerrechts für internationale Organisationen,* 37 ZAÖRV 107 (1977).

[31] *See* Gabriel H. Oosthuizen, *Playing the Devil's Advocate: The United Nations Security Council Is Unbound by Law,* 12 LEIDEN J. INT'L L. 549 (1999).

[32] HANS KELSEN, THE LAW OF THE UNITED NATIONS 735 (1951); *see also* CLYDE EAGLETON, INTERNATIONAL GOVERNMENT 297 (3d ed. 1957) (stating that the "United Nations is not so much a legal order as a political system").

[33] *Cf.* 1 ÖSTERREICHISCHES HANDBUCH DES VÖLKERRECHTS 326 (Hanspeter Neuhold, Waldemar Hummer, & Christoph Schreuer eds., 3d ed. 1997) (qualifying this discretion as a "blank cheque" to the Security Council).

security." This idea was stressed by an early commentator, who wrote that "[t]he purpose of the enforcement action under Article 39 is not: to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law."[34]

However, as the International Court of Justice (ICJ) emphasized in the *Admission to UN Membership* case of 1948, "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment."[35] The International Criminal Tribunal for the Former Yugoslavia (ICTY) more recently reaffirmed this reasoning by holding that "[t]he Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations . . . ."[36] Admittedly, ascertaining the precise limits and/or criteria for Security Council action is difficult. Yet it is a crucial task that should complement the political control exercised by the members of the Security Council, in particular, the permanent ones through their voting behavior.

Apparently, the Security Council is widely seen as enjoying broad discretion when determining whether or not a situation under Article 39 of the Charter has arisen.[37] For present purposes, however, this question is less relevant than the main issue: whether in exercising the powers following such a determination, i.e., when using nonmilitary and/or military coercive measures, the Security Council is subject to certain (legal) limits.

A textual approach. The far-reaching and almost unlimited Charter-based powers of the Security Council have led some commentators to conclude that the United Nations is not bound by general international law (custom and general principles) when acting under Chapter VII.[38] This view is mainly based on a literal and systematic interpretation of the Charter, which does not include an express provision requiring the Security Council to respect international law.[39]

In Article 24(2), however, the UN Charter does contain a provision obliging the Security Council to act "in accordance with the Purposes and Principles of the United Nations," among which Article 1(1) lists, inter alia, the maintenance of peace and security "in conformity with the principles of justice and international law." Nevertheless, if one remains within a Charter-based interpretive discourse, this duty to respect general international law is considerably weakened by the fact that Article 1(1) requires conformity only with "the *principles* of . . . international law," not with "international law" as such. Further, a close reading shows that the obligation to act "in conformity with the principles of justice and international law" literally refers only to the Security Council's function to settle disputes peacefully and that this qualification is not contained in the first part of Article 1(1), which addresses the Council's function to "take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other

[34] KELSEN, *supra* note 32, at 294.

[35] Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 ICJ REP. 57, 64 (May 28).

[36] Prosecutor v. Tadić, Appeal on Jurisdiction, Case IT–94–1–AR72, para. 28 (Oct. 2, 1995), *reprinted in* 35 ILM 32, 42 (1996).

[37] EAGLETON, *supra* note 32, at 525; *see also* Dapo Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?* 46 INT'L & COMP. L.Q. 309, 337 (1997); Helmut Freudenschuß, *Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council*, 46 AUS. J. PUB. INT'L L. 1 (1993); Vera Gowland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 INT'L & COMP. L.Q. 55, 61 (1994); Hanspeter Neuhold, *Peace, Threat to, in* 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 935 (Rudolf Bernhardt ed., 1997) [hereinafter ENCYCLOPEDIA].

[38] Oosthuizen, *supra* note 31; Anna M. Vradenburgh, *The Chapter VII Powers of the United Nations Charter: Do they "Trump" Human Rights Law?* 14 LOY. L.A. INT'L & COMP. L. REV. 175 (1991).

[39] An amendment proposed by the delegation of Ecuador at the San Francisco Conference stating that "[i]n the fulfilment of the duties inherent in its responsibility to maintain international peace and security, the Security Council shall . . . respect and enforce and apply the principles or rules of existing law" was not accepted. Doc. 2, G/7(p), 3 U.N.C.I.O. Docs. 393, 431 (1945); *see also* KELSEN, *supra* note 32, at 294–95.

breaches of the peace."[40] One could thus argue that the Security Council is not obliged to act in accordance with international law principles when maintaining or restoring international peace and security.[41]

On the other hand, the view that the fundamental purposes and principles of Article 1(1) of the Charter are relevant to all Security Council activities, including the maintenance of international peace and security,[42] and that Article 24(2) thefore sets relevant legal limitations to the Council's acts[43] finds additional support in another textual provision: the statement in the preamble proclaiming as one of the major goals of the Organization, "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." An organization that violates international law would certainly fail to establish such conditions.

Another Charter-based line of argument may equally lead to a human rights or humanitarian law–inspired limitation on the powers of the Security Council. It could be employed independently of recourse to general international law by looking at other substantive limits on the Organization's activities contained in the Charter text itself. Two such provisions are the human rights articles: Article 1(3) specifically refers to the promotion of human rights as one of the major purposes of the United Nations,[44] and Article 55(c) states that "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." This language does not explicitly require the Organization to observe human rights. However, one should not underestimate the historical context of this wording, i.e., that the lack of explicit obligations to respect human rights probably means that the framers did not anticipate human rights violations by the United Nations, rather than consider them permissible.[45] Put into perspective, it appears plausible to regard the United Nations as having violated its duty to promote respect for and observance of human rights if it disregards these rights itself.[46] Strong support for the proposition that the United Nations, as an international organization dedicated to supervising "universal respect for, and observance of, human rights," must itself comply with these rights can be found in the *Effect of Awards* opinion.[47]

[40] Another proposal to amend Article 1(1) so as to read "to maintain international peace and security in conformity with the principles of justice and international law" was not accepted at the San Francisco Conference. Rüdiger Wolfrum, *Article I, in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 52 (Bruno Simma ed., 1994).

[41] KELSEN, *supra* note 32, at 294–95; Oosthuizen, *supra* note 31; *see also* MALCOLM N. SHAW, INTERNATIONAL LAW 879 n.280 (4th ed. 1997); Akande, *supra* note 37, at 318.

[42] This view was largely endorsed by the ICJ in its 1971 advisory opinion on Namibia in approvingly citing the opinion of the UN Secretary-General that "Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter." Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ REP. 16, 52 (June 21) [hereinafter Namibia Advisory Opinion].

[43] Accordingly, Judge Weeramantry saw in Article 24(2) of the UN Charter a boundary circumscribing the Security Council's authority to discharge its peace and security duties. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. U.S.) [hereinafter Lockerbie case], Provisional Measures, 1992 ICJ REP. 3, 61, & 114, 171 (Apr. 14) (Weeramantry, J., dissenting). He further argued that "[t]he history of the United Nations Charter . . . corroborates the view that a clear limitation on the plenitude of the Security Council's powers is that those powers must be exercised in accordance with the well-established principles of international law." *Id.* at 65, 175.

[44] Article 1(3) of the Charter states the following purpose of the United Nations: "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

[45] This view reflects common wisdom as far as the European Community, an organization with further-reaching operative powers since its inception, is concerned. *See, e.g.,* Nanette A. Neuwahl, *The Treaty on European Union; A Step Forward in the Protection of Human Rights? in* THE EUROPEAN UNION AND HUMAN RIGHTS 1 (Nanette A. Neuwahl & Allan Rosas eds., 1995). It would appear all the more true with regard to the United Nations.

[46] Akande, *supra* note 37, at 323; Working Paper, *supra* note 10, para. 28.

[47] Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 ICJ REP. 47 (July 13). There, the International Court of Justice not only affirmed the United Nations' competence to establish an administrative tribunal for staff disputes, but also hinted at a duty to do so, stating that

Taking these various arguments together, one may well concur with the opinion of the ICTY appeals chamber that "neither the text nor the spirit of the Charter conceives of the Security Council as unbound by law."[48]

The United Nations as an international organization. Beyond these textual intricacies of interpreting Charter law, strong arguments in favor of an obligation to observe customary law may be derived from more general reflections concerning the status of the United Nations as an organization enjoying legal personality under international law. International organizations—even if endowed with wide powers—still command only those powers conferred on them by their member states. As "derivative" or "secondary" subjects of international law, they do not possess any original powers or sovereign authority.[49] Since international organizations are constituted by the common will of states through the act of transferring powers to them, the resulting legal creatures cannot acquire more powers than their creators: *Nemo plus iuris transferre potest quam ipse habet.*[50] Correspondingly, the assumption that the UN member states could have succeeded in collectively "opting out" of customary law and general principles of law by creating an international organization that would cease to be bound by those very obligations appears rather unconvincing.[51] A related consideration that does not focus on the powers and obligations of organizations as state creatures but, rather, on the general perception that they enjoy international legal personality leads to the same result: the United Nations—whose personality under public international law has been beyond doubt since the *Reparations* case[52]—is subject to public international law precisely because it partakes of personality under this legal system. Thus, it has been asserted that the Security Council, as a main organ of the United Nations, is "subject to" international law because the Organization itself is a "subject of" international law.[53]

In addition, its practice confirms that the United Nations is generally subject to international law. In an early important incident, the Organization acknowledged its international responsibility for damages caused in the course of the Congo operation.[54] This recognition was a

it would "hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals . . . that [the United Nations] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them." *Id.* at 57.

[48] Prosecutor v. Tadić, *supra* note 36, at 42.

[49] *See* Rudolf Bindschedler, *International Organizations, General Aspects*, 2 ENCYCLOPEDIA, *supra* note 37, at 1289, 1299 (2d ed. 1995); Manuel Rama Montaldo, *International Legal Personality and Implied Powers of International Organizations*, 1970 BRIT. Y.B. INT'L L. 111; Manfred Zuleeg, *International Organizations, Implied Powers*, ENCYCLOPEDIA, *supra*, at 1312. See, however, Seyersted's objective legal personality theory, which finds a basis for the legal personality of international organizations not in the "subjective" will of the member states derived from treaties but, rather, in the "objective" circumstance of their existence or in custom. Finn Seyersted, *Objective International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend upon the Conventions Establishing Them?* 34 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET 1 (1964).

[50] "No one can transfer more rights than one possesses." DIG. 50.54 (Ulpian, Ad Edictum 46); *see also* MAARTEN BOS, A METHODOLOGY OF INTERNATIONAL LAW 5 (1984) (regarding the principle *Nemo plus potestatis transferre potest quam ipse habet* as a general concept of law).

[51] *See* MOHAMMED BEDJAOUI, THE NEW WORLD ORDER AND THE SECURITY COUNCIL: TESTING THE LEGALITY OF ITS ACTS 7 (1994) (finding it "less acceptable than ever that sovereign States should have created an international organization equipped with broad powers of control and sanction vis-à-vis themselves but *itself* exempted from the duty to respect both the Charter which gave it birth and international law").

[52] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 ICJ REP. 174, 179 (Apr. 11).

[53] See the dissenting opinion of Judge Fitzmaurice in the Namibia Advisory Opinion, 1971 ICJ REP. 16, 294 (June 21), speaking of territorial sovereignty: "This is a principle of international law that is as well-established as any there can be,—and the Security Council is as much subject to it (for the United Nations is itself a subject of international law) as any of its individual member States are." See also the broader statement of the Court in Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 ICJ REP. 73, 89–90 (Dec. 20), 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."

[54] 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 (Feb. 20, 1965), 1965 UN JURID. Y.B. 39.

logical consequence of the applicability of general international law, in particular, the duty not to harm foreign nationals and to make reparations in case that duty is breached.[55]

Jus cogens *norms*. It is acknowledged that *jus cogens* forms a core of international rules that must be respected in all circumstances. The definition of *jus cogens* norms as rules from which derogation is prohibited actually refers to this legal consequence.[56] While views may differ over whether the Security Council is bound by international law in general,[57] it is hardly disputed that the Council must respect peremptory norms of international law because the core values protected by the concept of *jus cogens* are simply not derogable in the sense of *jus dispositivum*.[58] In the recent *Genocide Convention* case,[59] this issue was raised by Bosnia but not conclusively addressed in the ICJ's order rejecting a request for interim measures.[60]

Public International Law Rules to Be Respected by the Security Council in Imposing Sanctions

The fundamental humanitarian norms analyzed below are widely accepted as customary international law.[61] While the status as customary law of human rights law in general has been more controversial,[62] the basic provisions in issue as regards economic embargoes seem to

[55] Jean J. A. Salmon, *De Quelques Problèmes posés aux tribunaux belges par les actions de citoyens belges contre l'O.N.U. en raison de faits survenus sur le territoire de la République démocratique du Congo*, 81 JOURNAL DES TRIBUNAUX 713 (1966); Paul De Visscher, *De l'Immunité de juridiction de l'Organisation des Nations Unies et du caractère discrétionnaire de la compétence de protection diplomatique*, 25 REVUE CRITIQUE DE JURISPRUDENCE BELGE 449 (1971) (note on decision of September 15, 1969, by the Brussels Court of Appeals).

[56] *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 53, 1155 UNTS 331:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

[57] See the discussion beginning in the text at note 22 *supra*.

[58] Compare the view of the International Law Commission that

> peremptory norms of international law apply to international organizations as well as to States . . . . International organizations are created by treaties concluded between States . . . ; despite a personality which is in some respects different from that of States parties to such treaties, they are none the less the creation of those States. And it can hardly be maintained that States can avoid compliance with peremptory norms by creating an organization.

Commentary on the Draft Convention on the Law of Treaties Between States and International Organizations and Between International Organizations, [1982] 2 Y.B. INT'L L. COMM'N, pt. 2, at 56, UN Doc. A/CN.4/SER.A/1982/Add.1 (Part 2); *see also* BEDJAOUI, *supra* note 51, at 35; Karl Doehring, *Unlawful Resolutions of the Security Council and Their Legal Consequences*, 1997 MAX PLANCK Y.B. UN L. 91.

[59] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.) [hereinafter Genocide case], Provisional Measures, 1993 ICJ REP. 325 (Sept. 13).

[60] Bosnia had challenged the legality of the arms embargo imposed by Security Council Resolution 713 (Sept. 25, 1991). It argued that the application to Bosnia of the embargo, which formally concerned the territory of the former Yugoslavia, would amount to assistance in the commission of genocide against the Bosnian people. With the exception of Judge *ad hoc* Eli Lauterpacht, the Court did not address this issue and it is now probably relieved from doing so as a result of the lifting of the arms embargo after the Dayton Peace Accords through Security Council Resolution 1021 (Nov. 22, 1995), which may have rendered the matter moot. In 1993, however, Lauterpacht considered that the arms embargo had become contrary to a norm of *jus cogens* insofar as it required support for a "genocidal activity" and that in this respect "it ceased to be valid and binding in its operation against Bosnia-Herzegovina; and that Members of the United Nations then became free to disregard it." Genocide case, 1993 ICJ REP. at 441, paras. 102, 103 (Lauterpacht, J. *ad hoc*, sep. op.).

[61] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 113, para. 218 (June 27) (stating that "the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of [fundamental general principles of humanitarian law]"); *see also* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN LAW AS CUSTOMARY LAW (1989); Christopher Greenwood, *Customary Law Status of the 1977 Geneva Protocols, in* HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD: ESSAYS IN HONOUR OF FRITS KALSHOVEN 93 (Astrid J. M. Delissen & Gerard J. Tanja eds., 1991); Provost, *supra* note 21, at 616.

[62] *See* Louis Henkin, *Human Rights*, 2 ENCYCLOPEDIA, *supra* note 37, at 886, 887. *But see* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 1988–89 AUSTL. Y.B. INT'L L. 82, 90 (suggesting general principles of law as a more adequate source of unwritten general international law binding on subjects of international law).

qualify as customary rules. In addition, strong and convincing arguments may be made for considering core provisions of humanitarian law, as well as some basic human rights, as having attained the status of nonderogable, peremptory norms in the sense of *jus cogens* obligations.[63]

Specific humanitarian rules. The rules of international humanitarian law are codified and developed in the four Geneva Conventions of 1949[64] and the two Additional Protocols of 1977.[65] These rules, however, do not directly address economic sanctions.[66] As a consequence, applicable norms must be deduced from the general rules on protection of the civilian population.[67] Further, the distinction between international and noninternational armed conflicts and situations falling below the threshold of armed conflict—triggering the application of different sets of rules—raises the question whether humanitarian norms restricting the use of economic sanctions also apply to internal or even nonconflict situations. While one might concur with the Red Cross's statement that general humanitarian rules must be considered in assessing the legality of the effects of economic measures imposed in all situations of armed conflict,[68] this proposition may be more questionable regarding situations not involving armed conflict—where human rights law is normally applicable.[69] Indeed, as a matter of positive treaty law, the Geneva Conventions only "apply to all cases of declared war or of any other [international] armed conflict"[70] plus—to a lesser extent—cases of "armed conflicts not of an international character."[71] It may be tempting—*argumento a majore ad minus*—to demand that what is considered a minimum standard applicable in times of war or internal conflict should be so considered in peacetime.[72] However, one is forced to acknowledge that *de lege lata*—and despite a "growing convergence" of human rights and humanitarian law[73]—the applicability of humanitarian rules is generally understood to be limited to situations constituting some sort of armed conflict. The future will show whether a development that started with the legally nonbinding Turku Declaration on Minimum Humanitarian Standards[74] will bridge the perceived "gap" between human rights and humanitarian law protection.[75]

The fundamental humanitarian law principle prohibiting attacks on the civilian population finds concrete expression in various provisions of the Fourth Geneva Convention and

[63] *See* Report of the International Law Commission on the Work of its Thirty-second Session, [1980] 2 Y.B. Int'l L. Comm'n, pt. 2, at 46, UN Doc. A/CN.4/SER.A/1980/Add.1 (Part 2) (stating that "some of these rules [of humanitarian law] are, in the opinion of the Commission, rules which impose obligations of *jus cogens*"); *see also* Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AJIL 1 (1986).

[64] Convention [I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 UST 3114, 75 UNTS 31; Convention [II] for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 UST 3217, 75 UNTS 85; Convention [III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135; Convention [IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287 [hereinafter the four Geneva Conventions].

[65] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 UNTS 609 [hereinafter Protocol II].

[66] Gasser, *supra* note 21, at 884.

[67] *See infra* text at note 76.

[68] *See Red Cross Statement*, *supra* note 14 (stating that "[a]ny sanction regime established in the context of armed conflict is governed by international humanitarian law").

[69] As for its content relevant to sanctions, see *infra* text at note 83.

[70] The four Geneva Conventions, *supra* note 64, Art. 2, plus Protocol I, *supra* note 65.

[71] The four Geneva Conventions, *supra* note 64, common Art. 3, plus Protocol II, *supra* note 65.

[72] *See* Reisman & Stevick, *supra* note 21, at 95.

[73] *See* THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 14 (1987).

[74] Declaration of Minimum Humanitarian Standards, Dec. 2, 1990, *reprinted in* 85 AJIL 377 (1991) [hereinafter Turku Declaration].

[75] Although the Turku Declaration is mainly aimed at covering situations falling below the threshold of armed conflict, it is broadly phrased to affirm "minimum humanitarian standards which are applicable in *all* situations . . . and which cannot be derogated from under any circumstances." *Id.*, Art. 1 (emphasis added).

the two Additional Protocols. Probably the most relevant provision in the context of comprehensive economic embargoes prohibits starvation of the civilian population as a method of warfare.[76] The right to access to basic foodstuff is reinforced by the obligation to permit the free passage of all consignments of essential foodstuffs and other necessities,[77] and the positive duty of occupying powers to bring in these necessary articles.[78] In a similar vein, medical supplies must be freely admitted to the enemy population[79] and be made available by occupying powers.[80] In addition to food and medical supplies, Protocol I obliges the occupying power to ensure the provision of other articles essential to the survival of the civilian population.[81] The absolute character of these provisions is reinforced by the general prohibitions on reprisals against protected persons and collective penalties.[82]

Specific human rights rules. Several specific human rights guarantees contained in various human rights documents are also relevant to assessing the legality of economic sanctions, among them the right to life; the right to an adequate standard of living, including food, clothing, housing, and medical care; freedom from hunger; and the right to health.[83]

[76] Protocol I, *supra* note 65, Art. 54 provides: "Starvation of civilians as a method of warfare is prohibited." Protocol II, *supra* note 65, Art. 14 provides:

> Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works.

See also Turku Declaration, *supra* note 74, Art. 3(2)(f) (prohibiting "deliberate deprivation of access to necessary food, drinking water and medicine"); Provost, *supra* note 21 (discussing the question in detail).

[77] Geneva Convention No. IV, *supra* note 64, Art. 23(1) provides:

> Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

[78] *Id.*, Art. 55(1) provides: "To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate."

[79] *Id.*, Art. 23; *see supra* note 77.

[80] Geneva Convention IV, *supra* note 64, Art. 55; *see supra* note 78.

[81] Protocol I, *supra* note 65, Art. 69 provides:

> In addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.

[82] Geneva Convention IV, *supra* note 64, Art. 33(1) provides: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited." *See also* Hague Convention [IV] Respecting the Laws and Customs of War on Land with annex: Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631. Art. 50 of the Regulations provides: "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."

[83] On the right to life, see Universal Declaration of Human Rights, GA Res. 217, Dec. 10, 1948, Art. 3, UN Doc. A/810, at 71 (1948) [hereinafter UDHR]: "Everyone has the right to life, liberty and security of person"; International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 6(1), 999 UNTS 171 [hereinafter ICCPR]: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life"; Convention on the Rights of the Child, Nov. 20, 1989, Art. 6(1), 1577 UNTS 3: "States Parties recognize that every child has the inherent right to life."

On the right to an adequate standard of living, see UDHR, *supra*, Art. 25(1): "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control"; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, Art. 11(1), 993 UNTS 3 [hereinafter ICESCR]:

> The States Parties to the present Covenant recognize the right of everyone 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. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The scope of the right to life, which is included in both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (Civil and Political Covenant),[84] can be interpreted as limited to prohibiting arbitrary deprivation of life through execution, disappearance, or torture, or more broadly as even requiring states to take positive measures.[85] In the latter instance one might find that the right to life has been violated by a failure to prevent deprivation of life as a result of the lack of necessities such as food, and basic health and medical supplies.[86] In this case it is probably the broad interpretation as regards the precise content of the right to life that may be debatable, whereas its obligatory nature—whether because it forms part of customary international law or general principles—appears less controversial. The reverse may well apply to the more pertinent right to food, which—though also included in the Universal Declaration—is specified in the International Covenant on Economic, Social and Cultural Rights (Economic and Social Covenant).[87] There is no consensus that the contents of this Covenant, as well as the economic rights contained in the Universal Declaration, can be considered to represent established customary law or general principles.[88] However, a contextual analysis of the relevance of Article 55 of the UN Charter[89] could reasonably lead to the view that the Organization's obligation to promote "higher standards of living," "solutions of international economic, social, health, and related problems," and "universal respect for, and observance of, human rights" has been "authoritatively interpreted"[90] by the Universal Declaration, the Economic and Social Covenant, and the committee that administers that Covenant. The right to food and freedom from hunger—even if it is not interpreted as containing a positive obligation to provide essential foodstuffs to those in need—could be viewed at least to require abstention from deliberately depriving individuals of food and causing hunger and starvation.[91] If the Security Council takes action that deprives a significant part of a state's population of the means of effectively enjoying the right to food as contained in the Universal Declaration

Convention on the Rights of the Child, *supra*, Art. 27(1): "States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."

On freedom from hunger, see ICESCR, *supra*, Art. 11(2):

> The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
>
> (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
>
> (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

On the right to health, see *id.*, Art. 12(1): "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

[84] *See supra* note 83.

[85] *See* Human Rights Committee, General Comment 6 (Art. 6), para. 5, UN GAOR, 37th Sess., Supp. No. 40, at 93, UN Doc. A/37/40 (1982) (specifically mentioning measures to reduce infant mortality and malnutrition).

[86] Segall, *supra* note 21, at 768.

[87] *See supra* note 83.

[88] *See* RESTATEMENT, *supra* note 30, §702 cmt. *a*; *see also* MATTHEW C. R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 22–29 (1995).

[89] *See supra* text at note 46.

[90] *See* MYRES S. MCDOUGAL, HAROLD D. LASSWELL, & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 325 (1980); LOUIS HENKIN, RICHARD C. PUGH, OSCAR SCHACHTER, & HANS SMIT, INTERNATIONAL LAW 985, 987 (2d ed. 1987).

[91] Segall, *supra* note 21, at 768. See, on a more general level, A. EIDE, RIGHT TO ADEQUATE FOOD AS A HUMAN RIGHT, para. 170 (1989), who considers a duty of noninterference to flow from the obligation to respect the right to food. *See also* UN Committee on Economic, Social and Cultural Rights, General Comment 12: The Right to Adequate Food, UN Doc. E/C.12/1999/5, para. 19 (qualifying "denial of access to food to particular individuals or groups" as a violation of the right to food).

and the Economic and Social Covenant, the Council may be considered to be contravening Article 55 of its own Charter.

How are these limits respected? Obviously, the Security Council cannot be accused of having intentionally—at least as a matter of policy—disregarded these principles. On the contrary, the inclusion of specific humanitarian exceptions[92] in each set of sanctions was expressly aimed at guaranteeing respect for the above-mentioned humanitarian rules and human rights. However, do the existing humanitarian exceptions as they are administered by the sanctions committees of each of the Council's economic sanctions regimes actually meet these humanitarian and human rights standards? This is not the place to assess these factual issues in detail. Suffice it to say that at least in the context of the Iraq sanctions—even after the implementation of the so-called Oil-for-Food program[93]—various human rights bodies have expressed serious doubts.[94]

II. Remedies for Victims of UN Sanctions

The conclusion that under certain circumstances economic sanctions imposed by the UN Security Council may violate international humanitarian or human rights law prompts the question whether ways of redress are available to the injured individuals and/or states. Of course, invoking the possible responsibility of the United Nations would also raise difficult problems of attribution since UN sanctions are regularly imposed by the Security Council but implemented by national (or as in the case of the European Community, supranational) legislation. These questions will not be investigated more closely here; suffice it to say that strong arguments support UN responsibility in cases of precise implementation of Security Council sanctions.[95] This paper is also not the place to conclusively address various difficult issues of causality, among them the question to what extent the harm suffered by the civilian population in the target countries should be attributed to the Security Council's imposition of sanctions and to what extent it is due to the ruling elites.[96]

Clearly, we live in an era of heightened attention to actually holding accountable—civilly or criminally—those responsible for violations of human rights and humanitarian law. Examples range from the *Pinochet* case before the House of Lords,[97] the Holocaust litigation before American and German courts,[98] and the cases under the Alien Tort Claims Act[99] in U.S. federal courts (including the proceedings against Radovan Karadžić,[100] which in turn are

[92] UN Security Council resolutions regularly exclude from the sanctions regime "supplies intended strictly for medical purposes and, in humanitarian circumstances, foodstuffs." *See, e.g.,* SC Res. 661 (Aug. 6, 1990) (concerning Iraq); SC Res. 757 (May 30, 1992) (concerning the Federal Republic of Yugoslavia); *see also* Paul Conlon, *The Humanitarian Mitigation of UN Sanctions*, 1996 GER. Y.B. INT'L L. 249.

[93] SC Res. 986 (Apr. 14, 1995).

[94] *See supra* notes 7, 8, 9. *But see* Conlon, *supra* note 92, at 251 (asserting that "UN sanctions regimes currently in force do indeed satisfy [the] requirements [of traditional humanitarian law]").

[95] *See infra* text at note 109.

[96] For details, see STARCK, *supra* note 20, at 121–25 .

[97] Andrea Bianchi, *Immunity Versus Human Rights: The* Pinochet *Case*, 10 EUR. J. INT'L L. 237 (1999); Ruth Wedgwood, *International Criminal Law and Augusto Pinochet*, 40 VA. J. INT'L L. 829 (2000).

[98] *See* ENTSCHÄDIGUNG FÜR NS-ZWANGSARBEIT (Klaus Barwig, Günther Saathoff, & Nicole Weyde eds., 1998); Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICHMOND L. REV. 1 (2000); Stephen A. Denburg, *Reclaiming Their Past: A Survey of Jewish Efforts to Restitute European Property*, 18 B.C. THIRD WORLD L.J. 233 (1998); Burkhard Heß, *Entschädigung für NS-Zwangsarbeit vor US-amerikanischen und deutschen Zivilgerichten*, 44 DIE AKTIENGESELLSCHAFT 145 (1999); August Reinisch, *NS-Verbrechen und ":political questions": Können deutsche Unternehmen von ehemaligen Zwangsarbeitern vor US-Gerichten verklagt werden?* 20 IPRAX 32 (2000); Christian Tomuschat, *Rechtsansprüche ehemaliger Zwangsarbeiter gegen die Bundesrepublik Deutschland?* 19 IPRAX 237 (1999).

[99] The Alien Tort Claims Act provides for a civil action in U.S. courts by an alien "for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. §1350 (1994).

[100] Doe v. Karadžić, Kadić v. Karadžić, 70 F.3d 232 (2d Cir. 1995). After a default order, compensatory and punitive damages were awarded in both cases in August and October 2000. *See Award of Damages Against Bosnian Serb Leader Radovan Karadžić*, Sean D. Murphy, Contemporary Practice of the United States, 95 AJIL 143, 144 (2001).

based on the experience of litigation for human rights abuses),[101] to the *Genocide* cases brought by Bosnia-Herzegovina and Croatia against Serbia and Montenegro before the ICJ[102] and the attempt to bring NATO officials before the Yugoslavia Tribunal.[103] This trend coincides with a corresponding discussion about more effective civil liability (compensation) mechanisms for victims of human rights violations[104] and a tendency toward "criminalizing" international humanitarian and human rights law.[105]

Building on this momentum, a recent UN working paper on sanctions urged that the "full array of legal remedies should be available for victims of sanctions regimes that are at any point in violation of international law," mentioning, in particular, national courts, UN or regional human rights bodies, and the International Court of Justice as potential fora for such claims.[106] To date, the debate on compensation for sanctions damage has largely been limited to various types of "collateral damage," such as economic harm suffered by third states[107] and individual traders, and it has focused on liability claims against states and—in the European context—the European Community as the relevant sanctions legislator.[108] Interestingly, the European Court of Justice (ECJ) recently held that damage suffered as a result of the economic embargo against Iraq was not attributable to the Community. Rather, the Court hinted at the responsibility of the United Nations for Security Council sanctions.[109] It is clear, however, that the ECJ, whose power of judicial review is limited to acts of EC organs,[110] lacks jurisdiction to adjudicate such claims.

While the quest for legal remedies may already encounter various procedural obstacles if claims are brought against individual states imposing sanctions (or—for that matter—the European Community), the situation will become even more difficult if claims are attempted against the United Nations. Since UN bodies are explicitly recommending that victims of sanctions pursue their claims before national and international bodies,[111] these

[101] See the leading cases Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Forti v. Suarez-Mason, 672 F.Supp. 1531, *modified*, 694 F.Supp. 707 (N.D. Cal. 1987); Letelier v. Republic of Chile, 488 F.Supp. 665 (D.D.C. 1980).

[102] Genocide case, Provisional Measures, 1993 ICJ REP. 3 (Apr. 8); Provisional Measures, 1993 ICJ REP. 325 (Sept. 13); Preliminary Objections, 1996 ICJ REP. 595 (July 11); *see* Peter H. F. Bekker, Case Report: Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *in* 92 AJIL 508 (1998); Matthew C. R. Craven, *The* Genocide *Case, the Law of Treaties and State Succession*, 1997 BRIT. Y.B. INT'L L. 127; s*ee also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Yugo.), ICJ Press Communiqué 99/38 (July 2, 1999).

[103] ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (June 8, 2000), 39 ILM 1257 (2000).

[104] *See* M. Cherif Bassiouni, The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, UN Doc. E/CN.4/2000/62; *see also* Theo van Boven, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, UN Doc. E/CN.4/Sub.2/1993/8.

[105] *See* Antonio Cassese, *On the Current Trend Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2 (1998); Theodor Meron, *Is International Law Moving Towards Criminalization?* 9 EUR. J. INT'L L. 18 (1998).

[106] Working Paper, *supra* note 10, para. 106.

[107] See the discussion on activation of Article 50 of the UN Charter, Brun-Otto Bryde & August Reinisch, *Article 50, in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 40 (2d ed., forthcoming); Jeremy Carver & Jenine Hulsmann, *The Role of Article 50 of the UN Charter in the Search for International Peace and Security*, 49 INT'L & COMP. L.Q. 528 (2000).

[108] See in particular the German literature discussing at length a possible duty of either the German state or the European Community to compensate traders negatively affected by the Iraq embargo. *See, e.g.*, HANS-KONRAD RESS, DAS HANDELSEMBARGO: VÖLKER-, EUROPA- UND AUßENWIRTSCHAFTSRECHTLICHE RAHMENBEDINGUNGEN, PRAXIS UND ENTSCHÄDIGUNG (2000) (with further references).

[109] "The Court therefore considers that, in the circumstances of this case, the alleged damage can be attributed not to the adoption of Regulation No 2340/90 but only to United Nations Security Council Resolution No 661 (1990) which imposed the embargo on trade with Iraq." Case T-184/95, Dorsch Consult Ingenieurgesellschaftmb H v. Council, 1998 ECR II–776, para. 74 (CFI), *reprinted in* 117 ILR 363, *aff'd,* Case C–237/98 P (ECJ, June 15, 2000).

[110] *See infra* notes 119, 149.

[111] See under Recommendations to Non-Governmental Organizations and Victims of Sanctions: "Victims of sanctions having adverse consequences should bring their complaints to relevant national, international and regional bodies." Working Paper, *supra* note 10, Recommendation B.2.

problems are likely to arise more frequently in the future. In fact, the debate on this subject has probably just started.

Assessing the Legality of Security Council Resolutions: The ICJ

For various reasons the ICJ may appear to be the most "convenient" venue for litigating questions concerning the lawfulness of Security Council–imposed sanctions. As these sanctions are adopted by one of the main organs of the Organization, it would appear logical to ask the main judicial organ of the United Nations to pronounce on their legality.

Judicial review. The increased activities of the Security Council after the Cold War led to expanded interest in the question of judicial review of its decisions.[112] The good arguments in favor of such a power are largely based on such factors as the Court's implied powers, parallels with national constitutional jurisprudence, and the law-preserving function of the Court; but serious counterarguments can also be made, based, inter alia, on the lack of an express power of judicial review in the Charter[113] and the principle that each UN organ is called upon to assess the legality of its own acts.[114]

Both the *Lockerbie* and Yugoslavia *Genocide* cases not only posed the question of the substantive limits to the Security Council's powers,[115] but also crucially involved the issue whether the ICJ has jurisdiction to decide on the legality of the Council's acts. Libya openly challenged the legality of the Security Council's embargo resolutions in *Lockerbie*.[116] The original claim of Bosnia-Herzegovina in the *Genocide* case[117] also amounted to a challenge to the legality of Security Council decisions. To date the ICJ has been successful in avoiding a straightforward answer to these questions, but it has implicitly exercised some degree of judicial review in some cases by not calling into question, but rather confirming the legality of, acts of the Security Council.[118]

The case for or against judicial review has thus not yet been decided.

Causes of action. Both the *Lockerbie* and Yugoslavia *Genocide* cases also demonstrate the limited procedural means available to parties negatively affected by Security Council resolutions. Contrary to the direct cause of action provided to EC member states and EC institutions against other Community institutions,[119] UN members and UN organs cannot sue the

[112] See, for example, from the vast literature, BEDJAOUI, *supra* note 51; Akande, *supra* note 37; José E. Alvarez, *Judging the Security Council*, 90 AJIL 1 (1996); Doehring, *supra* note 58; Thomas M. Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?* 86 AJIL 519 (1992); Vera Gowland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in the Light of the* Lockerbie *Case*, 88 AJIL 643 (1994); Alain Pellet, *Peut-on et doit-on contrôler les actions du Conseil de sécurité? in* LE CHAPITRE VII DE LA CHARTE DES NATIONS UNIES: COLLOQUE DE RENNES, 50E ANNIVERSAIRE DES NATIONS UNIES 221 (Société Française pour le Droit International ed., 1995); W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AJIL 83 (1993); Bardo Fassbender, *Quis judicabit? The Security Council, Its Powers and Its Legal Control*, 11 EUR. J. INT'L L. 219 (2000) (review essay).

[113] In the *Namibia* case, the ICJ noted that "[u]ndoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned." Namibia Advisory Opinion, 1971 ICJ REP. 16, 45 (June 21).

[114] In *Certain Expenses* the ICJ stated that under the UN Charter no procedure existed for determining the validity of an organ's act and indicated that "each organ must, in the first place at least, determine its own jurisdiction." Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, 1962 ICJ REP. 151, 168 (July 20).

[115] For discussion of this subject, *see supra* text following note 22.

[116] Lockerbie case, Provisional Measures, 1992 ICJ REP. 3 (Apr. 14); Lockerbie case, Preliminary Objections, 1998 ICJ REP. 9 (Feb. 27).

[117] Genocide case, Provisional Measures, 1993 ICJ REP. 325 (Sept. 13).

[118] *See* Namibia Advisory Opinion, 1971 ICJ REP. 16 (June 21); Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 ICJ REP. 47 (July 13); Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 ICJ REP. 57 (May 28).

[119] TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, 1997 O.J. (C 340) 3, Art. 230 (ex-Art. 173) [hereinafter EC TREATY] provides: "The Court of Justice shall review the legality of acts adopted [by organs of the EC] intended to produce legal effects vis-à-vis third parties."

United Nations or any of its organs since the ICJ Statute limits contentious proceedings to interstate disputes.[120] Thus, both Libya and Bosnia had to raise the issue of the validity of the contested UN resolutions incidentally in two sets of interstate disputes.[121]

In both contentious cases and advisory proceedings individuals have no direct say about whether the Court should be seized or not. The right to institute proceedings is limited to states and—in the case of advisory opinions—to certain UN organs and specialized agencies. Access to the ICJ thus depends on the espousal of the claims of individuals by their home states in contentious proceedings and on the willingness of a sufficient number of states to vote in favor of a request for an advisory opinion in the appropriate UN organ, probably the General Assembly. That the latter is not necessarily wholly theoretical is evidenced by the General Assembly's application to the Court to assess the legality of the use of nuclear weapons and the advisory opinion rendered against the will of permanent members of the Security Council.[122]

National Courts

Challenging UN sanctions by suing the Organization before national courts appears to be almost impossible. National courts are usually unavailable to potential claimants since the United Nations enjoys sweeping immunity as a matter of treaty law and domestic legislation. According to the UN Charter, the Organization is accorded the immunity "necessary for the fulfilment of its purposes."[123] The General Convention even provides for immunity "from every form of legal process," with the exception of a waiver in particular cases.[124] Most national legislation on immunity equally provides for absolute immunity for the United Nations. But even if a national court would consider a more limited functional immunity to be determinative of the scope of UN immunity from suit,[125] it would be implausible to argue that the imposition of economic sanctions falls outside the scope of the Organization's functional immunity.[126]

The situation may be different where the legality of UN embargo resolutions forms an incidental question in disputes concerning private or other parties subject to the jurisdiction of national courts.[127] Thus, national courts might be asked to decide cases concerning the nonperformance of private law contracts as a result of the imposition of economic sanctions,

[120] ICJ STATUTE Art. 34.

[121] The legal impossibility of suing an international organization before the ICJ also accounts for the fact that in its recent application directed against the NATO bombing campaign, the Federal Republic of Yugoslavia instituted proceedings against ten member states of NATO individually. Legality of Use of Force (Yugo. v. Belg.) (Yugo. v. Can.) (Yugo. v. Fr.) (Yugo. v. FRG) (Yugo. v. Italy) (Yugo. v. Neth.) (Yugo. v. Port.) (Yugo. v. Spain) (Yugo. v. UK) (Yugo. v. U.S.), Provisional Measures (ICJ June 2, 1999), *at* <http://www.icj-cij.org>.

[122] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226 (July 8); Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 ICJ REP. 66 (July 8).

[123] UN CHARTER Art. 105.

[124] The Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, Art. II, §2, 21 UST 1418, 1 UNTS 16 [hereinafter General Convention], states:

> The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

[125] This could result from an attempt to construe the language of Article 105 of the UN Charter. *See* AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 205–14 (2000).

[126] In the recent case Askir v. Boutros-Ghali, 933 F.Supp. 368 (S.D.N.Y. 1996), plaintiff tried to recover damages for unauthorized and unlawful possession of his property in Somalia and thereby implicitly challenged the legality of the United Nations peacekeeping activities. The court, however, dismissed the case for lack of jurisdiction because the defendant organization enjoyed immunity from suit.

[127] See the U.S. litigation concerning the Rhodesia embargo in Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973), finding the relevant Security Council resolutions, although binding on the United States under international law, unenforceable there as a result of a subsequent U.S. statute. *See also* CHRISTOPH SCHREUER, DECISIONS OF INTERNATIONAL INSTITUTIONS BEFORE DOMESTIC COURTS 293 (1981); Alvarez, *supra* note 112, at 12.

which would require the judges to allocate the burden of risk between the private parties. However, such proceedings would not enable aggrieved parties to claim compensation for the harm suffered from those responsible for the imposition of the sanctions. Moreover, domestic courts could be expected to employ judicial "abstention" doctrines other than immunity so as to avoid adjudicating disputes involving the legality of acts of international organizations in such situations. Invoking a broad concept of act of state[128] or nonjusticiability[129] may serve as a welcome tool to dismiss lawsuits directed against international organizations.[130] And such a result appears understandable since domestic litigation over the lawfulness of Security Council sanctions would indeed represent a direct challenge to UN policy decisions. This is exactly the type of lawsuit that the principles of immunity, act of state, and nonjusticiability try to prevent.

Arbitration

An alternative mode of settling disputes with international organizations, which is routinely provided for in their procurement contracts, is arbitration.[131] In the case of claims arising from the imposition of economic sanctions, arbitration would be available only on the basis of a mutual agreement between the United Nations and the affected parties in the form of an ad hoc *compromis*. Thus, recourse to arbitration in these situations wholly depends on the willingness of the Organization to submit to such settlement. Further, arbitration does not seem to be well suited to determining the occurrence of fundamental rights violations because it is mainly designed for private law disputes arising from contracts entered into or torts committed by the United Nations.

Still, arbitration might be a fallback option where no other legal recourse is available. In cases where international organizations enjoy immunity from suit before national courts, they are required to agree to alternative dispute settlement of their "private law disputes" to prevent a denial of justice.[132] A strong policy argument can be made that this requirement holds true even if an issue cannot be identified as a "dispute of a private law character." There is no justification for recognizing human rights, including access to the courts, without providing any viable remedy against an entity such as the United Nations that is quite capable of violating those rights.

Human Rights Institutions

When searching for a judicial or quasi-judicial forum to adjudicate claims concerning the United Nations' abrogation of fundamental rights of individuals, international human rights organs would seem to be the most "natural and convenient." These treaty-based institutions scrutinize the human rights record of states parties to the respective agreements. In par-

[128] See, for example, the antitrust lawsuit instituted before American courts that was dismissed, inter alia, because OPEC's alleged price-fixing activity was considered to constitute an act of state. Int'l Ass'n of Machinists v. OPEC, 477 F.Supp. 553 (C.D. Cal. 1979), 649 F.2d 1354 (9th Cir. 1981).

[129] See, for example, the refusal of the English High court to make a winding-up order against the International Tin Council since it considered such questions "not justiciable by domestic courts. They must be solved by diplomacy, not domestic litigation." *Re* Int'l Tin Council, 77 ILR 18, 31 (Ch. 1987).

[130] For a broad overview of cases, see REINISCH, *supra* note 125, at 35–127.

[131] *See* PANAYOTIS GLAVINIS, LES LITIGES RELATIFS AUX CONTRATS PASSÉS ENTRE ORGANISATIONS INTERNATIONALES ET PERSONNES PRIVÉES (1990).

[132] The General Convention, *supra* note 124, as well as the Special Convention, Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 33 UNTS 261, leave it to the discretion of the organization concerned to choose the kind of alternative dispute settlement procedure to be used. Article VIII, section 29 of the General Convention provides that the organizations shall make provision for "appropriate modes of settlement of disputes" arising out of "contracts or other disputes of a private law character to which the United Nations is a party." A corresponding provision can be found in section 31(a) of the Special Convention. In practice, it is mainly arbitration that is chosen. *See* REINISCH, *supra* note 125, at 266.

ticular, the universal human rights treaty organs, such as the Human Rights Committee[133] and the Committee on Economic,Social and Cultural Rights,[134] which are entrusted with supervising the application of the two Covenants, and also regional institutions like the Strasbourg and San José courts, appear to be predestined for this task. Here again, however, complaints against international organizations face major procedural obstacles because the jurisdiction of these bodies is treaty based and, in the case of state and individual complaints, requires an additional act of acceptance by the state parties to the agreement.[135] Thus, only acts that are attributable to states that have expressed such consent are subject to the direct supervisory jurisdiction of these international human rights institutions.

Contrary to the elaborate efforts to find a legal basis for the claim that international organizations may be bound by human rights treaty obligations even if they are not treaty parties,[136] the accompanying jurisdictional obligations have not been interpreted to "devolve" upon international organizations. Equally, claims against member states of organizations that have allegedly violated human rights have been rejected. Thus, the UN Human Rights Committee denied the admissibility of a complaint against a member state alleging a violation of the Civil and Political Covenant by an international organization.[137] It is well settled case law that the Strasbourg institutions also do not consider themselves competent to decide human rights complaints against international organizations that are not parties to the European Human Rights Convention, even if all or some of the member states are.[138] Moreover, the European Court of Human Rights is still unlikely to allow claims instituted against an organization's member states, either individually or collectively, for human rights violations attributable to the organization,[139] although certain recent developments may ultimately lead to a fundamental change of attitude in this respect.[140]

While a direct complaint against the United Nations or one of its organs is thus excluded as a matter of *lex lata*, the UN human rights organs have demonstrated increasing willingness to scrutinize not only acts attributable to state parties to the respective human rights treaties, but also—at least indirectly—acts of international organizations, in particular as regards economic sanctions, in an incidental form. The work of the UN Committee on Economic, Social and Cultural Rights presents a pertinent example of such "indirect" supervision. In its General Comment No. 8,[141] the Committee carefully stated that it was not in any way calling into question the necessity for the imposition of sanctions in appropriate cases in accordance with Chapter VII of the UN Charter. However, it went on to assert that the human rights provisions of the Charter "must still be considered to be fully applicable in such cases."[142]

[133] ICCPR Arts. 28–45.

[134] The Committee on Economic, Social and Cultural Rights was not set up through the Covenant; rather, it was established by ECOSOC Res. 1985/17 (May 28, 1985).

[135] ICCPR Art. 41; Optional Protocol to the International Covenant on Civil and Political Rights, 999 UNTS 302; ECHR Arts. 25, 46.

[136] *See supra* text following note 49.

[137] *See* H. v. d. P. v. Netherlands, UN Human Rights Committee, Communication 217/1986 (1987), 9 HUM. RTS. L.J. 254 (1988).

[138] *See* Confédération francaise démocratique du Travail v. European Communities, Alternatively Their Member States (a) Jointly and (b) Severally, App. No. 8030/77, 13 Eur. Comm'n H.R. Dec. & Rep. 231 (1978).

[139] On the European Communities, see M(elchers) & Co. v. Federal Republic of Germany, App. No. 13258/87, 64 Eur. Comm'n H.R. Dec. & Rep. 138 (1990); and on the European Patent Organization, see Heinz v. Contracting Parties Who Are also Parties to the European Patent Convention, App. No. 12090/92, 76–A Eur. Comm'n H.R. Dec. & Rep. 125 (1994).

[140] *See* Matthews v. United Kingdom, App. No. 24833/94, 1999–I Eur. Ct. H.R. 251 where the European Court of Human Rights found a human rights violation on the part of the UK stemming from an EC act. *See* Henry G. Schermers, Matthews v. United Kingdom, *Judgment of 18 February 1999*, 36 COMMON MKT. L. REV. 673 (1999).

[141] UN Committee on Economic, Social and Cultural Rights, General Comment 8: The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights, UN Doc. E/C.12/1997/8.

[142] *Id.*, para. 1. The Committee later added that "parties should refrain at all times from imposing embargoes or similar measures restricting the supply of another State with adequate medicines and medical equipment," and that

While these conclusions may be problematic as a matter of substantive law,[143] they serve as an important indication that at least some human rights bodies have found an "indirect" way of exercising an "incidental" form of jurisdiction over international organizations via their power to adopt general comments. These trends evidence the fact that UN human rights monitoring bodies no longer feel inhibited from pronouncing themselves on human rights obligations of international organizations, in particular, those of the United Nations itself. While they may not be in a practical position to supply an adequate mechanism for compensating the victims of economic sanctions, they will probably further develop the conceptual framework establishing rights, violations, and potential remedies. This development, in turn, may ultimately contribute to a "political" solution that provides for compensation to sanctions victims.

III. Conclusions and Prospects

This overall assessment of the question of the Security Council's duty to respect humanitarian law and human rights provisions when imposing economic sanctions is another piece of evidence signaling the urgent need for more control and limitations of the power exercised directly by an international organization. When the United Nations—the major promoter of human rights in the international arena—takes enforcement action, it can be legitimately held to show respect for human rights in an exemplary fashion. At a minimum, one can support the conclusion drawn in a recent UN Sub-Commission working paper regarding remedies for civilian victims of sanctions imposed by the United Nations or regional bodies: "What is needed is for these entities—the Security Council, regional governmental organizations or regional defence pacts—to establish special mechanisms or procedures for relevant input from non-governmental sources regarding sanctions, including, especially, civilian victims."[144]

The preceding discussion has demonstrated that the existing judicial and quasi-judicial mechanisms not only are largely unavailable as a matter of current law, but also are unlikely—from a practical point of view—to provide adequate procedural means of compensating large groups of individuals or entire populations suffering as a result of economic sanctions. It is thus legitimate to reflect on possible alternative mechanisms or procedures. Admittedly, this search may lead away from judicial or quasi-judicial ways of redress toward more political mechanisms.

In this respect, an interesting lesson may be learned from another case of "collateral damage" from interstate trade sanctions, the losses incurred by European exporters on the U.S. market as an indirect consequence of the *Bananas* and *Hormones* disputes between the United States and the European Union.[145] In that case the United States had imposed retaliatory trade measures—more or less authorized by the World Trade Organization (WTO)[146]—

> [w]hile only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society—individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector—have responsibilities regarding the realization of the right to health. State parties should therefore provide an environment which facilitates the discharge of these responsibilities.

UN Committee on Economic, Social and Cultural Rights, General Comment 14: The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4, paras. 41, 42.

[143] See the preceding discussion beginning with the text at note 139.

[144] Working Paper, *supra* note 10, para. 107.

[145] *See, e.g.,* M. Salas & J. H. Jackson, *Procedural Overview of the WTO* EC-Banana *Dispute*, 3 J. Int'l Econ. L. 145 (2000).

[146] European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, WTO Doc. WT/DS27/ARB (Apr. 9, 1999). Since the United States did not act with full deference to the decisions by WTO organs, the Community successfully challenged the partly unilateral imposition of the retaliatory measures. *See* United States—Import Measures on Certain Products from the European Communities, WTO Doc. WT/DS165/R (July 17, 2000).

in the form of punitive tariffs on various European exports (wholly unrelated to the banana and beef industries) in response to persistent EC violations of the General Agreement on Tariffs and Trade (GATT).[147] The affected exporters are trying to recover their losses before the ECJ in currently pending actions for noncontractual liability[148] against the EC Council, which had adopted the legislative acts contrary to the Community's obligations under the GATT.[149] Such a remedy, which the EC Treaty expressly authorizes, complements annulment action, by which EC organs, member states, and—under certain restrictively interpreted circumstances—even individuals may challenge the legality of EC acts.[150] These types of recourse, of course, are very special and, one may add, highly refined mechanisms of legal accountability vis-à-vis the acts of a very special international organization and reflect its high level of integration and supranational character.[151] More traditional intergovernmental organizations are unlikely to adopt similar mechanisms.

For present purposes, however, the interesting fact is that even in the highly integrated, supranational European system of control of the organization's acts, there is an awareness that external trade measures for political purposes—and economic sanctions are a classical example of such measures—should not be "legally restrained."[152] Thus, it should not strike one as a surprise that when it came to compensating innocent third parties harmed as a result of the interstate measures adopted during the WTO *Bananas* and *Hormones* disputes, political, instead of legal adjudicatory, remedies were suggested. The European Parliament discussed the establishment of a special compensation fund for European exporters.[153] The underlying rationale for this attitude in the EC context is worth reemphasizing: so as not to hamper the political discretion of the EC organs within the WTO, including the freedom to violate binding GATT/WTO provisions, judicial remedies—even for those harmed as a result of possible violations—are considered inappropriate. Political action is deemed necessary if a total lack of accountability and redress for victims is to be avoided.

A political path viewed as more appropriate than judicial remedies in the "legal order" of the EC appears to be even more suited to the UN context. Given the importance for the Security Council to exercise a large degree of discretion when acting under Chapter VII to fulfill its political task, a similar approach should make sense. If the political will is fixed on resorting to economic sanctions to fulfill the Charter mandate to secure international peace and security, and if the implementation of this political resolve necessarily implies

[147] *See* Office of the United States Trade Representative, Press Release 99-35, USTR Announces Final Product List in Bananas Dispute (Apr. 9, 1999).

[148] EC TREATY Art. 288(2) (ex-Art. 215[2]) provides: "In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."

[149] It should be mentioned that some of the cases brought before the ECJ have already been dismissed on other grounds, while others are still pending. Geert A. Zonnekeyn, *EC Liability for Non-Implementation of Adopted WTO Panel and Appellate Body Reports: The Example of the 'Innocent Exporters' in the* Banana *Case, in* THE EUROPEAN UNION AND THE INTERNATIONAL LEGAL ORDER: DISCORD OR HARMONY? 251 (Vincent Kronenberger ed., 2001).

[150] EC TREATY Art. 230 (ex-Art. 173); *see supra* note 119.

[151] *See* TREVOR C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW (4th ed. 1998); THE ACTION FOR DAMAGES IN COMMUNITY LAW (T. Heukels & A. McDonnell eds., 1997).

[152] A related argument can be found in the debate on the direct applicability of GATT/WTO law within the EC legal order in which one of the major "policy" arguments against such applicability is that the political freedom of maneuver should not be restricted by individuals holding the EC accountable for WTO infringements. *See* Piet Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 COMMON MKT. L. REV. 11 (1997). Since the landmark decision in Joined Cases 21–24/72, Int'l Fruit Co. v. Produktschap voor Groenten en Fruit, 1972 ECR 1219, the ECJ has remained faithful to its denial of direct applicability of GATT/WTO law. See most recently, Case C–149/96, Portugal v. Council (Nov. 23, 1999). *See* Patricia Egli & Juliane Kokott, Case Report: Portuguese Republic v. Council of the European Union (Judgment), *in* 94 AJIL 740 (2000). Similar arguments can be made that militate against awarding compensation for WTO violations because the resulting financial disincentives would also effectively deprive the Community of its political option of acting freely within the WTO legal order, including having the option to derogate from such obligations.

[153] *See* BULLETIN QUOTIDIEN EUROPE, No. 7458, May 4/5, 1999, at 10. The fact that apparently nothing resulted from this initiative has probably contributed to the willingness of some firms to pursue their cause before the ECJ.

damage to innocent third parties, it may seem wiser to provide for mechanisms to alleviate and/or compensate for the harm inflicted upon those parties than to interfere with the legitimate sanctions decision as such.

The current practice of introducing and administering humanitarian exceptions to the UN embargo programs[154] may serve as one element of such a mechanism. Experience with these exceptions has shown, however, that they are not always effective in the sense of fulfilling their aim of shielding the population from the targeted suffering.[155] Another political tool serving the same purpose is the quest for better-directed sanctions. The whole "smart" sanctions debate[156] and the attempt specifically to target the ruling elites by aiming at their personal wealth[157] and/or freedom of travel,[158] coupled, as it happened in some instances, with the threat of personal criminal liability,[159] illustrate this development.

The question remains what should happen if all these precautionary steps prove ineffective and full-scale economic embargoes are imposed, massively hurting large groups of innocent civilians. In trying to develop another nonlegal remedy, a political compensation mechanism such as the one currently debated with regard to Article 50 of the Charter appears to hold promise. Although Article 50 is textually limited to third states, the underlying idea of compensating innocent third parties can be extended to the civilian population in a target country. Considering that the theory that economic hardship resulting from external sanctions will pressure the population of the target state into rebelling against its ruling elites has failed[160] or at least is no longer very persuasive, one should accept that the populations of sanctioned states are frequently as much the unintended victims of UN sanctions as third states.[161]

Article 50 has been a rather dormant Charter provision throughout the last fifty years, but the increase in sanctions programs during the last decade not only has caused more frequent economic difficulties for third states, but also has led to numerous requests for consultations under that article.[162] This development has now gained enough momentum for a serious demand for a more principled approach.[163] In 2000 the Security Council decided to establish an informal working group to develop general recommendations on how to improve the effectiveness of UN sanctions, including by preventing their unintended impacts and assisting member states in implementing them.[164] UN members have understandably remained reluctant to accept additional financial burdens. But if it is correct to demand that the affected countries alone should not be expected to bear the costs resulting from collective action,[165] it is hard to conceive of any alternative to collective burden sharing.

[154] *See supra* note 92.

[155] *See supra* notes 7, 8, 9, and text at note 94.

[156] *See supra* note 6.

[157] *See, e.g.,* SC Res. 1267 (Oct. 15, 1999) (Afghanistan).

[158] *See, e.g.,* SC Res. 1127 (Aug. 28, 1997) (Angola), 1132 (Oct. 8, 1997) (Sierra Leone).

[159] *See* SC Res. 827 (May 25, 1993), 955 (Nov. 8, 1994) (establishing the Yugoslavia and Rwanda International Criminal Tribunals).

[160] Working Paper, *supra* note 10, para. 48.

[161] This parallel is also hinted at in SUPPLEMENT TO AN AGENDA FOR PEACE, *supra* note 1, para. 75.

[162] *See* Carver & Hulsmann, *supra* note 107.

[163] In 1992 and 1995, the UN Secretary-General prominently raised the issue of the urgent need to respond to the expectations raised by Article 50 and suggested the establishment of a mechanism that, inter alia, would assess, at the request of the Security Council, and before sanctions are imposed, their potential impact on the target country and on third countries so as to measure their effects with a view to minimizing collateral damage, to explore ways of assisting member states that are suffering collateral damage, and to evaluate claims submitted by such states under Article 50. SUPPLEMENT TO AN AGENDA FOR PEACE, *supra* note 1, para. 75.

[164] Note by the President of the Security Council, UN Doc. S/2000/319 (2000).

[165] SUPPLEMENT TO AN AGENDA FOR PEACE, *supra* note 1, para. 73.

If one accepts the concept of compensatory funding for innocent third states, it should be even more acceptable to reallocate the burden of the costs of political action that innocent civilians in the target counties sustain, especially when that burden amounts to the deprivation of basic entitlements under humanitarian and/or human rights law.

AUGUST REINISCH*

CORRESPONDENCE

> The *American Journal of International Law* welcomes short communications from its readers. It reserves the right to determine which letters should be published and to edit any letters printed. Letters should conform to the same format requirements as other manuscripts.

TO THE CO-EDITORS IN CHIEF:

Professor Vagts's detailed analysis of the relationship of treaties to statutes in the United States would have been much simpler if he had merely pointed out that the United States has taken a "dualist" position, positing that international law and municipal law are two separate systems, since before Chief Justice John Marshall propounded that view. The eighteenth-century position espoused by John Jay was already seen by many others as insupportable at the time the Constitution was framed, when the "law of nations" (*jus gentium*) orthodoxy was found to be logically insupportable and was gradually replaced by an "international law" (*jus inter gentes*) orientation. I forbear from citations; most are in my book *Ethics and Authority in International Law* (1997). Also in that book is a short analysis of the non-inconsistency between Story's self-consciously political position in *La Jeune Eugénie* and Marshall's (for a unanimous Supreme Court, including Joseph Story) in *The Antelope*. Professor Vagts seems to think they are irreconcilable.

ALFRED P. RUBIN
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Professor Vagts replies:

Professor Rubin's letter shows that he has a different agenda from mine. He is interested in the lawyerly task of reconciling American views about the obligation of treaties and making a coherent unity of them. I am interested in the variety of attitudes taken in the course of that history and in the interplay between the changing posture of the United States in international affairs and the thinking of its scholars and practitioners. One could simplify matters by grouping them all as dualists, but that would obscure the differences between them. Interestingly, the writers that I cite do not use the term "dualist" and might have been as surprised to hear Professor Rubin give them that label as Molière's Bourgeois Gentilhomme was to learn that he had been speaking prose.

* Professor of Public International and European Community Law, University of Vienna; and professorial lecturer, Bologna Center, SAIS/Johns Hopkins University. This contribution is based on a lecture given at the 21st Meeting of Financial Sanctions Experts, held in Vienna on October 20, 2000. The author is grateful for comments and suggestions on an earlier draft received from Andrea Bianchi, Hanspeter Neuhold, Christoph Schreuer, Bruno Simma, Karel Wellens, and Karl Zemanek. Any errors are mine alone.