

# **The International Responsibility of the UN for the Internationally Wrongful Acts of the Security Council**

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by

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# Table of Abbreviations

AJIL	American Journal International Law
All ER	All England Law Reports
AOI	Arab Organisation for Industrialisation
BYBIL	British Yearbook of International Law
Duke J.Comp. and IL	Duke Journal of Comparative and International Law
ECOMOG	ECOWAS Ceasefire Monitoring Group
ECOWAS	Economic Community of West African States
EJIL	European Journal of International Law
EWHC	England and Wales High Court (Queen's Bench Division)
FRY	Federal Republic of Yugoslavia
ICLQ	International and Comparative Law Quarterly
ICJ	International Court of Justice
IFOR	Implementation Force in Bosnia and Herzegovina
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
ITC	International Tin Council
LJIL	Leiden Journal of International Law
NATO	North Atlantic Treaty Organisation
Netherlands YIL	Netherlands Yearbook of International Law



NGOs	Non Governmental Organisations
OAS	Organisation of American States
ONUC	United Nations Operations in the Congo
OPCW	Organisation for the prohibition of Chemical Weapons
P.C.I.J	Permanent Court of International Justice
Proc. ASIL	Proceedings of the American Society of International Law
RCADI	Recueil des Cours de l'Académie de Droit International
RRPs	Recommended Rules and Practices on Accountability
SOFA	Status of Forces Agreement
U.N	United Nations
U.N Charter	Charter of the United Nations , 1945
UNOMIL	United Nations Missions in Liberia
UNOSOM	United Nations Operation in Somalia
UNPROFOR	United Nations Protection Force
UNTS	United Nations Treaty Series
UNITAF	United Task Force
Yale L J	Yale Law Journal
YJIL	Yale Journal of International Law

# **ABSTRACT**

**Maysa Bydoon**

This thesis is a study of the possibility of invoking the international responsibility of the Security Council for its actions. The presumption of my thesis is that the UN with separate personality is responsible for the internationally wrongful acts of the Security Council, however, in certain circumstances the member states of the Security Council particularly, the decision makers could be held responsible. As many entities are dealing with Security Council, the determination of the responsible entity becomes very difficult. This thesis has identified three important areas of tension in such responsibility. First, the legal status of the Security Council, relating to whether it is considered “above the law”; secondly, the more persistent tension concerning the relationship between member states of an International Organisation and the International Organisation itself in considering the responsibility of member states. Last but not the least, the tension related to the scarcity, if not the lack, of recent practice concerning the international responsibility of the Security Council as well as the absence of rules that govern such a responsibility, will be discussed.

This thesis is premised on the assumption that the Security Council has recently extended powers and is getting involved in virtually every single matter at both international level and at the non-international level. This inevitably raises issues of the international responsibility of the Security Council which have remained undeveloped, and which, accordingly, urges the necessity of establishing principles govern such international responsibility.

Most notably, the subject of the international responsibility of the Security Council has not been addressed in the Articles on Responsibility of States for international wrongful acts. Thus in the light of the uncertainty and the rapid development of the powers of the Security Council, this thesis aims to fill the gaps as to the international responsibility of the Security Council.

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# Introduction

Under Article 24 (1) of the UN Charter, the Security Council is given “primary responsibility for the maintenance of international peace and security”. Articles 24 (1) and 25 render the responsibility of the Security Council for maintaining international peace and security authoritative.<sup>1</sup>

The powers of the Security Council have, in practice, increased recently due to changes that have taken place in the international legal order since 1945. The development of human rights and humanitarian law, as well as the evolution of general international law, has led to many changes in the world order.<sup>2</sup> More recently, the Security Council has played an unprecedented role in maintaining international peace and security. The way in which the Security Council handles “threat to the peace, breaches of the peace or acts of aggression”<sup>3</sup> has changed. In other words, a new approach is now being followed by the Security Council, which has led to the transformation of the understanding of the Security Council’s role in dealing with disputes and threats to peace<sup>4</sup> and interpreting its powers, to the extent that one may conclude that the Security Council exercises extraordinary powers which have never been exercised before.<sup>5</sup>

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<sup>1</sup> Article 24(1) of the UN Charter requires that members “agree that in carrying out its duties under this responsibility the Security Council acts on their behalf”. Article 25 requires members to “agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”.

<sup>2</sup> Debbas, V., ‘Security Council enforcement action and issues of state responsibility’, (1994) 43 ICLQ 91.

<sup>3</sup> Article 39 of the UN Charter.

<sup>4</sup> Gray, C., ‘From unity to polarization: international law and the use of force against Iraq’, (2002) EJIL 1-19.

<sup>5</sup> Examples that could be cited in this regard are the intervention with military force for humanitarian reasons into the anarchy of another state (Somalia), the establishment of the UN Compensation Commission for claims against Iraq in Geneva. For more details, see Chapter one, *infra*. Also, see Schweigman, D., *The Authority of the Security Council under Chapter VII of the*

Since the 1990s, a radical development in the mission of the Security Council has been discernible. Intervening in civil wars, establishing international tribunals, demarcating boundaries, undertaking peace-keeping operations, restoration of democracy, humanitarian assistance and actions against international terrorism are some examples of the shift in the mission of the Security Council.<sup>6</sup>

In terms of the fundamental relationship between the Security Council and the international environment, the Security Council must be responsive to changes in the international system. However, this does not mean the Security Council should be given unlimited scope as the more powers are given to the Security Council, the more the limitations to such powers must be examined.

In this study a principal organ of the UN is chosen. The reason for this choice is very obvious as under Article 25 of the UN Charter the Security Council is the single most important existing organ that makes binding decisions.<sup>7</sup> Moreover it lies at the heart of the work of United Nations.<sup>8</sup> Possible illegal decisions taken by the Security Council may give rise to a number of issues: the liability of member

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*UN Charter: legal limits and the role of the International Court of Justice.* Kluwer Law International, 2001, p.1.

<sup>6</sup> See Chapter One, *infra*. Also see, Shaw, Malcolm N., *International Law*, Cambridge: University of Cambridge Press, Fifth edition, 2003, pp. 1124, 1147. In this regard, Higgins, persuasively, maintained that 'in the improved international climate it has been possible, in 1990 and 1991, to envisage that the Security Council might behave rather more as was originally intended under the Charter. But there are indications that it is now setting out on the other new paths, which significantly risk legal incoherence'. Higgins, R., *Problems and Process: International Law and how we use it*, Oxford: Clarendon Press, 1999, p. 184.

<sup>7</sup> It is persuasively maintained that 'the Security Council constitutes the central element in the UN regime for the maintenance of world order', Pogany, I., *The Security Council and the Arab-Israeli Conflict*, Gower Publishing Company Limited, 1984, p.1.

<sup>8</sup> In accordance with organisation theory, 'An organisation can be regarded as (inter alia) a social group (or collectively) which is characterized by a normative structure (what ought to be) applicable to the participants, and by a behavioural structure (what is), linking participants in a common network or pattern of activities, interactions and sentiments' So that and '[i]n these broad terms, the Security Council can be regarded as an organisation which, in turn, is a principal component of the UN Organisation'. Young, Michael J R., *The impact of a changing international environment on the decisions and practices of the United Nations Security Council: 1946-1995*: PhD thesis, University of Keel, 2001, p.6.



states for making and/or contributing to making such decisions, the liability of the real actors of illegal decisions and the degree of responsibility of the UN itself.

### **The forms of accountability**

The issue of greatest concern with respect to the international responsibility of International Organisations is the relationship between the legitimacy of the actions of International Organisations and the accountability regime. One might question whether legitimacy may be considered as the other side of the coin of accountability. This issue is discussed by the International Law Association Committee on Accountability of International Organisations. As Hohmann suggests “the use of the term “accountability” could be replaced by “legitimacy” or “*autoritæet*”.<sup>9</sup> However, Shaw suggests that “the legitimacy dealt with the constitutional status of an organisation and its authority meant its competences or powers. Accountability was something else”.<sup>10</sup> Accountability often means three things:

First, it means participation in decision making...Second; it means transparency and making decisions according to rules. Third, it means being able to stop the execution of the decision, if people are unhappy with it, through an election”.<sup>11</sup>

If one accepts that a meaning of accountability is tantamount to sharing in decision-making, then this could ultimately lead to a form of monitoring and scrutiny of the adequacy of decisions or the actions made in accordance with the existing law. As one of the component elements of accountability aims to make

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<sup>9</sup> ILA Report of the 69<sup>th</sup> Conference held in London 25-29<sup>th</sup> July 2000, p. 895. It is maintained that ‘*Autoritæet*’ was not an English word but it could be translated. It had a meaning that was different, but similar to, authority’. Ibid.

<sup>10</sup> ILA Report (2000), supra note 9, p.895.

<sup>11</sup> Bradlow, D., ‘The accountability of international organisations to non-state actors’, (1998) ASIL Proceedings, p.366.

sure that the international organisations are under an obligation to take into consideration the forms of internal and external monitoring and scrutiny,<sup>12</sup> this monitoring examines *ultra vires*<sup>13</sup> acts in international organisations and in effect determines wrongful acts in order to determine the damage. Within this relationship, the twofold meaning of legitimacy, both political and legal, is linked with the notion of accountability. Although this relationship could be disputed, the rules that govern both legitimacy and accountability are ultimately political ones. The concept of accountability as Shaw maintains ‘is broader than the principles of responsibility and liability for internationally wrongful acts and rests upon the notion that the lawful application of power imports accountability for its exercise’.<sup>14</sup>

Accountability presents itself in different forms: legal, political, administrative, and financial.<sup>15</sup> Furthermore, types of accountability differ depending on whether it is the internal law of International Organisations or the laws governing International Organisations in general that are being considered.

In addition, accountability is seen as an essential means of ensuring the proper functioning of International Organisations. However, in this regard, the accountability regime should, in effect, take into consideration a balance between the interests of States and those of organisations.<sup>16</sup>

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<sup>12</sup> ILA Report of the 68<sup>th</sup> Conference, held at Taipei, Taiwan, Republic of China, 24-30 May 1998, pp. 599- 600.

<sup>13</sup> Osieke, E. *Ultra vires acts in international organisations- the experience of the international labour organisation*. (1976-1977) 48 BYBIL 256.

<sup>14</sup> Shaw, MN., *International Law*, supra note 4, p.1204.

<sup>15</sup> ILA Report (1998), supra note 12, p.602.

<sup>16</sup> Hirsch, Moshe, *The responsibility of International Organisations toward third parties: Some Basic Principles*, London, (1995), p. xiv. Moreover, the necessity to take into consideration the independence of International Organisations in decision making is required as it is maintained that ‘the model rules envisaged by the Committee will have to keep the balance between preserving the necessary autonomy in decision-making of IOs and guaranteeing that the IOs will not be able to

In spite of the fact that no set of rules of responsibility governing International Organisations have so far been drawn up, unlike rules governing the responsibility of States, and such rules are urgently required in light of the influential role of international organisations.<sup>17</sup> To this end, the International Law Commission (ILC) has decided to include the issue of the responsibility of International Organisations in its programme of work, as set out at its 2717<sup>th</sup> meeting of 8 May 2002 and set up a Working Group on the Responsibility of International Organisations.<sup>18</sup> On 4 June 2003 the Drafting Committee adopted draft Articles on the responsibility of international organisations.<sup>19</sup> The General Assembly ‘recommends that the debate on the report of the International Law Commission at the fifth-ninth session of the General Assembly commence on 1 November 2004’.<sup>20</sup> The ILC held its fifty-sixth session at the United Nations Office in Geneva from 3 May to 4 June and 5 July to 6 August 2004 and considered the Special Rapporteur’s second report concerning the responsibility of international organisations.<sup>21</sup>

As Article 57 of the Draft Articles on the State responsibility adopted by the ILC in 2001 stipulates as follows:

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avoid accountability’. ILA Report, (1998), *supra* note 12, p.602.

<sup>17</sup> It is notable that the decisions of International Organisations control every aspect of daily life, even the kind of food one eats. Not only that, but the awareness of any risk resulting from the activities of international organisation is prevalent. In this sense, Judge Alvarez expresses the view that ‘the decision which the court has arrived at appears to me to be in accordance with the general principles of the new international law...and the exigencies of contemporary international life’. *Reparation for Injuries suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Reports, p.190.

<sup>18</sup> UN. Doc. A/CN.4/L.622.

<sup>19</sup> UN.Doc. A/CN.4/L.632.

<sup>20</sup> UN. Doc. A/58/10.

<sup>21</sup>UN. Doc. A/59/10. The International Law Commission decided that its next session be held from 2 May to 3 June and from 4 July to 5 August 2005.

These articles are without prejudice to any question that may arise about the responsibility under international law of an international organisation, or of any State responsibility of that State.<sup>22</sup>

Because of the lack of rules governing the international responsibility of International Organisations, the International Law Association (ILA) Committee on Accountability of International Organisation has drafted a set of Recommended Rules and Practices on Responsibility (RRPs).<sup>23</sup>

The presumption of my thesis is that the UN with separate personality is responsible for the internationally wrongful acts of the Security Council,<sup>24</sup> however, in certain circumstances the member states of the Security Council particularly, the decision makers, could be held responsible. In arguing this, I will seek to establish a legal basis for the liability of member states by examining the nature of the relationship between the member states and the international organisation.

To better understand the implications of the nature of the relationship between the member states and the international organisation, one must analyze the role of the Security Council in conducting its operations, and the factors that might undermine the viability of this role, if any. In spite of the fact that there are no constitutional changes that serve to expand the powers of the Security Council, in practice this has happened as a matter of interpretation. The way in which the use of powers vested in the UN Charter has evolved in practice will be examined.

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<sup>22</sup> UN. Doc. A/56/10.

<sup>23</sup> See, ILA Report of Berlin Conference August (2004).

<sup>24</sup> As under Article 4 of the ILC's Draft Articles on the Responsibility of International Organisations, the general rule on attribution is established which makes clear that the acts of an organ are attributable to the Organisation itself.

The present research will deal with proposed rules relating to the responsibility of International Organisations. It will focus more particularly on the fundamental issues connected with the nature of the legal framework, if any, that may be seen to govern the international responsibility of International Organisations, and consequently, those which relate to the international responsibility of the UN itself.

This thesis aims to deal with the various issues arising from the constituent elements of responsibility: a breach of international obligation and the question of attribution. A further issue with which this thesis will deal is that the relationship between member states and international organisation, as it is of a complex nature.<sup>25</sup> This issue is currently under the consideration of the ILC committee.<sup>26</sup>

The ILC stated that:

Neither for States nor for international organisation is the relationship arising out of an internationally wrongful act necessarily bilateral. The breach of the obligation may well affect more than one subject of international law or the international community as a whole. Thus in appropriate circumstances more than one subject may invoke, an injured subject or otherwise, the international responsibility.<sup>27</sup>

Questions have arisen regarding the legality of actions taken by the Security Council; its actions have been criticised in situations such as Libya, Somalia and

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<sup>25</sup> Shaw, MN., *International Law*, supra note 6, p.1201.

<sup>26</sup> On the earlier work of the commission on this issue, the ILC stated that ‘ the question whether States may be responsible for the activities of international organisations of which they are members is probably the most contentious issue of the topic under consideration. As it is partly linked to the question of attribution, it may be preferable to deal with it in immediate sequence. Some cases of member States’ responsibility find a parallel in Chapter IV of part One of the Articles on State Responsibility . This chapter, which concerns relations between States, only considers instances in which one State aids or assists, directs and controls, or coerces another State over the commission of an internationally wrongful act. Member States’ responsibility may be engaged under further circumstances. As has already been noted, the different structure and functions of international organisations may lead to diversified solutions to the question now under consideration’. The Report of the International Law Commission fifty-fourth session. General Assembly, Official Records fifty seventh session supplement No. 10. UN Doc. A/57/10 ( 2002), p.233.

<sup>27</sup> UN. Doc. A/58/10, p.47.

Iraq. Different grounds for criticism have been put forward in these cases such as acting *ultra vires* and disregard for domestic jurisdiction.<sup>28</sup> Furthermore, it may be questioned whether the immunities and privileges granted to the UN remain a decisive barrier to remedial action for non- state claimant in cases UN powers have been exceeded.<sup>29</sup> Article 105 of the UN Charter deals with this question directly but inadequately.

The structure of this thesis is divided into two parts, reflecting the problems and limitations of establishing the international responsibility of the UN for the internationally wrongful acts of the Security Council. In the first part, the basic elements required for the establishment of the responsibility of international organisations: breach of obligation and attribution (imputability), are examined. In the second part, an attempt has been made to examine the applicability of these elements for the establishment of the responsibility of the UN for Security Council authorized operations.

Since this study has come at an early stage in the development of the law of international organisations' responsibility at a time where such rules are still under ILC consideration, it is hoped that this study will help to increase awareness of the necessity of ascertaining and formulating rules governing the international responsibility of the UN for the internationally wrongful acts of the Security Council.

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<sup>28</sup> See Chapter Four, *infra*.

<sup>29</sup> UN. Doc. A/CN.4/L.622. p5. Also, see ILA Report, *supra* note 23, p.41.

## **Part one: The elements of the International Responsibility of the Security Council through the United Nations: conceptual issues**

The nature of the activities of the Security Council highlights the approach that more limitations to the powers of the Security Council are needed.<sup>1</sup> Moreover, within the expanding areas of such activities, a more suitable structure for analyzing Security Council obligations is required.

The role of the United Nations and the existence of UN missions around the world are considerable as this organisation has the main responsibility for maintaining international peace and security. Such responsibility imposes a heavy burden in terms of the need to protect the world from any wrongful acts that might occur as a direct result of this Public International Organisation. This role brings with it the implicit need for rules pertaining to the responsibility of International Organisations. The concept and the background of international responsibility may be traced back to the international responsibility of States<sup>2</sup> as defined in the following words:

Responsibility is simply the principle, which establishes an obligation to make good any violation of international law producing injury, committed by the respondent State.<sup>3</sup>

Under Article 2 of the ILC Draft Articles on the Responsibility of International Organisations, the term ‘international organisation’ refers to ‘an organisation

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<sup>1</sup> Shaw, MN., *International Law*, Cambridge: University of Cambridge Press, Fifth edition, 2003, p.1148.

<sup>2</sup> The General Assembly recognized the importance of the codification of the principles of international governing State Responsibility in its adopting of resolution 799(VIII) of 7 December 1953. A/RES/799 (VIII) (1953).

<sup>3</sup> Eagleton, C., *The Responsibility of States in International Law*, The New York University Press, 1928, p.22. This principle is established by the Permanent Court of Justice in *Chorzow Factory Case* as the Permanent Court stated that ‘it is a principle of International Law that the breach of an engagement involves an obligation to make reparation in an inadequate form’, (1928) P.C.I. J, Series A, judgment No 17, p.29.

established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organisations may include as members, in addition to States, other entities'.<sup>4</sup> However, the concept of international organisations, in accordance with Article 2(1) (i) of the 1986 Vienna Convention, is restricted to intergovernmental organisations.<sup>5</sup>

The effectiveness of International Organisations is connected to, and measured by their ability to be responsible, as well as by the rules governing their responsibility, insofar as the guarantees of the legitimacy of these actions may arise spontaneously.

Before examining this issue in more detail, it is important to question whether the rule of *ultra vires* is to be found within the legal system of International Organisations. Not only this, but in order for the need for responsibility to be upheld, it is necessary to determine who has responsibility for what, and towards whom, and who is the actor. It is also essential to ascertain the nature of the accountability regime where International Organisations are concerned. Once it has been decided that there are rigid grounds for accountability, it is easier to maintain that International Organisations are responsible. Such a conclusion could not be reached, however, without deciding initially whether the rule of *ultra vires* in fact exists.

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<sup>4</sup> International Law Commission Report on the works of its fifty-fifth session (5 May to 6 June and 7 July to 8 August 2003) Official Records of the General Assembly, fifty-eighth Session, Supplement no. A/58/10.

<sup>5</sup>As this Article says that “‘international organisation’ means an intergovernmental organisations”. The Vienna Convention on the Law of Treaties between States and International Organisations, (1986) 25 ILM 540.



## **Chapter 1: The development of the functions of the Security Council**

The genesis of the Security Council may be traced back to the era of the League of Nations. In 1920, the League of Nations was created by the Treaty of Versailles. It consisted of two main organs: the General Assembly and a Council. However, the failure of the League of Nations to maintain international peace and security prompted the establishment of the United Nations in order to promote international peace and security.<sup>1</sup>

There were a series of meeting and conferences on the creation of the United Nations.<sup>2</sup> The process of creating the Charter was highly complex in that the San Francisco Conference was organized into general committees, commissions and technical committees.<sup>3</sup> The UN Charter was signed on 26 June 1945 by the 50 states represented at the San Francisco Conference and entered into force on 24 October 1945.<sup>4</sup> The purposes of the United Nations are provided in Article 1 of the Charter, as follows:

1. To maintain international peace and security, and to that end: 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 breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the

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<sup>1</sup>Goodrich, Leland and Hambro, Edvard, *Charter of the United Nations: Commentary and Documents*, Third and revised Edition, Columbia University Press, 1969, pp. 2-3.

<sup>2</sup> Conferences of Dumbarton Oaks in 1944, Yalta, Malta in 1945 and San Francisco in 1945. For details, see Russell, R B., *A history of the UN Charter: The role of the United States 1940-1945*, Washington: Brookings Institution, 1958, pp. 411-477. Eagleton, C., 'The Charter adopted at San Francisco', (1945) 39 American Political Science Review 935. Kelsen, H., 'The Old and new League: the Covenant and the Dumbarton Oaks', (1945 ) 39 AJIL 45-83. For official records concerning the Security Council genesis, see UNCIO, Documents, Vol, XI, XII, Commission III, Published in cooperation with the Library of Congress, 1945.

<sup>3</sup> Goodrich, Leland and Hambro., Edvard, *supra* note 1, p. 5. Schachter, Oscar, 'The Charters origins in today perspective', 5-8 April (1995) 89 ASIL proceedings 47.

<sup>4</sup> Ibid.

peace.

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation 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' and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends

Under Article 7(1) of the UN Charter there are six principal organs of the United Nations 'a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat'.

The composition of the Security Council is stated in Article 23 of Chapter V of the UN Charter<sup>5</sup>, as follows:

1. The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of the international peace and security and to the other purposes of the Organisation, and also

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<sup>5</sup> Before the amendment of the composition of the Security Council which took effect on 1 January 1966 as the number was increased to fifteen, the Security Council shall consist of eleven members. See Nicholas, H.G., *The United Nations as a Political Institution*, Oxford University Press, Fifth edition, 1975, pp.78-79. The enlargement of the composition of the Security Council has been criticised on the ground that 'the 1966 enlargement has not in itself brought about any really significant change in the balance of forces within the Council...as a result of the growth of UN membership, that balance had swung quite a long way before the enlargement. Compare, for example, the 1952 and 1962 compositions. Setting aside the Latin Americans, the other elected members in the first of these years were the Netherlands, Greece, Turkey and Pakistan; in the second, Ireland, Rumania, Egypt and Ghana. The numerical preponderance of Council members associated with the western powers by alliance or otherwise could not be maintained when the 'electorate' in the Assembly came to include a large number of non-aligned Asian and African States.' Boyd, A., *Fifteen Men on a powder Keg : A history of the UN Security Council*, Methuen and Co Ltd, 1971, p.112.

- to equitable geographical distribution.
2. The non-permanent members of the Security Council shall be elected for a term of two years... A retiring member shall not be eligible for immediate re- election.
  3. Each member of the Security Council shall have one representative.

Many complicated issues surround the Security Council' establishment. Indeed, there were wide discussions between the four great powers (the United States, Great Britain, the Soviet Union, and China) in some critical areas such as the composition, the functions and the procedure of the Council, as well as the collective security system. In addition, the voting system, particularly the veto right, was an important issue at the Yalta conference in 1945 and at the San Francisco conference in 1945.<sup>6</sup> The Security Council under Article 24(1) is given the major responsibility for maintaining international peace and security.

Pursuant to Article 27(2) of the UN Charter, decisions of the Security Council differ in their nature, as all decisions need an affirmative vote of nine of the Security Council member states. This excludes non procedural decisions which must be made by an affirmative vote of nine members states, including the concurring votes of the five permanent members of the Security Council.<sup>7</sup>

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<sup>6</sup> However, the composition of the Security Council raises some controversial issues: for example, the number of permanent members determined under Article 23. In order to make changes to the number of the members, an amendment to the Charter, conforming to Articles 108 and 109, is required. However, amendments to the Charter require the approval of nine members including the votes of the five permanent members of the Security Council, which leads, on a wider level, to barring these changes from taking place without their consent. Kelsen, H., *The Law of the United Nations : a critical analysis of its fundamental Problems*, London Stevens & Sons Limited, 1951, p. 222. Bailey, S., *Voting in the Security Council*, Oxford, 1969, 12-13. See also, McCarthy, Patrick A., 'Positionality, Tension and Instability in the Security Council', EUI Working Papers, European University Institute, 1997, pp. 18-23. Franck, Thomas M., *Nation against Nation*, Oxford University Press, 1985, pp. 161-183.

<sup>7</sup> In fact the voting formula of Article 27 (3) has been reached at Yalta. The strongest powers insisted on having a right of veto. It is maintained that 'the Security Council could obtain the necessary means of military enforcement only from the governments possessing the world's armed forces and facilities. It was evident that the strongest power would refuse to commit their national forces to collective use unless they had individual controlling votes in any such Council decision. That meant that any one of them could block action it opposed, against either itself or any other state it was interested in . Such inequity, it was therefore argued, was inevitable if those powers

During the Cold War era the Security Council was unable to fulfil its role in maintaining international peace and security as the veto had effectively paralyzed the Security Council.<sup>8</sup>

This does not mean, however, that after the Cold War, the Security Council could act free from the veto, although the average veto usage was less than the average in the Cold War era. In this regard, it is maintained that ‘the conflicting interests and aspirations that characterized the Cold War continue, and the veto remains as a possible restraint on action by the Security Council’.<sup>9</sup>

In spite of what might be noticed in the post Cold War period, there is, to a large extent, a similarity of interests between the permanent members. There is an inextricable link between the use of the veto by member states and their interests. The Iraq War 2003 showed that France at least felt that its interests would lead it to veto an express authorization to use force against Iraq. However, the USA and the UK commenced military action against Iraq without any express authorization from the Security Council.<sup>10</sup>

## **1.1 What is the Security Council for?**

### **1.1.1 The functions and powers of the Security Council**

The Security Council’s responsibilities and its functions with regard to international peace and security are explained under Chapters VI to VII, which

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were to accept a collective enforcement system. On the other hand, the Soviet Union’s additional demand for a similar right of veto on all substantive decisions of the Council, though a logical extension of the above reasoning, would have too flagrantly violated the Western tradition against self-judgment. It would also have discriminated too heavily against all the other states’. Russell, R B., *The United Nations and United Security policy*, Washington, D.C., The Brookings Institution, 1968, p.55. See also, Wilcox, Francis, O., ‘The Yalta Voting Formula’, (1945 ) 39 AJIL 943-956.

<sup>8</sup> See Chapter One, *infra*, pp. 19-24.

<sup>9</sup> Rosenne, S., ‘General Course on Public International Law: the United Nations System’, Chapter XII in (2001) RCADI 444.

<sup>10</sup> See Chapter Six, *infra*.

deal exclusively with the Security Council. Chapter VI is entitled 'Pacific Settlement of Disputes'. The Security Council, under Chapter VI, has the power to make recommendations for the friendly settlement of disputes as Article 33 provides a set of peaceful means: 'negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful settlement means of their own choice'. Under Article 34, the Security Council has the power to investigate a dispute. The Security Council has a wide range of powers in terms of its responsibilities for the maintenance of international peace and security. Under Article 39, the Security Council 'shall determine the existence of any threat to the peace, breach of the peace, or act of aggression'. Once the Security Council has so determined, it has the discretionary power to 'make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42'.<sup>11</sup> The measures that the Security Council may take are varied, and consist of measures not involving the use of force (Article 41), and measures involving the use of force (Article 42).<sup>12</sup>

The powers of the Security Council have greatly expanded. The most important turning point of the Security Council role may be found after the Iraq-Kuwait invasion.<sup>13</sup> First and foremost, the Security Council, through resolution 678 of 29

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<sup>11</sup> Article 39 of the UN Charter.

<sup>12</sup> There was a wide discussion concerning the enforcement powers of Security Council. The delegate from Norway, for example, asked for an explanation of the meaning of the words "make recommendations or decide upon the measures" in paragraph 2 of Section B, Chapter VIII, and also the meaning of "recommendations" as opposed to "measures necessary" in paragraph 1 of section B, Chapter VIII. His first interpretation was that the measures to which reference was made were measure to be taken only by the dispute'. Also, the delegate from Belgium 'thought that word "recommendations" should be either deleted from paragraph 2 and from the amendment thereto proposed by the four sponsoring governments or that a more suitable wording be substituted.' Summary report of eighth meeting of Committee III/3, May 16 1945, UNCIO, Documents, XII, Commission III/3 Enforcement arrangements May 18, 1945, pp. 334-335.

<sup>13</sup> Fassbender, Bardo, 'Uncertain steps into a post-cold war world: the role and functioning of the UN Security Council after a decade of measures against Iraq', (2002 ) 13 EJIL 273-303. See

November 1990, authorized member states to use 'all necessary means' against Iraq. This authorization has highlighted many crucial issues such as the scope for self-defence, the use of force in the no fly- zones, the extensive sanctions and question of implied authorization of the Security Council.<sup>14</sup>

Besides the sanctions against Iraq, the Security Council in resolution 674 (1990), acting under Chapter VII of the UN Charter, "reminds Iraq that under international law it is liable for any loss, damage or any injury in regard to Kuwait and third States and their nationals and corporations as a result of the invasion and illegal occupation by Iraq".<sup>15</sup> Moreover, the Security Council has created a new administrative instrument for the settlement of claims for war damages such as the establishment of the UN Compensation Commission for claims against Iraq.<sup>16</sup> Also, through resolution 687, the Security Council went further and established the disputed Iraq-Kuwait international boundary under Chapter VII of the UN Charter.

A further development in the activities of the Security Council may be found in establishing international criminal tribunals. Alvarez has argued that "the Council has gone beyond attributing responsibility to states and has found or suggested that individuals may be accountable for internationally wrongful acts as with the

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Fenton, Neil, *Understanding the UN Security Council Coercion or Consent?*, Ashgate Publishing Limited ,2004,pp. 1-37.

<sup>14</sup> Gray, C., 'From unity to polarization: international law and the use of force against Iraq', (2002) EJIL1-19.

<sup>15</sup> UN. Doc. S/RES/674 (1990).

<sup>16</sup> See, Schweigman, D., *infra* note 22, pp.1-3. Also, see resolution 692 of 20 May 1991; Paragraph 16 of resolution 687 (1991) stated that 'Iraq ...is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation'. Also, paragraph 18 of resolution 687 decided also 'to create a fund to pay compensation for claims that fall within paragraph 16 above and to establish a Commission that will administer the fund'. UN. Doc .S/RES/ 687(1991).

accused before the Yugoslavia war crimes Tribunal”.<sup>17</sup>

In relying on the wide interpretation of Article 39 of the United Nations, the Security Council, acting under Chapter VII of the UN Charter, decided to establish the International Criminal Tribunals in the Former Yugoslavia and Rwanda.<sup>18</sup>

The transformation of the understanding of the Security Council in dealing with civil war in Somalia could be cited as an example in this regard. The Security Council was encouraged to adopt a wide scope of interference in what had been seen as purely domestic affairs. On many occasions, the challenges of human rights and humanitarian assistance led to the Security Council undertaking action and activating Chapter VII of the UN Charter. For example, the Security Council intervened in Somalia, determining that the ‘magnitude of the human tragedy caused by the conflict in Somalia...constituted a threat to international peace and security’.<sup>19</sup>

Moreover, the Security Council, as in the case of Somalia and East Timor,<sup>20</sup> recognized that the massacre in the Former Yugoslavian Republic of Bosnia and Herzegovina constituted a threat to international peace and security. As a result, the Security Council, acting under Chapter VII of the UN Charter, authorized Member States to take “all necessary measures through the use of air power, in and around the safe areas in the Republic of Bosnia and Herzegovina.”<sup>21</sup>

A further example of the development of the role of the Security Council in

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<sup>17</sup> Alvarez, J., ‘Judging the Security Council’, (1996) 90 AJIL 21.

<sup>18</sup> Resolutions 827 (1993) and 955 (1994).

<sup>19</sup> Resolution 794 (1992).

<sup>20</sup> Resolution 767 of July 1992 was concerned with increasing the delivery of humanitarian assistance,

<sup>21</sup> Resolution 713 (1991).

determining the existence of any threat to or breach of the peace is intervention in order to restore democracy. Haiti, Cambodia and Sierra Leone are examples of this type of intervention as the Security Council considered that the conflicts in these countries constituted a threat to the peace.<sup>22</sup>

More recently, after 11 September 2001, the UN Security Council passed resolutions 1368 (2001) and 1373 (2001) in response to the terrorist attacks which took place in New York, Washington, D.C and Pennsylvania. Through these resolutions, the Security Council regards “such acts like any acts of international terrorism as a threat to international peace and security”. These resolutions have been criticized from many points of view.<sup>23</sup> However, what seems clear is that the US policy was to try to engage the Security Council in action rather than to act unilaterally and this was clear in Iraq 2003, as the USA and the UK tried to seek express authorization from the Security Council but they failed. Whether this was a means to rubber stamp a decision already taken by the US and the UK is another issue.

A further development in the mission of the Security Council could be noticed in peacekeeping operations. First and foremost, the mechanism of peacekeeping operations has changed since the end of the Cold War. The peacekeeping operation evolved from the traditional principles of peace-keeping to third-generation peacekeeping, which “envisages the use of military force beyond the principle of the self-defence”.<sup>24</sup> The function of the second generation peacekeeping is the implementation of political solution. In this regard it is

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<sup>22</sup> For further details, see Schweigman, D., *The Authority of the Security Council under Chapter VII of the UN Charter: legal limits and the role of the International Court of Justice*. Kluwer Law International, 2001, pp.136-149.

<sup>23</sup> Cassese, Antonio, ‘Terrorism is also disrupting some crucial legal categories of International Law’, (2001) 12 EJIL 994-996.

<sup>24</sup> Katayanagi, M., *Human Rights Functions of United Nations Peace-Keeping operations*, the Hague: Kluwer Law International, Martinus Nijhoff Publisher, 2002, p.52.



maintained that there is 'a clear shift in the purpose of the operations - from provisional to permanent peace, and from primarily-centred missions to predominantly political ones'.<sup>25</sup>

The third generation of peacekeeping operation is defined as going beyond "monitoring a cease-fire or controlling a buffer zone"<sup>26</sup> and it is "a new order of magnitude for peacekeeping operations as well, making them extraordinarily complex and almost as dependent on civilian experts as on military personnel".<sup>27</sup>

By resolution 751 of 29 April 1992 the Security Council established the United Nations Operations in Somalia (UNOSOM) for humanitarian assistance. In resolution 794 of 3 December 1992 the Security Council authorized the Secretary-General to use "all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia" and called on all Member States to provide military forces and other contributions. This resolution was unprecedented as for the first time, the use of force was authorised for humanitarian purposes<sup>28</sup>. In this regard it is persuasively maintained that:

UNOSOM II is the first UN peacekeeping operation authorized by Council, under Chapter VII of the UN Charter, to use force in the crucial task of disarming Somali factions. In fact, with this enforcement mandate, UNOSOM II may well represent the emergence of a third generation of peacekeeping operations, it has been said.<sup>29</sup>

The use of force by peacekeeping operations was demonstrated in the mandates for their operations, and in some cases mandates have been enlarged in order to

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<sup>25</sup> Ratner, Steven R., *the New UN Peacekeeping :Building Peace in Lands of conflict after the Cold War*, London: Macmillan, 1997 p.17

<sup>26</sup> Gray, C., *International Law and the Use of Force*, Oxford University Press, Second edition, 2004, p. 211.

<sup>27</sup> Address of Deputy-Secretary-General, Press Release DSG/SM/91, cited in Gray, C., *International Law and the Use of Force*, supra note 26, p. 211.

<sup>28</sup> See Katayanagi, M., supra note 24, pp.50-61.

<sup>29</sup> 'UN operations: Not only expanding, but breaking new ground', UN Chronicle, vol. 30 No.3, September (1993), p.44.

include new humanitarian tasks.<sup>30</sup>

In spite of the fact that the prominent feature of the third generation of peacekeeping authorizes enforcement action, the third generation still differs from the enforcement action under Chapter VII of the UN Charter. However, the legal distinction between peacekeeping and enforcement action continues to remain a problematic one.<sup>31</sup>

## **1.2 Factors that determine the new role of the Security Council**

There are many factors that determine the new approach of the Security Council. These factors may be traced to the political changes happening in the international community.<sup>32</sup> In this regard, it is maintained that ‘the 1990s have witnessed changes in the international system so pro-found that they would have been unimaginable several decades ago. The demise of the Cold War, the disintegration of the Soviet Union, and the events that surrounded the Persian Gulf War changed perceptions of the behaviour of states and international institutions in the global arena.’<sup>33</sup>

### **1.2.1 The end of the Cold War era**

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<sup>30</sup> Katayanagi, M., *supra* note 24, pp50-61.

<sup>31</sup> *Ibid.*, p.59.

<sup>32</sup> White, N., *Keeping the Peace: the United Nations and the maintenance of international peace and security*, Manchester University Press, 1993, p.9.

<sup>33</sup> Abiew, F K., *The evolution of the doctrine and practice of humanitarian intervention*, Kluwer Law International, 1999, p.137.

First and foremost, the end of the Cold War has directly affected the activities of the Security Council. The Security Council, which during the Cold War era was primarily “characterized by bipolar mistrust and competition”, was paralyzed by veto usage.<sup>34</sup> In other words, the disagreement between the USSR and United States led the Security Council to act ineffectively during the Cold War era, as the USSR used the veto extensively.<sup>35</sup>

Before the 1990s and over the first 45 years of the Security Council’s existence, the average number of Security Council resolutions was “less than eleven per year” as the Security Council passed 650 resolutions during this era.<sup>36</sup>

Between 1945 and 1985, the veto of the five permanent members of the Security Council was used 279 times. The USSR exclusively used the veto from 1946-1970, and the USA used the veto for the first time in 1970.<sup>37</sup> As Gray has indicated, the veto was used not only to prevent the adoption of any action by the Security Council, but also the threat to use it <sup>38</sup>

The USSR practiced a double veto by relying on Article 27 of UN Charter. Article 27 stipulates that:

1. Each member of the Security Council shall have one vote
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members
3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to dispute shall abstain from voting...

According to Article 27 (2) the approval of nine members, whether permanent or

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<sup>34</sup> Murphy, Sean D., ‘The Security Council legitimacy, and the concept of collective Security after the Cold War’, (1994) 32 *Columbia Journal of Transitional Law* 209.

<sup>35</sup> Gray, C., *International Law and the Use of Force*, supra note 26, p.196.

<sup>36</sup> Murphy, Sean D., supra note 34, p.207.

<sup>37</sup> Gray, C., *International Law and the Use of Force*, supra note 26, p.196.

<sup>38</sup> Ibid.

non-permanent, is required to make a decision on procedural matters.<sup>39</sup> However, the criteria in distinguishing between procedural matters and non-procedural ones are unclear. That is to say, a double veto existed in the case of voting in terms of preliminary question as to whether it was considered as a procedural or substantive matter.<sup>40</sup> The USSR relied on this paragraph during the Cold War era by using its veto to determine the main issue as a non-procedural matter.<sup>41</sup>

The main reason for relying on the voting system to paralyze the effectiveness of the Security Council might be related to the ideology behind the USSR and the United States in their dealings with the United Nations organisation in the furtherance of their individual interests. In this respect, Rivlin maintains:

Both super-powers sought to exploit the world body in furthering their respective interests. The Soviet Union espoused the cause of the non-aligned Third World states as one way by which to undercut the United States, while the latter led in the efforts to advance UN efforts in the human rights field, as part of its counterattack. At times, both found the institutions of the UN to be convenient vehicles to help them step back from mutual confrontations, actual or potential, brought on by regional conflicts.<sup>42</sup>

The USSR's use of the veto paralyzed the Security Council's capacity to use Chapter VII. The Security Council rarely determines the existence of a threat to,

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<sup>39</sup> The resolutions of the Security Council are issued in accordance with Article 27 of the Charter. There are two types of matter that the Security Council votes for: procedural and substantive matters. That is to say that any objection of any of the five permanent members will lead to the rejection of any resolution. It is worth noting that the United Nations Charter did not mention the word veto but as Patil suggests "it is the common-usage term for the power of any of the five Permanent Members to defeat a draft resolution by voting NO." Patil, *The UN Veto in World Affairs, 1946-1990*. Florida: UNIFO, 1992 p.13.

<sup>40</sup> Bailey, S., *supra* note 6, 1969, p. 19

<sup>41</sup> Bowett, D., *The law of International Institutions*, London Stevens and Sons, Fourth edition, 1982, p.30. See also, Brierly, J.L., *the Law of Nations : An introduction to the international law of peace*, Oxford: The Clarendon Press, 1963, pp. 111-113.

<sup>42</sup> Rivlin, Benjamin, 'Boutros Ghali's Ordeal: leading the UN in age of uncertainty' in Bourantonis, Bimitris, (ed) *A United Nations for the twenty-first century: peace, security and development*, Kluwer Law International, 1996, pp 129-135. White, N., *supra* note 32, p.49.

or breach of the peace or an act of aggression, as these concepts are motivated by the fulfilment of political requirements or considerations.

By contrast with the average number of Security Council resolutions during Cold War, the Security Council passed 250 resolutions during 1990-1993, “an average of more than sixty per year”.<sup>43</sup>

The nature of the UN as a political organ<sup>44</sup>, in effect, means ‘every decision of every organ of the United Nations (except the ICJ) is therefore a political decision, whatever its legal implications’.<sup>45</sup>

As a response to the new considerations of the new challenges, the then UN Secretary General Boutros Boutros Ghali raised the issues of the “re-establishment of the military Staff Committee, institutionalization of peacekeeping forces, creation of peace enforcement units, and an increased role of the International Court of Justice”.<sup>46</sup>

### **1.2.2 The impact of globalization on the role of the UN Security Council**

Another challenge plays a central role in the function of the Security Council, and this may be found in the idea of the globalization of the media, communications and information systems. The impact of globalization directly affects political orders, social patterns and values.<sup>47</sup> The concept of globalization has been viewed

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<sup>43</sup> Murphy, Sean D., supra note 34, p. 207.

<sup>44</sup> The International Court of Justice refers to this nature by stating that ‘the political character of an organ cannot release it from the purposes established by the Charter...’, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, [1948] ICJ Reports, p.57.

<sup>45</sup> Rosenne, S., supra note 9, p 418.

<sup>46</sup> Boutros-Gali, B, *an Agenda for peace: Preventive Diplomacy, Peacemaking and Peace keeping*, New York: United Nations, 1992, para 44 .

<sup>47</sup> Seidelmann, Reimund , ‘The search for a new global order: rehabilitating the idea of the global state’ in Bourantonis, Bimitris, (ed) *A United Nations for the twenty- first century: peace, security and development*, Kluwer Law International, 1996,p. 55. In fact, the value of globalization is being at issue since the New World order, as ‘the rapid growth of international trade, the expansion of transnational corporation, and emergence of global financial markets have produced a truly global

from several dimensions. In this regard, Kofi Annan defined globalization as being ‘commonly understood to describe those advances in technology and communication that have made possible an unprecedented degree of financial and economic interdependence and growth. As markets are integrated investments flow more easily, competition is enhanced, prices are lowered and living standards everywhere are improved’.<sup>48</sup>

The problem created by this globalization is that any conflict between national and global norms brings global identity to the test<sup>49</sup>. In this respect, Seidelmann has maintained that “in contrast to the relatively homogenous nation-states with all its classical means for identity-building the global order faces the problem that common grounds are limited and that some of the most effective identity-building strategies such as external federation, ... identity-formation through conflicts with an outside enemy, do not exist for the supranational actor”.<sup>50</sup>

The impact of globalisation could be viewed in different dimensions. The first dimension is concerned with the impact of the globalization of media, for example, on the role of the Security Council, and the second dimension is embodied in the role of the Security Council in facing the challenges of globalization. As long as the first dimension is concerned, the media face the international community and the attention paid by the media is highly effective.

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economy and globalization of production, markets, labour, and technology in many sectors.’ Mingst, K A., and Karns, M P., *The United Nations in the Post-Cold War Era*, Westview Press, 2000, p.6.

<sup>48</sup>Annan, K., ‘the Politics of Globalization’, in O’Meara, P., and others (eds), *Globalization and the Challenges of a New Century: A Reader*, Indiana University Press, 2000, p. 126. See, also, Levy-Livemore, A., (ed), *Handbook on the Globalization of the World Economy*, Northampton, Mass: Edward Elgar, 1998. Waters, M., *Globalization*, London: Routledge, 1995. Wood, N., ‘Globalization: Definitions, Debates and Implications’, (1998) *Oxford Development Studies* 5-13

<sup>49</sup>Seidelmann, Reimund, *supra* note 47, p.55

<sup>50</sup>Seidelmann, Reimund, *supra* note 47, p.55 .

After the end of the Cold War, the international news coverage includes news about the suffering in 'war zones', 'civil strife' and 'natural disasters' are more likely to be visible.<sup>51</sup> In this regard, Durch maintained that:

The revolution in electronics allowed the news media to drop into remote, troubled areas and to broadcast live images using portable, satellite-linked equipment. Television crews extracted graphic images of mass suffering and over-stretched relief workers and broadcast them around the world. The images tended to give rise, first, to increased support for those agencies, private or international, who were attempting to deal with the crisis and, second, to public pressure on governments, at least among the industrial democracies, to do something as well.<sup>52</sup>

Such media exposure has an effect on public opinion, which arouses, in many cases, the international community to take action. This is not least since the international media can change the political atmosphere. For example, the horrifying television reports from Rwanda 'called attention in 1994 to what is widely acknowledged as genocide'.<sup>53</sup> Furthermore, the influential role that might be played and be drawn by international media could arouse the Security Council to act in certain cases<sup>54</sup> such as in Somalia, Rwanda and the Former Yugoslavia, even if the action was too late in both Rwanda and the Former Yugoslavia.<sup>55</sup>

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<sup>51</sup>Junne, G C A., 'International organisations in a period of globalization : New (problems) of legitimacy', in Coicaud, J, and Heiskanen, Veijor,(eds) *the legitimacy of International organisations*, United Nations University Press, 2001,p.201.

<sup>52</sup> Durch, W J., 'Keeping the Peace: Politics and lessons of the 1990s', in Durch, W J., *UN peacekeeping, American politics and the uncivil wars of the 1990s*, Macmillan Press, 1997, p.1-2.

<sup>53</sup> Baehr, P R., Gordenker, L., *the United Nations at the end of the 1990s*, Macmillan Press Ltd, Third edition, 1999, p.87.

<sup>54</sup> In some cases, the Security Council did not act in spite of what has been viewed as influential factor in provoking international responses as in the case of the abuse of human rights embodied in the physical and sexual abuse of Iraqi inmates at Abu Ghraib prison in Iraq. See, the U.S Military's Report on Prisoner Abuse at Abu Ghraib Prison available at: [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf).

<sup>55</sup> However, this is not always the case. The influential role of the media has been criticized by some authors as it is maintained that 'the role of the media in provoking international responses continues to be controversial and understudied. Rwanda illustrates probably better than the other cases that such coverage may be necessary for humanitarian assistance even if it is insufficient for timely and robust military action. When enough gruesome images appear in the media, the daily legislative preoccupation with cost-cutting is momentarily suspended. There is evidence that many wealthier societies, in particular those of the West, are viscerally and ethically unable to ignore certain massive tragedies even though the initial reaction is to do nothing. Rwanda shows, however, that if governments are determined not to send troops, even media coverage of sudden

Secondly, it is worth noting that the Security Council faces the challenges of globalization whether economic, relating to transportation and the idea of global village or advanced technology.<sup>56</sup> All of these elements have led to developments in the role of the Security Council as the range of the Security Council actions from humanitarian assistance to enforcement action has been remarkable. The Security Council has been able to develop a variety of mechanism to face such challenges, for example, the Security Council has strengthened the role of regional organisation. The Security Council has established through Resolution 1373 the Counter-Terrorism Committee consisting of all 15 members of the Security Council in order to increase the capability of States to fight terrorism.<sup>57</sup>

### **1.2.3 The impact of new international relations on the role of the Security Council**

The Warsaw Pact disintegrated following the collapse of the Soviet Union. As a result, Russia, the successor of the Soviet Union, has built new relations with the North Atlantic Treaty Organisation (NATO) thereby building a 'lasting and inclusive peace in the Euro-Atlantic area on the principles of democracy and cooperative security and the principle that the security of all states in the Euro-Atlantic community is indivisible'.<sup>58</sup>

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and massive genocide may not change that governmental view. Reactions in the face of some 150,000 deaths in the three-year period beginning in October 1993 in neighboring Burundi indicate that the changes in international practices lag substantially behind changes in international rhetoric.' Weiss, T G., and others, *The United Nations and changing world politics*, Westview Press, Second edition, 1997, pp.88-89.

<sup>56</sup> For further discussion see Facing the challenges of globalization: Equity, Justice and Diversity, People's Summit, May 2000, available at: <http://www.globalpolicy.org/ngos/role/globalact/challeng.htm>

<sup>57</sup> Resolution 1373 (2001). Also, a Working Group is established under resolution 1566 as in accordance with paragraphs 9 and 10 of Security Council resolution 1566 (2004) ,the Working Group is tasked to examine a) "practical measures to be imposed upon individuals, groups or entities involved in or associated with terrorist activities". Resolution 1540 (2004).

<sup>58</sup> NATO Basic Texts: NATO-Russia Relations: A New Quality Declaration by Heads of State and Government of NATO Member States and the Russian Federation available at: <http://www.nato.int/docu/basic/b020528e.htm>



On 28 May 2002 at the Rome Summit, the NATO-Russia Council was established in order to strengthen co-operation between NATO and Russia. The NATO-Russia Council works as equal partners in areas of common interests such as struggle against terrorism, crisis management, non-proliferation, arms controls and confidence- building.<sup>59</sup>

NATO-Russia relations seem to formulate a new aspect in the New World order,<sup>60</sup> as well as a challenge to the role of the Security Council. Legally speaking, the Security Council might be required to play a new role in maintaining international peace and security as a result of the new NATO-Russia relations.

The aforementioned political changes, embodied at the end of the Cold War, globalization and the NATO-Russia relations enhanced the new role of the Security Council. In order to cope with these new challenges, the Security Council has sought to renew the effectiveness of the Charter provisions. The response of the Security Council to these challenges is embodied in authorizing the use of force within peacekeeping operations (third generation), enforcement peace, and the activation of the role of regional organisation.<sup>61</sup>

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<sup>59</sup> *ibid.*

<sup>60</sup> It is worth mentioning that the notion of New World Order is elusive. Moreover, it is maintained that 'the concept of "world order" is itself problematic. It may be taken to refer, at one level, to conditions existing *between* the constituent elements of the international system, *i.e.* States. In this sense, world order may be understood as a condition of peaceful and systematic relations between States. However in addition to this *external* dimension of the concept of world order, which concerns relations between States, there is a significant *internal* dimension. Conditions between States cannot be divorced from the realities of conditions *within* State.' Pogany, I., 'The legal Foundations of World Order', (1983) *The Year Book of World Affair* 277. Also, see Henrikson, Alan., 'Great powers, superpowers and global powers: managerial succession' in Bourantonis, Bimitris, (ed) *A United Nations for the twenty- first century: peace, security and development*, Kluwer Law International law, 1996, p.65.

<sup>61</sup> Vicuna, F., 'The settlement of disputes and conflict resolution in the context of a revitalised role for the United Nations Security Council' , in *the development of the role of the Security Council. Workshop*, (1992) RCADI 41.

The Security Council has established a legal framework around its new role in accordance with the UN Charter. First and foremost, under Article 39 of the UN Charter, the Security Council shall determine the “threat to peace”, “breach for the peace” or “act of aggression”, yet, there is no definition of these terms in that the Security Council has wide discretionary powers not least since, as already noted, the Security Council may recommend or decide the proper measures in such a situation.<sup>62</sup> The ambiguity of Article 39 enables the Security Council to undertake extensive actions in the New World order. The Security Council has a duty to determine the existence of a threat to the peace, breach of the peace or act of aggression. This duty is clear from Article 39 of the UN Charter, which reads as follows:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.<sup>63</sup>

The Security Council has a wide discretionary power under Article 39 of the UN Charter in that the Security Council has a major responsibility to determine action with respect to the existence of any threat to the peace, breach of the peace, or act of aggression. Because of this determination, the Security Council “shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”<sup>64</sup>

There are no solid grounds for distinguishing between these different terms. Nor

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<sup>62</sup> See *supra* pp. 14-15.

<sup>63</sup> Article 39 of the UN Charter.

<sup>64</sup> *Ibid.*

is there any clear definition of any of them. This determination has a political nature, not a legal one.<sup>65</sup> The Security Council generally acted under Chapter VII without differentiating between a threat to the peace, a breach of the peace, or act of aggression. In 1974, the General Assembly adopted by consensus the following definition of aggression. Article (1) runs as follows:

Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.<sup>66</sup>

The broad meaning of these terms, particularly “a threat to the peace” makes the power of the Security Council in determining such cases flexible.<sup>67</sup> Here, Shaw maintains that “the question is thus raised at this juncture as to the definition of a threat to, or breach of the peace or act of aggression. The answer that has emerged in practice is that it depends upon the circumstances of the case. It also depends upon the relationship of the five permanent members of the Council (United Kingdom, United States of America, Russia, China and France) to the issue under consideration...”.<sup>68</sup>

In the *Certain Expenses Case*, the ICJ pointed out the discretionary powers of the Security Council. The Court stated as follows:

The Court cannot accept so limited a view of the powers of the Security Council under the Charter. It cannot be said that the Charter has left the Security Council impotent in the face of an emergency when agreements

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<sup>65</sup> Debbas, ‘Security Council enforcement action and issues of state responsibility’, (1994) 43 ICLQ 61.

<sup>66</sup> Report of the Special Committee on the Question of Defining Aggression (Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19 (A/9619 and Corr. 1). UN. Doc. G/A 9619. United Nations General Assembly Resolution 3314 (XXIX). Definition of Aggression 2319th plenary meeting, 14 December 1974.

<sup>67</sup> Simma, Bruno, (ed) *The Charter of the United Nations: A commentary*, Oxford University Press, Second edition, vol. 1, 2002, p.719.

<sup>68</sup> Shaw. MN., *International Law*, Cambridge: University of Cambridge Press, Fifth edition, 2003, p. 1120.

under Article 43 have not been concluded.<sup>69</sup>

Not only is Article 39 of the UN Charter the legal framework for the new role of the Security Council, but a new interpretation of the concept of a threat to peace in order to undertake new activities is considered.<sup>70</sup> Indeed, the Security Council has utilised the language of the New World order in making its decisions. Humanitarian assistance, the potential threat to peace and the restoration of democracy are terms often found in recent resolutions of the Security Council.<sup>71</sup> More recently too, in order to improve the humanitarian situation, the Security Council adopted resolution 1409 (2002). By this resolution, the Security Council developed a new policy of “smart sanctions”, as distinct from the situations imposed on Iraq over the last ten years.<sup>72</sup> However, the exact nature of so-called smart sanctions is highly debatable.<sup>73</sup>

Gray has framed the objectives of the measures taken by the Security Council in the following terms:

Some of the measures are clearly not directed against any wrongdoer. Thus certain of the arms embargoes were imposed not because a state had broken international law, but to try to secure that conflict did not escalate. The arms embargo on Yugoslavia, Somalia, Liberia (under Resolution 788), Rwanda, Ethiopia and Eritrea were of this type...<sup>74</sup>

In keeping with the transformation of the understanding of the Security Council, a wide scope of interference in domestic affairs is taken by the Security Council. The Security Council has to deal with civil war situations as such situations constitute a challenge to peace and security. In this sense, the UN Secretary

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<sup>69</sup> *Certain Expenses of the United Nations*, Advisory Opinion, [1962] ICJ Reports, p.167.

<sup>70</sup> Koskenniemi, M., ‘The place of Law in Collective Security’, (1996) 17 *Michigan Journal of International Law* 325-344.

<sup>71</sup> For example :Resolutions: 794(1992), 840 (1993), 1132 (1997), 1246 (1999)

<sup>72</sup> Security Council Resolution 1409 (2002) paragraphs, 2-8.

<sup>73</sup> Craven, M., ‘Humanitarianism and the Quest for Smarter Sanctions’, 2002 13(1) *EJIL* 43-61.

<sup>74</sup> Gray, C., *International Law and the Use of Force*, supra note 26, p.207.

General Boutros Boutros-Ghali remarked as follows:

States Sovereignty takes a new meaning in this context. Added to its dimension of rights is the dimension of responsibility, both internal and external. Violations of state sovereignty are and will remain an offence against the global order, but its misuse also may undermine human rights and jeopardize a peaceful global life. Civil Wars are no longer civil, and the carnage they inflict will not let the world remain indifferent...Now that the Cold War has come to an end, we must work to avoid the outbreak or resurgence of new conflicts. The upsurge of nationalities, constitutes a new challenge to peace and security...A new strategy will have to be adopted by the United Nation in order to respond to the irredentism or pro-autonomy claims of ethnic and cultural communities.<sup>75</sup>

As a result, the Security Council has full assessment power to decide which measure is appropriate. Although the Security Council is under an obligation to respect the principle of the domestic jurisdiction of states, this restriction is limited in that the Security Council can decide whether the case is considered as an internal affair, a civil war, or a threat to international peace and security.

The Security Council has considered implied powers as a part of the legal bases of its actions<sup>76</sup>. The ICJ, meanwhile, has asserted the implicit powers of the Security Council and the General Assembly in different cases. In the *Reparation for Injuries suffered in the Service of the United Nations Case* in (1949), the Court went on to say:

The Charter does not expressly confer upon the Organisation the capacity to include, in its claim for reparation, damage caused to the victim ... under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.<sup>77</sup>

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<sup>75</sup> Agenda for peace , supra note 46 , para 14.

<sup>76</sup> This issue will be dealt on the following Chapters.

<sup>77</sup> The *Reparation for Injuries suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Reports, p.182.

## **Concluding remarks**

In conclusion, this chapter has sought to analyze the development of the way that the Security Council handles its primary responsibility for the maintenance of international peace and security. Also, we have shown how the role of the Security Council in terms of its primary responsibility under Article 24 of the UN Charter has been modified in practice, to the extent that the Security Council has concerned itself with the civil wars and other internal issues in addressing some disputes. However, many questions arise such as the appropriate definition of internal affairs and the extent to which the language of human rights should be used in the Security Council's legal framework.

The transformation in the practice of the Security Council may be traced back to political changes happening in the international community such as the end of the Cold War and globalisation, as the Security Council was paralyzed by the use of the veto during the Cold War era.

This chapter has also analysed how the Security Council deals with the determination of the situation under Article 39 and has raised problems related to the absence of the definition of a threat to peace, or a breach of the peace, or an act of aggression. However, in the final analysis, one may conclude that such a determination is not a legal one, but rather political in nature.

Perhaps, the most striking point is that these new developments in the role of the Security Council mean that the Security Council is engaged in missions where the question of the international responsibility of the UN could arise. Hence, the legal personality of the UN is essential in establishing such a responsibility. Chapter two will discuss this issue in further detail.

## Chapter 2: Legal basis for the international responsibility of the United Nations

### 2.1 International legal personality

It is no longer the case that the State is the only person that could be held responsible within international systems.<sup>1</sup> Indeed, International Organisations may equally be held responsible for their actions.<sup>2</sup> The very functions and activities performed by International Organisations give rise to the whole question of legal personality. This legal personality is considered as “an important component of an overall framework of accountability”.<sup>3</sup> However, the nature of international legal personality, its scope and consequences are still controversial issues.<sup>4</sup> The international legal personality of international organisations has been established through different approaches: namely, the inductive approach and the objective approach and are important for the determination of responsibility. The inductive approach is based on the ‘existence of certain rights and duties expressly conferred upon the organisation, and derives from these particular rights and duties a general international personality’.<sup>5</sup> Accordingly, the foundation of the

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<sup>1</sup> There is a wide range of literature that has gone into such issue. See for example: Eagleton, C., ‘International Organisation and the Law of responsibility’, (1950) 76 RCADI 323-324. Seyersted, ‘International personality of intergovernmental organisations: Do their capacities really depend upon their constitution?’, (1964) 4 *Indian Journal of International Law* 1-74. In General see, Brownlie, I., *System of the Law of Nations: State Responsibility*, Oxford: Clarendon Press, Part I, 1983; Jennings, R., and Watts, A., (eds) *Oppenheim’s International Law: Peace Introduction and Part I*, Longman, Ninth Edition, 1992, pp16-22, pp.119-125 and pp.499-550.

<sup>2</sup> It is worth mentioning that International Organisations play an indispensable role in the international community, as can be seen in the “rapid growth of intergovernmental organisations (“international organisations”) both in number and in the scope of their operations”. Hirsch, Moshe, *The responsibility of International Organisations toward third parties: Some Basic Principles*, London, 1995. p. xiii.

<sup>3</sup> Sands, Philippe and Klein, Pierre, *Bowett’s Law of international institutions*. London: Sweet and Maxwell, 2001, p. 470. Patel, Bimal N., ‘The Accountability of International Organisation: a case study of the Organisation for the prohibition of Chemical Weapons’, (2000) 13 LJIL 575-577.

<sup>4</sup> ILA Report, 1998, p 604.

<sup>5</sup> Rama Montaldo, M., ‘International legal personality and implied powers of international organisations’, (1970) 44 BYBIL pp.111-112.

personality depends in general on the will of states. In contrast, the objective approach links the foundation of the personality on the general international law.<sup>6</sup>

Amerasinghe maintains that:

There would also not be a single international person as such having the capacity in its own right to have rights, obligations and powers, whether implied or expressed, both at the international level and at the non-international level. Such rights, obligations and powers would be vested collectively in all the creating States, which may not have been the intention behind the creation of the organisation, and also could create unnecessary practical problems, *particularly in the area of responsibility*....Another separate issue,..., is whether personality would presumptively shield the member States from liability, direct or secondary, for the obligations of the organisation in the absence of their consent.<sup>7</sup> (Italic added)

The legal personality of International Organisations could be found either in the constituent instrument, or implicitly from within its practice.<sup>8</sup> In spite of the rarity of provisions dealing with the legal personality in the constituent instrument, an example may be the legal personality of the Organisation for the Prohibition of Chemical Weapons (OPCW).<sup>9</sup> The UN Charter did not settle the issue of legal personality and the ‘relevance of the existence of the legal personality of an international organisation in national law is questionable’.<sup>10</sup> However, Article 104

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<sup>6</sup> Ibid.

<sup>7</sup> Amerasinghe, C.F., *Principles of the Institutional Law of International Organisations*, Cambridge University Press, 1996, p.69.

<sup>8</sup> ILA Report, 1998, p 604. It is maintained here that ‘The explicit conferment of international legal personality on intergovernmental organisations has for a long time remained the exception rather than the rule’. Sands, Philippe and Klein, Pierre, *supra* note 3, p. 470.

<sup>9</sup> Article VIII (E) paragraph 48 of the Chemical Weapons Convention stipulates that “the Organisation shall enjoy on the territory and in any other place under the jurisdiction or control of a State Party such legal capacity and such privileges and immunities as are necessary for the exercise of its functions”. Also paragraph 50 of the same article runs as follows “ the legal capacity, privileges, and immunities referred to in this Article shall be defined in agreements between the Organisation and the States Parties as well as in an agreement between the Organisation and the State in which the headquarters of the Organisation is stated. These agreements shall be considered and approved by the Conference pursuant to paragraph 21(i).” the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, page 28, is available at:

[http://www.opcw.org/html/db/cwc/eng/cwc\\_frameset.html](http://www.opcw.org/html/db/cwc/eng/cwc_frameset.html).

<sup>10</sup> Amerasinghe, C.F., *Principles of the Institutional Law of International Organisations*, *supra* note 7, p.79.



provides that “the Organisation shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its function and the fulfilment of its purposes”.<sup>11</sup>

International legal personality need not be established only by express provisions in constituent instruments; it may be established implicitly from the nature of the International Organisation.<sup>12</sup> In the *Reparation for Injuries Suffered in the Service of the United Nations* case, the Court stated that:

The fifty states, representing the vast majority of the members of the international community, has the power, in conformity with international law, to bring into being an entity possessing objective international personality...together with the capacity to bring international claims.<sup>13</sup>

Also, in the same case, the Court went on to say that:

It is at present the supreme type of international organisation, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with competence required to enable those functions to be effectively discharged.<sup>14</sup>

Undeniably, the United Nations has a manifest international legal personality, while other International Organisations enjoy this status through reference to the status of the UN.<sup>15</sup> The legal status of International Organisations as an international legal personality is recognized by the ICJ. In the case of *Reparation for Injuries Suffered in the Service of the United Nations*, for instance, the ICJ went on to say that:

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<sup>11</sup> Article 104 of the UN Charter.

<sup>12</sup> Sands, Philippe and Klein, Pierre, *supra* note 3, p.471.

<sup>13</sup> *Reparation for Injuries suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Reports, p.185.

<sup>14</sup> ICJ Reports, 1949, p.179.

<sup>15</sup> Schermers, HG., and Blokker, Niels M., *International Institutional Law: Unity within diversity*, Kluwer Law International, Third revised edition, 1995, p. 1543.

Accordingly, the Court has concluded that the Organisation is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality, rights, and duties are the same as those of a State.<sup>16</sup>

## 2.2 The legal consequences of international personality

Although the advisory opinion of the ICJ in the *Reparation Case* recognized the international legal personality of United Nations, the capacity and the consequences of such recognition, and the liability of member states, have not been fully addressed.<sup>17</sup>

The ICJ has asserted the consequences of possessing an international personality, by declaring as follows:

The organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights, which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane.<sup>18</sup>

However, the ICJ in the *Reparation case* denied that International Organisations have the same nature as that of the State under international law. The Court acknowledged this very fact by stating as follows:

The subjects of law in any legal system are not necessarily identical in their nature or in the extent in their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.<sup>19</sup>

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<sup>16</sup> ICJ Reports, 1949, p.178.

<sup>17</sup> Furthermore, and among these questions is 'the question of "piercing the organisation veil", i.e. the distribution of responsibility between the organisation and its member States'. Ginther, Konrad 'International organisations, Responsibility', (1983) 5 Encyclopaedia of public international law 165.

<sup>18</sup> ICJ Reports, 1949, p. 179.

<sup>19</sup> ICJ Reports, 1949, p. 180.

The Court commented on the consequences of the international legal personality, noting that the UN had the capacity to have duties and rights:

This is no doubt a doctrinal expression, which has sometimes given controversy. But it will be used here to mean that if the Organisation is recognized as having that personality; it is an entity capable of availing itself of obligations incumbent upon its Members.<sup>20</sup>

However, the legal consequences of the attribution of legal personality to international organisation are not the same of those of a state or 'a super- state' as such legal consequences depend on its constituent instrument, not least since 'the precise scope of those rights and duties will vary according to what may reasonably be seen as necessary, in view of the purposes and functions of the organisation in question, to enable the latter to fulfil its tasks'.<sup>21</sup>

In this regard, the ICJ concluded as follows:

Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organisation must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.<sup>22</sup>

Also, the ILC recognized the differences between the attribution of international personality and the precise scope of possessing international rights and duties. The ILC stated that 'all entities having treaty-making capacity necessarily (have) international personality. On the other hand it (does) not follow that all international persons (have) treaty-making capacity'.<sup>23</sup>

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<sup>20</sup> ICJ Reports, 1949, p.178.

<sup>21</sup> Sands, Philippe and Klein, Pierre, *supra* note 3, p. 473.

<sup>22</sup> ICJ Reports, 1949, p. 180.

<sup>23</sup> ILC Report, UN. Doc. A/4169, p.10, para. 8(a), cited in Sands, Philippe and Klein, Pierre, *supra* note 3, p. 473.

### **2.3 The limitations in considering the responsibility of international organisations**

There are many obstacles concerning the responsibility of International Organisations, one of them being immunity from jurisdiction. This is because International Organisations are not subject to the jurisdiction of national courts, as the immunity jurisdiction is considered as a procedural obstacle facing non-state claimants to remedial action.<sup>24</sup> Article 105 of the UN Charter provides that “the Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes”. However, the problem arises when International Organisations have committed violations of international legal rules in States where such organisations have immunity from national courts. In such a case, it may be noted that Article 105 could be interpreted in terms of International Organisations having immunity, to the extent that this achieves their purposes, as Article 105 provides functional immunity. However, where these purposes are exceeded or where powers are breached, Article 105 could not be applied, and International Organisations would not have this immunity. Here, there is a strong need for international responsibility; the ICJ has supported this in the following terms:

The question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.<sup>25</sup>

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<sup>24</sup> Wellens, Karel, *Remedies against International Organisation*, Cambridge University Press, 2002, p. 114. Sands, Philippe and Klein, Pierre, *supra* note 3, p. 512. In this regard, Wellens maintained correctly that “the absence of adequate alternative internal remedies within an international organisation could, if combined with a successful claim for jurisdictional immunity before domestic courts, easily amount to a denial of justice” Wellens, Karel, *Remedies against International Organisation*, p. 114.

<sup>25</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory opinion, [1999] ICJ Reports, p.88. The functional immunity is a controversial issue in accordance with the assumption raised before, as it contradicts the literal reading of Article 105 of the Charter. Wellens, Karel, *supra* note 24, p.123.

Another problem, of considerably more concern is the question as to which organ has the right to settle disputes in regards to international responsibility, where there is no legal basis for settling this issue, as in the case of the United Nations. It might be argued that the International Court of Justice has no competence to review the actions of the United Nations and consequently void these actions.<sup>26</sup> However, it is maintained that “ this argument is, no doubt, persuasive, but it fails to take into account the fact the Court’s lack of competence cannot be in doctrinal isolation: it has to be seen in the context of a number of considerations. The most important of these is the judgment and opinions of the Court have great authoritative weight”.<sup>27</sup>

The absence of this procedure further complicates this issue, as has been asserted by the ICJ:

In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations.<sup>28</sup>

A further related point is the general problem of interpreting the Charter of the United Nations, as this problem cannot be readily settled within the United Nations Charter itself.<sup>29</sup> This leads to a contradiction in determining international responsibility in the case of disputes as to whether wrongful actions are considered as a consequence of exercising conferred powers.<sup>30</sup>

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<sup>26</sup> Kaikobad, Kaiyan Homi, *The International Court of Justice and Judicial Review: A study of the Court’s Powers with respect to Judgements of the ILO and UN Administrative Tribunals*, Kluwer Law International, 2000, p. 26-50. This issue will be discussed in details in Chapter 4.

<sup>27</sup> Kaikobad, Kaiyan Homi , *supra* note 26 , p.301.

<sup>28</sup> *Certain Expenses of the United Nations*, Advisory Opinion, [1962] ICJ Reports, p.168.

<sup>29</sup> The ICJ pointed out that “Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must in the first place at least, determine its own jurisdiction” .ICJ Reports, 1962, p. 168.

<sup>30</sup> Undeniably, the doctrine of implied powers has taken place in the practice of United Nations. In addition, on many occasion the Court has asserted this principle. However, it should be borne in

In cases where International Organisations claim that their actions are taken in accordance with their implied powers, or otherwise in accordance with those powers conferred by the constitution instrument, the question may arise as to whether International Organisations should be made responsible for actions taken in accordance with their powers. If it is agreed that they should, it should also be questioned whether the responsibility of International Organisations has to be implicit in cases where a wrongful action is committed, notwithstanding the allegation of their acting under conferred powers.

A further dilemma arises from the controversial issue of the legal status of international organisations. This is because International Organisations have a different nature due to the absence of territory and rules, and this variation leads to different procedures and structures which may require a different mechanism for settling claims.<sup>31</sup>

This dilemma also derives from the fact that International Organisations consist of States.<sup>32</sup> This raises the question of the attribution of wrongful acts, and whether International Organisations or their member States are responsible.

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mind that this doctrine could be used ineffectively. This doctrine will be discussed in the following Chapters.

<sup>31</sup> Eagleton, C., *supra* note 1, pp. 394-403.

<sup>32</sup> This dilemma could be concluded from Article 57 of the draft articles on State responsibility, with the commentaries on this article noting that “Article 57 is a saving clause which reserves two related issues from the scope of the Articles. These concern, first, any question involving the responsibility of international organisations and second, any question concerning the responsibility of any State for the conduct of an international organisation Commentaries to the draft articles on Responsibility for internationally wrongful acts”. November 2001, (A/56/10) chp.IV.E.2), p 361.

Moreover, the question of “who may present claims against international organisations?” remains a controversial issue.<sup>33</sup> It is argued that the role of non-governmental organisations (NGOs), as non-State actors, is relevant to the accountability regime of international organisations. The role and influence of NGOs in ‘spurring the UN system towards greater transparency and accountability’<sup>34</sup> is indispensable as the NGOs could monitor the activities of the General Assembly, which is of considerable political importance, even in decision-making processes.<sup>35</sup> However, when considering remedial action to establish a comprehensive accountability regime for international organisations, the lack of *locus standi* for representational NGOs could be considered as a procedural obstacle. In this regard, the ILA recommended that:

National and international courts and tribunals whose jurisdiction extends to cases brought before them involving IO-s, should where appropriate and when within their competence, develop procedures to enable representative non-governmental Organisations duly accredited to the IO in question to submit statements or written observations on cases before them involving that IO.<sup>36</sup>

In spite of the relationship between NGOs and the UN being established under Article 71 of the UN Charter, as Article 71 stipulates that the Economic and Social Council (ECOSOC) ‘may make suitable arrangements for consultation with non-governmental organisations which are concerned with matters within its competence’,<sup>37</sup> there is no mention for a mechanism for the NGOs to present claims against UN as the relationship under Article 71 is of consultative status.

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<sup>33</sup> See, Wellens, K., *supra* note 24, pp 106-113.

<sup>34</sup> Wellens, K *supra* note 24, p. 106.

<sup>35</sup> Simma, Bruno and Paulus, Andreas L., ‘The international Community facing the Challenge of globalization’, (1998) 9 EJIL 266-278.

<sup>36</sup> ILA Report, 2004, p. 42.

<sup>37</sup> Article 71 of the UN Charter.

Another striking dilemma concerning the responsibility of international organisations is embodied in the limitation contained in Article 34(1) of the Court's Statute where the lack of direct standing of international organisations before the ICJ is clear. In this regard, proposals on amending Article 34 of the Statute of the ICJ were submitted.<sup>38</sup> However, there is an indirect possibility to access the ICJ in situations where it is agreed by both the State and International Organisation that there should be recourse to the ICJ to request an advisory opinion, in accordance with Article 96 of the Charter and Article 65 of the Statute, and that such an opinion should be accepted as having binding force.<sup>39</sup>

Moreover, the Court pointed out that the parties could present their claim to an arbitral tribunal,<sup>40</sup> as this is considered a usual means of settling disputes which may arise among International Organisations themselves, or between International Organisation and States.<sup>41</sup> Arbitration proceedings might be referred to where the

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<sup>38</sup>For example, the Guatemala proposal in 1997. This proposal was submitted before the Special Committee on the Charter of the United Nations and on Strengthening the Role of the Organisation. A/AC.182/L.95 and Rev. 1 of 28 January 1997.

Also, Eagleton maintained in this regard that "it would be unreasonable or illogical for the Court to hold, if opportunity presented, that the world (states) was used in the sense of (international legal personality and that, consequently, international organisation having legal personality could be allowed before the Court)". Eagleton, C., *supra* note 1, p.418.

<sup>39</sup> An example for such agreement could be found in Article 30 of the Convention on the Privileges and Immunities of the United Nations in 1946, which runs as follows: "All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties". Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S 15, 13 February 1946.

<sup>40</sup> ICJ Reports, 1949, p.177.

<sup>41</sup> However, due to the increase in pending procurement-related arbitration claims instituted against the UN, the General Assembly in resolution 53/217 adopted in 7 April 1999 requested that member states should be kept duly informed by the Secretary-General, identifying arbitration and settlement cases as separate items in corresponding financial performance reports.



parties have been unable to reach a solution by using dispute settlement mechanisms. The Court pointed out the means that the capacity of International Organisations could be allowed to refer. In the *Reparation Case*, the Court went on to say:

When the organisation brings a claim against one of its Members, this claim will be presented in the same manner, and regulated by the same procedure. It may, when necessary, be supported by the political means at the disposal of the Organisation...

It is dealt with by means of negotiation and cannot, in the present State of the law as to international jurisdiction, be submitted to tribunal except with the consent to the States concerned.<sup>42</sup>

Moreover, there is a lack of a jurisdictional connection between individual and international organisations, which raises the question of the exercise of diplomatic protection by a State in order to bring claims on behalf of its own nationals, as individuals are unable to bring liability claims against International Organisations directly except through their States.<sup>43</sup> In this regard, the question of exhaustion of the domestic remedial procedure has been raised. As to the argument relating to the application of the rule of the local redress has relied on whether the respondent party is the UN or the State and on the ability of the International Organisations to provide local remedies,<sup>44</sup> Eagleton has reached the conclusion that “any claim made against the United Nations would necessary have to by pass the rule of local redress and presented as a direct diplomatic claim”.<sup>45</sup>

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<sup>42</sup> ICJ Reports, 1949, p.178.

<sup>43</sup> Before restoring diplomatic protection, the private claimants in accordance to peacekeeping operations has a duty to exhaust the remedies provided in the agreement between the host state and UN (SOFA), Wellens, K., supra note 24, p. 77.

<sup>44</sup> Ibid., p. 76. Also, in this regard it is maintained that “The question now arises as to whether this rule should be observed by the United Nations when its alleges injury against itself by a State. There appears to be no reason why the rule should not be followed. In this situation, it would save the United Nations much trouble and give the respondent state an opportunity to require through its own agencies the damage charged against it” Eagleton, C., supra note 1, p.352.

<sup>45</sup> Eagleton, C., supra note 1, p. 412. Also, it is stated that “The United Nations.... has no courts and none of usual administrative procedures which states have for protection of aliens, and it has so little need for such agencies that it does not seem worth while to establish them for the limited number of claims which might be advanced”. Ibid., p.402.

Although the ICJ kept silent on such matters in its Advisory Opinion of 1949, in his separate opinion, Judge Azevedo expressed the following view:

In the case of officials or experts appointed directly by the organisation, regardless of nationality, the organisation will have a priority and may make a claim without having, or even to show that domestic remedies have been exhausted.<sup>46</sup>

Furthermore, it is worth noting another problematic issue in considering the accountability of International Organisations, namely the variety of existing remedial mechanisms of International Organisations. In order to adopt such a regime, it seems necessary to change the existing remedial mechanisms, if there are any, so that the decision making process plays a more crucial role in accepting the accountability regime. This is because the adoption of this regime needs some amendment to the existing constitution instruments.<sup>47</sup> Even if a remedial regime is adopted, it might create a controversial issue in applying the same accountability regime over all international organisations.

These obstacles are crucial, and need to be addressed in any International Organisation accountability regime. This is because if these obstacles have not been settled in general, trust in the law of international responsibility for International Organisations or of any remedies against International Organisations could be compromised. More pertinently still, the absence of rules governing this problem could lead to States or other entities avoiding any relationship with International Organisations. This arises in view of the fact that States or other entities initially recognize that the result of any dispute may arise between them

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<sup>46</sup> ICJ Reports, 1949, p 195.

<sup>47</sup> It is notable in this regard that amendments to the constitution instrument are no straightforward issue. To give an example, Article 108 of the UN Charter provided that “ Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly...including all the permanent members of the Security Council”.

and International Organisations, given that the advisory opinion has no binding force.<sup>48</sup>

## **2.4 The rules that govern international responsibility for international organisation**

If practice has, in certain cases, determined the responsible entity in claims against international organisations, the rules and procedures governing the presentation of such claims, as well as the determination of primary and secondary responsibility, are still considerably disputed. The main question that arises here relates to the exact nature of the international legal rules as applied between wrongdoer organisations and the injured third party. There is no reference within the constituent instrument of the United Nations to any intention to determine the liability of its members and the type of such a liability.<sup>49</sup>

Having recognized that International Organisations have an international legal personality, such that they may be held responsible, it would indeed seem inappropriate to recognize the responsibility of International Organisations for wrongful acts without reference to a set of general principles and rules that govern remedial action against International Organisations. There is no comprehensive regime relating to the international responsibility of international organisations that might in itself serve as solid grounds for establishing the responsibility of

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<sup>48</sup> As has been mentioned before, the advisory opinion has no decisive power as the nature of this opinion leaves a wide-ranging freedom to International Organisations to accept or refuse advisory opinion. To give an example, in the advisory opinion in 1962, in spite the acceptance of the General Assembly to this advisory opinion, France and the Former USSR refused this with regard to their financial obligations. Quoted from:

<http://www.dfait-maeci.gc.ca/ciw-cdm/chronool2-en.asp>. In this regard, Higgins maintained that 'States have in large numbers ignored the finding of the Court in the Expenses Case that they are under a legal obligation to pay for certain peace-keeping operations (and thus, by implication, for other comparable ones)'. Higgins, R., *Problems and process : International Law and how we use it*, Oxford: Clarendon Press, 1999, p. 203.

<sup>49</sup> Amerasinghe, C.F., 'Liability to third parties of member states of international organisations: practice, principle and judicial precedent', (April 1991) 85 AJIL 276.

member states for illegal decisions taken by the Security Council.<sup>50</sup> However, one may state that the silence in structuring these rules in international law does not affect the rights of the others, and does not mean in any sense that the power of the Security Council is unaccountable. However, in the absence of any such texts relating to international responsibility as regards International Organisations, the responsibility of International Organisations might be determined variously by the following: rules of international responsibility situated within international law; internal law of International Organisations; general principals of law; or principles of the domestic law applicable to the State.<sup>51</sup> Accordingly, as a principle, it is largely accepted that the rules governing the responsibility of States may apply equally to International Organisations<sup>52</sup> in terms of those organisations' procedural and substantive rules and should constitute, *mutatis mutandis*, the basis for the law of responsibility of international organisations.<sup>53</sup> As a result, these rules could be referred to in order to determine the rules that relate to the settlement of disputes between International Organisations and other entities. As is correctly maintained, 'The ILC draft articles which have customary status are, at least presumptively, also applicable to organisations. These principles provide a settled core regulating organisation responsibility although, in relation to some matters,

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<sup>50</sup> However, it is maintained that 'the elements of state responsibility- breach of an international obligation and attribution of the wrongful act to the state-apply equally to the determination of an international organisation's responsibility'. Sands, Philippe and Klein, Pierre, *supra* note 3, p.520.

<sup>51</sup> *Ibid.*, pp. 513-519.

<sup>52</sup> *Ibid.*, p. 519. However, it is notable that the distinction between the responsibility of international organisations and the Article on State Responsibility would be made in addressing the text of the responsibility of international organisation as it has specific aspects due to a little practice could be found in international organisations. UN.Doc .A/CN.4/L.622. UN. Doc. A/58/2003.

<sup>53</sup> Chanka Wickrmasinge and others., 'Responsibility and liability for violations of human rights in the course of un field operation', in Scott, Craig, (ed), in *Torture as Tort: Comparative Perspective on the development of Transnational Human Rights Litigation* , Oxford-Portland Oregon: Hart Publishing, 2001, p.472.

further exegesis is required'.<sup>54</sup>

However, in accepting this, the question remains as to whether such rules are appropriate, and if so, under what conditions they should be implemented.

The question of the mechanism for determining who is responsible (International Organisations or States, or indeed, both of them) could be settled if there is an agreement between the parties. If such an agreement is impossible, it may be necessary to recognize the nature of the actions and powers, as well as accountability regimes and internal law.

### **Concluding remarks**

It has been recognised that an international legal personality is essential in establishing the capacity for possessing rights and being under obligations as otherwise any dealings with the entity that has no such legal personality will have no legal effect. One of the most prominent consequences of the international personality of International Organisations is that International Organisations may suffer the consequences of wrongful acts on the one hand, yet on the other, they may be held accountable for the consequences of their illegal or wrongful acts. In effect, where there are rights, there are also duties.<sup>55</sup> Responsibility may in itself arise from a breach of the internal legal order which an International Organisation follows, or of the domestic legal order or international law.

In spite of there being limitations in establishing international responsibility for International Organisations, as embodied in the special nature of International

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<sup>54</sup> Scobbie, I., 'International Organisations and International Relations', in R.J. Dupuy (ed) A handbook of International Organisations, Kluwer Law International, 1998, p.887.

<sup>55</sup> Eagleton, C., *supra* note 1, p385.

Organisations, it would not mean that the International Organisations may not held responsible.

The capacity of the UN to bring claims has been well established since 1949. However, it would appear that there are few rules governing the international responsibility of international organisations. Consequently, the corresponding provisions of the Articles on State Responsibility for wrongful acts will be applied where relevant to the question of international responsibility of the international organisations.

### Chapter 3. The obligations that bind the Security Council

It is arguable whether the rules of international law are applicable to international organisations, and if so the question of ‘the extent to which rules of international law are applicable to international organisations’ could be raised.<sup>1</sup> Indeed, it may be questioned whether International Organisations have been under any obligation to take into consideration the rules of international law. In this sense, due to the differences between the nature of International Organisations and the States, the question of whether or not International Organisations should respect rules that they have not themselves established, and consequently accept them, remains a moot point.<sup>2</sup> A further problem that may arise in this juncture concerns the limitations of power of International Organisations, and whether the United Nations is limited only by internal law, or by the sources of international law as defined in Article 38 (1) of the Statute of the ICJ.<sup>3</sup>

In this chapter I shall argue that the Security Council cannot act outside the UN Charter and international law and that its action should be judicially reviewed. Accordingly, establishing Security Council obligations will be the first step to determining what the boundaries around the Security Council are and should be beyond which the Security Council will be responsible.<sup>4</sup> A further point of

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<sup>1</sup>Schermers, HG, and Blokker, Niels M., *International Institutional Law: Unity within diversity*, Kluwer Law International, Third revised edition, 1995, p. 982. In this regard, it is maintained that “International organisations are bound to comply with the norms of international law flowing from any source”, Hirsch, Moshe, *The responsibility of International Organisations toward third parties: Some Basic Principles*, London, 1995, p.30.

<sup>2</sup>Schermers, HG, and Blokker, Niels M., *supra* note 1, p 983.

<sup>3</sup> Article 38 of the Statute of the International Court of Justice provides that “the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations ...”.

<sup>4</sup> Robert Ago saw that ‘the principle which govern the responsibility of States for internationally

concern is whether a member State, in accordance with a decision taken by the United Nation, could be held responsible for such a decision, particularly in the absence of the implementation of Article 43 of the UN Charter, where the member States use their own organs and exercise full organic jurisdiction and control. In this case, the responsibility of the United Nations and member States would be difficult to envisage.<sup>5</sup>

### **3.1 The UN and the obligations derived from the sources of the international law**

By analogy with the international responsibility of States, one of the conditions in order to be held responsible is a breach of international obligations. Where a breach of international obligation exists, international responsibility may be invoked. Wrongful acts result from a breach of international law.<sup>6</sup> In this sense, it is maintained that ‘The obligation may result either from a treaty binding the international organisation or from the any other source of international law applicable to the organisation’.<sup>7</sup> However, it is debatable whether such a breach could be lawful in accordance with the internal law of the international organisation.<sup>8</sup> This is the case even if the action has been taken in accordance with

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wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility...it is one thing to define a rule and content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation’. Second Report on State Responsibility ,(1970) II Yearbook of International Law Commission, p. 306 para 66.

<sup>5</sup> In this sense, Judge Kortiski stated that “armed forces which would be available to the Security Council would continue to be armed forces the members of the organisation and not to those of organisation”. ICJ Reports, 1962, p. 257.

<sup>6</sup>See Article 38 (1) of the Statute of ICJ, supra note 3.

<sup>7</sup> UN .Doc. A/58/10, p.46.

<sup>8</sup> However, Article 32 of Draft Articles on State responsibility (2001) states that ‘ the responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.’ UN. Doc. A/56/10.



internal law, as it might at the same time amount to a breach of international law.<sup>9</sup>

As the distinction between “primary” and “secondary rules” has taken place in the draft articles of state responsibility<sup>10</sup>, it might be controversial to go into the content of the obligation that the state can have. The issue is no less controversial in the case of obligations for international organisations. As regards the obligations of the Security Council, it is submitted here that the obligations of the Security Council are derived from the obligations of the UN. Consequently, the Security Council is “subject to” principles of international law because the UN itself is a “subject of” international law’.<sup>11</sup>

### **3.2 The constitutional limitations of the powers of the Security Council**

The central issue as regards the extensive powers of the Security Council is

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<sup>9</sup> It is maintained that ‘The second sentence in article 3 on State responsibility cannot be easily adapted to the case of international organisations. When it says that the characterization of the same act as wrongful under international law “is not affected by the characterization of the same act as lawful by internal law”, this text intends to stress the point that internal law, which depends on the unilateral will of the state, may never justify what constitutes, on the part of the same State, the breach of an obligation under international law. The difficulty in transposing this principle to international organizations depends on the fact that the internal law of an international organisation cannot be sharply differentiated from international law. At least the constitution instrument of international organisation is a treaty or another instruments governed by international law; some further parts of the internal law of the organisation may be viewed as belonging to international law. One important distinction is whether the relevant obligation exists towards a member or a non-member State, although this distinction is not necessarily conclusive, because it would be questionable to say that the internal law of the organisation always prevails over the obligation that the organisation has under international law towards a member State. On the other hand, with regard to non-member States, Article 103 of the United Nations Charter may provide a justification for the organisation’s conduct in breach of an obligation under a treaty with a non-member State. Thus, the relations between international law and the internal law of an international organisation appear too complex to be expressed in a general principle” UN. Doc. A/58/10, pp. 48-49.

<sup>10</sup> Crawford, James, *The International Law Commission’s Article on State Responsibility: introduction, text and commentaries*, Cambridge University Press, 2002, pp.14-16.

<sup>11</sup> Judge Gerald Fitzmaurice in his dissenting opinion in *Legal Consequences for States for the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, stated that “ 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”. ICJ Reports, 1971, p.294.

embodied in the question of whether the Security Council is “above the law”<sup>12</sup> or “is free to do whatever it wants”.<sup>13</sup>

It is arguable not only whether the powers of the Security Council have constitutional limitations, but also, whether these limitations are applicable to Chapter VII of the United Nations Charter.<sup>14</sup>

Before establishing what might be considered an illegal decision of the UN Security Council, it would be appropriate to establish what are the obligations that the Security Council must conform to.<sup>15</sup> Indeed, the legal limitations of the powers of the Security Council may derived from the Charter, which is the constituent treaty of UN, and further limitations might be derived from general international law.<sup>16</sup> In this sense, the ICJ in the *Conditions of Admission of a State to Membership in the United Nations Case* referred to the limits of the powers of the Security Council and pointed out that:

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<sup>12</sup>Gill maintained that “it is not too difficult to conclude that the Council’s discretion in this context is in fact almost unlimited and that its powers to affect the rights of States are extremely far-reaching”. Gill, T., ‘Legal and some political limitations on the power of the U.N Security Council’, ( 1995 ) 26 Netherlands YIL, p.61.

<sup>13</sup>Koskeniemi, M., ‘The place of Law in Collective Security’, (1996) 17 *Michigan Journal of International Law* 327.

<sup>14</sup>Judge Shahabuddeen questioned the limits of the power of the Security Council in his separate opinion in the case of the aerial incident at Lockerbie 1992 by stated that “The question now raised by Libya’s challenge to the validity of resolution 748 (1992) is whether a decision of the Security Council may override the legal rights of States, and, if so, whether there are any limitations on the power of the Council to characterize a situation as one justifying the making of a decision entailing such consequences. Are there any limits to the Council’s powers of appreciation? In the equilibrium of forces underpinning the structure of the United Nations Charter within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results? If there are any limits, what are those limits and what body, if other than Security Council, is competent to say what those limits are?” ICJ Reports, 1992, p.32.

<sup>15</sup> For example, Judge Rosalyn Higgins pointed out as follows: “What are the limits to institutional creativity? What was intended in the Charter is to be regarded as lawful, imaginative adaptations to contemporary needs? And are to be regarded as doing that step too far to be consistent with legality, and as ultra vires?” Sarooshi, D., *The United Nations and the development of collective security*, Oxford University Press, 1999, p.xi.

<sup>16</sup> Schweigman, D., *The Authority of the Security Council under Chapter VII of the UN Charter: legal limits and the role of the International Court of Justice*. Kluwer Law International, 2001, pp.163-202.

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 and criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of the constitution”.<sup>17</sup>

### **3.2.1 The Security Council within the United Nations Charter.**

The United Nations Charter is considered as a constraint to the power of the Security Council, due to the nature of the treaty that created the organisation. The Charter is the constitution of the United Nations.<sup>18</sup>

#### **3.2.1.1 Procedural limitations**

In terms of procedural legal limitations, the decisions of the Security Council should be issued in accordance with Article 27 of the UN Charter. The requirements of the voting system, under Article 27, constitute a legal restraint to the powers of the Security Council.<sup>19</sup> However, this limitation has in practice all but disappeared because of the end of the Cold War. Moreover, the political changes and the positive relationship between the permanent members can govern how decisions are made.<sup>20</sup>

The voting system in the Security Council is a highly controversial issue.<sup>21</sup> Also, it is worth noting that there is nothing in the Charter that can explain the difference between procedural and non-procedural matters in order to decide if such matters

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<sup>17</sup>*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, [1948] ICJ Reports, 1948, p.64.

<sup>18</sup> In this nature of the UN Charter it is maintained that “the United Nations Charter has certain features distinguishing it from an “ordinary” treaty”... it is the “supreme law” of the organisation”. Schweigman,D., supra note 16 , p.14.

<sup>19</sup>Nkala, J., *The United Nations International Law and the Rhodesian independence crisis*, Clarendon Press, Oxford, 1985,p176.

<sup>20</sup>Debbas, Vera Gowlland, ‘Security Council enforcement action and issues of state responsibility’, (1994 ) 43 ICLQ 91.

<sup>21</sup> Shaw, MN., *International Law*, Cambridge: University of Cambridge Press, Fifth edition, 2003, p. 1085.

need an affirmative vote.<sup>22</sup> Therefore, a double veto could be envisaged where the voting determines the preliminary question of whether a matter is to be considered a procedural matter or a substantive one.<sup>23</sup> Furthermore, the absence of or abstention of a permanent member from voting is not expressly mentioned in Article 27, except in the case where the member is a party to a dispute. In such a case, the member shall abstain from voting.<sup>24</sup> However, in practice, the absence of a permanent member is considered as approval and does not preclude making resolutions.<sup>25</sup> Furthermore, the ICJ has settled the issue in the *Advisory Opinion of the Namibia case* and accepted State practice. The Court went on to say:

...By abstaining, a member does not signify its objection to approval of what is being proposed in order to prevent the adoption of a resolution requiring unanimity of the permanent member; a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of the Organisation.<sup>26</sup>

### 3.2.1.2 Substantive limitations to the powers of the Security Council

The most important of the Council's obligations is to act in accordance with the purpose and principles of the Organisation and the provisions of the Charter.<sup>27</sup> The

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<sup>22</sup> Bailey, S., *Voting in the Security Council*, Oxford, 1969, p.19.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Kelsen, H., *The Law of the United Nations : a critical analysis of its fundamental Problems*, London Stevens & Sons Limited, 1951, p. 244. *The Law of the United Nations : a critical analysis of its fundamental Problems*, London Stevens & Sons Limited, 1951, p. 244. However, it is argued that the Security Council has adopted many important resolutions in spite of the absence of its permanent members. To give an example, the resolution adopted by the Security Council against the North Korean invasion of the South in 1950 violated Article 27 of the Charter as it was made in the absence of USSR. In the Gulf Crisis, the Security Council adopted Resolution 678, despite the abstention of a permanent member of the Security Council (China). Stone stated as follows: "For none of the three Korean resolutions meet the voting requirements for decisions". Stone, J., *Legal controls of international conflict- A Treatise on the dynamics of dispute*, Second impression, 1959, p.232. Bedjaoui, M., *The new World order and the Security Council: Testing the legality of its Acts*, Martinus Nijhoff Publishers, 1994, p.38.

<sup>26</sup> ICJ Reports, 1971, p. 22.

<sup>27</sup> Schweigman, D., *supra* note 16, pp. 163-165.

limitations imposed by the purposes and principles of the Charter, in accordance with Articles 1 and 2, stated in Article 24, have been recognized for example by judges of the ICJ.<sup>28</sup> However, the legal limitations, under Article 24, raise many controversial issues.<sup>29</sup> One issue derives from the wide scope of the purposes and principles of the Charter, which grant more extended discretionary powers to the Security Council. In this sense, Gill maintains that “the purposes and principles of the Organisation are extremely broad in scope and hardly synonymous in most respects with specific rules of international treaties and general international law”.<sup>30</sup> As the purposes and principles of the UN are “broad goals”<sup>31</sup>, the flexibility of such a limitation plays a significant role in terms of the uncertainty of acting in conformity with the purposes and principles of the Charter. By way of illustration, several purposes and principles of the United Nations have gradually evolved in the practice of the Security Council.<sup>32</sup> To give examples, the principles of domestic jurisdiction (Article 2(7))<sup>33</sup> and sovereignty (Article 2 (1)) have been

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<sup>28</sup> For example, Judge Weeramantry, in his dissenting opinion in Lockerbie case, stated that “Article 24 itself offers us an immediate signpost to such a circumscribing boundary when it provides in Article 24 (2 ) that ‘the Security Council in discharging its duties under Article 24(1), shall act in accordance with the Purposes and Principles of the United Nations’. The duty is imperative and the limits are categorically stated”. ICJ Reports, 1992, p.171.

<sup>29</sup> Article 24 of the UN Charter stipulates that “1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of International peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. 2. In discharging these duties, the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII”.

<sup>30</sup> Gill, T., *supra* note 12, p. 73.

<sup>31</sup> Akande, D., ‘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?’, (April 1997) 46 ICLQ 317.

<sup>32</sup> Schweigman, D, *supra* note 16, p182.

<sup>33</sup> This Article stipulates that “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, but the principle shall not prejudice the application of enforcement measures under Chapter VII”. Article 2 (7) of the UN Charter.

reinterpreted under the practice of the UN.<sup>34</sup> Not least in accordance with Article 2(7), the principle of non-interference in domestic affairs restricted the Security Council powers in a manner that does not conflict with the “application of enforcement measures under Chapter VII”.<sup>35</sup> As is correctly maintained, “these two provisions contained in the Purposes and Principles of the Organisation do far more to restrict the freedom of Member States than to restrict or limit the Organisation-especially the Security Council in applying enforcement measures”.<sup>36</sup> There are no definite boundaries to the scope of the principle of domestic jurisdiction. In fact, the line between domestic affairs and a threat to the peace is very crucial, to the extent that it is hard to recognize what jeopardizes international peace and security.<sup>37</sup> In this sense, Higgins maintains that “the legal principle of domestic jurisdiction is, for various reasons singularly susceptible to development by the process of interpretation by political bodies... what is truly domestic today will not necessarily be so in five years time”.<sup>38</sup>

It is worth mentioning that the UN Charter itself provides in Articles 55 and 62 that the principles and functions which bind the United Nations Members in terms of promoting and taking into consideration international economic and social cooperation.<sup>39</sup> These functions and principles remain very close to those matters

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<sup>34</sup> Not least, as it is maintained that “the concept of sovereignty, mentioned in Article 2(1), has lost ground in international relations”. Schweigman, D, *supra* note 16, p.182. Dicke, Klaus., ‘National interest vs. The interest of the International Community- a critical review of recent UN Security Council practice’, in Delbruck Jost. *New trends in international lawmaking-international “legislation” in the public interest*, vol. 38 (1995) p.160.

<sup>35</sup> Schweigman, D., *supra* note 16, p. 182.

<sup>36</sup> Gill, T., *supra* note 12, p.73.

<sup>37</sup> It is maintained that ‘the term of “domestic Jurisdiction” as used in the Covenant of the League of Nations was referred to by James Brierly as a “catchword” capable of various interpretations and of which “little seems to be known except its extreme sanctity’, Kahng, TJ., *Law, politics, and the Security Council: An inquiry into the handling of legal questions involved in international disputes and situations*, Martinus Nijhoff, Second edition, 1969, p.28. See also, Rajan, M.S., *The Expanding Jurisdiction of the United Nations*, Bombay: Oceana Publications, 1982.

<sup>38</sup> Higgins, R., *The development of International Law through the political organs of the United Nations*, Oxford University Press, 1963, p. 61.

<sup>39</sup> Article 55 of the UN Charter runs as follows “With a view to the creation of conditions of

which are essentially within the domestic jurisdiction.

However, Kelsen points out that “this provision might be interpreted to mean that Members are obliged to permit intervention on the part of the Organisation in matters referred to in Article 55, even if these matters are within their domestic jurisdiction. This provision is hardly consistent with Article 2 paragraph 7”.<sup>40</sup>

Another controversial issue lies in the duty of reporting to the General Assembly with regard to paragraph 3 of Article 24, which provides that “The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.”<sup>41</sup> This limitation could raise the question of whether there is a hierarchy between the General Assembly and the Security Council.<sup>42</sup>

However, Nkala has questioned the reality of these limitations by stating as follows:<sup>43</sup>

It is doubtful whether these limitations are real. For example, how can anyone say with certainty that the Security Council has not acted in accordance with the purposes and principles of the United Nations? How frequently have such reports been submitted by the Security Council to the General Assembly?...it would appear therefore that these limitations are more apparent than real.

Furthermore, there is the question of who is to decide these limitations: the ICJ or the member States of the UN. Moreover, whether member states are allowed to

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stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: 1.higher standards of living, full employment, and conditions of economic and social progress and development; 2.solutions of international economic, social, health, and related problems and international cultural and educational cooperation; and3.Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex language, or religion”.

<sup>40</sup> Kelsen, H., *supra* note 25, p.773.

<sup>41</sup> This limitation has been considered as a procedural limitation imposed by the provisions of the Charter. Schweigman, D., *supra* note 16, p.183-187.

<sup>42</sup> See chapter 4.

<sup>43</sup> Nkala, J., *supra* note 19, p174.

interpret their powers remains a debatable issue.<sup>44</sup>

### **3.3 Limitations derived from the sources of international law**

In this regard, it has been maintained that a large number of rules of international law are not applicable to international organisations. This raises the question of which rules of international law are, in fact, applicable to International Organisations: treaty law, general principles of law or customary law.<sup>45</sup> However, the ICJ has reached the conclusion that it is the rules of international law that are applicable to international organisations.<sup>46</sup> In principle, general international law is binding on international organisations.<sup>47</sup>

#### **3.3.1 The Security Council and General International Law**

Under Article 1(1) of the United Nations Charter the Security Council is obliged to act “in conformity with the principles of justice and international law.” However, it is arguable whether the power of the Security Council is limited by general international law and if not, whether this means that the United Nations Charter gives the Security Council *carte blanche* to derogate from the rights of States under international law?<sup>48</sup>

In effect, the importance of this argument derives from the belief that the Security Council is not subject to international law. On one hand, Kelsen has stated that “the Charter does not provide that the decisions-except those of the International

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<sup>44</sup> This issue will be dealt in Chapter 4.

<sup>45</sup> Schermers, HG., and Blokker, Niels M., *supra* note 1, p. 982 .

<sup>46</sup> As the Court stated that “international organisations are subjects of international law and rules of international law”. ICJ Reports, 1980, p.90.

<sup>47</sup> Reinisch, August, ‘Securing the Accountability of international organisations’, (2001)7*Global governance, a review of multilateralism and international organisations* 135.

<sup>48</sup> Akande, D., *supra* note 31, p320.



Court of Justice- in order to be enforceable must be in conformity with the law, which exists at the time they are adopted”.<sup>49</sup> Moreover, he sees that the main purpose of the Security Council's actions as is being to maintain and restore peace “which is not necessarily identical with the law”. Thus, Kelsen points out that “The decision enforced by the Security Council may create new law for the concrete case”.<sup>50</sup>

Viewing the issue from another angle, Kelsen's view is debatable. It is true that the wording of Article 1(1) of the UN Charter excludes the collective measures under Chapter VII from being taken in conformity with the principles of justice and international law, and only peaceful “adjustment or settlement of international disputes or situations which might lead to a breach of the peace”. Yet it is also true to say that the delegates to the San Francisco conference intended to limit Security Council actions under Chapter VII through the principles of international law.<sup>51</sup> Secondly, the claim that the Security Council can “create new law” is not acceptable, as the Security Council is not initially a legislative organ and the nature of such an organ is in the first instance a political one. Also, the function of the Security Council is not to create new rules. In this regard, Bedjaoui maintains that “Nowhere in the Charter is there any indication that States abdicated to the organs of the United Nations their exclusive power to create new customs through their concordant, consistent and undisputed practice.”<sup>52</sup> Shaw further asserts as follows: “The Council is not able to modify, for example, the conditions required

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<sup>49</sup>Kelsen, *supra* note 25, p. 293.

<sup>50</sup>*Ibid.*, p. 295. Also, Gill maintained that “the Security Council has a general duty to respect the principles and purposes stated in Article 1 and 2 of the Charter, but not international law as such in the exercise of its enforcement powers”. Gill, T., *supra* note 12, p. 73.

<sup>51</sup>In the Committee on the Structure and Procedure of the Security Council, the debate on the application of principles of international law was not conclusive. This demonstrates that “when the question of limitation of the enforcement powers of the Security Council was raised it was assumed that they were similarly limited by the principles of international law”. Akande, D., *supra* note 31, pp. 319- 320.

<sup>52</sup> Bedjaoui, M., *supra* note 25, p.32.

to establish the international responsibility of states in particular circumstances. It can only adopt a factual conclusion stating in effect that the situation is such that the accepted legal criteria apply to a particular set of facts. In other words, it is able to go no further than reaffirm existing international law and suggest a particular application in a particular situation".<sup>53</sup>

Thirdly, although, the provision of Article 103 of the Charter of the United Nations<sup>54</sup> clearly expresses the primacy of the Charter over treaty obligations,<sup>55</sup> the extent and the limit of such primacy remain unclear. Furthermore, a distinction has been drawn between rights and obligations, and whether such rights arise under general international law or under treaty in terms of deciding whether the Charter has primacy over general international law.<sup>56</sup> As these problems seem to be effective, the primacy of the Charter has little to do with the allegation that the Security Council is not bound by general international law.

Another response to Kelsen's view is that the Security Council cannot act in violation of international law as the Charter is a treaty, which at any rate may not contradict international law.<sup>57</sup> The fundamental norms themselves are embodied in the Charter. As Shaw maintains, "One cannot easily envisage it being acceptable that the Council should by decision consciously breach the norms of the law of

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<sup>53</sup> Shaw, Malcolm N., 'The Security Council and the International Court of Justice: Judicial Drift and Judicial Function', in A. Muller, D. Raic, and J. Thuransky (eds), *the international Court of Justice: its future role after fifty years*, Martinus Nijhoff Publishers, Leiden Journal of International Law, 1997 p.235.

<sup>54</sup> Article 103 runs as follows "In case of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

<sup>55</sup> It is maintained that the "this appears understandable and meaningful, since the Charter presumes or aspires to be the "constitution" of the international community accepted by the great majority of states", Simma, Bruno, (ed) *The Charter of the United Nations: A commentary*, Oxford University Press, Second edition, 2002 ,p.1119.

<sup>56</sup> Judge Bedjaoui, Dissenting opinion, Lockerbie case, *infra* note 60, p.47. However, Shaw is of the view that " Rights and obligations are often the two sides of the same coin". Shaw, MN., 'The Security Council and the International Court of Justice: Judicial Drift and Judicial Function', *supra* note 53 , p.230.

<sup>57</sup> Bedjaoui, M., *supra* note 25, p. 34.

armed conflict”.<sup>58</sup> Further support for the view that the Security Council is under the duty to act in conformity with general international law can be found in the opinions of the International Court of Justice. In the Namibian case, for example, the Court went on to comment as follows:

The Court has therefore reached the conclusions that the decisions made by the Security Council in paragraphs 2 and 5 of resolutions 276(1970), as related to paragraph 3 of resolution 264 (1969) and paragraph 5 of resolution 269(1969), were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25.<sup>59</sup>

At this point, many judges expressed in their separate opinions that the purposes and principles of the United Nations and general international law limit the powers of the Security Council. Judge Weeramantry, in his dissenting opinion as regards the Lockerbie case, stated as follows:

The history of the United Nations Charter thus corroborates the view that a clear limitation on the plenitude of the Security Council’s powers is that the powers must be exercised in accordance with the well- established principles of international law. It is true this limitation must be restrictively interpreted and is confined only to the principles and objects which appear in Chapter 1 of the Charter ... The restriction nevertheless exists and constitutes an important principle of law in the interpretation of the United Nations Charter.<sup>60</sup>

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<sup>58</sup> Shaw, ‘The Security Council and the International Court of Justice: Judicial Drift and Judicial Function’ *supra* note 53, p. 230.

<sup>59</sup> ICJ Reports, 1971, p.53.

<sup>60</sup> ICJ Reports, 1992, p.176. Judge Bedjaoui in the same case pointed out as follows: “This question of validity is liable to raise two major problems, at once serious and complex, namely, whether the Security Council should, in its action, firstly respect the United Nations Charter and secondly respect general international law. The first problem is perhaps the less difficult of the two. Simplifying a great deal, one could say that it would not be unreasonable to state that the Security Council must respect the Charter... because it serves this Charter and the United Nations Organisation...The second problem, relating to respect for international law by the Security Council, is more acute one. ... Of course, the Council must act in accordance with the principles of justice”. ICJ Reports, 1992, p. 45.

In addition, in the Namibia case, Judge Sir Gerald Fitzmaurice in his dissenting opinion stated as follows: “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 members are. The Security Council might, after making the necessary determinations under Article 39 of the Charter, order the occupation of a country or a piece of territory in order to restore peace and security, but it could not thereby, or as part of that

Also, the ICJ in the *advisory opinion of the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* stated that ‘international organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law’.<sup>61</sup>

### 3.3.2 Norms of *jus cogens*

While member states’ obligations under the Charter have a higher rank than is the case with other treaty obligations, the primacy of the Charter over norms of *jus cogens* is not clear under the Charter.<sup>62</sup> Article 53 of the Vienna Convention on the Law of Treaties defines such norms<sup>63</sup> as follows:

A peremptory norm of general international law is a norm accepted and recognized by the international community of States as 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.<sup>64</sup>

The non-derogatory character means that ‘all subjects of international law, including the Security Council, have to abide by them’.<sup>65</sup> Article 53 of the Vienna Convention on the Law of Treaties provides that:

Peremptory norms of international law apply to international organisations as state. ...International organisations are created by treaties concluded between States ...despite a personality which is some aspects different

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operation, abrogate or alter territorial rights ...it was to keep the peace that the Security Council was set up not to change world order”. ICJ Reports, 1971, p. 294.

<sup>61</sup> ICJ Reports, 1980, p.90.

<sup>62</sup> In this meaning, Watson stated that “ Article 103 would make it difficult for the Court to rely solely on a treaty provision to invalidate a decision of the Security Council since clause,” provides that Charter obligations prevail over states obligations under Article 103, “the supremacy international agreements ... Article 103 says nothing about customary international law.” Watson, G R., *Constitutionalism, Judicial Review, and the World Court*, (1993) 34 *Harvard International Law Journal* 37.

<sup>63</sup> However, the precise classification to the *jus cogens* is disputable as Watson stated that” it is quite reasonable to conclude that the UN Charter, itself a treaty, does not authorise acts that violate peremptory norms of international law. Precisely what these norms are is a matter of dispute. It is generally agreed, however, that states cannot enter into treaties to commit genocide, to perpetuate slavery, to engage in illegal aggression, or to perpetuate apartheid”, Watson, G R., *supra* note 62, p. 37.

<sup>64</sup> Vienna Convention on the Law of Treaties, International Legal Materials 8 (1969)

<sup>65</sup> Schweigman, D, *supra* note 16, p197.

from that of States parties to such treaties, they are none the less creation of those State.<sup>66</sup>

Akande concludes that “any Security Council decision in conflict with a norm of *jus cogens* must necessarily be without effect”.<sup>67</sup>

The issue of the non-derogatory character of *jus cogens* and the duty of the Security Council to respect them has been recognized by Judge ad hoc Eli Lauterpacht.<sup>68</sup> In the Bosnia case, Judge Eli Lauterpacht in his separate opinion states as follows:

The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms- extend to a conflict between a Security Council resolution and *jus cogens*.<sup>69</sup>

Judge Eli Lauterpacht further declared:

Now, it is not to be contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately flouting a rule of *jus cogens* or requiring a violation of human rights...the Security Council Resolution can be seen as having in effect called on Members of the United Nations, albeit unknowingly and assured unwilling, to become in some degree supporters of the genocide activity of the Serbs and in this manner and to that extent to act contrary to a rule of *jus cogens*.<sup>70</sup>

Moreover, Gill maintains that the Security Council is under a duty to respect essential human rights, the right to self-defence as well as humanitarian values.<sup>71</sup>

Gill goes further to express the view that the “Council will at a minimum be bound by the rules of human rights contained in the International Bill of Rights

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<sup>66</sup> Vienna convention on the Law of Treaties International Legal Materials 8 (1969)

<sup>67</sup> Akande, D., *supra* note 31, p.322.

<sup>68</sup> As in the Bosnia case, the claim was that the Security Council by resolution 713 establishing arms embargo on Bosnia which in effect asserted the ongoing acts of genocide. *Ibid*.

<sup>69</sup> ICJ Reports, 1993, p. 440.

<sup>70</sup> ICJ Reports, 1993, p.325.

<sup>71</sup> Gill,T., *supra* note 12, p.79.

from which no derogation is permitted in time of emergency or armed conflict”.<sup>72</sup>

Thus, Principles relating to the purposes of the UN as provided in the preamble and Article 1, these principles relating to human rights and humanitarian law,<sup>73</sup> are obligations upon the Security Council which should act in accordance with them.<sup>74</sup>

### **3.3.3 Security Council and customary international law**

A wrongful act could be envisaged where there is a breach of international customary law or of international rules where the customary law is the main sources for such rules. International organisations are bound by customary international law.<sup>75</sup> The issue of whether the Security Council is under the obligation to respect international law in exercising its responsibilities under Chapter VII could be viewed by way of the understanding of the Security Council’s limitations. In this respect, it is maintained that ‘an early “positivist” commentator deduced from the sweeping and almost unlimited powers of the Security Council that the UN is not bound by general international law when it acts under Chapter VII of the UN Charter’.<sup>76</sup> In spite of this view, ‘strong arguments in favour of an obligation to observe customary law may be derived from more general reflections concerning the status of the UN as an organisation enjoying legal personality under international law’.<sup>77</sup> This is all the more significant since it is maintained that ‘The majority view is probably that the UN

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<sup>72</sup> Gill, T., *supra* note 12, p.79.

<sup>73</sup> In its *Advisory opinion of the Legality of the Threat or Use of Nuclear Weapons*, the ICJ stated that ‘Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality’. ICJ Reports, 1996, p.226.

<sup>74</sup> Shaw, MN., *International Law*, *supra* note 21, p. 1148.

<sup>75</sup> Schermers, HG., and Blokker, Niels M., *supra* note 1, 824.

<sup>76</sup> Reinisch, August, *supra* note 47, p.136.

<sup>77</sup> Reinisch, August, *supra* note 47, p.136.

has a duty to observe general international law'.<sup>78</sup> In the United Nations operations in Korea and Congo, the customary principles of the laws of warfare have been observed.<sup>79</sup>

### **3.3.4 General principles of law**

As general principles of law are considered to be one of the sources of international law<sup>80</sup>, the breach for such principles could invoke responsibility for the member states of international organisation. However, as to whether the Security Council should comply with the general principles of law, it is argued that by 'analogous to the position of the customary and conventional international law, it must be concluded that as a matter of hierarchy there are no general principles of law by which the Council must abide'.<sup>81</sup> Notably, the Security Council in conferring its powers under Chapter VII, has to respect the general principle of law insofar as there are constraints on the case of the delegation by the Security Council.<sup>82</sup>

General principles of law have been respected in peacekeeping operations, and have been summarized in the Congo crises as acting in good faith, avoiding abuse of rights and respecting considerations of justice.<sup>83</sup>

### **Concluding remarks**

As long as the matter concerns the obligations of the Security Council, it is here submitted that there are constraints flowing in terms from the UN Charter both

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<sup>78</sup> Ibid.

<sup>79</sup> Hirsch, Moshe, *supra* note 1, p.31.

<sup>80</sup> Article 38(1) c of the ICJ Statute.

<sup>81</sup> Schweigman, D., *supra* note 16, p.201.

<sup>82</sup> See chapter 6, pp 163-164.

<sup>83</sup> See 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, 1965, 535 U.N.T.S.191.

procedural and substantive limitations, general principles of law and principles of international law as the Security Council has to act in conformity of such constraints.

It is argued that although Article 103 of the UN Charter expresses the primacy of the Charter over treaty obligations, such primacy would not include the *jus cogens* norms.

However, it might be asserted here that, because Article 39 of the UN Charter is so broadly interpreted and the purposes and principles of the UN as provided in Article 1 of the Charter are broad in scope, these constraints may be disregarded. The next chapter will highlight the question of the breach of these obligations and whether this breach is attributable to the Security Council.



## **Chapter 4: The essential elements of international responsibility**

Under Article 3 of the draft Articles on the international responsibility of international organisation, the elements of international responsibility are: the existence of the wrongful act and the attribution of this act to the international organisation under international law.<sup>1</sup>

As is determined in the scope of the articles, the elements of an internationally wrongful act of international organisations that entail the international responsibility are existed when conduct of an action or omission:

- a) Is attributed to the international organisation under international law; and
- (b) Constitutes a breach of an international obligation of that international organisation.<sup>2</sup>

It is worth noting that the ‘order and wording of the two paragraphs in Article 3 are identical to those appearing in Articles 1 and 2 of the Articles on the responsibility of States for internationally wrongful acts, but replace the word “State” with the expression “international organisation”.<sup>3</sup> In this regard, it is correctly maintained that ‘the essential characteristic of responsibility hinges upon certain basic factors: first, the existence of an international legal obligation in force between two particular states; secondly, that there has occurred an act or omission which violates that obligation and which is imputable to the State responsible; and finally, that loss or damage has resulted from the unlawful act or omission’.<sup>4</sup> The same would necessarily apply to international organisations.

### **4.1 Breach of obligation**

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<sup>1</sup> Article 3 runs as follows: 1. Every internationally wrongful act of international organisation entails the international responsibility of the international organisation  
2. There is an internationally wrongful act of an international organisation when conduct consisting of an action or omission...’ UN.Doc. A/58/10

<sup>2</sup> *ibid.* para (a),(b).

<sup>3</sup> UN. Doc. A/58/10, p.46.

<sup>4</sup> Shaw, MN., *International Law*, Cambridge: University of Cambridge Press, Fifth edition, 2003, p. 696.

An essential requirement of international responsibility is embodied in committing wrongful international acts.<sup>5</sup> As is stated in Article 3 paragraph 2 (b) of the Draft Articles on the Responsibility of International Organisation, an act of an international organisation may constitute a breach of an international obligation and may be regarded as a wrongful act under international law. This principle may be deduced from the established rules of international responsibility.<sup>6</sup> The Security Council could in practice act *ultra vires* with regard to the Charter or violate general international law. This consequence is derived from the legal personality and the capacity of the United Nations, as a subject of international law, to have rights and obligations.<sup>7</sup>

#### 4.1.1 Types of wrongful acts

The issue of the responsibility of the UN could arise with regard to *ultra vires* actions in cases where the UN itself has committed a wrongful act or indeed, where there is an illegal decision of the Security Council. Furthermore, the failure of the Security Council to comply with its main task of maintaining international peace and security could, at least theoretically, give rise to such responsibility.

Acting *ultra vires* and committing an abuse of rights are types of wrongful acts.

*Ultra vires* acts could be procedural *ultra vires* or substantive *ultra vires*.<sup>8</sup> However, it is maintained that 'the most frequent wrongful acts of international organisations

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<sup>5</sup> It is defined that "for the purposes of the articles, the term "internationally wrongful act" includes an omission, and extends to conduct consisting of several actions or omissions which together amount to an internationally wrongful act" The commentaries to the draft articles on responsibility of states for internationally wrongful acts. adopted by the International Law Commission at its fifty-third session ,2001, p.61.

<sup>6</sup> Ueki, Toshiya, 'Responsibility of International Organisations and the role of the ICJ', in N. Ando et al. (eds.), *Liber Amicorum Judge Sheigeru Oda*, Kluwer Law International, 2002, p.242. Also the Permanent Court of International Justice stated that 'it is a principle of international, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation' Chorzow Factory Case 1928, P.C.I.J. Ser. A, No.17, p.29.

<sup>7</sup> Karl, Doebring., 'Unlawful resolutions of the Security Council and their legal consequences', (1997) 1 *Max Planck Yearbook of United Nations* 92.

<sup>8</sup> Oskie, E., 'The legal validity of Ultra- Vires Decisions of International Organisations', (1983) 77 *AJIL* 239- 243.

that might entail the responsibility of those organisations are *ultra vires* acts”<sup>9</sup> so that it is argued here that the Security Council could commit *ultra vires* acts.

#### 4.1.1.1 Ultra vires acts

In the *Certain Expenses of the United Nations* case, the ICJ distinguished between internal and external *ultra vires* acts. As the Court stated that:

If the action was taken by wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the organisation.<sup>10</sup>

Article 7 of the Draft Articles on State Responsibility of the ILC provides that:

The conduct of an organ of a State or a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.<sup>11</sup>

It has been widely accepted that international organisations have the capacity to commit *ultra vires* acts so that the doctrine of *ultra vires* is applicable to international organisations.<sup>12</sup> In his separate opinion in the *Certain Expenses* case, Judge Morelli argued that:

‘there may be cases in which an act of the organisation would have to be considered as invalid and therefore as an absolute nullity.’<sup>13</sup>

The concept of *ultra vires* has not been defined in relation to the acts of international organisations. However, the definition ‘in terms of action taken outside or beyond the legally ascribed powers may be adequate’.<sup>14</sup> The consequence of acting *ultra vires* is itself debatable. E. Lauterpacht persuasively maintained that:

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<sup>9</sup> Ueki, Toshiya, *supra* note 6, p.238.

<sup>10</sup> *Certain Expenses of the United Nations*, Advisory Opinion, [1962] ICJ Reports, 1962, p.151.

<sup>11</sup> UN. Doc. A/56/10.

<sup>12</sup> Amerasinghe, C.F., *Principles of the Institutional Law of International Organisations*, Cambridge University Press, 1996, p. 167.

<sup>13</sup> Separate opinion of judge Morelli, ICJ Reports, 1962, p.223.

<sup>14</sup> Amerasinghe, C.F., *supra* note 12, p.166.

‘what legal effects, if any, have the illegal acts of international organisations? As will be seen, neither states nor international organisations have yet worked out an adequate answer to this question. Even within what may be called traditional customary international law there is as yet no fully developed or generally applicable theory determining the legal consequence of acts which violate the law. Some are void *ab initio*, others are voidable; some give rise to an obligation to make *restitutio in integrum*, while others merely call for the payment of compensation’.<sup>15</sup>

In dealing with ultra vires acts, the ICJ in *Intergovernmental Maritime Consultative Organisation IMCO* case decided that the action taken by the organisation in electing its Maritime Safety Committee was ultra vires. The ICJ went on to say:

Maritime Safety Committee of the Intergovernmental Maritime Consultative Organisation, which was elected on 15 January 1959, was not constituted in accordance with the Convention for the Establishment of the Organisation.<sup>16</sup>

As already stated, the problem that presents itself in determining the consequences of acting ultra vires in the United Nations is related to the absence of a ‘compulsory adjudicatory review system’ in an international organisation. Judge Fitzmaurice has stated that:

But the important practical point involved is how the validity or invalidity of an given expenditures can be determined, if controversy arises, seeing that as the Court points out, the Assembly is under no obligation to consult the Court, and even if consulted, the Court can only render an opinion having a purely advisory character, and more, that there exists no other jurisdiction to which compulsory reference can be made and which can also render a binding decision.<sup>17</sup>

#### **4.1.1.2 Abuse of rights**

The principle that prohibits abuse of rights is considered as a general law principle applied in civilized nations. Abuse of powers is defined as ‘the use of discretionary

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<sup>15</sup> Lauterpacht, E., ‘The legal effect of Illegal Acts of International Organisations’, in *Cambridge Essays in International Law, Essays in honour of Lord McNair*: London Stevens and Son, 1965 . p.88.

<sup>16</sup> ICJ Reports, 1960, p.171.

<sup>17</sup> ICJ Reports, 1962, p.202.

power for a purpose other than intended by the grantor of the power.’<sup>18</sup> This differs from *ultra vires* acts in that *ultra vires* acts are ‘beyond the limit of the defined power of these organisations’ whereas acts in the case of the abuse of power ‘are within the limit of defined power, but carried out for improper and devious purposes’.<sup>19</sup> In applying this principle to the Security Council decisions, one could state that there are examples that may be regarded as a case of the abuse of power such as the misuse of veto power, the misuse of the interpretation power and, interference in domestic affairs.

In municipal law<sup>20</sup>, the principal general meaning of an *ultra vires* act is ‘one performed without any authority to act on the subject’.<sup>21</sup> However, writers on English administrative law refers to an ‘act out side or ‘beyond the scope’ of the powers of bodies’.<sup>22</sup> In *Anisminic Ltd v Foreign Compensation Commission Ltd & Another*, the House of Lords widened the doctrine of *ultra vires*.<sup>23</sup> In doing so, the improper exercise of discretion would amount to acting *ultra vires*.

#### 4.1.1.3 Breach of UN obligations

Having established that the Security Council is under an obligation to act in accordance with the Charter provisions and general international law<sup>24</sup>, the breaches

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<sup>18</sup> Ueki, Toshiya, *supra* note 6, p. 241. Also, see Baxt, ‘Is the doctrine of ultra vires Dead?’, (1971) 20 ICLQ 301.

<sup>19</sup> *Ibid.*

<sup>20</sup> It is worth mentioning that the analogy between municipal law and international law is misleading. See Kaikobad, Kaiyan., *infra* note 49, p.27

<sup>21</sup> Amerasinghe, C.F., *supra* note 12, p.163.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Anisminic Ltd v Foreign Compensation Commission* [1969]2 AC 147 2QB 862. The factual background has been summarized by Walsh as follows ‘the case was in the Court of Appeal. The plaintiff was an English company which owned property in Egypt before 1956. Their property was sequestered by Egypt and sold to TEDO (an Egyptian Company). The plaintiff put pressure on customers not to buy ore from TEDO so that they bought the mining business from them for \$500,000. the UK reached a compensation agreement with the UAE...the Foreign Compensation Commission said that they only had to inquire whether there was a successor in title and if they qualified’, Walsh, D., ‘Judicial review, competence and the rational basis theory’, the student law Journal 2005, available at <http://studentlawjournal.com>. Also see, *Anisminic Ltd v Foreign Compensation Commission* [1969]2 AC 147 2QB 862

<sup>24</sup> See Chapter 3, pp.51-56.

of Security Council obligations could give rise to international responsibility. Where a UN Member State or third party suffers damage by virtue of a decision of the Security Council that is based on such evidently illegal procedures, the “injured” or “damaged” Member State or third party will be entitled to invoke the responsibility of the United Nations itself or, otherwise, of the Member States of the Security Council, collectively or separately’.<sup>25</sup>

Any breach of obligations under international conventions and customary international law raises the issue of responsibility.<sup>26</sup> In this sense, Article 12 of the Draft Articles on State Responsibility states that:

‘There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character’.

It is to be noted that the issue of whether the responsibility of UN is limited in a case where there has been an unlawful act or omission depends to some extent on the argument as to whether the types of blameworthiness (*culpa, dolus*) must be present.<sup>27</sup> It would be debatable whether the UN is responsible for everything that goes wrong: for example, in cases of injury to third parties resulting from military necessity in military operations or from lawful acts.

However, determining such wrongful acts is not without difficulties as there are practical problems surrounding it which will be examined in the next section.

#### **4.1.2 What if there is a dispute over the illegal decision? Who will decide the breach of obligations?**

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<sup>25</sup> Ueki, Toshiya, *supra* note 6, p. 239.

<sup>26</sup> *Ibid.*, p.240.

<sup>27</sup> Klabbers, J., *An introduction to International Institutional Law*, Cambridge University Press, 2002, p. 311.

#### **4.1.2.1 The entity that could determine the *ultra vires* character of the Security Council decisions**

So as to identify who might determine *ultra vires* decisions, three possible scenarios will be discussed in turn: firstly, the right of Member States to assess Security Council decisions; secondly, the possibility of Council decisions to be judicially reviewed; and thirdly, the right of the General Assembly to challenge Security Council decisions.

##### **4.1.2.1.1 The right of Member States to assess Security Council decisions**

On various occasions, it could be argued that the Security Council has not acted in conformity with the Charter and General International Law.<sup>28</sup> In such cases, it is argued that UN Member States have the right to pass judgment on the legality of Security Council decisions.<sup>29</sup> Angelet has asserted that “the right to protest flows from the fact that the Council has not been granted the right to modify the UN Charter.”<sup>30</sup>

However, an argument against the right of member states to assess Security Council decisions is raised on the grounds that such a right could affect their binding character under Article 25 of the UN Charter.<sup>31</sup> Actually, this argument has a little logic, as the wording of Article 25 of the Charter might provide for the right of member states to interpret and apply Council decisions in accordance with the Charter.<sup>32</sup> In the Libyan case, the Brazilian representative declared that:

As provided in Article 24 (2) of the Charter, the Security Council is bound to discharge its responsibilities in accordance with the purposes and the

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<sup>28</sup> For example: resolutions concerning Bosnia, and Libya.

<sup>29</sup> Schweigman, D., *The Authority of the Security Council under Chapter VII of the UN Charter: legal limits and the role of the ICJ*. Kluwer Law International, 2001, p. 206. Angelet, N., ‘Protest against Security Council decisions’, in Wellens, Karel (ed.), *International law : Theory and practices, essays in Honour of Eric Suy*. 1998. pp277-285.

<sup>30</sup> Angelet, N., *supra* note 29, p. 282.

<sup>31</sup> Combacau, J., *Le pouvoir de sanction de l'ONU: Etude The'orique de la coercition non militaire*, Paris, Pedone, 1974, pp 259-260. Quoted from Angelet, *supra* note 29 , p. 278.

<sup>32</sup> Angelet., *supra* note 29 , p.279.

principles of the United Nations. That means also that decisions taken by the Council, including decisions under Chapter VII, have to be construed in the light of those purposes, which, inter alia, require respect for the principles of justice and international law<sup>33</sup>

Also, in terms of supporting the view of the right of member states to pass judgment on Security Council decisions, it is maintained that “leaving aside the wording of Article 25, it is believed that Member States must necessarily be allowed to pass judgment on Security Council decisions. It is sufficient to mention here that the prevailing view is that the UN Charter may be amended by custom (or acquiescence)”.<sup>34</sup>

Through the possibility of such a right, the question that might arise is “to what extent do member states of the United Nations have discretion to claim that their interpretation of the Charter is the correct one?”<sup>35</sup> The discretionary power for protesting against Council decisions must be in accordance with the Charter, in the sense that the Security Council effectiveness would not be affected by such protesting.<sup>36</sup>

It is worth mentioning that member States may express their refusal to comply with Security Council decisions in the case of not acting in conformity with the UN Charter by official notification, or without such notification. In this sense, it is maintained that “protest against Security Council decisions really has two faces...the first can be referred to as “Voice”, i.e. expressing one’s dissatisfaction to

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<sup>33</sup> S/PV.3312:48-49.

<sup>34</sup> Angelet., supra note 29 , p.279.

<sup>35</sup> In answering this question, it is maintained that “from the outset it must be stated that the according to international law as it stands today, absent any treaty provisions that hold otherwise, states themselves determine the legality of their acts and those of other subject of international law”. Schweigman, D, supra note 29, p.207.

<sup>36</sup> Ibid., pp.205-207.



the decision-makers in an attempt to correct unsatisfactory performance from within the organisation. The second face of protest is Exit".<sup>37</sup>

It may be possible to control Security Council decision making, and consequently enhance the legitimacy of the Security Council decisions by granting UN Member States the right to pass judgment on the Security Council. However, it could be argued that the right of Member States to challenge Council decisions contradicts the binding nature of the Council decisions, and consequently Article 25 of the UN Charter.<sup>38</sup> Article 25 of the Charter stipulates that "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". According to this Article, if the decisions of the Security Council are taken in accordance with the Charter, members are obliged to carry out these decisions. In other words, the Charter itself restricts the effect of Security Council decisions. However, the binding feature of the Security Council decisions does not mean that Member States are "to be treated as having accepted, in advance, whatever decisions the Council might make".<sup>39</sup>

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<sup>37</sup> Angelet, *supra* note 29, p. 280

<sup>38</sup> Ibid.

<sup>39</sup> Bowett D.W., 'Judicial and political functions of the Security Council and the ICJ', in Abi-Saab and others, Fox, Hazel (ed) *the changing constitution of the United Nations*, the British Institute of International and Comparative Law, 1997, p. 81. It is worth mentioning that the binding character provided in Article 25 of the Charter does not apply only to enforcement measures adopted under Chapter VII of the Charter. This view has supported by prominent scholars and ICJ. Higgins maintained that "both the *travaux préparatoires* and the wording of the Charter lead one in the direction that the application of Article 25 is not limited to Chapter VII resolutions, excluding Chapter VI resolution". Higgins, Rosalyn, 'The advisory opinion on Namibia: which UN resolutions are binding under Articles 25 of the Charter', (April 1972) 21 ICLQ 281. Also, Shaw stated that "although the invocation of Chapter VII in a resolution is often the clearest signal of a decision having been adopted, it should be recalled that under Article 39 the Council may indeed make recommendation in the context of that same Chapter". Shaw, M.N., 'The Security Council and the ICJ: Judicial Drift and Judicial Function', in A. Muller, D. Raic, and J. Thuransky (eds), *the ICJ: its future role after fifty years*, Martinus Nijhoff Publishers, Leiden Journal of International Law, 1997, p.223. Indeed, the ICJ in Namibia case went on to say as follows: "It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions about enforcement action but applies to "the decisions of the Security Council" adopted in accordance with Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter, which deals with the functions, and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement action

In 1966, Portugal and South Africa questioned the legality of the Security Council resolutions on Southern Rhodesia and refused to implement these resolutions. Portugal and South Africa in this respect addressed several letters to the Secretary General, however the Secretary General did not clarify the legal aspects of the Security Council resolutions but replied that the Security Council has the power to interpret its resolutions.<sup>40</sup>

Another constructive example concerning states' practice in protesting against Security Council decisions is ,perhaps, Iraq's refusal to cooperate with UNSCOM and its protest against the procedure of the UNCC.<sup>41</sup>

#### **4.1.2.1.2 The possibility of the right of the General Assembly to challenge Security Council decisions.**

The hierarchical relationship between the General Assembly and the Security Council is, *prima facie*, not clear. On the one hand, it is correctly maintained that "the Charter clearly does not subordinate the Council to the Assembly in any way".<sup>42</sup> Accordingly, political control of Security Council decisions may not be envisaged as well as there is no such constitutional right.<sup>43</sup> However, it is also argued that the General Assembly has supremacy over the Security Council and thus the Security Council is accountable before the General Assembly.<sup>44</sup> In fact, the General Assembly cannot review Security Council decisions, and moreover the

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under Article 41 and 42 of the Charter... then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter..." ICJ Reports, 1971, pp 53-54.

<sup>40</sup> See for references Gross, L., 'Voting in the Security Council: Abstention in the Post-1967 amendment Phase and its impact on Article 25 of the Charter', (1968) 26 AJIL316-318.

<sup>41</sup> See, S/AC.26/1993/None No.14 and S/AC.26/1993/None No.17.

<sup>42</sup> Bedjaoui, M., *The new World order and the Security Council: Testing the legality of its Acts*, Martinus Nijhoff Publishers, 1994, p125.

<sup>43</sup> Ibid., p.126.

<sup>44</sup> This view has taken from the most of the representatives of Third World countries as on 22 June 1993, the most of the debates on the plenary meeting of the General Assembly on the Annual Report of the Security Council was concerned on the method of work of the Security Council and the accountability of the Security Council. See A/47/PV.106 p.17-75. Cited in Eric Suy, 'the role of the United Nations General Assembly',. In Abi-Saab and others, Fox, Hazel (ed). *the changing constitution of the United Nations, the British Institute of International and Comparative Law*, 1997, pp 68-69.

General Assembly can not essentially challenge Security Council action and can not take action in respect of a dispute or situation unless the Security Council can not exercise its functions under the UN Charter in respect of the same dispute or situation. This indeed, is deduced from the division of functions between the Security Council and the General Assembly under the UN Charter provisions, particularly, Articles 10 to 14.

More recently, following the lack of action by the Security Council in regards to the construction of the Wall being built by Israel in Palestinian Occupied territory,<sup>45</sup> the General Assembly adopted RES/ES 10/14 on December 2003 by which it decided to request the ICJ to render an advisory opinion on the legitimacy of the wall that Israel is building in the occupied Palestinian territories. The question was as follows:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?<sup>46</sup>

Notably, the General Assembly would play a significant part in regards to international peace and security in that it followed the line of reasoning that was behind the adopting of the Uniting for Peace Resolution. It has ,however, been argued in this case that the adoption by the General Assembly of resolution ES-10/14 was *ultra vires* as not in accordance with Article 12.<sup>47</sup> However, in its Advisory Opinion 2004, the ICJ stated that:

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<sup>45</sup> As on 14 October 2003 the draft resolution that considering the Construction of the Wall departing from the Green Line was illegal and should be ceased was vetoed .

<sup>46</sup> A/RES/ES-10/14 adopted on 8 December 2003.

<sup>47</sup> ICJ Reports, 2004, para. 25. available at [www.icj.cij.org](http://www.icj.cij.org) .

It notes that, under Article 24 of the Charter, the Security Council has “primary responsibility for the maintenance of international peace and security” and that both the Security Council and the General Assembly initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council’s agenda, but that this interpretation of Article 12 has evolved subsequently. The Court takes note of an interpretation of that text given by the United Nations Legal Counsel at the Twenty-third Session of the Assembly, and of an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security. The Court considers that the accepted practice of the Assembly, as it has evolved, is consistent with Article 12, paragraph 1; it is accordingly of the view that the General Assembly, in adopting resolution ES-10/14, seeking an advisory opinion from the Court, did not contravene the provisions of Article 12, paragraph 1, of the Charter. The Court concludes that by submitting that request the General Assembly did not exceed its competence.<sup>48</sup>

Consequently, the issue of whether the ICJ can review the legality of the General Assembly actions is raised before the Court and is examined such issue by accepted the practice of the General Assembly in regard to Article 12.

#### **4.1.2.1.3 The possibility of Security Council decisions being judicially reviewed**

Indeed, it would be helpful to consider more closely what is meant by the concept of judicial review. Kaikobad has defined the concept of judicial review as follows:

The power of a court or a system of courts to examine an act of either a constitutional organ of government, or of a statutory body or official thereof, with a view to determining whether or not the act is consistent with the provisions of the constitutions, a statute or statutes or other sources of law and/or whether the said act is void and thus incapable of producing any lawful effect.<sup>49</sup>

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<sup>48</sup> ICJ Reports, 2004, para 25-26.

<sup>49</sup> Kaikobad, Kaiyan ., *The ICJ and Judicial Review: A study of the Court’s Powers with respect to Judgements of the ILO and UN Administrative Tribunals*, Kluwer Law International, 2000, p.11. In the words of Elihu Lauterpacht the ingredients of the concept of judicial review in the context of international organisations are the followings: ‘1. a grant of power to an organisation; 2. the purported exercise of such power by the organisation; 3. an allegation of a substantive or procedural flaw in the exercise of such power; 4. the existence of a tribunal with an express or implied jurisdiction to consider the allegation; 5. the absence of any third-party interest in respect of which no consent to adjudication has been given; 6. the absence of any prohibition, express or implied, of judicial review in relation to the conduct in question; 7. a review by the tribunal of the exercise of the

Within the context of international law, however, many considerations have to be taken into account when considering an analogy between the system of municipal law and the international legal system, as both have special features.<sup>50</sup> This is particularly so because the analogy itself is misleading. However, judicial review in the international legal system might mean “the power of an international tribunal to pass upon questions dealing with the validity of international institutional action and decisions in the light of various principles of law, but mainly those originating in the relevant constitutive instruments of international organisations”.<sup>51</sup> In accordance with the definition of judicial review and in terms of the principal judicial organ of the United Nations, an issue of significant importance is whether the ICJ has the power to review Security Council actions and if so, what actions would be reviewable; and what the ICJ might say upon reviewing Security Council actions.<sup>52</sup>

#### **4.1.2.2 The Relationship between the Security Council and the ICJ**

The ICJ is the principal judicial organ of the United Nations.<sup>53</sup> The Security Council is also a principal organ.<sup>54</sup> However, there is nothing in the Charter relating to the substantive relationship between the Security Council and the ICJ, and whether

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powers in question, such review not to involve the substitution by the tribunal of its own discretion for that of the organisation’, Lauterpacht, E., ‘Judicial review of the acts of international organisations’, in De Chazournes, Laurence B., and Sands, Philippe, (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge University Press, 1999, p.97.

<sup>50</sup>As it is correctly maintained “any attempt to transpose the municipal notions of judicial review onto the plane of international law must take into account not only the fact that most international legal concepts, principles and institutions are different from national legal systems.” Kaikobad, Kaiyan, *supra* note 49, p.27.

<sup>51</sup> Ibid.

<sup>52</sup> In this regard, Akande maintained that “even if the Court possesses powers of review over decisions of the Council in what instances can the power be exercised? What would be the legal effect of any decision of the Court in this area and what standard of review should be used? Akande, D., ‘The ICJ and the Security Council: is there room for judicial control of decisions of the political organs of the United Nations?’, (April 1997) 46 ICLQ 327.

<sup>53</sup> Article 92 of the United Nations Charter runs as follows: The ICJ shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of Justice and forms an integral part of the present Charter.

<sup>54</sup> Greenwood, C., ‘The impact of decisions and resolutions of the Security Council on the ICJ’, in Heere, Wybo P., (ed.), *International Law and the Hague's 750th Anniversary*. The Hague: Kluwer Law International, 1999, p. 81

there is a hierarchical relationship between them.<sup>55</sup> In this sense, the relationship between the Security Council and ICJ is, as Rosenne has pointed out “neither a position of superiority nor in one of inferiority in relation to the others”.<sup>56</sup> The ICJ emphasises that “the Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events”.<sup>57</sup>

#### **4.1.2.2.1 The constitutional basis for the judicial review of Security Council decisions.**

Whether the ICJ possesses the power of judicial review in respect of the decisions taken by the Security Council is a crucial issue.<sup>58</sup> On the one hand, a constitutional crisis may arise from adopting such approach. In the first place, the Charter and the Statute of ICJ have mentioned nothing in terms of judicial review,<sup>59</sup> as there is a lack of any constitutional basis for such review. Accordingly, and in terms of the argument against judicial review, there is no clear provision provided by the Charter that may adequately explain the judicial review mechanism. Thus, it is maintained that “if no judicial review mechanism is expressly provided for, or clearly results from elements of interpretation, it is up to the organ endowed with a given power to ensure that the latter is exercised within the limits established by the law...it is up to the Security Council to verify the legality of its actions under Chapter VII of the Charter”.<sup>60</sup> At San Francisco, proposals concerning the power of judicial review and

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<sup>55</sup> Ibid., p.82.

<sup>56</sup> Rosenne, S., *The world Court what it is and how it works*. Martinus Nijhoff Publishers, 1994, p.36.

<sup>57</sup> ICJ Reports, 1984, p. 435 para.96.

<sup>58</sup> Caflisch, L., ‘Is the international Court entitled to review Security Council resolutions adopted under chapter VII of the United Nations Charter?’, in Nauimi, Najeeb and others., *International Legal issues arising under the United Nations Decade of International Law*, Qatar Conference, 1995, p.655.

<sup>59</sup> Bowett, D., *supra* note 39, p.73.

<sup>60</sup> Caflisch, L., *supra* note 58, p.655.

whether the ICJ could invalidate the Security Council decisions were rejected. To give an example, the Belgian Amendment<sup>61</sup> was rejected, as judicial review could limit the freedom of the Security Council. The delegate of the Union of Soviet Socialist of Republic expressed “the opinion that the Belgian Amendment should not be adopted by the Committee. He felt that the Security Council should receive the full confidence of the Members of the Organisation”.<sup>62</sup>

It would appear that the Court has no such review power because of the absence of the legal basis in both the United Nations Charter and the Statute of the ICJ.

However, the silence regarding the constitution of the UN has not banned the ICJ from reviewing the Security Council, as it is convincingly maintained that “Lack of an express power of review is not, however, determinative. What is more important is a lack of an express prohibition from engaging in judicial review”.<sup>63</sup>

In addition, the idea of implied power as a legal basic of judicial review has been suggested. However, the idea of implied power cannot be applied to the power of judicial review. Skubiszewski maintains that “indeed, in analogy to municipal law, for such powers to exist there must be an express norm authorizing judicial review. These powers cannot be implied. No appeal, review or similar procedure has been provided for either in the Statute”.<sup>64</sup> Weston further argues that “the term ‘ principal judicial organ’ might imply a power of judicial review, particularly if most states agree that some “judicial” body must have the authority to examine the validity of

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<sup>61</sup> The Belgian Amendment provided as follows: “Any state party to dispute brought before the Security Council, shall have the Right to ask the Permanent Court of International Justice (ICJ) whether a recommendation or a decision made by the Council or proposed in it infringes on its essential rights. If the Court considers such rights have been disregarded or are threatened, it is for the Council either to reconsider the question or to refer the dispute to the Assembly for decision”. Quoted from .Kelsen, H., *The Law of the United Nations : a critical analysis of its fundamental Problems*, London Stevens & Sons Limited, 1951, p.446.

<sup>62</sup> Kelsen, supra note 61, p. 447.

<sup>63</sup> Akande, D., supra note 52, p.326.

<sup>64</sup> Skubiszewski, *Kryzstof.*, ‘The ICJ and the Security Council’, in Lowe, V., and Fitzmaurice, M., (eds). *Fifty years of ICJ: Essays in honour of Sir Robert Jennings*, Grotius Publications: Cambridge University Press, 1996, p. 623.

acts of other organs of government”.<sup>65</sup> Furthermore, although there is a clear functional separation between the Court and the Council in accordance with responsibilities and composition,<sup>66</sup> it is worth noting that the purpose and principles of the Charter do not contradict judicial review. Indeed, judicial review may be essential so as to ensure the maintenance of the peace not least since judicial review can add legitimacy to Security Council decisions which is “beneficial to its decision”.<sup>67</sup>

It is worth noting that the Court in practice stated on many occasions that it does not possess the power of judicial review as such. For example, in the *Namibia case*, the Court states as follows:

It was suggested that though the request was not directed to the question of the validity of the General Assembly resolution and of the related Security Council resolutions, this did not preclude the Court from making such an inquiry. On the other hand, it was contended that the Court was not authorized by the terms of the request, in the light of the discussions preceding it, to go into the validity of these resolutions...  
Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concern.<sup>68</sup>

In the *Expenses case*, the Court went on to say as follows:

In the legal system of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the ICJ were not accepted; the opinion, which the Court is in the course of rendering, is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction.<sup>69</sup>

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<sup>65</sup> Watson, G R., ‘Constitutionalism , Judicial Review, and the World Court’, (1993) 34 *Harvard International law Journal* 14.

<sup>66</sup> Debbas, Vera Gowlland. ‘The relationship between the ICJ and the Security Council in the light of the Lockerbie case’, (1994) 88 *AJIL* 653.

<sup>67</sup> Akande, D., *supra* note 52, p.336.

<sup>68</sup> ICJ Reports, 1971, p. 45.

<sup>69</sup> ICJ Reports, 1962, p.168.



At any rate, notwithstanding the silence of the Charter on the judicial review issue, the most striking issue is how the question of judicial review may arise and which of the Security Council actions would be challenged. We begin with the proceedings where the question of judicial review may arise.

#### **a. Advisory opinion**

Under Article 96 (1) of the Charter, the General Assembly or the Security Council may request that the ICJ to provide an advisory opinion regarding any legal question.<sup>70</sup>

The Court reserves the right to review the legality of the Security Council decisions in the event of the Court having jurisdiction under Article 36 of the Statute of the ICJ, where there is a request for an advisory opinion.<sup>71</sup> As a result, the issue of judicial review may arise during the request for an advisory opinion on any legal question.<sup>72</sup> In order to illustrate this, one may assess the practice of the ICJ in terms of certain cases submitted by the General Assembly and the Security Council. These cases are:

Firstly, in the *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* case, the General Assembly submitted the following legal question:

Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant records, has the General Assembly the right on any Grounds to refuse to give effect to an award of compensation made by the Tribunal in favour of a staff member of the United Nations whose contract

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<sup>70</sup> Article 96 of the Charter which runs as the following: 1.The General Assembly or the Security Council may request the ICJ to give an advisory opinion on any legal question.2.other organs of the United Nations and specialised agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

<sup>71</sup>Sarooshi, D., *The United Nations and the development of collective security*, Oxford University Press, 2000, p.49. The ICJ under Article 65 of the Statue may give an advisory opinion. Article 65 stated that “ The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”

<sup>72</sup> Akande, D., *supra* note 52, p. 327.

of service has been terminated without his assent?<sup>73</sup>

Notwithstanding the details of this case and the controversial opinions surrounding it, the opinion of the Court affirmed that the Court could review the decisions of the United Nations organs.<sup>74</sup> Secondly, another advisory opinion given by the ICJ is the *Case of the Certain Expenses of the United Nations 1962*. The General Assembly requested an advisory opinion from the Court as to “whether certain expenditures authorized by the General Assembly constitute expenses of the Organisation within the meaning of Article 17, paragraph 2 of the Charter of the United Nations”.<sup>75</sup>

The implications of the Court in the *Certain Expenses of the United Nations case* are embodied in the possibility of judicial review, whereby the Court stated:

The Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion.<sup>76</sup>

In addition, in the same case the Court noted as follows:

It has been asked to answer a specific question related to certain identified expenditures which have actually been made, but the Court would not adequately discharge the obligation incumbent on it unless it examined in some detail various problems raised by the question which the General Assembly has asked.<sup>77</sup>

In this case, the Court asserted that it had the power to review whether the action taken by the General Assembly was valid or void. The Court stated as follows:

The United Nations purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have

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<sup>73</sup> ICJ Reports, 1954, p.50.

<sup>74</sup> In this regard, the Court held that “ it is not the object of the Request to determine how the Security Council should apply the rules governing its voting procedure....the Court therefore, called upon to determine solely whether the General Assembly can make a decision to admit a state when the Security Council has transmitted no recommendation to it”, ICJ Reports, 1950, p.7.

<sup>75</sup> ICJ Reports, 1962, p.152. It is worth mentioning that the General Assembly rejected the French amendment which was directed to ask the Court on the legality of the decisions of the political organs of the UN and whether the resolutions in question were “ decided in conformity with the provisions of the Charter”. Official Records of the General Assembly, 16<sup>th</sup> session, Plenary Meetings, vol. 1, 1086<sup>th</sup> meeting, p.115. Cited in Akande, supra note 52, p.328.

<sup>76</sup> ICJ Reports, 1962, p.157.

<sup>77</sup> Ibid, p.158.

entrusted the Organisation with the attainment of these common ends, the Member States retain their freedom of action. But when the organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires*.<sup>78</sup>

In 1970, the Security Council, for the first time, asked the ICJ for an advisory opinion.<sup>79</sup> The Security Council question was: “what are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?” The Court asserted that it did not possess any powers of judicial review in respect of decisions taken by the organs of the United Nations. However, at the same time, the Court stated that it could review the actions of the UN organs during the exercise of its judicial function. The Court stated as follows:

The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning; will consider these objections before determining any legal consequences arising from those resolutions.<sup>80</sup>

In addition, in the *Namibia case*, the Court examined the validity of the resolutions of the Security Council 264 (1969), 296 (1969), 276(1970) and the resolutions of the General Assembly 2145(XXI). In so doing, the Court stated:

A resolution of a properly constituted organ of the United Nations, which is passed in accordance with the organ’s rules of procedure, must be presumed to have been validly adopted.<sup>81</sup>

Also, in the same case the Court went further, to test the legality of the actions of the Security Council through their conformity with the purposes and principles of the Charter.

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<sup>78</sup> Ibid, p.168.

<sup>79</sup> Higgins, R., supra note 39 ,p. 270.

<sup>80</sup> ICJ Reports, 1971, p.45.

<sup>81</sup> ICJ Reports, 1971, p.22.

Thus when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential function and powers under the Charter.<sup>82</sup>

It can be noted that the ICJ in the above-examined case, the Court addressed its power to review the acts of the political organs of the United Nations.<sup>83</sup> Hence, one could maintain that the Court could control the legality and illegality of the decisions of the Security Council where advisory opinions are concerned.

The non-binding force of the advisory opinion leaves the Security Council free to take the opinion of the Court into consideration or not. In this sense, it is maintained that “upon receiving the Court’s opinion, the Council is free to accept or disregard it. Legally speaking, advisory procedures, which are expressly provided for the Charter, do not in any way affect the Council’s powers”.<sup>84</sup> It is worth noting that the ICJ emphasises in its advisory opinions the non-binding nature of such opinions.<sup>85</sup> However, the effect of the advisory opinion cannot be underestimated as it has valuable legal and moral effects in term of interpreting and developing the role of the political organs in maintaining international peace and security as well as entrenching important legal principles.<sup>86</sup>

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<sup>82</sup> ICJ Reports, 1971, p. 54.

<sup>83</sup> Schweigman, D., *supra* note 29, p. 271

<sup>84</sup> Caflisch, L., *supra* note 58, p.455. Stone, J., *Legal controls of international conflict- A Treatise on the dynamics of dispute*, Second impression, 1959, p.120.

<sup>85</sup> The Court stated that “ the Courts reply is only of an advisory characters such, it has no binding force”, ICJ Reports, 1950, p.71. Also, as the Court stated that ‘under Article XII of the Statute of the Administrative Tribunal, the Opinion thus requested will be “binding”. Such effect of the Opinion goes beyond the scope attributed by the Charter and by the Statute of the Court to an Advisory Opinion’, ICJ Reports, 1956, p. 84. However, Judge Castro in his individual opinion pointed out that “ the effect of an Advisory Opinion is not confined to the parties as though it were a matter of judgment, the opinion is authoritative erga omnes, and is not restricted to the states or organisations that make written or oral statement or submit information or documents to the Court”. ICJ Reports, 1975, p.138.

<sup>86</sup> Hudson maintained that “they are advisory not legal advice in the ordinary sense, not views expressed by Counsel for the guidance of Client, but pronouncements as to the law applicable in given situations formulated “after deliberations by the Court”. Hudson, M., ‘The Effect of Advisory Opinions of the World Court’, (1948) 42 AJIL 630.

## **b. Contentious cases**

The Lockerbie and Bosnia cases have raised question regarding the review of the validity of Security Council actions in contentious cases.<sup>87</sup> The implications of these cases will be discussed as follows:

### **The Lockerbie case**

In the case of the aerial incident at Lockerbie in 1992 a major constitutional issue was raised in accordance with the United Nations Charter, and more pertinently, Chapter VII.<sup>88</sup> Moreover, in this case “the Court was faced essentially with a new scenario”.<sup>89</sup> Furthermore, as Franck maintains, “perhaps more significant than what the Court said in Lockerbie was what it did not say. It did not declare itself incompetent to review the legality of a Security Council resolution”.<sup>90</sup> The factual background is helpful in looking more closely at this case.

### **Factual Background**

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<sup>87</sup> Franck, Thomas., ‘The political and the judicial empires: must there be conflict over conflict-resolution?’, in Nauimi, Najeeb, et al, *International Legal issues arising under the United Nations Decade of International Law*, 1995, p. 625. Akande, supra note 52, p.331. Caflisch, L., supra note 58, p. 638. A new challenge has been raised in Lockerbie cases as it is maintained that “this would be the first review of the validity of a United Nations resolution in contentious proceedings”. Debbas, V., ‘The relationship between the ICJ and the Security Council in the light of the Lockerbie case’, supra note 66, p.670.

<sup>88</sup> Debbas, V., ‘Security Council enforcement action and issues of state responsibility’, (1994) 43 ICLQ 55. Actually, judge Shahabuddeen underlined the constitutional crises raised by Lockerbie case by questioned the limits of the power of the Security Council in his separate opinion ,ICJ Reports, 1992, p32.

<sup>89</sup> Shaw, MN., ‘The Security Council and the ICJ: Judicial Drift and Judicial Function’, supra note 39, p. 252.

<sup>90</sup> Franck, Thomas. ‘The political and the judicial empires: must there be conflict over conflict-resolution?’, supra note 87, p. 627.

On 21 January 1992 the Security Council, acting under Chapter VI of the Charter, adopted resolution 731 (1992), requiring Libya to surrender two Libyan nationals, both charged with terrorism, to the United Kingdom and the United States.<sup>91</sup>

In response to the Security Council resolution, Libya brought an application before the ICJ asking the Court to adjudge and declare:<sup>92</sup>

1. That Libya has fully complied with all of its obligations under the Montreal Convention;
2. That the United States has breached, and is continuing to breach, its legal obligations under Article 5(2),5(3), 7, 8(2) and 11 of the Montreal Convention; and
3. That the United States is under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, and from all violations of the sovereignty, territorial integrity, and political independence of Libya.<sup>93</sup>

Moreover, Libya requested that the Court indicate provisional measures against the UK and USA under Article 41 of the Statute of the ICJ.<sup>94</sup> The Security Council, after three days of I.C.J hearings on this request for provisional measures, adopted resolution 748(1992) which runs as follows:<sup>95</sup>

Acting under Chapter VII of the Charter,

3. Decides that on 15 April 1992 all States shall adopt the measures set out below, which shall apply until the Security Council decides that the Libyan Government has complied with paragraphs 1 and 2 above,
- 4- Calls upon all States, including States not member of the United Nations, and all international organisations, to act strictly in accordance with the provisions of the present resolution, granted before 15 April 1992.

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<sup>91</sup> See Graefrath, Bernhard., 'Leave the Court what belongs to the Court the Libyan case', (1993) 4 EJIL 184-205. It is maintained that "there is no obligation on Libya under international law to surrender her own nationals to a foreign states" Graefrath, Bernhard., 'Leave the Court what belongs to the Court the Libyan case', p.188.

<sup>92</sup> Caflisch, L., *supra* note 58, p.641.

<sup>93</sup> ICJ Reports, 1992, pp.117-118.

<sup>94</sup> Caflisch, L., *supra* note 58, p.641

<sup>95</sup> Resolution 748 ( 1992).

Through its Order of 14 April 1992, the Court by eleven votes to five, found that the circumstances of the case “were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures”.<sup>96</sup>

According to Libya’s view of Resolution 748, the Court should invalidate Resolution 748 as the Security Council violated international law by misusing its powers and exceeding those powers conferred by the Charter as the Security Council should have respected the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.<sup>97</sup> However, it is maintained that the Security Council acted under Chapter VII of the Charter with regard to the legal dispute taking place before the Court.<sup>98</sup> Several judges have addressed this issue: Judge Lachs, for example, in his separate opinion on the *Lockerbie case* stated as follows:

While the Court has the vocation of applying international law as a universal law, operating both within and outside the United Nations, it is bound to respect, as a part of that law, the binding decisions of the Security Council. This of course, in the present circumstances, raises issues of concurrent jurisdiction as between the Court and a fellow main organ of the United Nations.<sup>99</sup>

The Court referred to Articles 25 and 103 of the UN Charter to affirm that all member states were obliged to accept and carry out the decisions of the Security Council and to explain that obligations under the Charter prevail over obligations under any other international agreement. Thus, in accordance with Article 103 of

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<sup>96</sup> ICJ Reports, 1992, p. 114.

<sup>97</sup> Clafisch, L., *supra* note 58, p. 641.

<sup>98</sup> Franck, Thomas M. The Security Council and “threats to the peace”: some remarkable recent development. Workshop, the Hague, 1992 RCDI 107.

<sup>99</sup> ICJ Reports, 1992, p. 138. Also, the Declaration of Judge NI points out as follows: ‘Although both organs deal with the same matter, there are differing points of emphasis. In the instant case, the Security Council, as a political organ, is more concerned with the elimination of international terrorism and the maintenance of international peace and security, while the ICJ, as the principal judicial of the United Nations, is more concerned with legal procedures such as questions of extradition and proceedings of compensation, etc. but these functions may be correlated with each other. What would be required between the two is co-ordination and co- operation, not competition or mutual exclusion’. ICJ Reports, 1992, p.23.

the Charter the Security Council resolution 748 (1992) prevailed over the Montreal Convention.<sup>100</sup> Judge Oda supported the supremacy of Security Council resolutions in terms of United Nations law, by stating as follows:

...As I understand the matter, a decision of the Security Council, properly taken in the exercise of its competence, cannot be summarily reopened, and since it is apparent that Resolution 748(1992) embodies such a decision, the Court has at present no choice but to acknowledge the pre-eminence of that resolution.<sup>101</sup>

However, the significance of the Court's reference to Article 103 in Lockerbie Case could be challenged as the extent and the limit of the primacy of UN Charter over treaty obligations remain unclear. In this sense it is maintained that 'what are the obligations imputable to Libya under the Montreal Convention that have been overruled by the Security Council Resolution? Is it the obligation to initiate proceedings against suspects if the State is not willing to extradite them?'.<sup>102</sup>

### **Genocide case**

In resolution 713 (1991), the Security Council imposed a weapons embargo on the former Yugoslavia. On 20 March 1993, Bosnia-Herzegovina instituted proceedings against the Federal Republic of Yugoslavia, asking the Court to declare that the Security Council resolution 713 "must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and

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<sup>100</sup> ICJ Reports, 1992, p.15.

<sup>101</sup> ICJ Reports, 1992, p.17. More recently, Libya has agreed on the compensation payment, however does this mean that the court was right in refusing Libya request or does this mean the settlement of the issue of judicial review, why not to consider this settlement a political one ?. as is maintained that ' Libya's agreement to admit responsibility for the Lockerbie bombing and pay \$2.7 billion to victims' families is a step in the rehabilitation of its dictator, Muammar Qaddafi. But he escapes personal blame and remains a menace'. Libya and the Lockerbie bombing Compensation but no real justice' Aug 14 2003, the Economist Global.

Available at <http://www.economist.com/research/backgrounders/displaystory.cfm?Story>

<sup>102</sup> Graefrath, Bernhard., 'Leave the Court what belongs to the Court the Libyan case', supra note 91, p. 198. Also, see Dissenting Opinion of Judge Bedjaoui, ICJ Reports, 1992, 47.



Herzegovina”.<sup>103</sup> Furthermore, the Court was asked to rule that “under the current circumstances, the Government of Bosnia and Herzegovina has the right to seek and receive support from other States in order to defend itself and its people, including by means of immediately obtaining military weapons, equipment, supplies”.<sup>104</sup> In other words, the Court was asked to essentially or significantly reinterpret the Security Council resolution. However, the Court could not address this request, as the Court found that this request fell outside the Genocide Convention thus the Court had no jurisdictional basis.<sup>105</sup>

However, both the Lockerbie and Bosnia cases are examples where the issue of judicial review has been raised by the party but the Court did not address such an issue.

### **Congo v. Uganda case**

The issue of the ICJ’s review power and the compatibility of Security Council resolutions with international law were raised in the request for the provisional measures phase of the Congo v. Uganda case<sup>106</sup>. Uganda, in this case, argued that the Congo's request for an indication of provisional measures would conflict with the Security Council resolutions and the Lusaka Agreement<sup>107</sup>.

The legality of the Security Council resolutions concerning Congo, including resolution 1304 (2000), was not expressly questioned in the Congo’s request.

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<sup>103</sup> Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Prov. Measures), ICJ Reports, 1993, para 2, p. 6.

<sup>104</sup> ICJ Reports, 1993, para 3, p. 8.

<sup>105</sup> Schweigman, D., *supra* note 29, p. 281. Debbas, V., ‘The relationship between the ICJ and the Security Council in the light of the Lockerbie case’, *supra* note 66, p.668.

<sup>106</sup> On 23 June 1999, the Democratic Republic of the Congo instituted proceedings against the Republic of Uganda in respect of a dispute concerning “acts of *armed aggression* perpetrated by Uganda on the territory of the Democratic Republic of the Congo, in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity”; Democratic Republic of the Congo v. Uganda Case Concerning Armed Activities on the Territory of the Congo - Request for the Indication of the Provisional Measures, ICJ Reports, Order of 1 July 2000, para.1.

<sup>107</sup> *Ibid.*, para 30.

However the Court observed that the Security Council resolution 1304 (2000) was adopted under Chapter VII, but at the same time, this resolution does not preclude the Court from acting in accordance with its Statute and with the Rules of Court with respect to the same events.<sup>108</sup>

The Court then observes that in the present case the Security Council has taken no decision which would *prima facie* preclude the rights claimed by the Congo from “be[ing] regarded as appropriate for protection by the indication of provisional measures”.<sup>109</sup>

One might conclude that the Court in the Congo v. Uganda case emphasized the parallel powers of the Security Council and of the Court, where the ICJ’s review power could be raised.

#### **4.1.2.2 Testing the illegal action and the approaches of interpretation**

It is quite obvious that the Security Council will not say that the actions taken by the Council are against international law, but illegality might be a question of interpretation. The interpretation of the UN Charter and testing the validity of acts are “closely related subjects”.<sup>110</sup> The Security Council is an organ of an international organisation created by a treaty. The silence on the interpretation issue and the manner that would be adopted towards it in both the UN Charter and the ICJ Statute has led to different approaches being taken in tackling this issue. Prominent scholars

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<sup>108</sup> Ibid, para .36.

<sup>109</sup> Summary of ICJ Reports, Order of 1 July 2000, paras. 32-46.

<sup>110</sup> Bedjaoui, M., supra note 42, p.9. See, Alvarez, J.E., ‘Constitutional interpretation in international organisations’, in Coicaud, J, and Heiskanen, Veijor,(eds) *the legitimacy of International organisations*, United Nations University Press, 2001, pp 104-155.

are of the view that the Charter should be interpreted dynamically.<sup>111</sup> Shaw, for example, states as follows:

The special nature of the constituent instruments as forming not only multinational agreements but also constitutional documents subject to constant practice, and thus interpretation, both of the institution itself and of member-states and others in relation to it. This of necessity argues for a more flexible or purpose-orientated method of interpretation.<sup>112</sup>

The ICJ, in supporting the teleological and dynamic interpretation, has stated as follows:

The Court cannot accept so limited a view of the powers of the Security Council under the Charter. It cannot be said that the Charter has left the Security Council impotent in the face of an emergency when agreements under Article 43 have not been concluded.<sup>113</sup>

Furthermore, the ICJ referred to the implicit powers of the Security Council and the General Assembly in different cases. In *Reparation for injuries suffered in the service of the United Nations case*, the Court pointed out as follows:

The Charter does not expressly confer upon the Organisation the capacity to include, in its claim for reparation, damage caused to the victim ... Under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.<sup>114</sup>

In this regard, Debbas has stated that “the Charter’s “purposes” however, are not static and should also be determined by the evolution of general international law since 1945...an international instrument may be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation, providing that the concepts included in the treaty are inherently evolutionary and

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<sup>111</sup> Kelsen maintains that “the fact that the legal norms as formulated in words having frequently more than one meaning is the reason why every legal instruments has its own life, more or less independent of the wishes and expectations of its begetters”. Kelsen, H., *supra* note 61, p.xiv.

<sup>112</sup> Shaw, MN., *International Law*, *supra* note 4, p.1194.

<sup>113</sup> ICJ Reports, 1962, p.167.

<sup>114</sup> ICJ Reports, 1949, p.182.

that it was the intention of the parties to have them considered as such”.<sup>115</sup>

Also, in the *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* case, the Court addressed the legal power of the General Assembly to establish a tribunal competent to render judgments binding on the United Nations and went on to say that:

“The Court finds that the power to establish a tribunal, to do justice as between the Organisation and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.”<sup>116</sup>

Therefore, there is a strong tendency for the Court to interpret the provisions of the Charter widely, in order to expand the competence of the United Nations organs rather than invalidate the action.

#### **4.1.2.2.3 The scope of judicial review**

As has been mentioned before, judicial review may arise in advisory proceedings and contentious procedures. However, complicated and crucial matters also surround such a judicial review<sup>117</sup> and many unresolved questions have arisen as follows:

#### **What is reviewable?<sup>118</sup>**

We have noted the wide discretionary power of the Security Council under Article 39 of the United Nations Charter in determining a threat to peace, a breach of the

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<sup>115</sup> Debbas, V., ‘The relationship between the ICJ and the Security Council in the light of the Lockerbie case’ supra note 66, p. 665.

<sup>116</sup> ICJ Reports, 1954, p. 57.

<sup>117</sup> Debbas, ‘The relationship between the ICJ and the Security Council in the light of the Lockerbie case’, supra note 66, p. 670.

<sup>118</sup> It is worth mentioning that Bowett has suggested the potential grounds for review: 1- Grounds to be excluded such as a. differences of political judgment, b. evidence of bias. c. procedural irregularities. 2. Grounds to be included as valid grounds of challenge a. ultra vires, b. denial of a right to a hearing. c. the decision is manifestly defective. Bowett, D.W., supra note 39, pp 83-84.

peace or an act of aggression.<sup>119</sup> However, it is argued that the power of the Security Council, to make a determination under Article 39 could be a valid ground for reviewing. On the one hand, it is maintained the Security Council does not have unlimited power to make a determination under Article 39; consequently there is room for such determination to be reviewed.<sup>120</sup> In this sense, in the Namibia case, Judge Gros supported the idea by stating as follows:

To assert that a matter may have a distant repercussion on the maintenance of peace is not enough to turn the Security Council into a world government.<sup>121</sup>

Furthermore, Judge Sir Gerald Fitzmaurice in the Namibia case has stated that:

No threat to peace and security other than such as might have been artificially created as a pretext for the realization of ulterior purposes.<sup>122</sup>

However, this argument has another point of view, as the power of judicial review is excluded from the Security Council's determinations under Article 39 of the UN Charter. This determination is considered to be a political matter, insofar the inherent limitations on the judicial function have taken place.<sup>123</sup> In this regard, Bowett maintains as follows:

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<sup>119</sup> Also, Kelsen stated as follows: "But, in order to be in conformity with general international law, the Security Council is allowed to direct its action only against the state responsible for the threat to, or breach of, the peace, in spite of the wording of Article 39 authorizing the Council to take enforcement action against any state whatever after having determined the existence of any threat to, or breach of, the peace. Since the Security Council is completely free in its determination of what is a threat to the peace or breach of the peace, it may determine as such any conduct of a state without regard to whether this conduct constitutes the violation of obligations by pre-existing law". Kelsen H., *supra* note 61, p.736.

<sup>120</sup> Akande, D., *supra* note 52, p.337. In the Tadic case, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia stated that the concept of a "threat to the peace is more of political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter." Appeals Chamber Decision on the Tadic Jurisdiction Motion, [*Prosecutor v. Dusko Tadic*], Case No. IT-94-I-AR72, 2 October 1995, para.29.

<sup>121</sup> ICJ Reports, 1971, p. 340 para 34.

<sup>122</sup> ICJ Reports, 1971, pp. 293- 294.

<sup>123</sup> The examples that could be quoted from Bowett are " where the Council decides under Article 39 that the Chapter VII applies, and in addition decides that State is guilty of aggression, or must pay compensation, the later finding based on the assessment of the facts. So, too, where the Council

It would be wrong to allow any Court to question the Council's judgment that a Chapter VII situation- "a threat to the peace, breach of the peace, or act of aggression"- either had, or had not, occurred. Equally the Council's discretion over the choice of means to deal with situation, for example, whether to order provisional measures under Article 40, or economic sanctions under Article 41, or to institute measures of peacekeeping must be preserved as not subject to judicial challenge. The same would be true of decisions as to the timing of, or participation in, such measures.<sup>124</sup>

Akande has formulated further grounds for the argument of the non-reviewable Security Council determination under Article 39 of the UN Charter, maintaining that such determination is not fit to be determined by judicial body, on the grounds of the absence of legal standards for such determination.<sup>125</sup> Akande maintains as follows:

Therefore such questions are not fit for the ICJ not because of any supposed inherent limitations of the international judicial function but because they are not questions to which international law, which the Court is charged to apply by Article 38 of its Statute, provides an answer.<sup>126</sup>

Moreover, Judge Weeramantry, in his dissenting opinion in the *Lockerbie case*, went on to remark:

Once we enter the sphere of Chapter VII, the matter takes on a different complexion ... thus any matter which is subject of a valid Security Council decision under Chapter VII does not appear, *prima facie*, to be one with which the Court can properly deal.<sup>127</sup>

To sum up the aforementioned views, the determination under Article 39 of the existence of any threat to the peace, breach to the peace or act of aggression falls entirely within the discretionary powers of the Security Council. However, the

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decides that Member States must apply economic sanctions against State X because of its violation of the right of self-determination. The obligation to apply sanctions arises because of the delict by state X, and a finding of delict is not a purely political decision: it is a finding of fact and law". Bowett., D., *supra* note 39, pp.84-85. Also, Northern Cameroons case ,ICJ Reports, 1963, p.29.

<sup>124</sup> Ibid., p. 84.

<sup>125</sup> Akande, D., *supra* note 52, p. 338.

<sup>126</sup> Ibid.

<sup>127</sup> ICJ Reports, 1992, p.176.

political feature of such a determination leads to the complicated question of drawing the line between political questions and legal questions, and consequently, leads to confusion in considering which of the Security Council resolutions is not reviewable. For this reason one would maintain that the exclusion of challenging the resolutions based on the assessment of Article 39 has an undesirable effect in seeking a judicial review. Put in other terms, if there is no clear definition of the terms, “threat”, “breach “ of peace or “act of aggression”, the Security Council may selectively determine the case under Article 39 and the ICJ must not touch this determination. Furthermore, the non reviewable feature of the timing in making such a determination, as Bowett claimed<sup>128</sup>, means, perhaps, that if the Security Council has failed in maintaining international peace and security and has not acted on time, it would not be responsible for such wrongdoing or omission, which would contradict with the purpose of seeking the review of Security Council decisions.

#### **4.1.2.2.4 What are the consequences of illegal acts and what might the Court say?**

A further problem that may arise from the review of the validity of the Security Council resolutions is that of the consequences of the determination of illegality. First and foremost, if the Court found that the Security Council resolution is *ultra vires* then the question arises as to whether the legal effect of such determination on the decision makes it null and void,<sup>129</sup> or voidable.<sup>130</sup>

To view the legal effect of the Court’s determination from another angle, it is of considerable importance to recognize the non-binding force of the advisory opinion.

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<sup>128</sup> See supra p.94.

<sup>129</sup> Null and void means that decision is without legal effects from the date it was issued” Schweigman, D., supra note 29, p. 283.

<sup>130</sup> Voidable means that “ avoidable act is an act that produces all its effect in spite of the defects by which it is vitiated...” quoted in Schweigman, D., supra note 29, p. 283.

Since it is not binding and since any decision is limited to the parties in the case before the Court, complying with the Court's opinion would be selective. Moreover, the non-use of the advisory opinion also plays a significant role in determining such a legal effect.<sup>131</sup> In this sense, Akande maintains that "any determination in an advisory opinion that Security Council resolution is *ultra vires* and invalid would not be binding on the organ concerned or on state".<sup>132</sup>

The practice of the Court shows that it could decide, through its judicial function, on the validity of the resolutions of the Security Council.<sup>133</sup> However, would the Court dare to be in conflict with the Security Council? In this respect, it has been stated that "no doubt the ICJ would prefer not to cross a bridge to have the cup pass from it. But can it escape the hard cases forever"?<sup>134</sup>

The Court, in the sense of reviewing the validity of the Security Council resolution, lacks the authority to achieve such a review. Additionally, "the lack of an

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<sup>131</sup>From this angle and without entering into scholarly debate over the access to the Court, the non use of the advisory opinion might be related to the general cause of the position of the international judicial process in international relations and the sovereignty principle still play a significant role in international relations. The particular reasons related to non use might be as follows: firstly, there are reasons related to the mechanism that governs Court functions. Secondly, there are reasons related to the states attitudes of the states towards Court in general. In the words of Szasz 'the development of international law is an objective that states tend to praise rather than seriously pursue. In particular, governments generally prefer to keep all law-creating and even law-defining processes firmly within their control, even at the cost of significantly retarding this work. Therefore, while political theorists and unengaged international lawyers might welcome increased activity by the World Court (whether contentious, quasi-contentious or genuinely advisory) just because the judgments and opinions of the Court will contribute to the still scant body of international law, the enthusiasm of states for even modest judicial legislation has always been most limited', Szasz, P. C. 'Enhancing the advisory competence of the World Court', in Gross, L., *the future of the ICJ*, Dobbs Ferry, New York, Oceana Publications, vol II, p 511. See also, Forsythe, D.P., 'the ICJ at fifty', in A. Muller, D. Raic, and J. Thuransky (eds), *the ICJ: its future role after fifty years*, Martinus Nijhoff Publishers, Leiden Journal of International Law, 1997, pp 385-405. Also, Shahabuddeen, M., 'the World Court at the turn of the century', in A. Muller, D. Raic, and J. Thuransky (eds), *the ICJ: its future role after fifty years*, Martinus Nijhoff Publishers, Leiden Journal of International Law, 1997, pp. 3-29. Higgins, R., 'A comment on the current health of advisory opinions', in Lowe, V., and Fitzmaurice, M., (eds). *Fifty years of ICJ: Essays in honour of Sir Robert Jennings*, Grotius Publications: Cambridge University Press, 1996, pp.567-581. Visscher, C. D., *Theory and reality in public international law*, Princeton University Press, 1968, pp.381-386. Keith, K. J., *The extent of the advisory jurisdiction of the ICJ*, Leyden, A.W. Sijthoff, 1971, pp. 239-254.

<sup>132</sup> Akande, D., *supra* note 52, p. 333. Kelsen, H., *supra* note 61, p. 545.

<sup>133</sup>Shaw, M.N., 'The Security Council and the ICJ: Judicial Drift and Judicial Function', *supra* note 39, p. 251.

<sup>134</sup> Franck, Thomas M., *supra* note 87, p. 625.



established procedure for judicial review, which makes the process incidental or fortuitous; ...the absence of a coherent theory of the legal effects of illegal acts of international organisations are also missed in the term of such review”.<sup>135</sup> In this respect it is maintained that “ what the Court seemed to be saying was that it lacked powers of judicial review in the sense of being able to quash definitively the decisions of the political organs of the United Nations”.<sup>136</sup>

The ICJ can express the view that a resolution of the Security Council violates general international law. Clearly, however, it cannot argue that the Security Council action in question is void as the ICJ is realised the sensitivity of its relationship with the Security Council. Also, “the Court cannot declare with universally binding effect that a decision of the Security Council is invalid”.<sup>137</sup> In this regard, Bedjaoui maintained that “the Court itself is fully aware of all its limitations in that direction”.<sup>138</sup>

The drawback surrounding the judicial review process is embodied in the elements of requesting an advisory opinion. These elements are provided under Article 65 of the Statute and Article 95 of the Charter, which restrict the competence of the Court to give advisory opinions on legal question and not on a political one.<sup>139</sup> These elements, however, provide an opportunity to consider matters as political matters. The following is maintained: “But the Court, in view of its function, cannot and in

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<sup>135</sup> Debbas, V., ‘The relationship between the ICJ and the Security Council in the light of the Lockerbie case’, supra note 66, p.670.

<sup>136</sup> Akande, D., supra note 52 , p.333.

<sup>137</sup> Ibid

<sup>138</sup> David, P Forsythe., the ICJ. A. Muller, D. Raic, and J. Thuransky (eds), *the ICJ: its future role after fifty years*, Martinus Nijhoff Publishers, Leiden Journal of International Law, 1997, pp. 385-405. Bedjaoui, M., supra note 42, p121.

<sup>139</sup> Higgins, R., ‘A comment on the current health of advisory opinions’, supra note 131, pp.567-581. Kelsen, H., supra note 61, p.545. Elias summarised these elements as follows : ‘(a) questions must be legal; (b) they must be requested by duly authorized bodies; (c) they must be put by written request; (d) the request must contain an exact statement of the question; (e) the request must be accompanied by all documents likely throw light upon the question’. Elias, T.O., ‘how the ICJ deals with requests for advisory opinions’, in Makarczyk, J.,(ed) *Essays in International Law in Honour of Judge Manfred Lachs* ,Martinus Nijhoff Publishers, 1984, p.355.

fact did not shy away from pronouncing on the conformity of Security Council acts with law in both contentious and advisory procedures”.<sup>140</sup>

## 4.2 Attribution

The second element in the responsibility of international organisations is that of attribution. The question of attribution is of prime importance for the purposes of responsibility. Article 3 of the Draft Articles on Responsibility of International Organisations provides that:

There is an internationally wrongful act of an international organisation when conduct consisting of an action or omission:

- (a) is attributable to the international organisation under international law; and
- (b) constitutes a breach of an international obligation of the international organisation.<sup>141</sup>

The ILC considered the Special Rapporteur’s second report which dealt with attribution of conduct of International Organisations,<sup>142</sup> and adopted the four proposed draft articles. Draft Articles 4-7 run as follows:<sup>143</sup>

Article 4 deals with general rules on the attribution of conduct to an international organisation, stipulating that:

1. The conduct of an organ or agent of an international organisation in the performance of functions of that organ or agent shall be considered as an act of that organisation under international law whatever position the organ or agent holds in respect of the organisation.
2. For the purposes of paragraph 1, the term “agent” includes officials and other persons or entities through whom the organisation acts
3. Rules of the organisation shall apply to the determination of the functions of its organs and agents
4. for the purpose of the present draft article, “rules of the organisation” means, in particular: the constituent instruments; decisions, resolutions and other acts taken by the organisation in accordance with those instruments; and established practice of the organisation

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<sup>140</sup> Skubiszewski, Krysztof., *supra* note 64, p. 628.

<sup>141</sup> A/56/10, p.45.

<sup>142</sup> A/CN.4/541.

<sup>143</sup> *Ibid.*

Article 5 deals with conduct of organs or agents placed at the disposal of an international organisation by a state or another international organisation and stipulates that:

The conduct of an organ of a State or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international law an act of the later organisation if the organisation exercises effective control over that conduct.

Article 6 deals with excess of authority or contravention of instructions, and stipulates that:

The conduct of an organ or an agent of an international organisation shall be considered an act of that organisation under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of that organ or agent or contravenes instructions.

Article 7 deals with conduct acknowledged and adopted by an international organisation as its own, and stipulates that:

Conduct which is not attributable to an international organisation under the preceding draft articles shall nevertheless be considered an act of that international organisation under international law if and to the extent that the organisation acknowledges and adopts the conduct in question as its own.

Moreover, the question of attribution has been recognized in Article 288, paragraph 2, of the Treaty Establishing the European Community, which stipulates that:

The Community shall make good any damage caused by its institutions or its servants in the performance of their duties.<sup>144</sup>

The issue of whether wrongful acts are committed by the international organisation or member states is a matter of command and control, as it is in determining the

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<sup>144</sup> Article 288 (2) (ex Article 215) of the Treaty Establishing the European Community (Treaty of Rome) as Amended by Subsequent Treaties, Rome, 25 March, 1957 entered into force on 1 January 1958.

responsibility of member states. However, the criterion of effective control<sup>145</sup> has measured the degree of attribution of acts, either to the organisation or to the member states.<sup>146</sup> To put it differently, agreement between the UN and the contributing States, status agreements with the host state and regulations issued by UN Secretary General remain of considerable importance in viewing the issue of responsibility. Under section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations, the United Nations is obliged to ‘make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party’.<sup>147</sup> Moreover, the Model-Status- of Forces Agreement (SOFA) states that ‘any dispute or claim of a private law character to which the United Nations peace-keeping operation or any member thereof is a party and over which the courts of [host country/territory] do not have jurisdiction because of any provision of the present agreement, shall be settled by a standing claims commission to be established for that purpose’.<sup>148</sup>

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<sup>145</sup> In spite the validity of the criterion of effective control for deciding the attribution of unlawful acts to the member states or international organisation, this criterion has been criticized by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Tadic* case. The Appeals Chamber stated that “the requirement of international law of the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control”. *Prosecutor v. Tadic*, 15 July 1999, para. 117. The Appeals Chamber continued on to state that “the Appeals Chamber holds the view that international rules do not always require the same degree of control over armed groups or private individuals for the purpose of determining whether an individual not having the status of a State official under internal legislation can be regarded as a *de facto* organ of the State. The extent of the requisite State control varies...” *Prosecutor v. Tadic*, 15 July 1999, para 137.

<sup>146</sup> It is worth mentioning that the ICJ examined the degree of control that is required for the attribution of the acts of individuals to a State, as in the Nicaragua case the ICJ went on to say that ‘Such acts could well be committed by members of the contras without the control of the United States. for this conduct to give rise to the legal responsibility of the United States, it would have to be proved that State had effective control of the military operations in the course of which the alleged violations were committed’. ICJ Reports, 1986, pp. 64-65.

<sup>147</sup> Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15, 13 February 1946.

<sup>148</sup> Model Statues of Forces Agreement for Peace-keeping Operations, A/45/594 paragraph 51. UNTS of the Status of force concerning Bosnia and United Nations May1993 paragraph 48.

Yet taking into consideration the Model-Status-of Forces Agreement (SOFA) in dealing with peacekeeping operations, not all decisions taken by the Security Council concern peacekeeping operations, and not every implementation of the decisions of the Security Council is structured by agreements or by law. Moreover, even if activities carried out by UN forces are attributed to the contributing states and the criterion of command is applied, problematic issues could nonetheless be found where member states of the UN refuse to pay expenditure resulting from the decision, and/or where the illegality of this decision is questionable. Thus, the agreement signed between the United Nations and contributing states or host countries would not exempt the UN member states from repairing damages caused to third parties, where activities carried out by UN forces are based on illegal decisions.

Member States could also be held responsible even if the act is attributed to the organisation, in the case where there is no good faith in the action of the member states. An example that could be cited in this regard, as illustrated by Klabbers, is that the member States of the EC, consistent with the European Convention on Human Rights, have transferred powers to the EC, which is not a party to the European Convention. In this case, where there is any violation of the norms established in this convention, the member states are held responsible.<sup>149</sup>

Turning again to the second part of the question which this Chapter addresses, one may ask whether member states who vote against the decision are liable. The

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<sup>149</sup> See *Matthews v. UK*, judgment of 18 February 1999, para. 32. Klabbers also indicates that in the attribution issue could arise in 'responsibility of UN member states for violations of the laws of armed conflict by UN troops, as the UN is not a party to any convention on humanitarian law', Klabbers, J., *supra* note 27, p. 303.

requirements of fairness would seem to preclude member states voting against the decision from bearing the same degree of responsibility. The striking point here is the possibility for drawing an analogy between possessing command and possessing veto powers, and consequently making decisions. Can the minority which have voted against the decision be held responsible for the damages that may occur from such a resolution? This dimension is a relevant issue in attributing actions to the organisation or to the majority of member states that take such acts, or excluding the minority from being responsible.<sup>150</sup> However, it is argued that attribution of the act of the international organisations only to the majority that has taken the decisions and consequently to those states that voted in favour of such decisions must be rejected, as such attribution ‘weakens the position of the international organisation’ as well as the establishment and functioning of international organisations.<sup>151</sup> Furthermore, the argument that the minority that voted against the decisions taken by the majority are not responsible is rejected, as the minority already accepted the risk for unwilling decisions taken by the majority.<sup>152</sup> In this sense, Butkiewicz has maintained that:

It is to be assumed that by becoming a member of an international organisation each state had accepted certain structural rules, considering that in the last resort this will prove to be profitable. The sole act of majority voting in an organ of international organisation is nothing but the execution of one of the obligations accepted unanimously by all member-states.<sup>153</sup>

The attribution of the act is to be assumed as being attributed to the organisation as whole, and not to the majority and those member states that voted in favour of the

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<sup>150</sup> In this sense, it is maintained that “ the question arises to whether a decision adopted by a majority can be attributed to the organisation as a whole, without taking into consideration the views of the minority. For, it could be argued that it is only an act of the majority and therefore attributable only to those who voted in favour’. Butkiewicz, Ewa., ‘The Premises of international responsibility of Inter- Governmental organisations’, (1981-1982) XI *Polish Yearbook of International Law* 127.

<sup>151</sup> Ibid

<sup>152</sup> Ibid

<sup>153</sup> Ibid

decisions. It may be different in other situations where, unlike the International Tin Council, certain members of the Security Council have the right of veto so that there is no equal representation. However, establishing the liability of member states at the international legal level is connected with the international community as a whole. The ILC stated, in this sense, that “The breach of the obligation may well affect more than one subject of international law or the international community as a whole”.<sup>154</sup>

To put it differently, the problem emerges where the decisions made by the Security Council need the concurring votes of the five permanent member states. In this case, the allegation of harming the establishment and functioning of international organisation by incurring the decision-makers in the Security Council responsibility would be not acceptable from a practical point of view. Consequently, the attribution of the action taken by the inter-state organs<sup>155</sup> is basically based on the degree of the power that creates the decision and/or controls the action. Thus the connection between attributing the behaviour of member state that possess command and control powers over operations, (for example peacekeeping operations), and between possessing power in making decisions in terms of being responsible is very likely to be clear. In accordance with the involvement in the functioning of the organisation and control theory, the member states of international organisation could be held responsible. Despite the fact that this line of argument has been rejected in the cases mentioned before,<sup>156</sup> if one follows the

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<sup>154</sup>UN. Doc A/58/10, p.47.

<sup>155</sup>The inter- state (inter-governmental) organs are fundamental organs of international organisations. They are the decision making bodies on the most important matters affecting the actions of the organisations...’ Butkiewicz, Ewa *supra* note 137, p. 125.

<sup>156</sup> The Swiss Federal Tribunal concluded in the Westland case that ‘ the predominant role played by these [founding] states and the fact that the supreme authority of the AOI is a Higher Committee composed of ministers cannot undermine the independence and personality of the organisation’. Jul 19, 1988, 80 ILR 658.

extent of control by member states on the behaviour of the organisation, particularly the way that the decisions of the Security Council are made<sup>157</sup>, one could easily envisage that member States could exercise a high degree of control so that, here again, the member States could be liable for the organisation's wrongful act. In this sense, it is maintained that 'a liability of members based on the control theory should not be ruled out entirely, but such control would have to be clearly established, and cannot be deduced from the mere participation in the functioning of the organisation'.<sup>158</sup>

#### **4.2.1 Exceptions to the imputability of the unlawful act to the UN**

We have determined that unlawful acts are imputable to the UN as long as effective control belongs exclusively to the UN. However, the UN might be free from responsibility in other cases. Firstly, the Security Council may not have a supervisory role regarding the operation, or may not have reported back on the process of the operation.<sup>159</sup> Although the relevance of this exception may be noted, this does not make much sense when the Security Council has been informed of the operation, but, perhaps, is unable to make a decision on operational events. This situation occurred, for instance, in Korea, where although the United States regularly provided the Security Council with reports on the action taken under the Unified Command,<sup>160</sup> these reports had no effect on military operations.<sup>161</sup> As

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<sup>157</sup> The discretionary powers given to the Security Council by the provisions of the Charter under Chapter VII are very extensive to extent that one might say that at least the five permanent states in the Security Council can control the behaviour of the UN.

<sup>158</sup> Sands, Philippe and Klein, Pierre, *Bowett's Law of international institutions*. London: Sweet and Maxwell, 2001, p. 523.

<sup>159</sup> Sarooshi, supra note 71, p165

<sup>160</sup> Paragraph 6 of the Security Council resolution 83 (1950).

<sup>161</sup> It is precisely maintained that 'the United States used this practice to provide information, rather to seek political guidance. Indeed, it has been observed that the Secretary General had difficulty in ensuring that the Security Council received these reports before they were released to the press. They were also subject to censorship in Washington before they reached the Security Council' Higgins, R.,



General MacArthur clearly stated, 'my encounter with the United Nations was largely nominal...I had no direct connection with the United Nations whatsoever'.<sup>162</sup> Thus, to provide such reports did not mean that the Security Council could be held responsible, as the overall and effective control was in the hands of the United States, and in consequence, the United Nations never assumed responsibility for unlawful acts committed in the Korea case.<sup>163</sup>

The second exception where the Security Council may not be liable is the case where States have acted *ultra vires* of the delegated powers under Chapter VII.<sup>164</sup> The question is whether command and control powers have initially been delegated with a delegated mandate (on one hand), as in this case the Security Council would have no command and control which in effect free it from the responsibility; or alternatively, whether states have acted *ultra vires* where the command and control powers have been vested exclusively in the UN. In this case the UN 'may be held responsible for its force even if such acts were 'bona fide' or were 'ultra vires'.<sup>165</sup> In this sense, the ICJ has stated that:

If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organisation. Both national and international law contemplate cases in which the body corporate or politic may be bound, as third parties, by an *ultra vires* act of an agent'.<sup>166</sup>

## Concluding remarks

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*United Nations peacekeeping 1946-1967: Documents and commentary*, p 179.

<sup>162</sup> As cited in Higgins, R., *supra* note 161, p 179.

<sup>163</sup> This is discussed in Chapter 7.

<sup>164</sup> Sarooshi, D., *supra* note 71, p 165.

<sup>165</sup> Amrallah, Borhan, 'The international responsibility of the United Nations for activities carried out by U.N peacekeeping forces', (1976) 32 *Revue Egyptienne De Droit International* 71.

<sup>166</sup> ICJ Reports, 1962 . p.168.

The logical consequence of any breach of the above mentioned obligations,<sup>167</sup> is to establish international responsibility. Acting *ultra vires* and committing an abuse of rights are types of wrongful acts that would entail the responsibility of the Security Council. However, to establish such a sequence, Security Council actions should be judicially reviewed, but as is discussed in this chapter, many constitutional and practical problems could arise. First and foremost I have argued that the non-reviewable Security Council determination under Article 39 of the UN Charter, could limit the scope of judicial review and, in essence, could weaken the effectiveness of such a review. The question of whether there is any court with the power to review the Security Council actions is also discussed here. It is clear that from a domestic point of view, there is no competence for the domestic courts to state such accountability, as they have no power to do so. However, regardless of the fact that the ICJ is neither a supreme Court nor a constitutional one, if there is a dispute over the legality of a Security Council decision, the scope and the extent of reviewing the Security Council decisions remains limited. However, the special importance of the role of advisory opinions as authoritative statements of the law in regards to legality of the acts of organ is recognised. As Judge Bustamante notes:

An advisory opinion, taking the place of judicial proceeding, is a method of voluntary recourse which, if only by way of elucidation, precedes the decision which the Organisation is called upon to give with regard to legal objections raised by Member States.<sup>168</sup>

The attribution is the second element in the responsibility of the international organisation that has been dealt in this chapter. It is here submitted that the unlawful acts are imputable to the UN as long as the criterion of command and control is proved.

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<sup>167</sup> See Chapter 3.

<sup>168</sup> ICJ Reports, 1962, p.304. Higgins also stated that 'it is a public affirmation of the authoritative quality of the advice that has been rendered'. Higgins, R., *Problems and process : International Law and how we use it*, Oxford: Clarendon Press, 1999, p .203.

## **Part two: the responsibility of the United Nations for Security Council' authorized operations**

Following the creation of a new world order<sup>1</sup> and an associated, sharply increased demand for UN intervention around the world, the Security Council has carried out a wide range of activities in conducting peacekeeping and peace enforcement operations.<sup>2</sup> Such operations, in themselves, raise the issue of international responsibility for crimes committed by their forces. The relationship between the United Nations and its member States will be addressed in order to determine which entity should ultimately be held responsible. This is of particular importance because it could be questioned whether, and (if so), to what extent, the Security Council is responsible for crimes committed by UN forces.

This part addresses the question of who may be held responsible for illegal decisions, whether it be the Security Council through the UN and/or those decision makers who voted in favour or against these decisions, thereby causing damage to third parties.<sup>3</sup>

Are states who vote against a particular decision responsible when the decision causes damages to third parties?<sup>4</sup> Who is responsible when an international organisation acts *ultra vires*?<sup>5</sup> Higgins has postulated the question thus: 'is the method by which the organisation decisions were taken that led to the obligation

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<sup>1</sup> See the development of the powers of the Security Council which were dealt with Chapter one.

<sup>2</sup> Rosenne, S., 'General Course on Public International Law: the United Nations System', Chapter XII in (2001)RCADI 418.Coicaud, J., 'International organisations, the evolution of international politics, and legitimacy', in Coicaud, J. and Heiskanen, Veijor.(eds) *the legitimacy of International organisations*, United Nations University Press, 2001, pp.519-553.

<sup>3</sup> It is correctly stated that 'there is the general problem that Member states are already perceived as a dominating IO-s to such an extent that these are unable to exercise maximum control over their environment. The considerable influence exercised by Member states constrains autonomous behaviour by IO-s'. ILA Report, 2002, p. 19.

<sup>4</sup> Hirsch, Moshe, *the responsibility of international organisations toward third parties: Some basic principles*. London, 1995.ix.

<sup>5</sup> Ibid.

to a third party a relevant factor?'.<sup>6</sup>

As the United Nations is considered to be a highly political international institution, the starting point of this part will include the operations conducted by the Security Council in the case of delegation, peacekeeping and peace enforcement. This is because the focus here will be on arguably illegal decisions taken by the Security Council, and the consequences of taking such decisions.

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<sup>6</sup> Higgins, R., The legal consequences for member States of non-fulfilment by International Organisations of their obligations toward third parties. (1995) 66(1) *Annuaire de l'Institut de Droit International* 253.

## **Chapter 5: The relationship between member states and International organisations in considering the responsibility of member states.**

### **5.1 Liability of member states**

The United Nations has a legal personality, and is capable of being responsible for activities carried out by its organs,<sup>1</sup> in that it has a legal personality that is separate from its member States. UN responsibility for the actions of its forces, even if such actions were ultra vires, provokes a discussion as to the relationship between the UN and its member States with regard to the liability of member states for action taken by the UN. The question of whether member states are responsible for UN expenditure such as compensation that has been paid by the UN for activities carried out in relation to UN peace keeping in the Congo is of significant importance.<sup>2</sup> The general principle has to be established as to whether the members of international organisations are to be held responsible for the obligations of the international organisation towards third parties and if this is so, the kind of responsibility that would be invoked.

The argument concerning the members' responsibilities is broadly based on the general principles of international responsibility,<sup>3</sup> international treaties<sup>4</sup> and the examination of judicial decisions.<sup>5</sup>

The office of Legal Affairs of the UN holds the following view:

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<sup>1</sup> ICJ Reports, 1949, pp.179-183.

<sup>2</sup> See Chapter 7, pp.206-207.

<sup>3</sup> See, Higgins, R., The legal consequences for member States of non-fulfilment by International Organisations of their obligations toward third parties. (1995) 66(1) *Annuaire de l'Institut de Droit International* 248-469. Hirsch, Moshe, *The responsibility of International Organisations toward third parties: Some Basic Principles*, London, 1995, pp 50 -120.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

Clear obligations of the UN should be paid, regardless of whether there is an appropriate resolution or whether the organisation has a claim against a third party for the sum in question on which it has not yet been able to collect.<sup>6</sup>

## 5.2 The legal basis for the liability of member states

A problematic issue arises here in terms of whether member states may be simultaneously liable for actions committed by their organisation.<sup>7</sup> Schermers has answered the question in the negative: ‘unless the constitution provides for such simultaneous liability’.<sup>8</sup> The UN Charter makes no provisions whatsoever in its constitutive instruments in terms of the liability of its members.<sup>9</sup> However, the legal basis for conducting liability for member states may be established in accordance with a relevant general principle of international law.<sup>10</sup> Shaw maintains that ‘such a question falls to be decided by the rules of international law not least since it is consequential upon a determination of personality which is in the case of international organisations governed by international law’.<sup>11</sup> Some assert that if there is no express exclusion of the liability of member states, there is a possibility of liability.<sup>12</sup> As is stated in the RRP on accountability ‘there is no general rule of international law whereby States members are, due solely to their membership, liable concurrently or subsidiary, for the obligations of an IO of

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<sup>6</sup> As cited in Schermers, HG., and Blokker, Niels M., *International Institutional Law: Unity within diversity*, Kluwer Law International, Third revised edition, 1995, p.991.

<sup>7</sup> Ibid., p.992.

<sup>8</sup> Ibid.

<sup>9</sup> Higgins, R., *supra* note 3, p.401. ILA stated that “constituent instruments of IO-s may contain a clause explicitly providing for the Organisation’s responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions”. ILA Report, 2002, p.18.

<sup>10</sup> Wellens, Karel, *Remedies against International Organisation*, Cambridge University Press, 2002, p.47.

<sup>11</sup> Shaw, MN., *International Law*, Cambridge: University of Cambridge Press, Fifth edition, 2003, p.1202.

<sup>12</sup> In the ITC case *Gibson L.J* rejected the view that ‘in the absence of a non-liability provision in the constituent treaty, the members were directly responsible to the creditors’ *MacLaine Watson & Co. Ltd v. Department of Trade*, Court of Appeal (1989) 80 ILR 169.

which they are members'.<sup>13</sup>

However, as is stated, 'In particular circumstances, members of an IO may be liable for its obligations in accordance with a relevant general principle of international law, such as acquiescence or the abuse of rights'.<sup>14</sup>

In accordance with Article 57 of the Draft Articles on Responsibility of States, the responsibility of member states for acts of an international organisation lies beyond the scope of the Draft Articles on Responsibility of States. The ILC, in its commentary on this Article, has indicated as follows:

Article 57 also excludes from the scope of the articles issues of the responsibility of a state for the acts of an international organisation, i.e., those cases where the international organisation is the actor and the state is said to be responsible by virtue of its involvement in the conduct of the organisation or by virtue of its membership of the organisation.<sup>15</sup>

In spite of the exclusion, as mentioned in Article 57, Chapter IV of Part One of State Responsibility Articles could be applied to the issue in consideration by analogy.<sup>16</sup> However, applying such a Chapter may raise crucial issues. In this regard the ILC maintains that they raise 'controversial substantive questions as to the functioning of international organisations and the relations between their members, questions better dealt with in the context of the law of international

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<sup>13</sup> ILA report, 2002, p.18. Article 2(b) (i) and (ii) of the 1995 Resolution of the Institute de Droit International reads as follows: '(i) Concurrent liability means a liability that allows third parties having a legal claim against an international organisation to bring their claim, at their choice, against either the organisation or its members. (ii) Secondary or subsidiary liability means a liability by which third parties having a claim against the international organisation will have a remedy against States members only if and when the organisation defaults'. Higgins, *infra* note 107, p. 234.

<sup>14</sup> ILA Report, 2002, p.18.

<sup>15</sup> Crawford, James, *The ILC's Article on State Responsibility: introduction, text and commentaries*, Cambridge University Press. 2002, p.311.

<sup>16</sup> Chapter IV deals with the responsibility of a state in connection with the act of another state. p. 145. A/56/10.

organisations'.<sup>17</sup> The ILC stated that the 'main question that has been left out in the article on State responsibility, and what will be considered in the present draft articles, is the issue of the responsibility of a State which is a member of an international organisation for a wrongful act committed by the organisation'.<sup>18</sup> The ILC Draft Articles on State responsibility serve as the starting point by analogy.<sup>19</sup> In its report on the work of its fifty-fifth session, the ILC considered the question of the international responsibility of a State for the conduct of an international organisation. Draft Article 1 reads as follows:

#### Scope of the present draft articles

"The present draft articles apply to the question of the international responsibility of an international organisation for acts that are wrongful under international law. They also apply to the question of the international responsibility of a State for the conduct of an international organisation".<sup>20</sup>

The General Assembly has requested 'the Secretary General to invite States and international organisations to submit information concerning their practice relevant to the topic 'responsibility of international organisations', including cases in which State members of an international organisation may be regarded as being responsible for acts of the organisation'.<sup>21</sup>

The principles of international responsibility of the members of an international

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<sup>17</sup> Crawford, James., *supra* note 15, p.311.

<sup>18</sup> Official Records of the General Assembly, fifty-eight Session, Supplement no. A/58/10 p.36. In the sixth Committee held from 27 October to 4 November, the General Assembly discussed the report of the ILC on the work of its fifty-fifth session. With regard to the topic Responsibility of international organisations, delegations praised the progress already achieved by the Commission. It was suggested that future work on the topic should take into account the particular situation of regional economic organisations, such as the European Union. UN General Assembly 58<sup>th</sup> Session, Legal Sixth Committee. Summaries of the work of the Sixth Committee.

<sup>19</sup> William, E.Holder., 'Can international organisations be controlled? Accountability and responsibility'. (2003) ASIL Proceedings 234.

<sup>20</sup> A/58/10 these draft Articles were adopted by the Drafting Committee on 4 June 2003 A/CN.4/L.632.

<sup>21</sup> A/C.6/58/L.25 p.2 Draft resolution: Report of the ILC on work of its fifty-fifth session, 5 November 2003. p.2.



organisation are reflected in the sources of international law. However, the problem, as Shaw maintains 'is also to be addressed in the context of the general principle of international law that treaties do not create obligations for third states without their consent (*pacta tertiis nec nocent nec prosunt*) by virtue of this rule member states without their consent would not be responsible for breaches of agreements between organisations and other parties'.<sup>22</sup>

Several examples could be referred here. The legal regime of secondary responsibility is adopted in Article 22 of the 1972 Convention on the International Liability for Damage Caused by Space Objects and this provides that:

'International organisations and their members are jointly and severally liable for damaged caused by the space activities of the organisation'.<sup>23</sup>

The ILC stated that:

The fact that an international organisation is responsible for an internationally wrongful act does not exclude the existence of parallel responsibility of other subjects of international law in the same set of circumstances. For instance, an international organisation may have cooperated with a State in the breach of an obligation imposed on both.<sup>24</sup>

Another example that could be cited is that of judicial decisions with regard to the international responsibility of member states for acts committed by international organisations. These decisions are the International Tin Council Case and the Westland case.

### **5.2.1 The International Tin Council (hereinafter the ITC)**

#### **Background**

In 1985, the ITC<sup>25</sup> collapse led to financial crisis, and very substantial legal

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<sup>22</sup> Shaw, MN., *International Law*, supra note 11, p. 1202.

<sup>23</sup> Convention on the International Liability for Damage Caused by Space Objects 1972, 961 U.N.T.S 187.

<sup>24</sup> UN.Doc. A/58/10.p47.

<sup>25</sup> The ITC was 'an international organisation with thirty two members (including the EC), based

questions emerged such as whether ‘the members of an international organisation are responsible for obligations undertaken by the organisation’.<sup>26</sup>

In spite of the fact that the ITC was concerned with the responsibility of member states to cover debts in the case of insolvency, and not with the responsibility of member states for wrongful act,<sup>27</sup> the litigation following the collapse of the ITC raised many principles concerning the international responsibility of international organisation.<sup>28</sup>

In this regard, it is maintained that ‘if an international organisations defaults on its financial obligations, its member states have no obligation to meet its debts unless they have chosen to accept such liability. Such a choice normally would appear in the organisation’s constituent instruments’.<sup>29</sup> In the International Tin Agreement, there is no clause relating to responsibility in the constituent document, and this is, indeed, ‘a general pattern’ in international organisations.<sup>30</sup> Even though there is nothing in the International Tin Agreement of such clause, this does not mean that there is no liability of member States.

Three arguments have emerged in the United Kingdom Courts for the

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on an International Tin Agreement, the sixth version of which was in force in the mid-1980s’. Klabbers, J., *An introduction to International Institutional Law*, Cambridge University Press, 2002, p.303.

<sup>26</sup> Hirsch, Moshe, *supra* note.3, p.112.

<sup>27</sup> Some authors discuss this issue from another point of view. Schermers for example, stated that ‘the ILC of the United Nations discussed the problems of State responsibility and the responsibility of international organisations for internationally wrongful acts. That is not our subject. In the present article we use the word “liability” for the obligation to pay money in order to fulfil a contractual commitment. Probably the same kind of liability arises from a court judgment ordering the payment of a particular sum of money, but we do not enter into obligations arising from wrongful acts’. Schermers, G., ‘Liability of International Organisations’, (1988) 1LJIL 4.

<sup>28</sup> In this sense, Klabbers maintained that ‘the litigation provides a good picture of some of the issues and complexities involved when it comes to responsibility of international organisations and their member-states vis-à-vis third parties’ Klabbers, J., *supra* note 25, p.306.

<sup>29</sup> Singer, Michael, ‘Jurisdictional immunity of international organisations: human rights and functional necessity concerns’, (1995) 36 *Virginal Journal of international law* 59.

<sup>30</sup> Klabbers, J., *supra* note 25, p.301.

responsibility of member states for the debts of the ITC.<sup>31</sup> First and foremost, the argument concerning the direct responsibility of member states on the basis that the ITC had no distinct legal personality. The second argument seeking to establish a concurrent or secondary responsibility of ITC Member states was based on mixed entities. Lastly, the constitutional agency argument was based on the International Tin Agreement 6.<sup>32</sup> However, these arguments were dismissed by the English Courts as it was held that the separate legal personality of the organisation excluded the liability of member states. Millett. J argued that the ITC had 'been granted specifically the legal capacities of a body which is separate and distinct from its members'. Consequently,

The ITC has full juridical personality in the sense that it exists as a separate legal entity distinct from its members; though it is sufficient to dispose of this case to say that it has the characteristic attribute of a body corporate which excludes the liability of the members, that is to say the ability to incur liabilities on its own account which are not the liabilities of the members.<sup>33</sup>

Also, Millett J. stated that:

"By conferring on the ITC the legal capacities of a body corporate, Parliament has granted it sufficient legal personality to enable it to incur liabilities on its own account which are not the liabilities of its members."<sup>34</sup>

The English Court of Appeal ruled that:

The relationship between the member states and the ITC under the provisions of the Sixth International Tin Agreement is not that of principles and agents but in the nature of a contract of association or membership similar to that which arises upon the formation of company

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<sup>31</sup> Romana Sadurska and Chinkin, C.M., 'The collapse of the International Tin Council: A case of state responsibility?', (1990) 30 *Virginia Journal of International Law* 855.

<sup>32</sup> for further details see Hirsch p.112-120

<sup>33</sup> *MacLaine Watson & Co. Ltd v. Department of Trade and Industry and others*, decision of 29 July 1987, High Court, Chancery Division, in 80 ILR 39 p.44. also, the House of Lords confirmed that the 'ITC is a separate legal personality distinct from its members' J.H Rayner (Mincing Lane) Ltd v. Department of trade and others, decision of 26 October 1989, House of Lord in 81 ILR 704 ( hereinafter International Tin Council Case, House of Lords).

<sup>34</sup> *MacLaine Watson & Co. Ltd v. Department of Trade* High Court, Chancery Division, May 13, 1987, 77 ILR45

between the shareholders inter se and the legal entity which they have created by contract or association.<sup>35</sup>

The decisions of the House of Lords were based on the English law, more precisely the Order of Council of 1972. The submissions related to the direct responsibility, concurrent or secondary responsibility and agency relationship were rejected by the House of Lords.<sup>36</sup> Lord Templeman has stated that ‘no evidence was produced of the existence of such a rule of international law’.<sup>37</sup>

### 5.2.2 Westland Case

#### Background

In 1979, the member states of the Arab Industrialization Organisation (AOI)<sup>38</sup> declared the end of the existence of the AOI. In 1980, Westland proceeded with arbitration against the AOI, claiming that the organisation and its members were bound to ‘pay under a joint and several liabilities’ the sum of 126,000,000 pounds sterling to the claimants.<sup>39</sup> The Award of the Tribunal of the International Chamber of Commerce found as follows:

The states responsibility in each individual case can be assessed only on the basis of the acts constituting the joint organisation when construed also in accordance with the behaviour of the founder states.<sup>40</sup>

After examining the constituent instruments and the structure of the AOI, the Tribunal of the International Chamber of Commerce declared that:

In the absence of any provision expressly or impliedly excluding the liability of the four states, this liability subsists since; those who engage in

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<sup>35</sup> English Court of Appeal, APRIL 27 1988. *MacLaine Watson & Co. Ltd v. Department of Trade* 80 ILR 114.

<sup>36</sup> International Tin Council Case, House of Lords, in 81 ILR pp. 671, 677, 681, 715.

<sup>37</sup> Ibid., p. 680.

<sup>38</sup> In 1975, the United Arab Emirates, Saudi Arabia, Qatar and Egypt established the AOI for the development of an arms industry. For the background of Westland case, see *Westland Helicopters Ltd v. ARAB Organisations for industrialisation*. The Law Reports. Queen’s Bench Division 1995 pp. 286, 287.

<sup>39</sup> Hirsch, Moshe, *supra* note 3, p. 108.

<sup>40</sup> Cited in Hirsch, Moshe, *supra* note 3, p. 108.

transactions of an economic nature are deemed liable for the obligations which flow there from. In default by the four states of formal exclusion of their liability, third states could legitimately count on their liability. This rule flows from general principles of law and from good faith.<sup>41</sup>

Colman J in his judgment in *Westland Helicopters Ltd. v Arab Organisation for Industrialisation* held that:

Having concluded that the proper law governing the constitution of A.O.I. is public international law and further that the intervener is unable to prove in the English courts that under that body of law it is the same entity as A.O.I., I reject the intervener's submission that in these courts it has standing to set aside the order of Clarke J. of 9 July giving leave to enforce the award against A.O.I. as a judgment.<sup>42</sup>

However, the government of Egypt applied to the Court of Justice of Geneva for annulment of the arbitration award as Egypt contended that 'the Tribunal had no jurisdiction over Egypt since the latter had not signed the arbitration agreement.'<sup>43</sup>

The Court of Justice of Geneva found that the 'tribunal did not have jurisdiction over Egypt in the absence of an arbitration agreement signed by the latter'.<sup>44</sup>

Westland appealed to the Federal Supreme Court of Switzerland against the decision rendered by the Court of Justice of Geneva. However, the Federal Court supported the decision rendered by the Court of Justice of Geneva.<sup>45</sup>

According to the decisions of the Swiss Courts in the Westland case, the responsibility of member States towards third parties is exempted, unless it is provided in its constituent instruments.<sup>46</sup>

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<sup>41</sup> Ibid.

<sup>42</sup> *Westland Helicopters Ltd v. Arab Organisations for industrialisation.* Queen's Bench Division, in the Law Reports 1995 p.312.

<sup>43</sup> Westland case, Geneva Court, p.622. Cited in Hirsch, Moshe, supra note 3, p. 109.

<sup>44</sup> Ibid, p.633.p.110.

<sup>45</sup> Westland case, Federal Court, p.652. Cited in Hirsch, Moshe, supra note 3, p. 110.

<sup>46</sup> Hirsch, Moshe, supra note 3, p.112.

It is true that the conclusion reached by the judicial decisions dealt with in this chapter is disappointing, according to the issue before us, but it is also true that there are cases where member states might be held responsible. Examples that could be cited in this regard are:

Members may be co-authors of illegal acts in parallel with the organisation, or lend their assistance to the commission of such acts by international organisations (complicity). Moreover, members of international organisations are under obligation of due diligence, which compels them to make sure that the transfer of competences to the organisation does not allow them to avoid their responsibilities under international law'.<sup>47</sup>

Consequently, in the case where the state has failed to perform the duty of preventing any violations in the powers that transferred to the international organisation, and has failed to observe compliance in terms of the actions of the international organisation with the boundaries limited by the creators of an international organisation, member States could be held responsible for failing to perform this duty, as members of international organisations are under an obligation of due diligence. The European Court of Human Rights in the *Matthews* case in 1999 stressed such an obligation.<sup>48</sup>

In his report, Mr. Giorgio Gaja, Special Rapporteur further stated that:

According to circumstances, the responsibility of a State may nevertheless arise either because it has contributed to the organisation's unlawful act or else because it is a member of the organisation.<sup>49</sup>

Also, he observed, 'saying that an international organisation is responsible for its own unlawful conduct does not imply that the other entities may not also be held

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<sup>47</sup>Sands, Philippe and Klein, Pierre, *Bowett's Law of international institutions* London: Sweet and Maxwell, 2001, p. 524.

<sup>48</sup> *Matthews case* 18 February, 1999, application 24833/94, para 32

<sup>49</sup> First report on responsibility of international organisations by Mr. Giorgio Gaja, special Rapporteur A/CN.4/532 26 March 2003.p.18.

responsible for the same conduct'.<sup>50</sup>

In the Report on responsibility for the Rwanda genocide of 1994 submitted to the UN, the issue of responsibility is invoked against the UN and member states, as the UN failed in its duty and in preventing the genocide in Rwanda. The independent Inquiry finds that 'the response of the United Nations before and during the 1994 genocide in Rwanda failed in a number of fundamental respects. The responsibility for the failure of the United Nations to prevent and stop the genocide in Rwanda lies with a number of different actors, in particular the Secretary-General, the Secretariat, the Security Council, UNAMIR and the broader membership of the United Nations. This international responsibility is one which warrants a clear apology by the organisation and by Member States concerned to the Rwandese people. As to the responsibility of those Rwandese who planned, incited and carried out the genocide against their countrymen, continued efforts must be made to bring them to justice-at the international Criminal Tribunal for Rwanda and national in Rwanda'.<sup>51</sup>

### **5.3 Who is responsible?**

Having determined the changing role of the United Nations peacekeeping operations and the legal possibility of conducting enforcement action under Chapter VII of the UN Charter, and because of the range of problems and high level of complexity they represent, the issue of who is responsible for the acts of a

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<sup>50</sup> A/CN.4/532 p. 20.

<sup>51</sup> UN. Doc 1999 S/1999/1257 p.32.

force carrying out peacekeeping operation or enforcement action comes into play.<sup>52</sup>

As a basic element in determining the entity responsible, the parties involved in the peacekeeping operations or enforcement action must be determined. The United Nations, member States, the states providing contingents and host States are involved in operations.<sup>53</sup> The legal framework that governs this action could determine the relationship between each party with the United Nations.<sup>54</sup> However, this is not always the case, as the Security Council could authorize its powers to member States without precisely determining which party has command and control over such powers. As an illustration, Security Council resolution 678 authorizes member States to take 'all necessary means' which did not determine the State or States that might command the actions. Accordingly, the participating troops from a wide variety of states could be under the command of member States whose authority has not been subcontracted from the Security Council as in the case of Iraq. Given such complexity, who should be sued? In addition, it is difficult to determine responsibility even if the command and control powers are vested in a Unified Command for example.<sup>55</sup>

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<sup>52</sup> In this sense Peck maintained that 'Suppose the allegations that U.N soldiers raped Bosnian women, or that the U.N troops had no valid reason to open fire on civilians in Somalia, are true. Who is responsible for such actions?' Peck, Julianne, 'the U.N and the laws of war: How can the world's peacekeepers be held accountable', (1995) 21 *Syracuse Journal of International Law and Commerce* 283.

<sup>53</sup> Amrallah, Borhan, 'The international responsibility of the United Nations for activities carried out by U.N peacekeeping forces', (1976) 32 *Revue Egyptienne De Droit International* 57.

<sup>54</sup> The authorization of an enforcement action has many conditions derived from delegation doctrine itself. See Sarooshi, D., 'Some preliminary remarks on the conferral by states of powers on international organisations', Jean Monnet Working Paper4/03 (2003) available at <http://netec.mcc.ac.uk/WoPEc/data/erpjeanmo2.htm>, p.41.

<sup>55</sup> It is maintained that 'it is more difficult, however, to determine the position of the other participating states. these were not, like the United States, entrusted by the United Nations with the conduct of the war, but were recommended to place their contingents under the command of the United States. Their contingents were integrated into the United States armed forces and the United States military commanders had direct command authority over all units of the contingents.' Seyersted, F., 'United Nations Forces: some legal problems', (1961) 37 *BYBIL* 433.



### 5.3.1 The relationship between member states and international organisations

The ITC case invoked ‘the question of whether or not the organisation must be seen as legally distinct (at international law) from its member-states, or rather as little more than an agent of the member-states’.<sup>56</sup> The agency relationship between member states and international organisation is recognized by many authorities in different cases.<sup>57</sup> However three preconditions are required in order to establish such a relationship. The first requisite is that the principal (state) and agent (organisation) are separate legal entities.<sup>58</sup> The second precondition for the establishment of an agency relationship is the consent by the principal for establishing such a relationship.<sup>59</sup>

Another precondition is the possessing of the control power. This precondition is a relevant factor in determining the issues of responsibility, and this is why the agency relationship between international organisation and member states is discussed here. The control of the state over the acts plays an essential role in determining for ‘whose behaviour’<sup>60</sup> a state or international organisation that could be held liable. However, possessing control over the acts of the agent is not considered a sufficient condition for establishing an agency relationship. In this regard, Sarooshi maintains that:

...it is important not to misinterpret this approach and conclude that control by a state over the acts of another entity is *per se* an adequate basis

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<sup>56</sup> Klabbers, supra note 25, p.304.

<sup>57</sup> Such as, the ICJ, the ILC and authoritative commentators. Sarooshi, Dan., Some preliminary remarks on the conferral by states of powers on international organisations, supra note 52, p.38.

<sup>58</sup> As Sarooshi maintained, “if the organisation did not possess a separate legal personality then the organisation constitutes nothing more than an extension of the States concerned and thus when the organisation acts it is nothing more than the States themselves acting”, *ibid*, p.40

<sup>59</sup> Sarooshi, D., supra note 53, p.42.

<sup>60</sup> Klabbers., J., supra note 25, p306.

for establishing an agency relationship, independent of, and without the need to establish, the other two agency preconditions. Control is necessary but not sufficient to establish an agency relationship, as opposed to establishing attribution, and the concepts of attribution and agency relationship should not be conflated.<sup>61</sup>

With regard to drawing an analogy between the above-mentioned preconditions of an agency relationship between the states and international organisation, and between the international organisations in terms of possessing the overall control on the actions of the organisation, it seems that the elements of such a relationship should be cautiously examined.

Sarooshi has maintained that:

There is a general presumption against the establishment of an agency relationship between an international organisation and its Member States. The reason for the existence of this presumption is that two of the preconditions for establishment of an agency relationship-consent and control- are not fulfilled on a *prima facie* basis.<sup>62</sup>

In this sense, Shihata, too, has asserted as follows:

The relationship between a state and an international organisation of which it is a member cannot be characterized as a principal-agent relationship in the absence of a strong evidence to this effect or an explicit agreement by virtue of which the member requests the organisation to act as its agent for certain purpose.<sup>63</sup>

On the other hand, in terms of answering the question, 'does an international organisation act as the agent of its members? And if so, in what circumstances', posed by Institut Rapporteur (Rosalyn Higgins)', Amerasinghe has stated as follows:

The argument based on the theory of agency proceeds on the basis that,

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<sup>61</sup> Sarooshi, D., 'Some preliminary remarks on the conferral by states of powers on international organisations', *supra* note 53, p.46.

<sup>62</sup> *Ibid.*, p.53.

<sup>63</sup> Higgins, R., 'The legal consequences for member States of non-fulfilment by International Organisations of their obligations toward third parties', *supra* note 3, p.312.

while the international organisation falls to be treated as a legal entity which is distinct from its members in the same way as a body corporate and, therefore, has a personality of its own, the organisation which would normally be solely liable in respect of the obligations it contracts may not be so liable when it contracted those obligations on behalf of its members directly liable and may be “constitutional” or “factual”. The issue of factual agency could arise in any situation...it is entirely possible that in a given factual situation the agency relationship between the organisation and its members could be established. In that case there would be a direct liability on the part of members for the obligations incurred.<sup>64</sup>

Crawford, in answering the same question, is of the view that:

Plainly an international organisation can act as the agent of one or more members. However, the presumption must be that an international organisation with separate personality is acting on its own behalf and not as an agent of its members.<sup>65</sup>

It seems that there is a general presumption that there is no agency relationship between international organisations and their member states. Yet as Amerasinghe has stated, there is a space for such a relationship. Moreover, even if we accept this presumption, we should not accept it in all cases. In this sense, as Sarooshi concludes in his discussion, ‘it is only a presumption against agency and a rule since there are cases where an international organisation may possibly act as an agent for a State or group of States that have conferred powers on an organisation’.<sup>66</sup>

The first condition concerning separate legal entity status has been achieved, as the UN is universal organisation acting on behalf of its member states. When the Security Council acts under Chapter VII, the military operations in question are the product of the approval of the five permanent member states and controlled by them. This would be enough in terms of achieving the condition in acting on

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<sup>64</sup> Ibid.p.353.

<sup>65</sup> Ibid .p.335.

<sup>66</sup> Sarooshi, D., supra note 53, p.68.

behalf of the principal (state). Conducting a military operation as ratified by the Security Council ,in theory, means that member States, in accordance with Article 43 of the Charter, confer powers upon the UN for conducting such operations. Thus, in effect, the requirement for consent which is considered as a precondition for an agency relationship, is met. This is particularly so since member states through the Security Council have the power to control such operations, and could for example, ask for the termination of such operations. In resolution 678 for example, the Security Council authorized member states to “use all necessary means” in the First Gulf War.<sup>67</sup> In spite of the fact that military operations have been conducted by the USA and its allies, the relationship between member states that voted in favour of this resolution and the UN could be categorized as an agency relationship.

The consequence of the establishment of an agency relationship is of significance in terms of invoking international responsibility. The first consequence is the “‘revocability of an agency relationship’ i.e. ‘the principal has the power to decide at any time whether an agent should be able to continue to act on his or her behalf regardless of the existence of any contractual agreement that may exist between the principal and agent’”.<sup>68</sup> Another consequence of an agency relationship is that the principal is responsible for the acts of its agent.<sup>69</sup>

However, by establishing the agency relationship, not only are the principal member States responsible for illegal acts committed by international organisations, but also the type of responsibility seems to be direct responsibility.

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<sup>67</sup> Security Council Resolution 678 of 29 November 1990

<sup>68</sup> Sarooshi, ‘Some preliminary remarks on the conferral by states of powers on international organisations’, *supra* note 53, p. 63.

<sup>69</sup> *Ibid.*, p. 65.

Accordingly, the responsibility of international organisations would be of a secondary nature and ‘ the consequences in practice of the responsibility being secondary in nature is that any claims for redress should in the first instance be made to the State who bears primary responsibility in the case where there is an agency relationship between a State and an organisation’.<sup>70</sup>

### **5.3.2 The relationship between international organisation and third party**

It is worth noting that the meaning of the term ‘third party’ could refer to non-member states and/or member states. In this regard, Amerasinghe points out that:

These third parties may be states, other organisations, individuals or legal persons. The states may be member states of the organisation itself or other states, and individuals and legal persons may be nationals of member states or not.<sup>71</sup>

The ILA Report, in accordance with applying member states responsibility towards third parties, provides that the third party must be informed about the allocation of responsibility between the member states and the international organisation as it states that:

There is an obligation for IOs and member states to provide third parties with assurances and guarantees on the respective liability of IO-s and Member states.<sup>72</sup>

In accordance with the aforementioned argument concerning the clause of the member states liability, such a clause is essential in determining the liability of member states. The presumption of the non-liability of member states could arise in two main ways: firstly as the ILA states:

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<sup>70</sup> Ibid., p.66.

<sup>71</sup> Amerasinghe, C.F., ‘Liability to third parties of member states of international organisations: practice, principles and judicial precedent’, (1991) 85 AJIL 259.

<sup>72</sup> ILA Report, 2002, p. 18.

‘in case of the absence of a clause in the organisation’s constituent instrument excluding or limiting financial liability, there is a presumption that Member states are not liable, unless there is evidence that Member states or the IO with their approval gave creditor reason to assume otherwise’.<sup>73</sup>

Secondly:

‘in case of the absence of a clause in the organisation’s constituent instrument excluding or limiting financial liability, there is no presumption that Member states are liable, unless there is evidence that Member states or the IO with their approval gave creditor reason to assume otherwise’.<sup>74</sup>

This clause could directly explain the nature of the responsibility and whether it suggests joint or several liability for acts of the organisations.<sup>75</sup> In this regard Shihata, in responding to the questions posed by Institut’s Rapporteur, has stated that:

The relationship between the organisation and its members should preferably be detailed in the organisations charter or regulations as a matter of international law.<sup>76</sup>

### **5.3.3 The Security Council and regional arrangements and agencies.**

Another complicated issue concerns the ‘proposals for a “new complementary” between the UN and regional organisations’.<sup>77</sup> This issue ‘presented itself not as one of allocating legal liability between the UN and its member States, but between the UN and another international organisation, said to be acting “under its own procedures” but as agent for the Security Council in the fulfilment of UN

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<sup>73</sup> ILA Report, 2002, p.19.

<sup>74</sup> ILA Report, 2002, p.19.

<sup>75</sup> ILA states that: ‘Constituent instruments of IO-S may clause explicitly providing for joint and several liability for acts of the organisation or for the acts of other states acting within such an organisation’. Ibid., p.20.

<sup>76</sup> Higgins, R., supra note 3, p.315.

<sup>77</sup> Higgins, R., The responsibility of States Members for the defaults of international organisations continuing the dialogue’, in Liber Amicroum Ibrahim F.I. Shihata, 2001, p.446.

objectives'.<sup>78</sup>

The existence of regional arrangements or agencies for dealing with matters relating to the maintenance of international peace and security at a regional level is regulated under Chapter VIII of the United Nations Charter.<sup>79</sup> Although there are significant unsettled issues with regards to the regional actions,<sup>80</sup> the Security Council's recent practice has demonstrated a flexible relationship with regional arrangements. While the interaction between the Security Council and regional organisations and arrangements could signal a new development in the Security Council's missions, Haiti, Liberia and Kosovo are examples that could be cited in this regard, the issue of determining the responsible entity could arise.

#### **5.3.3.1 Haiti**

In resolution 45/2 (10 October 1990), the General Assembly established the United Nations Observer Group for the Verification of the Elections in Haiti. In December 1990, Jean-Bertrand Aristide was elected as the president of Haiti. However, the Aristide democratic government did not survive in front of a military overthrow led by Colonel Raul Cedras. In response to this overthrow, the Organisation of American States (OAS) adopted sanctions against Haiti. In spite of the request made by President Aristide in 1991 to the Security Council to restore his elected government, the Security Council did not react till 16 June 1993.<sup>81</sup>

In Resolution 841 (1993), the Security Council acting under Chapter VII, imposed an arms and oil embargo on Haiti. By this resolution, the Security Council

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<sup>78</sup> Ibid.

<sup>79</sup> Articles 52, 53 and 54 of the United Nations Charter.

<sup>80</sup> for example, whether the regional action is taken in consistent with the purposes and principals of the UN Charter. see Shaw, MN, *International Law*, supra note 11, p. 1154.

<sup>81</sup> The Security Council issued a presidential statement called for the restoration of the legitimate Haitian government. UN Doc. S/PV.3011, 3 October 1991.

commended the OAS resolutions concerning the Haiti crisis and called for 'effective co-operation between regional organisations and the United Nations'.<sup>82</sup>

The Security Council on 16 October 1993 acting under Chapters VII and VIII of the Charter of the United Nations, adopted resolution 875 (1993) which called upon:

Member States, acting nationally or through regional agencies or arrangements, cooperating with the legitimate Government of Haiti, to use such measures commensurate with the specific circumstances as may be necessary under the authority of the Secretary-General to ensure strict implementation of the provisions of resolutions 841 (1993) and 873 (1993) relating to the supply of petroleum products or arms and related material of all types, and in particular to that inward maritime shipping as necessary in order to inspect and verify their cargoes and destinations

Interestingly, the Security Council's resolutions on the Haiti crisis stressed the need for interaction between the regional organisation and the United Nations.

### **5.3.3.2 Liberia**<sup>83</sup>

Another example of cooperation with regional organisations is embodied in the preamble to resolution 788 (1992) in which the Security Council commends 'the continued commitment of the Economic Community of West African States

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<sup>82</sup> In the preamble to Resolution 841 (1993) the Security Council noted that 'the incidence of humanitarian crises, including mass displacements of population, becoming or aggravating threats to international peace and security' and expressed that the continuation of Haiti crises 'contributes to a climate of fear of persecution and economic dislocation which could increase the number of Haitians seeking refuge in neighbouring Member States and convinced that a reversal of this situation is needed to prevent its negative repercussions on the region'. UN. Doc. SC/RES/ 841 (1993).

<sup>83</sup> In his final report on the United Nations Observer Mission in Liberia (UNOMIL), the Secretary General maintained that 'The conflict in Liberia was essentially a power struggle with some ethnic elements, but the command and control exercised by faction leaders over their commanders and troops in the field was often loose. The central government, law and order, and physical infrastructure of Liberia had been either seriously degraded or had disappeared altogether. As a result, the fighting was characterized by widespread lawlessness, the easy availability of small arms and gross violations of human rights by all factions against innocent civilians'. Un. Doc. S/1997/712, 12 September. 1997 paragraph 23.



(ECOWAS) to and the efforts towards a peaceful resolution of the Liberian conflict'. Also, paragraph 9 of resolution 788(1992) supports such a cooperation as in this paragraph the Security Council 'decides within the same framework that the embargo imposed by paragraph 8 shall not apply to weapons and military equipment destined for the sole use of the peacekeeping forces of ECOWAS in Liberia'. In the Liberian conflict in 1989-1990, a civil war 'had claimed the lives of as many as 150,000 civilians and driven some 700,000 Liberians to flee to neighbouring countries as refugees'.<sup>84</sup> In response to the Liberian war and the absence of the role of the Security Council, the Economic Community of West African States (ECOWAS)<sup>85</sup> in May 1990 established a Standing Mediation Committee for an immediate ceasefire in Liberia monitored by a Cease-Fire Monitoring Group (ECOMOG).<sup>86</sup> Therefore, the Security Council established the United Nations Mission in Liberia (UNOMIL), this mission was established under the Security Council authority and 'under the direction of the Secretary –General through his Special Representative'.<sup>87</sup>

The Security Council noted that the UNOMIL mission would be 'the first peacekeeping mission undertaken by the United Nations in co-operation with a peacekeeping mission already set up by another organisation, in the case ECOWAS'.<sup>88</sup>

The Secretary General commended the interaction between United Nations and

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<sup>84</sup> Final Report of the Secretary General on the United Nations Observer Mission in Liberia (UNOMIL), UN. Doc. S/1997/712, 12 September. 1997 paragraph 22.

<sup>85</sup> The Economic Community Of West African States (ECOWAS) is a regional group of sixteen countries founded in 1975 by ECOWAS Treaty 1976 for promoting the economic integration in all fields.

<sup>86</sup> See Shaw, MN., *International Law*, supra note 11, p.1157. Schweigman, D., *The Authority of the Security Council under Chapter VII of the UN Charter: legal limits and the role of the International Court of Justice*. Kluwer Law International, 2001, p.87.

<sup>87</sup> Security Council Resolution, 866(1993) paragraph 2.

<sup>88</sup> Ibid.

regional organisations in the Liberian conflict as he observed that:

The expiry of the current mandate of UNOMIL will bring to a close, after four years, an operation whose successful conclusion was long delayed and often in doubt. To the extent that its ultimate success was due to the cooperation established between ECOWAS and its peacekeeping force, ECOMOG, the United Nations and its observer mission, UNOMIL, and bilateral and multilateral donors, the operation deserves further study. The lessons learned in UNOMIL and their application to current and possible future missions of a similar kind are therefore now being carefully examined.<sup>89</sup>

While the Security Council resolution 788 (1992) which commended ECOWAS, in the Liberian conflict, for its efforts to restore peace, security and stability could signal, as already noted in Haiti, a new transformation in the Security Council missions. It is, however, questionable as Shaw persuasively maintained 'whether the spirit and terms of Chapter VIII were fully complied with'.<sup>90</sup>

### **5.3.3.3 Kosovo**

A further instructive example may be discussed concerning the interaction between the Security Council and regional arrangements is the practice of the Security Council in Kosovo. The Security Council was concerned with the Kosovo situation by resolution 1199 of 23 September 1998 the Security Council,<sup>91</sup> as affirmed that the situation in Kosovo 'constitutes a threat to peace and security in the region', but there was no action taken by the Security Council. Consequently, the North Atlantic Treaty Organisation (NATO) led an air

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<sup>89</sup> UN. Doc S/1997/712 paragraph 21.

<sup>90</sup> Shaw, MN., *International Law*, supra note 11, p.1159. see also, Franck, Thomas M., 'the United Nations as Guarantor of International Peace and Security: Past, Present and Future', in Tomuschat, C., (ed), *The United Nations at age fifty: A legal perspective*, Kluwer Law International, 1995. pp 31-32.

<sup>91</sup> In Resolution 1199 the Security Council, acting under Chapter VII, expressed, "gravely concerned at the recent intense fighting in Kosovo and particular indiscriminate use of force by Serbia security forces and the Yugoslavia Army which have resulted in numerous civilian casualties....Affirming that the deterioration of the situation in Kosovo, Federal Republic of Yugoslavia constitutes a threat to peace and security..Also the Security Council deeply concerned by the flow of refugees into the Northern Albania, Bosnia and Herzegovina...", ( S/RES/ 1199 (1998 ) ).

campaign over Kosovo in 1999. However, the legal basis for the NATO actions over Kosovo is debatable as the NATO action was without Security Council authorisation. The claim of implied authorization and humanitarian necessity were extensively used to justify the action of the (NATO) over Kosovo in 1999. Some states justified their operation against Yugoslavia in 1999 as an implied authorization under the Security Council resolutions<sup>92</sup>. However, the doctrine of implied authorization was not the proper legal basis for NATO air campaign. In this regard, Gray maintained that

‘it was clear, despite the failure by the Security Council to condemn the NATO bombing, that a majority of states were not willing to accept a doctrine of implied authorization’.<sup>93</sup>

Different views were taken concerning the NATO action: the NATO Secretary General explained the motivation for their intervention as based on the principles of humanitarian intervention. The NATO Secretary General maintained that:

‘This military action is intended to support the political aims of international community, it will be directed towards disrupting the violent attack being committed by the Serb Army and Special Police Forces and weakening their ability to cause further humanitarian catastrophe.... we must halt the violence and bring an end to the humanitarian catastrophe now unfolding in Kosovo.’<sup>94</sup>

The UK affirmed the humanitarian purposes of the NATO actions as legal justification. The UK government stated that:

‘the action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe... Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of

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<sup>92</sup> On the legal basis of the operation see Charney, J., ‘Anticipatory humanitarian intervention in Kosovo’, (1999) 93 AJIL 843-841; Chinkin, Kosovo: A ‘Good’ or ‘Bad War’, (1999) 93 AJIL 841-847.

<sup>93</sup> Gray, C., *International Law and the use of force*, Oxford University Press, Second edition, 2004, p. 269.

<sup>94</sup> NATO Press Release 1999 (040) on 23 March 1999 available at: <http://www.nato.int/docu/pr/1999/p99-040e.htm>

overwhelming humanitarian necessity, military intervention is legally justifiable. The force now being used is directed exclusively to averting a humanitarian catastrophe, and is the minimum necessary for that purpose'.<sup>95</sup>

The NATO's intervention has been justified in terms of the failure of the Security Council to act effectively in Rwanda and Bosnia.<sup>96</sup>

However, the NATO intervention in Kosovo has been criticised on the grounds that the NATO intervention was unlawful. In this sense, Henkin, has stated that "in my view, the law is and ought to be, that unilateral intervention by military force by states is unlawful unless authorized by the Security Council. Some scholars thought that NATO too needed, but had not had, such authorization, at least *ab initio*".<sup>97</sup>

Another criticism concerning NATO actions over Kosovo has been established on the grounds that it violated the United Nations Charter and International law since the Security Council has the jurisdiction to address humanitarian abuses. The main problematic issue in the doctrine of humanitarian intervention is that there is no need for previous authorization and "the intervening state authorizes itself to use force against another state based on its own value judgment".<sup>98</sup>

At this juncture, one should bear in mind that the crucial edge in the argument of the legality of the use of force by NATO without authorization from the Security

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<sup>95</sup> Statement by Sir Jeremy Greenstock, Permanent Representative of the United Kingdom Security Council available at <http://www.fco.gov.uk/news/newstext.asp?2157>.

<sup>96</sup> In this respect, Wedgwood maintained that "the veto of the permanent members of the Security Council has often thrown a monkey wrench in the machinery of collective security", Wedgwood, Ruth, *Editorial Comments: NATO's Kosovo Intervention*, (1999) 93 AJIL 834.

<sup>97</sup> Henkin, Louis, *Editorial Comments: NATO's Kosovo Intervention*, (1999) 93 AJIL 826.

<sup>98</sup> Katayanagi, M., *Human Rights Functions of United Nations Peace-Keeping operations*, the Hague: Kluwer Law International, Martinus Nijhoff Publisher, 2002, p.249.

Council resulted from the failure of the Security Council to act over Kosovo.<sup>99</sup>

However, it would be a highly risky issue to rely, broadly, on such a failure, as this would threaten the role of the Security Council in maintaining international peace and security.

Uncertainty remains as to whether the NATO action was legal or constituted a violation of UN Charter. As a matter of fact, the Security Council Resolution 1244 had nothing to do with the legal basis of the NATO action.

Consequently, whatever the legal basis of the acts of the NATO in Kosovo, the ECOWAS in Liberia and the OAS in Haiti is, the complexity of such acts is embodied in the issue of responsibility as from whom the injured party will ask for reparation? Should the Security Council be sued firstly or the regional organisations or the member states?. In the case of *Yugoslavia v. Canada 1999*, *Request for Interim Measures*. Canada was of the view that

“Joint and several liability for acts of an international organisation, or for acts of an international organisation, or for the acts of other States acting within such an organisation, cannot be established unless the relevant treaty provides for such liability. Article 5 of the NATO Convention, cited in the first round, provides no such indication of an assumption of joint and several liability, and neither do the provisions of the handbook respecting the integrated military structure of the organisation. The separate liability of Australia in *Naura* was of course based on the specific terms of the trust instruments in issue in that case, not on general principles on international organisations. The work of the ILC on State responsibility provides no more support for the joint and several concepts.”<sup>100</sup>

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<sup>99</sup> The Security Council rejected the draft resolution which condemned the use of force by NATO. Security Council meeting 3989, 26 March 1999. Cited in Gray, C., *supra* note 90, p. 269.

<sup>100</sup> Oral argument on behalf of Canada in the case *Yugoslavia v.. Canada 1999*, Request for interim Measures, CR 99/27, 12 May 1999, p.7 available at ICJ website: [www.icj-cij.org](http://www.icj-cij.org). As Canada rejected the argument of Federal Republic of Yugoslavia (FRY) in establishing any agency relationship between NATO and its Member States as FRY argued that ‘the command structure of NATO constitutes an instrumentality of the respondent States, acting as their agent’. Oral argument on behalf of Yugoslavia in the case of *Yugoslavia v. Canada*, CR 99/14, 10 May 1999 p.33 available at [www.icj-cij.org](http://www.icj-cij.org).

More recently, however, in the eight cases brought by Applicant Serbia and Montenegro concerning legality of the use of force against eight of NATO member states before the ICJ, the Court, unanimously found that:

It has no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro on 29 April 1999.<sup>101</sup>

#### **5.4 The nature of member states' responsibility**

Neither the UN Charter nor the ILC Draft Articles on States Responsibility address the issue before us.<sup>102</sup> As a necessary starting point, the international organisation is not the only party liable for wrongful acts even if the illegal act is conducted in its name. As it is correctly stated, “when States are responsible for an internationally wrongful act for which an international organisation of which they are members is also responsible, it is necessary to inquire whether there is a joint and several responsibility or whether the member States' responsibility is only subsidiary”.<sup>103</sup>

At any circumstances, determining the nature of member States' responsibility is of significance in deciding to deal with the organisation or to avoid any relationship with the organisation.<sup>104</sup> Put differently, members states ‘will have a

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<sup>101</sup> Judgment of 15 December 2004 in the following cases: 1. Case concerning Legality of Use of Force (Serbia and Montenegro v. United Kingdom) Preliminary Objections General List No. 113  
2. Case Concerning Legality Of Use Of Force (Serbia And Montenegro v. Canada) General List No. 106.

3. Legality of Use Of Force (Serbia And Montenegro v. Belgium General List no. 105.

4. Case concerning legality of use of force (Serbia and Montenegro v. France) no. 1075. Case concerning legality of use of force (Serbia and Montenegro v. Germany No. 108.

6. Case concerning legality of use of force (Serbia and Montenegro v. Italy) 109.

7. Case concerning legality of use of force (Serbia and Montenegro v. Portugal) no. 111.

8. Case concerning legality of use of force (Serbia and Montenegro v. Netherlands) no. 110 available at [www.icj.cij.org](http://www.icj.cij.org).

<sup>102</sup> Article 57 of State Responsibility Articles is the only Article related to the responsibility of international organisation.

<sup>103</sup> UN Doc. A/57/10.p.233.

<sup>104</sup> Hirsch has mentioned the principal regimes concerning the international responsibility of the members states toward third party organisation: limited responsibility 2. concurrent responsibility 3.

greater incentive to adopt suitable measures to reduce the probability of the organisation violating the rights of others'.<sup>105</sup> The argument that takes place against the liability of member states pertains to the efficiency of the organisation, as there is a danger in holding the member states responsible, since they would be in charge in every single matter.<sup>106</sup> This argument could be rejected on the grounds that member states are the creators of the organisation, and have the right to monitor and control the activities carried out by the organisation provided that this would not affect the daily activities of the organisation.<sup>107</sup> Achieving this balance has led to the establishing of the responsibility of member states on the grounds of secondary responsibility rather than limited and concurrent responsibility.<sup>108</sup> In spite of limited responsibility being a 'natural concomitant of incorporation',<sup>109</sup> there are manifold reasons why limited responsibility is criticized. First and foremost, limited responsibility 'undermines the two major aims of international responsibility: provision of remedy to innocent injured parties, and reduction in violations of the law (by deterrence)'.<sup>110</sup> Moreover, limited responsibility may

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secondary responsibility, 4. indirect responsibility, 5 responsibility according to the intention of the parties, 6. responsibility in accordance with responsibility toward the organisation, 7. Responsibility in accordance with the aims and functions of the organisation, Hirsch, *supra* note 3, p.97.

<sup>105</sup> *Ibid.*, p. 155.

<sup>106</sup> Schermers, HG., and Blokker, Niels M., *supra* note 6, p.993.

<sup>107</sup> In this sense, Article 8 of the 1995 Resolution reads as follows: 'Important considerations of policy, including support for the credibility and independent functioning of international organisations and for the establishment of new international organisations, militate against the development of a general and comprehensive rule of liability of member states to third parties for the obligations of international organisations', Higgins, R, *supra* note 3, p. 460. See Higgins, R., The legal consequences for member States of non-fulfilment by International Organisations of their obligations toward third parties. (1996) 66(2) *Annuaire de l'Institut de Droit International* 233-260.

<sup>108</sup> As Hirsch maintains, 'the regime of secondary responsibility aims at achieving a balance between the two extreme alternatives of limited and concurrent responsibility'. Hirsch, M., *supra* note 3, p. 155.

<sup>109</sup> Amerasinghe, C.F., 'Liability to third parties of member states of international organisations: practice, principles and judicial precedent', *supra* note 69, p.277.

<sup>110</sup> Hirsch, M., *supra* note 3, p.150.

affect any new relationship with the international organisation<sup>111</sup> as the third party recognizes the danger that might occur in the case that the organisation could not fulfil its obligations.<sup>112</sup> However, as Hirsch has stated, ‘examination of judicial decisions has not led to one unified answer. The only decision rendered by an international tribunal, based on international law rejected the principle of limited responsibility, and apparently adopted the notion of secondary responsibility (the ICC’s award in the Westland Case)’.<sup>113</sup>

It is worth noting that the above-mentioned argument could be followed in rejecting the regime of the concurrent responsibility of member states for wrongful acts committed by the organisation.<sup>114</sup> In this regard, Shihata has stated that:

since liability is not to be presumed and has to be established by the text of the organisation’s charter, by separate acts of the acts of the states involved or by unequivocal practice, the characteristics of such liability will vary according to the case at hand. If state liability is established only in principle, it would be reasonable to conclude that it should be (a) secondary to the liability of the organisation and (b) proportionate to the share of each member in the organisation’s capital or budget, as the case may be.<sup>115</sup>

These three kinds of international responsibility are linked to the direct responsibility of member states of the international organisation and third parties and other kinds such as the responsibility according to the intention of the parties, are linked to the relationship between member states and international

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<sup>111</sup> Hirsch, maintained that ‘the doctrine of limited responsibility may also harm the interests of international organisations in the long run. The release of the members from responsibility may deter potential third parties from including contracts with the organisation’. Ibid., p. 152.

<sup>112</sup> Ibid., p.151.

<sup>113</sup> Ibid., p. 147.

<sup>114</sup> Ibid., pp.154-155. This regime basically proposes that ‘the injured party has the choice of applying either to the organisation or to members at its choice, in order to claim an adequate remedy’. Ibid.

<sup>115</sup> Higgins, R., *supra* note 3, p. 313.



organisations.<sup>116</sup> However, Amerasinghe has stated that ‘direct liability should be distinguished from secondary or concurrent liability. Direct liability is a primary one...in general the absence of a positive rule of direct liability raises a presumption against such liability’.<sup>117</sup>

There will be concurrent responsibility of a state for an act of implementation of an unlawful measure adopted by an International Organisation, if the state is under the obligation to implement such a measure.

The joint and several liability has been criticized on the grounds that there is no available remedy for claims against joint defendants.<sup>118</sup> Amerasinghe considers that “once a decision is taken by the organ the members of the organisation are collectively responsible for any negligence of the organisation, if there is no concurrent or secondary liability, irrespective of participation or support”.<sup>119</sup> He also states that ‘the absence of vires has no relevance, if there is no concurrent or secondary liability. If there were such liability, it may be relevant to the question as to which members are liable. Only where the obligation is created by a decision of particular organ, it may be possible to take the position that only those members who supported the decision were jointly and severally liable’.<sup>120</sup> The UN limited the liability of its member states.<sup>121</sup>

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<sup>116</sup> Hirsch, M., *supra* note 3, p.157.

<sup>117</sup> Amerasinghe, C.F., ‘Liability to third parties of member states of international organisations: practice, principles and judicial precedent’, *supra* note 71, p.360.

<sup>118</sup> Romana Sadurska and Chinkin, C.M., *supra* note 31, p.889.

<sup>119</sup> Amerasingh, C.F., ‘Liability to third parties of member states of international organisations: practice, principles and judicial precedent’, *supra* note 71, p.353.

<sup>120</sup> *Ibid.*

<sup>121</sup> Arsanjani, Mahnoush H., ‘Claims against international organisations: Quis Custodiet Ipsos Custodes’, (1981) 7 *Yale Journal of World Public Order* 137-138.

## **5.5 Circumstances where member states might be deemed liable**

### **5.5.1 UN responsibility for illegal decisions**

The question of the responsibility of the UN with regard to *ultra vires* actions could take on another dimension in cases where the UN itself has committed a wrongful act by adopting *ultra vires* or arguably illegal decisions of the Security Council. An example that could be cited in this regard is the argument of the legality of the Security Council resolution in the Bosnia case.<sup>122</sup> In the Bosnian case, it was argued that the Council's decision to impose arms embargo on the Former Yugoslavia had to be interpreted in a manner that would not deprive Bosnia of its inherent right of self-defence.<sup>123</sup>

A further example might be that of the U.N Security Council Resolution 748 of 31 March 1992 in imposing an aerial embargo on Libya as the legality of this has been challenged. Graefrath criticized this resolution by stating that 'with due respect to the wisdom of the Security Council, it seems to me rather doubtful whether a failure to fully respond to the United States' requests to surrender suspects to the United States or the United Kingdom and to pay compensation can be interpreted, within the meaning of Article 39 of the Charter, as a threat to international peace; especially when it has not been established that Libya violated international law'.<sup>124</sup> This is not least because the failure of the Security Council to comply with its main task of maintaining international peace and

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<sup>122</sup> As the disagreement between five permanent member states led to indecision in the Security Council. Coicaud, J., 'International democratic culture and its sources of legitimacy: the case of collective security and peacekeeping operations in the 1990s, in Coicaud, J. and Heiskanen, Veijor, (eds) *the legitimacy of International organisations*, United Nations University Press, 2001, p. 272.

<sup>123</sup> Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Prov. Measures), ICJ Reports, 1993, para 2, p. 6.

<sup>124</sup> Graefrath., B., 'Leave to the Court what belongs to the Court. The Libyan Case', 1993 EJIL 199.

security could raise such a responsibility.<sup>125</sup> If these arguments concerning illegal resolutions adopted by Security Council<sup>126</sup> are to have a strong voice and to prove the illegality of such resolution, then it is necessary to ask who is responsible for these decisions, whether the UN, or the decision makers in the Security Council. This question could be reformulated in terms of the question raised by Hirsch, as follows: 'Are states who voted against a particular decision responsible when the decision causes damage to third parties?'.<sup>127</sup>

The final dimension, and no less important, is the responsibility of the Security Council for making illegal decisions.

To establish such a responsibility, many factors that play a significant role in taking decisions within the Security Council must be borne in mind. First and foremost, the 'veto' power falls primarily among the five permanent powers. The decisions makers in the Security Council are the five permanent member States.<sup>128</sup> The main reason given in justifying the veto power is that the five member states have a huge responsibility in maintaining international peace and security.<sup>129</sup> The Security Council has recognized the position of its permanent members in carrying out its resolutions.<sup>130</sup>

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<sup>125</sup> As mentioned in pages 147-150 of this Chapter.

<sup>126</sup> It is not of the scope of this Chapter to deal with illegal resolutions of the Security Council as the concern is whether the responsibility could be held in such a case.

<sup>127</sup> Hirsch, Moshe., supra note 3, p. xi.

<sup>128</sup> However, effectively the consensus between the five member states is also problematic.

<sup>129</sup> At the San Francisco conference in 1945, fifty-one members of the major power states after the Second World War agreed on the voting formula as well as the right of the veto to the permanent members in the United Nations and justified that in the gravity of the task imposed on these members. Patil, A., *The UN Veto in World Affairs, 1946-1990*, Florida: UNIFO, 1992, p.13. This might be true to a certain extent as a political view, but the Charter did not give the five permanent members any extra responsibility, and they have the same responsibility as other members, so this makes this justification unacceptable from a legal points of view. Kelsen, H., *The Law of the United Nations : a critical analysis of its fundamental Problems*, London Stevens & Sons Limited, 1951, p. 272.

<sup>130</sup> In a random example, one could find that the five members states have precise powers in making and implementing decisions. In the Question concerning the situation in Southern Rhodesia, the Security Council 'calls upon all states member of the United Nations and in particular those with primary responsibility under the Charter for the maintenance of international

In this regard, it would seem logical to state that the privilege flows from the veto right which is conferred on the five permanent member states of the Security Council, since they are endowed with the primary responsibility for maintaining international peace and security, would affect the degree of responsibility. Thus, it would be an injustice to the others member states to be held the same degree of the responsibility that the permanent members states in the Security Council would be held. In this regard, Amerasinghe, raises the question of 'why the minority that is against a certain decision should be held liable in the same way as the majority'.<sup>131</sup> However, the question may arise as to whether third parties sue the member states directly and ask for compensation for action taken by an organisation or the third parties should primarily sue the international organisation, and then the member states.

In any event, the member states could be held responsible regardless of the kind of responsibility, whether concurrent, limited or secondary, and regardless of whether the question of the minority or majority should reflect the preference of the secondary, concurrent or limited responsibility.

In order to exercise responsibility over member states, the decision of the Security Council is generally accepted as having a binding force. To establish such a responsibility under the general principle of international responsibility, the legal effect of the action taken by the Security Council is of prime importance in this

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peace and security to assist effectively in the implementation of the measures call for the present resolution.' Resolution 253(1968) 29 May 1968, paragraph 16. See Amerasinghe, C.F., *Principles of the Institutional Law of International Organisations*, Cambridge University Press, 1996, p. 203-205

<sup>131</sup> Amerasinghe, C.F., 'Liability to third parties of member states of international organisations: practice, principles and judicial precedent', *supra* note 71, p.278. However, the question of fairness is rejected from Hirsch on the ground that 'while this argument seeks a just solution for the members of the organisations( by not imposing responsibility on those members who have opposed a harmful act), it underestimates the injustice done to injured parties. The desired rule, it is submitted, should reflect a balance between the requirements of fairness on both levels, internal and external'. Hirsch, Moshe., *supra* note 3., p.157.

regard. Thus, given that the extent of the responsibility is not unlimited, it is necessary (here) to differentiate between the nature of the Security Council decisions. Article 25 of the UN Charter runs as follows:

The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

This Article places emphasis on the need to interpret the word ‘decision’ and whether it includes the idea of recommendation, such that there may be no difference between them and both of them having a binding force.<sup>132</sup>

Higgins considered the scope of Article 25 of the UN Charter as it is maintained that “both the *travaux préparatoires* and the wording of the Charter lead one in the direction that the application of Article 25 is not limited to Chapter VII resolutions, excluding Chapter VI resolution”.<sup>133</sup>

With regard to the notion of recommendation, one cannot state that they have no legal effect, but rather, that their effect is at a lower degree than that of decisions,<sup>134</sup> as acting in conformity with the recommendation reflects the legality of the actions that are taken. However, to link legitimacy with recommendations does not, in itself, mean that states are responsible for not carrying out the recommendation. In short, as regards the legal effect of the decisions taken by the Security Council, the binding character of the decision is likely not to be established on the basis of nomination criteria rather than objective criteria, given

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<sup>132</sup> In this regard, Simma points out that ‘the scope of binding character of decisions within the meaning of Art.25 is, however, not only controversially discussed in terms of the straightforward meaning of the words. Rather the determination of which decisions are to be binding according to Article. 25 is also undertaken by considering the various functions of the SC, such as, for instance, under Chapter VI (‘Pacific Settlement of Disputes’). Simma. Bruno (ed) *The Charter of the United Nations : A commentary*, Oxford University Press 1994, p.410.

<sup>133</sup> Higgins, Rosalyn, ‘The advisory opinion on Namibia: which UN resolutions are binding under Articles 25 of the Charter’, (April 1972) 21 ICLQ 281

<sup>134</sup> Eagleton, C., ‘the Jurisdiction of the Security Council over disputes’, (1946) 40 AJIL 513.

that the nature of the decision or the recommendation plays a vital role in considering whether there is a binding character or not.<sup>135</sup> In any event, it is not easy to interpret this nature, and if so, who is qualified to decide on this nature, as most of the decisions make no mention of the legal bases, and as far as the responsibility issues are concerned, it seems that the most important factor in determining such a responsibility is the command and control issue, rather than the nature of the decision, whether considered as recommendation or as a decision. In this sense, Higgins maintains persuasively that:

Any responsibility was that of the volunteering coalition nations. This incidentally, is in part a reply to those who suggest that recommendations to members might entail responsibility to the organisation itself. Resolution 678 was clearly a decision- a decision to authorize volunteer action, and was thus a complex hybrid, the form of which cannot itself determine liability.<sup>136</sup>

It is worth mentioning that the nature of the resolutions adopted by the Security Council governs the issue of whether the resolution is undertaken in accordance with Chapter VI of the UN Charter, or is undertaken under Chapter VII.<sup>137</sup> The

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<sup>135</sup> See, Simma, *supra* note 132, p.408-418.

<sup>136</sup> Higgins, R., 'The responsibility of States Members for the defaults of international organisations continuing the dialogue', *supra* note 77, p.445.

<sup>137</sup> The resolutions taken in the peaceful settlement are dealt at paragraph 1 of article 33 of Chapter 6 of the UN Charter as provides that the 'parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first seek a solution by negotiation...', Article 33. However, the parties shall refer to the Security Council to seek a solution in cases where parties fail to settle the dispute by the means mentioned in Article 33. See Article 37. Thus, the power of the Security Council to call the parties of dispute in accordance to Article 33 paragraph 1 has no binding force as such, as is clear from Article 37 paragraph 1. Moreover, under paragraph 2 of Article 33, 'the Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means'. It is worth noting that this obligation of the Security Council is subject to the fact that the continuance of the dispute between parties is 'likely to endanger the maintenance of international peace and security'. See Chapter 1. The power of the Security Council under Articles 37 may effectively be divided into two categories: firstly, 'to decide whether to take action under Article 36' and secondly 'to recommend such terms of settlement as it may consider appropriate', Article 37 of the UN Charter. Perhaps, a striking aspect of the legal effect of the actions taken by the Security Council chapter 6 is the action taken under Article 36 is the binding nature of the recommendation of the Security Council to refer the legal disputes by the parties to the International Court of Justice. This argument has arisen, for example, in a well-known conflict between the United Kingdom and Albania concerning the incidents in the Corfu Channel as the Security Council recommended that its parties refer the dispute to the International Court of Justice In Resolution 22 of 9 April 1947, the

most important theme of the discussion, in regards to the nature of the resolutions, is that member states are not liable if they violate resolutions taken by the Security Council under Chapter VI. This, however, contradicts the purposes and principles stated in the UN Charter<sup>138</sup>, where the Security Council could take action against states that violate such purposes and principles. Legally speaking, as a general rule, actions taken by the Security Council under Articles 33, 36, 37 have no binding force and consequently, there is no liability for member states violating them.<sup>139</sup>

On the other hand, actions taken under Chapter VII have a binding force over member states. However, Chapter VII does not in itself mean that decisions taken under Chapter VII are binding where they are not in conformity with the UN Charter.<sup>140</sup> However, most decisions<sup>141</sup> with regard to Chapter VII of the UN

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Security Council ‘ recommends that the United Kingdom and Albanian Governments should immediately refer to the dispute to the International Court of Justice in accordance to the provisions of the Statue of the Court’. In discussing a draft resolution under Article 36 of the Charter: the representative of Australia stated that ‘ any decision, any recommendation that we make binds the United Kingdom and also binds Albania’. Quoted in Amerasinghe, C.F., *Principles of the Institutional Law of International Organisations*, supra note 130, p.204. See also, Corfu Channel Case (Preliminary Objection), ICJ Reports, 1947-1948, p.26. Yet in fact, the recommendation of referring the dispute to the International Court of Justice is not in itself binding unless the dispute endangers international peace and security.

<sup>138</sup> Paragraph 2 of Article 2 provided that ‘all members , in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter’. Also, paragraph 3 of Article 2 provides that ‘all members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered’.

<sup>139</sup> Bowett, D.W., *The law of International Institutions*, London Stevens and Sons, Fourth edition, 1982, pp. 30-31.

<sup>140</sup> It is worth mentioning that the binding character provided in Article 25 of the Charter does not apply only to enforcement measures adopted under Chapter VII of the Charter. Bowett D.W., ‘Judicial and political functions of the Security Council and the International Court of Justice’, In Abi-Saab and others, Fox, Hazel (ed). *The changing constitution of the United Nations, the British Institute of International and Comparative Law*, 1997, pp.83-84. This view has supported by prominent scholars. Higgins maintained that “both the *travaux préparatoires* and the wording of the Charter lead one in direction that the application of Article 25 is not limited to Chapter VII resolutions, excluding Chapter VI resolution”. Higgins, R., ‘The advisory opinion on Namibia: which UN resolutions are binding under Articles 25 of the Charter’. (1972) 21 ICLQ 281.

<sup>141</sup> It is argued that Article 40 has no binding nature as the words ‘recommendation’ and ‘call upon the parties’ have been used by the father of the Charter. the Security Council under this Article may ‘call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable’. Not only that since under this Article the Security Council ‘shall duly take account of failure to comply with such provisional measures’. Simma, supra note 132, p.620.

Charter are binding in nature.<sup>142</sup> This is because actions taken with respect to the 'threat to the peace, breach of the peace, or act of aggression'<sup>143</sup> involve a binding force in itself, and a binding force in employing measures 'not involving the use of armed forces' to implement them.<sup>144</sup>

According to the recommendations taken by the Security Council in accordance with Chapter VII, these are considered to be decisions with a binding character, rather than recommendations, even if they are nominated as recommendations.

In any event, the legal effect of the decision of the Security Council is embodied in sanctions that might be taken against the non-implementation of these decisions.<sup>145</sup> In general, decisions have a binding nature, while recommendations have no such nature. In such circumstances, it would be proper to examine the details of both decisions and recommendations in order to find a text that indicates such a binding nature. However, if there is a conflict in determining the nature of the Security Council decisions, the Security Council might settle such a conflict, given its power conferred by the Charter to execute its decisions, particularly those related to the maintenance of international peace and security.<sup>146</sup> Regardless of this, however, the question remains as to what happens if the Security Council, after settling such a conflict, fails to utilise any means of implementing its decisions.

One might suggest here that if we consider that the binding nature of the actions taken by the Security Council is derived from Article 25 as 'the members of the United Nations agree to accept and carry out the decisions of the Security Council

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<sup>142</sup> Examples could be cited in this respect, Korea, Rhodesia, Iraq

<sup>143</sup> Article 39 of the UN Charter.

<sup>144</sup> Article 41 of the UN Charter.

<sup>145</sup> Article 5, 6, 42 provided the sanctions.

<sup>146</sup> Article 41 of the UN Charter.



in accordance with the present Charter',<sup>147</sup> it would be argued that all actions taken by the Security Council have a binding feature. However, this conclusion would contradict the establishing of any difference between the decisions and the recommendations of the Security Council. It would, indeed, be appropriate to keep in mind that the Security Council has a general power to 'investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security'.<sup>148</sup> This, in fact, is a general power gives the Security Council the right of the determination of the situation under Article 39.

#### **5.5.2 The liability of member states for not carrying out the decisions of the Security Council.**

Under Articles 2/2, 2/3, 2/5 and 4/1 of the UN Charter, member states are obliged to implement decisions, since they undertake to carry out the obligations assumed by them in accordance with the Charter.<sup>149</sup> Furthermore, Article 25 of the Charter requires the carrying out of the Security Council decisions. It could be argued that member states are obliged to carry out decisions, as states usually adopt this notion. In this respect, Williams indicates that "International policymakers frequently recite the mantra that they are required to enforce the arms embargo because it is mandated by the Security Council".<sup>150</sup>

Indeed, the Security Council has the power to enforce sanctions against member

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<sup>147</sup> Article 25 of the UN Charter.

<sup>148</sup> Article 34 of the UN Charter.

<sup>149</sup> Article 2(2) of the UN Charter.

<sup>150</sup> Williams, Paul R., UN Members Share Guilt for the Genocide in Bosnia August 9, 1995 available at:  
[www.publicinternationallaw.org/programs/balkans/](http://www.publicinternationallaw.org/programs/balkans/)

states for not implementing its decisions<sup>151</sup> but it would be hard to argue that member states are required to carry out illegal decisions that are not in conformity with the Charter.

Having established the nature of decisions, and having established that member States have to implement such decisions, the main question is whether member States are liable for the non-implementation of the Security Council decisions, given the failure of the Security Council to verify the implementation of its decisions. In this regard, and by analogy with the principles of state responsibility, the issues of negligence and omission arise as relevant factors in incurring responsibility. To put it differently, the responsibility of member states for illegal actions may, in effect, be viewed in different dimensions. First and foremost, the responsibility of member states for implementing what may be considered illegal decisions could be provoked where a third party claims compensation for damages arising from the non-implementation of decisions or from implementing them if they are illegal.

An example that could be cited in this regard is the resolution of the Security Council in imposing an arms embargo on Bosnia.<sup>152</sup> Given that the legality of this resolution is highly controversial,<sup>153</sup> this raises the matter of the responsibility of

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<sup>151</sup> Articles 40, 41 of the UN Charter.

<sup>152</sup> In resolution 713 (1991), the Security Council imposed a weapons embargo on the former Yugoslavia. UN. Doc. SC/RES/713 (1991).

<sup>153</sup> The issue whether the state's right to self-defence takes precedence over maintenance of international peace and security has been raised by Bosnia. Bosnia claimed that its inherent right to self-defence under Article 51 took priority over the embargo. Gray maintained that 'it is clear that there are strong arguments against a claim that an embargo violates Article 51 of the UN Charter. If every arms embargo is automatically inconsistent with Article 51 this would restrict the Security Council's discretion to take measure under Article 41 and deprive it of a useful tool to put pressure on a wrongdoing state or to try to limit the escalation of a conflict'. Gray, C., *The international law and the use of force*, , Oxford University Press, 2000, p. 95. However, it is true that Bosnia

UN members states. Hence, it is maintained that ‘by enforcing the illegal UN arms embargo on the sovereign and independent state of Bosnia-Herzegovina, the member states of the UN are not failing to prevent and punish crimes of genocide, they are actually facilitating the commission of these crimes’.<sup>154</sup> Accordingly, UN members share the responsibility and ‘share guilt for the genocide in Bosnia’,<sup>155</sup> particularly since the question of the responsibility for member States could arise regarding actions taken against Iraq, Libya and Kosovo, for example. However, the ICJ did not concern itself with the legality of the Security Council actions in the Lockerbie and Bosnia cases.

Another dimension by which the responsibility of member states could be viewed is the responsibility of member states for not practicing their surveillance role<sup>156</sup> as regards the implementation of legal decisions, for not asking for the implementation of such decisions and/or for not asking for sanctions to be imposed on member states for not implementing decisions upon them. This arises because the Security Council is the authorized organ for employing sanctions to give force to its decisions.<sup>157</sup> Moreover, the Security Council is responsible for taking the proper measures to implement the judgments of the ICJ. Under paragraph 2 of Article 94 of the UN Charter, the Security Council has the power to ‘make recommendations or decide upon measures to be taken to give effect to the judgment’.<sup>158</sup> Although there is no obligation on the part of the Security Council to make recommendations or decisions to provide judgment<sup>159</sup>, the

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allegation could undermine the power of the Security Council to impose an arm embargo, but it is also true that in the case of Bosnia there was a threat to it, and Bosnia had to exercise its inherent right to self defence against Yugoslavia (Serbia and Montenegro).

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> See Kelsen, H., *supra* note 129, p. 60.

<sup>157</sup> Article 41 of the UN Charter.

<sup>158</sup> Article 94/2 of the UN Charter.

<sup>159</sup> This non obligatory feature of Article 94 is highly criticized, as it weakens the judgment and

Security Council in terms of having a primary responsibility in maintaining international peace and security would be obliged to give effect to the judgments, as non compliance with the ICJ judgment could threaten the judicial function of the ICJ.

### **5.5.3 Negligence**

The argument of negligence could be found in MacLaine Waston' claims before the European Court of Justice. As Romana maintains:

This claim rested on two grounds. First, that both the member States of the EEC and the Community institutions had failed to scrutinize the Sixth ITA before becoming parties to it in order to determine the duties of member States and the corrective mechanisms available under the Treaty. Secondly, if this negligent omission at the time of entering into the Sixth ITA could not be attributed to the European Community, then there was nevertheless negligence in their refusal to support a United Kingdom initiative.<sup>160</sup>

Negligence of supervision of acts of member states may cause member State's liability. To put it differently, recognition of harm to third parties and failing to prevent such harm may be an indicator of the intention to commit a wrongful act, and a logic reason to hold the member states of the international organisation liable, as the member states have a duty in terms of supervision and control of the actions of international organisation. To apply the above-mentioned argument to the Security Council decision makers, one could maintain that in spite of the fact that there is no hierarchy between the organs of UN, however, a claim of

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Court itself. As the question has been raised 'whether the Council is vested with some power to review decisions of the Court', not only that but as correctly maintained that 'the case of the Military and Paramilitary Activities in and against Nicaragua may be regarded as another example in which recourse to the Security Council under Article 94 could be seen as a threat to the legal authority of the judicial decisions of the Court, due the lack of action by the Council', Attila, Tanzi, 'Problems of enforcement of decisions of the International Court of Justice and the Law of the United Nations', (1996) 7 EJIL 544. The problem of the concurrent jurisdiction between the Security Council and the International Court of Justice could be arisen in this argument. *ibid*.

<sup>160</sup>Romana Sadurska and Chinkin, C.M., *supra* note 31, p. 880.

negligent supervision as a basis for member states responsibility could be acceptable for the following reasons: firstly, the absence of such a hierarchy does not prevent the organs from acting in accordance with the purposes of the UN Charter. Secondly, the General Assembly has a wide range of competences and has a concurrent competence in maintaining international peace and security, it would be difficult to envisage that the member state have no supervisory role over the Security Council decisions.<sup>161</sup> By establishing this relationship, the member states of the UN are responsible for illegal acts, regardless of the degree of the responsibility that they might bear.

## **5.6 Piercing the Organisational Veil.**

The connection between the separate legal personality of international organisations and the notion of being liable cannot be underestimated. Therefore, a legal personality is considered as a 'necessary precondition for an organisation to be liable for its own obligations'.<sup>162</sup> In this regard, it is stated that 'there is no general concept that member states retain an international legal responsibility for the acts of their international organisation endowed with a separate legal personality'.<sup>163</sup> However, this is not always the case, as it is maintained that 'a municipal court must recognize that in international law the attribution of legal personality to an international organisation does not necessarily free its members

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<sup>161</sup> See Chapter 6, pp. 157-158.

<sup>162</sup> Higgins, R., *supra* note 3., p.382. However as it is correctly maintained 'it does not necessarily determine whether Member states have a concurrent or residual liability' ILA Report, 2002, p19.

<sup>163</sup> Wellens, K., *supra* note 10, p.46. Article 5(b) and (c) of the 1995 Resolution of the Institute de Droit International runs as follows: '(b) in particular circumstances, members of an international organisation may be liable for its obligations in accordance with a relevant general principle of international law, such as acquiescence or the abuse of rights. (c) In addition, a member State may incur liability to a third party: (i) through undertakings by the State or (ii) if the international organisation has acted as the agent of the State, in law or in fact. Higgins, *supra* note 3, p. 460. See Higgins R., *supra* note 107, pp.233-260.

from liability for its obligations'.<sup>164</sup>

However, piercing the organisational veil is not yet been established on an international plane. In spite of this, it has been argued that the veil could be pierced in some circumstances, and consequently, member states responsibility could be held liable.<sup>165</sup> One of those circumstances could be that 'where international organisations violate the most basic principles of international law' for example committing international crimes such as aggression, genocide and crimes against humanity.<sup>166</sup> Another case where the veil of the organisation could be pierced is 'cases of abuse of the separate personality of the international organisation for illegal acts or in order to evade some legal obligations'.<sup>167</sup>

Another circumstance, perhaps, to justify the piercing of the veil is the dominance of a single state over the international organisation.<sup>168</sup> Put differently, Hirsch maintains that 'where an international organisation is under complete, or almost complete, control of a single member and the organisation is functionally identical with the member'.<sup>169</sup> It is worth noting that the power that governs and controls the activities of international organisations could be considered as a legal basis for establishing the liability of the member States that govern the action of the Security Council.

In the Westland Case, the Tribunal of the International Chamber of Commerce concluded that the organisation veil could be lifted. Gibson LJ concluded that

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<sup>164</sup> Hirsch, Moshe, *supra* note 3, p.117

<sup>165</sup> *Ibid.*, p.170. See Klabbers, J., *supra* note 25, p.317. Romana Sadurska and Chinkin, C.M., *supra* note 31, pp.867-879.

<sup>166</sup> *Ibid*

<sup>167</sup> *ibid*, An example could be cited in this regard is as Hirsch stated that "if the government of a state wished to evade its obligation to comply with a valid award made by an international tribunal which had prescribed the transfer of some territory to another state, by transferring the same territory to a new international organisation, the third state would be entitled to bring a direct action against that state", Hirsch, Moshe, *supra* note 3, p. 170.

<sup>168</sup> Klabbers, J., *supra* note 25, p.317.

<sup>169</sup> Hirsch, Moshe., *supra* note 3, p. 172.

Westland Helicopters decided that:

Members of an international organisation which had legal personality must, if they are to escape secondary liability for the debts of the organisation, at least in the circumstances of that case, be able to point the provisions of the constituent document which expressly or impliedly exclude that liability.<sup>170</sup>

### **Concluding remarks**

Despite the fact that the UN Charter did not make any provisions whatsoever in terms of the liability of its member states, the legal basis for the liability of member states could be found in the nature of the relationship between member states and international organisation, as I argued here that the absence of mentioning such a responsibility in the constituent instruments does not automatically mean the opposite. In applying this presumption to the Security Council, one may state that ‘if the member-states fail to exercise proper control over the acts of the organisation, then they may be held responsible for negligence’.<sup>171</sup>

Also, the ITC and Westland cases have dealt with the member states liability as three arguments emerged before the Courts concerning the nature of the member states’ liability. However, both of the ITC and Westland judgments relied on the principle of independent personality of international organisations. It is true that the separate legal personality of the international organisation leads to an establishing of international responsibility of international organisation; however, to cover under the separate personality veil is an issue that should be taken cautiously in order to avoid any excuse for justifying illegal actions committed by member states themselves.

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<sup>170</sup>Cited in Romana Sadurska and Chinkin, C.M., *supra* note 31, p.876.

<sup>171</sup>Klabbers, J., *supra* note 25, p.304.

The relationship between member states and international organisation, and the relationship between international organisations and third party are of significant importance in determining the nature of member states responsibility as to whether is classified as a direct responsibility or secondary and concurrent responsibility. This relationship could vary from case to another depending on the legal documents that govern such a relationship.



## **Chapter 6: Responsibility in the case of the delegation by the Security Council of its Chapter VII powers**

A distinction between delegation and authorization may be made,<sup>1</sup> as authorization is more limited than delegation both in the objectives and nature of powers. The crucial issue here is when the authorization or delegated powers are misused or *ultra vires* the delegated or authorized powers.<sup>2</sup> In this respect, the ILA raises several questions.<sup>3</sup> Sarooshi raises the question “who is responsible for breaches of international law that may occur as a result of the organisation’s exercise of the conferred power: the State or the organisation or both? This question may also arise in the case of authorization granted to State or member States.”<sup>4</sup>

A delegation of powers may be defined as “taking place whenever an organ of an international organisation which possesses an express or implied power under its

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<sup>1</sup> Sarooshi asserted that an authorization is more limited than a delegation of powers, both in terms of the specification of the objectives to be achieved and the qualitative nature of the powers transferred to achieve the designated objective. Sarooshi, D., *The United Nations and the development of Collective Security the delegation by the UN Security Council of its Chapter VII Powers*, Oxford, 1999, p.13. However, both of an authorisation and a delegation contain the same idea, that of acting on behalf of the delegate. Moreover, the authorization and the delegation are closely linked.

<sup>2</sup> An example could be given in the case of the use of force on fly zone as the USA and UK relies on the implied authorization in resolution 688 to use the force in no fly zone for achieving humanitarian assistance.

<sup>3</sup> For example, ‘whether there is room for an attempt by an IO to transfer its legal responsibility for any consequences flowing from the delegation of the exercise of powers in question to another entity’ ; also ‘what the delegating consequences are for the responsibility of the IO and the delegate when the delegating organ has not complied with the conditions that are applicable to the process of delegation’, ILA Report, 2002, p 17. In this sense, the Draft Secondary Recommended Rules and Practices on Responsibility of International Organisation stated that : “1) when a State or a group of States acts under a delegation or authorisation by an IO of powers or functions conferred on the IO by its constituent instruments, the international legal responsibility of the IO remains unaffected.

2). Without prejudice to the previous RRP, the State or group of States incur international legal responsibility for its own actions undertaken pursuant to the delegation or authorisation.” ILA Report, 2004, p.31.

<sup>4</sup> Sarooshi, D., *The United Nations and the development of Collective Security the delegation by the UN Security Council of its Chapter VII Powers*, supra note 1, pp. 13, 38 . ILA Report, 2004, pp.30-31.

constituent instrument conveys the exercise of this power to some other entity”.<sup>5</sup>

This entity may be the Secretary General, the UN subsidiary organs, Member States and regional arrangements.<sup>6</sup>

A delegation has been justified<sup>7</sup> as arising because of the lack of consensus between the permanent members of the Security Council during Cold War. Not only this, but the absence of the contribution of armed forces and facilities, as detailed in Article 43 of the Charter, due to the non conclusion of Article 43 agreements, had the effect of paralyzing Chapter VII of the United Nations Charter.<sup>8</sup> Article 43 remains ineffective because of great power disputes.<sup>9</sup> However, if one justification for the delegation is that the Cold War created the need to delegate, what might be the justification for this practice after the end of the Cold War, particularly insofar as there may be a clear consensus between the five permanent members? In addition, the urgent question may arise as to why the

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<sup>5</sup> Sarooshi, D., *supra* note 1, p.5.

<sup>6</sup> *Ibid.* It is worth mentioning that the focus of this Chapter is to examine the legal framework of the delegation of Chapter VII powers by the Council.

<sup>7</sup> Sarooshi, D., *supra* note 1, p. 1. See Quigley, J., ‘The “Privatization” of Security Council Enforcement Action: A Threat to Multilateralism’, (1996) 17 *Michigan Journal of International Law* 255. Also it is maintained that “the United Nations is criticized for failing to act in situations that call for peace enforcement. If the major powers are unwilling to have the Council take Article 42 action, and if the only route to action is via the authorization technique, then, according to this view, the United Nations should use the authorization technique; and if the action succeeds, the criticism over process should be lost in the praise of a successful outcome”, Quigley, J., ‘The “Privatization” of Security Council Enforcement Action: A Threat to Multilateralism’, p.260.

<sup>8</sup> Sarooshi, D., *supra* note 1, p.34. Article 43 provided that ‘1. All Member of the United Nations, in order to contribute to the maintenance of International peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces...’

<sup>9</sup> It is of significance, here, to refer to the fact that there was a wide disagreement between the delegates in the UNCIO concerning the special agreement or agreements. The basis point of the disagreement was the right of passage as was suggested by the delegate of France as follows: ‘All members of the Organisation should contribute to the maintenance of international peace and security, they should undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. Such agreement or agreements should govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided’. The French delegate said that the ‘only point in either the Australian or French amendments upon which the sponsoring governments were not unanimously agreed was that of the “right of passage”, UNCIO, Doc, XII, Commission III/3, p. 432. Also, the composition of the Military Staff Committee was a point of disagreement. See UNCIO, Doc, XII, Commission III/3, pp. 490- 494.

Military Staff Committee does not exist after the end of Cold War.<sup>10</sup>

Undoubtedly, it is questionable whether the increasing challenges facing the Security Council might, in a sense, constitute a legal basis for expanding its powers by interpreting the Charter in a manner appropriate to the interests of its members. Furthermore, does this mean that the Security Council can act illegally and, if so, where responsibility may be? In addition, one might question to what extent the authorization grants States permission to act on behalf of the Security Council. All these questions may arise in this connection, but what is most debatable, perhaps, is whether the Security Council may delegate Chapter VII powers.<sup>11</sup>

To answer these questions, it is preferable to discuss the possible constitutional basis for the delegation of power by the Security Council and the legal constraints of delegation as follows:

### **6.1 The constitutional basis of delegation**

Before determining the legal basis of the competence of the Security Council to delegate its powers, some remarks concerning the nature of the powers conferred by member States to the Security Council by virtue of Article 24 of the UN Charter<sup>12</sup> will be made. Clearly, under Article 24 the Security Council is acting on

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<sup>10</sup> In this respect, Blokker maintains that “the end of the Cold War has taught us that there are other reasons besides the Cold War for the absence of Article 43 agreements which, according to the Charter, would provide the Security Council with troops necessary to carry out military enforcement action. In future, therefore, authorization resolutions will be the instrument through which the Security Council will have to act if the use of military force is required to deal with crisis situations”. Blokker, N., ‘Is the Authorization Authorized? Powers and Practice of the UN Security Council to authorize the use of force by “Coalitions of the able and willing”’, (2000) 11EJIL 567.

<sup>11</sup> Sarooshi, D., *supra* note 1, p. 26.

<sup>12</sup> Paragraph 1 of Article 24 of the Charter runs as follows: ‘In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary

behalf of the member states for the purpose of ensuring “prompt and effective action by the United Nations.”<sup>13</sup>

Article 24 confers general competence in maintaining international peace and security.<sup>14</sup> The powers of the Security Council with regard to maintaining international peace and security are not merely exclusive. The General Assembly in accordance with Article 11 (2) and Article 14 of the UN Charter could discuss issues related to the maintenance of international peace and security. Article 14, particularly, emphasises the General Assembly’s role with regard to international peace and security.<sup>15</sup> In the *Certain Expenses Case*, the ICJ examined the powers of the General Assembly and the Security Council with respect to the maintenance of international peace and security and concluded that powers of the Security Council in such matters are primary but not exclusive<sup>16</sup>, the Court went on to say that :

The functions and powers conferred by the Charter on the General Assembly are not confined to discussion, considerations, the initiation of studies and the making of recommendations; they are not merely hortatory.<sup>17</sup>

Furthermore, the ICJ in the *Certain Expenses Case* pointed out that the General Assembly could recommend:

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responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.’

<sup>13</sup> Kelsen. H., *The law of the United Nations* (1951), p. 279.

<sup>14</sup> Gill, T., ‘Legal and Some Political Limitations on the Power of the UN Security Council to exercise its Enforcement Powers under Chapter VII of the Charter’, (1995 ) 26 *Netherlands YIL* 69.

<sup>15</sup> Article 14 of the UN Charter provides that ‘ the General Assembly may recommend measures for peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare of friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations’

<sup>16</sup> ICJ Reports, 1962, 163.

<sup>17</sup> Ibid.

measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations<sup>18</sup>

In 1950 the General Assembly adopted the Uniting for Peace resolution, this resolution was adopted because of the lack of consensus of the permanent members in maintaining international peace and security. This resolution stipulated that:

If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly may meet to consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.<sup>19</sup>

Undeniably, some powers are exclusive and some powers are concurrent under the UN Charter. As a result, the General Assembly also has a responsibility to maintain international peace and security.<sup>20</sup> One implication of this is that the authority of the Security Council is derived from the Member States. That is to say, the word ‘confer’ “implies a hierarchical relationship in-as-much as the grantor generally has the power to determine that the grantee has exceeded his authority and ultimately to withdraw the authority which has been granted”.<sup>21</sup> The Security Council does not act individually as any action of the Security Council is

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<sup>18</sup> ICJ Reports., 1962, p.163.

<sup>19</sup> General Assembly Resolution 337(V). 3 November 1950, 302<sup>nd</sup> meeting. The legality of this resolution was debatable, for further details see Woolsey, L.H., ‘the ’ Resolution of the United Nations, (1951) 45 AJIL 129-137. Kunz, Josef L, ‘Legality of the Security Council Resolutions of June 25 and 27, 1950, (1951) 45 AJIL 137-142.

<sup>20</sup> See Kelsen, H., supra note 13, p. 60. In particular, the competence of the General Assembly is recognized by the International Court of Justice as it stated that ‘ the Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security’. ICJ Reports, 1962, p.168.

<sup>21</sup> Gills, T., supra note 14, p 69.

considered as an action of the organisation as a whole.<sup>22</sup>

Not only this, but by virtue of paragraph 2 of Article 24 of the Charter, an annual report should be submitted for consideration of the General Assembly.<sup>23</sup> Nevertheless, in accordance with the theme of the collective security system, the Security Council acts through Member States. In this sense, the Security Council authorizes its powers to the Member States.

However, the main problem in delegating Chapter VII powers to Member States is that control over the force and the command of operations, under Articles 42, 43, 46 and 47 of the UN Charter, should be exclusively in the hands of the UN.<sup>24</sup>

Turning now to the constitutional basis for the delegation of powers of the Security Council, it is undoubtedly also debatable whether there is any legal framework which governs the delegation of power and ultimately the process of delegation. First and foremost, under the United Nations Charter, there is no clear legal basis and no express provision for the Security Council to authorize others to take enforcement actions.<sup>25</sup>

In this regard, Kelsen points out that “no organ can legally delegate power to another organ without being authorized by the constitution to do so”.<sup>26</sup>

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<sup>22</sup> See Goodrich Hambro, E., and Simons, A-P., *Charter of the United Nations: Commentary and Documents* (1969) 202-203. Also, in this respect, the representative of Brazil maintained correctly that: it should be borne in mind that the authority of the Security Council is not self-constituted but originates from a delegation of powers by the whole Membership of the Organisation. S/PV. 3175 .pp 6-7. See also, Bedjaoui, M., *The new World order and the Security Council: Testing the legality of its Acts*, Martinus Nijhoff Publishers, 1994, p. 253.

<sup>23</sup> Article 24 of the UN Charter.

<sup>24</sup> In this respect, White points out that ‘ the Charter does strongly indicate that UN control of such military operations is an essential prerequisite for the legality of military action by the Security Council’, See White, N., *Keeping the peace: the United Nations and the maintenance of international peace and security*. Manchester University Press, 1993, p.103.

<sup>25</sup> Gardam, Judith G. ‘Security Council Military Enforcement Action’, (1996) 17 *Michigan Journal of International Law* 286.

<sup>26</sup> See Kelsen, H., *supra* not 13 , p. 142.

Furthermore, it is maintained that the authorization has violated the virtue of Article 24 of the United Nations Charter. In this respect, Michael, for instance finds that:

By virtue of Article 24, the members of the United Nations have conferred the responsibility for maintenance of the peace on the Security Council and not any other entity that the Council may imagine. All the procedural rules governing the exercise of this responsibility would be circumvented if there were such a power delegation.<sup>27</sup>

However, the competence of the Security Council to delegate its powers is, of course, recognized from many points of view.<sup>28</sup> According to Sarooshi, the Security Council does possess general competence in delegating its powers. He finds that the Security Council's competence to delegate its powers is derived from two main sources. The first source is that this competence has existed as a general principle of law as recognized by Article 38 of the Statute of the ICJ.<sup>29</sup> The second source is that the law of international institutions operates on the basis of a general principle of the power of a principal organ of an international organisation to delegate certain of its powers to other entities.<sup>30</sup>

Indeed, the lack of any provision for the competence of the Security Council in delegating its Chapter VII powers makes implied powers the legal basis of this competence.<sup>31</sup> This is not to say that the aforementioned sources, from which the delegation is derived, are no longer valid for establishing a legal basis. It is true that the general principles of law can be considered as a legal basis for the

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<sup>27</sup> Quoted in Quigley, J., *supra* note 7, p. 255.

<sup>28</sup> Sarooshi, D., *supra* note 1, pp. 16-17.

<sup>29</sup> This general principle of law "indicated by the fact that constitutions of a large number of States, both from common and civil law systems, allow their organs of government to delegate powers". *Ibid.*, p16.

<sup>30</sup> *Ibid.*, p17.

<sup>31</sup> This doctrine helps in cases where there is no express provision in particular powers which provide a 'liberal and progressive approach to the powers of organisations even though constitutions may be silent on the particular powers, concerned, in order to enable organisations effectively and purposefully to carry out their functions.', Amerasinghe, C.F., 'Interpretation of Texts in Open International Organisations', (1996) BYBIL 196.

competence of delegation. However, it could be true at the same time that the Security Council's powers, in certain cases, are unlimited in respect of general principles of law, as it does not apply existing law when it acts under Chapter VII of the United Nations Charter.<sup>32</sup> Furthermore, the treaty which creates an international institution is also its constitution. The Charter of the United Nations is the constitution of the organisation. However, there is no provision to explain which organ can interpret the UN Charter.

The Charter has been recognized as being essentially a multilateral treaty, in the light of which the Court interprets the Charter of the United Nations by following 'the principle and rules applicable in general to the interpretation of treaties'.<sup>33</sup> The Vienna Convention on the Law of Treaties 1969 contains provisions regarding interpretation of treaties.<sup>34</sup> Proposals for placing the competence of interpretation of the UN Charter in the ICJ were rejected.<sup>35</sup> In the light of this, the Court states that 'each organ must, in the first place at least, determine its own jurisdiction'.<sup>36</sup> However, the General Assembly resolution 171(II)A in 1947 recognized the competence of the International Court of Justice to interpret the Charter, and recommended that "organs of the United Nations, and specialized agencies should from time to time, review the difficult and important points of

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<sup>32</sup> Kelsen maintains that 'by declaring the conduct of state to be a threat to, or breach of the peace, the Security Council may create a new law', Kelsen, H., *supra* note 13, p.736.

<sup>33</sup> ICJ Reports, 1962, p.157. Also, Judge Sir Percy Spender, in his separate opinion, pointed out that 'each organ of the United Nations, of course, has an inherent right to interpret the Charter in relation to its authority and functions'. ICJ Reports, 1962, p 197.

<sup>34</sup> Article 31 of Vienna Convention stipulated that: '1-a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Also Article 32 provided a Supplementary Means of Interpretation. Vienna Convention (1969) 8 ILM 691.

<sup>35</sup> A Belgium proposal was that the United Nations organs should submit their disagreements over interpretation to the International Court of Justice. However, this proposal was rejected. Bedjaoui, M., *supra* note 22, p. 10. see also, Russell, R B., *A history of the United Nations Charter: The role of the United States 1940-1945*, Washington: Brookings Institution, 1958, pp. 877-890.

<sup>36</sup> ICJ Reports, 1962, p.168.



law within the jurisdiction of the International Court of Justice”, as the International Court of Justice has been recognized as a principal judicial organ of the United Nations.<sup>37</sup> Not only this, but the Statute of the International Court of Justice provided for this in Article 36.<sup>38</sup> Moreover, the International Court of Justice has asserted the implicit powers of the Security Council and the General Assembly in several cases. In the *Reparation for injuries Suffered in the Service of the United Nations case*, for instance, the Court went on to say:

The Charter does not expressly confer upon the Organisation the capacity to include, in its claim for reparation, damage caused to the victim ... under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.<sup>39</sup>

The principle of implied power is considered as a ‘good example of the teleological principle to the interpretation of constitutions’.<sup>40</sup> On many occasion, the Court applied the principle of implied powers. However, applying the doctrine of implied powers is, in a sense, constrained by the principle of effectiveness.<sup>41</sup> Furthermore, the implied power should be relevant to the functioning, duties and achievement of the organisation and its purposes.<sup>42</sup> Further to this, in *Effect of awards of compensation made by the United Nations Administrative Tribunal*

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<sup>37</sup> Resolution 171(II) of the General Assembly. ‘Need for greater use by the United Nations and its organs of the International Court of Justice’. (A/RES/171 (II) (1947)).

<sup>38</sup> Article 36 of the Statute of the ICJ runs as follows: ‘1. The jurisdiction of the Court comprises all cases which the parties refer to it all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. 2. ..., the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty.’

<sup>39</sup> ICJ Reports, 1949, p.182. Also, in the *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* case, the Court invoked the principle of implied powers. However, the ICJ ignored the doctrine of implied powers in the advisory opinion of *Nuclear Weapons* 1996, the Court as Akande maintained “has been rather liberal in implying powers for the UN”. Akande, D., ‘The Competence of International Organisation and the Advisory Jurisdiction of the International Court of Justice’, (1998) 9 EJIL 445.

<sup>40</sup> Also, as Gill maintains, the ‘concept of implied powers has indeed become part and parcel of general United Nations law’, Gill, T., *supra* note 14, p 196.

<sup>41</sup> Which provided that the treaties in accordance with this principle are to be interpreted with respect to the express apparent objectives and purposes. Amerasinghe, C.F., *supra* note 31, p.189.

<sup>42</sup> Campbell, I., ‘The Limits of the Powers of International Organisations’, (1983) 32 ICLQ 533.

case, the International Court of Justice stated that ‘an implied power can only be exercised to the extent that the particular measure under consideration can be regarded as absolutely essential’.<sup>43</sup>

In the *Certain Expenses of the United Nations advisory opinion*, the ICJ emphasises the discretionary powers of the Security Council.<sup>44</sup>

Undoubtedly, the constitutional basis of the delegation of the Security Council powers is highly relevant to the interpretation of the Charter. The implication of this is that if the Charter does not settle the interpretation issue, the possibility of extra powers for the competence of the Security Council might, in effect, continue to exist.<sup>45</sup>

The root cause of this is that there is no general rule as to the interpretation of the Security Council powers. However, the practice of the Security Council indicates that there is a tendency of the Security Council to interpret the Charter in a broader, more flexible manner.

## **6.2. The legal constraints of delegation.**

The lack of consensus as a result of the Cold War, and arising from the very structure of the Security Council led to the creation of the delegation process. However, the power of the Security Council to delegate its powers is not open-ended. There are, rather, constraints as regards the competence of the Security

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<sup>43</sup>ICJ Reports, 1954, p.58.

<sup>44</sup> The Court stated that “The Court cannot accept so limited a view of the powers of the Security Council under the Charter. It cannot be said that the Charter has left the Security Council impotent in the face of an emergency when agreements under Article 43 have not been concluded”. ICJ Reports, 1962, p.167.

<sup>45</sup> Here, Gray maintained correctly that ‘the doctrine of implied authorization is a dangerous one which risks undermining the authority of the United Nations. There is a serious risk that the Security Council will become unwilling to pass resolution under Chapter VII condemning state action if there is a possibility that such resolutions might be claimed as implied justification for regional or unilateral use of force despite their drafting history’. Gray, C., *International Law and the Use of Force*, Oxford University Press, Second edition, 2004, p. 280.

Council to delegate its Chapter VII powers. Moreover, constraints are also imposed on the delegate.

The first constraint is embodied in the general principle of law which is that '*nemo dat quod non habet*': 'one cannot give what one does not possess'.<sup>46</sup> In other words, the lawful delegation of powers must be derived from an authorized power. However, the certainty in this constraint is linked with the nature of the competence of the Security Council and the fact that the Security Council acts on behalf of the Member States.

The second constraint to be taken into account in the case of delegation is derived from another general principle of law, namely the non-delegation doctrine. This doctrine deals with the delegation of scope of power to another entity. That is to say, the Security Council is prohibited, in effect, from delegating certain powers such as determination under Article 39, and is also prohibited from delegating unrestricted power.

In the first place, the non delegation doctrine lays down a restriction over the Security Council with regard to its power of delegation. In other words, there are certain powers that cannot be delegated. Moreover, the delegated power must be transferred with the limitations which have already been imposed on it. Delegated powers are to be construed narrowly.<sup>47</sup> The gravity of an Article 39 determination and the decision as to what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security, is confined to the Security Council. The Security Council cannot delegate this power as the

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<sup>46</sup> Sarooshi, D., *supra* note 1, p.20.

<sup>47</sup> *Ibid.*, p.34.

determination of a threat to or breach of the peace under Article 39 is conferred exclusively to the Security Council. By turning the powers of Article 39 over to member states, difficulties could arise. Equally, the question arises as to who can decide whether any delegated power is less in danger than delegating Article 39 of determination. In other words, as will be discussed in this section, the delegated powers might allow the delegate to decide on the gravity of the action in order to use proper means.<sup>48</sup> For example the language of resolution 678, which authorizes States to “use all necessary means”, is more dangerous than deciding the existence of a threat to peace, breach of the peace or act of aggression as much as the ‘all necessary means’ is the use of force. Thus, a distinction needs to be drawn between a delegation of a power and a delegation of a function, in order not to transfer the discretionary power of the Security Council.<sup>49</sup> Consequently, the Security Council cannot delegate Article 39 as the Security Council shall determine a threat to peace and not any one else.

Another restriction resulting from the constraint of non-delegation doctrine is that the Security Council is prohibited from delegating unrestricted power of command and control over a military enforcement force. This constraint is embodied in Articles 46 and 47.<sup>50</sup> In order to conduct an enforcement action under Chapter VII of the UN Charter, the requirements of Articles 43, 46 and 47 must be fulfilled. In accordance with Article 43, the special agreements which are provided were not held as there was no agreement between permanent members.<sup>51</sup>

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<sup>48</sup> Ibid., pp. 32-33.

<sup>49</sup> Ibid., p.10.

<sup>50</sup> Article 46 of the UN Charter stipulates that: ‘Plans for the application of armed force shall be made by the Security Council with assistance of Military Staff Committee’. Also, Article 47(1) runs as follows ‘There shall be established a Military Staff Committee to advise and assist the Security Council’s military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments and possible armament’.

<sup>51</sup> See supra note 9.

Furthermore, the strategic direction by the Military Staff Committee and the political control by the Security Council must also be fulfilled. Furthermore, the strategic direction by the Military Staff Committee and the political control by the Security Council must also be fulfilled. However, in practice, the Security Council has taken enforcement action in the absence of the implementation of Article 43.<sup>52</sup>

Actually, the hazard of the non-control system provided for the Security Council is the possibility of exceeding the limits of the authorization, if any. To give an example, the Security Council, in Resolution 678, gave “the UN members carte blanche vis-à-vis Iraq after January 15”.<sup>53</sup> In this regard, Malaysia asserted that ‘It must be underlined that this resolution does not provide a blank cheque for excessive and indiscriminate use of force’.<sup>54</sup>

Furthermore, this restriction derives from the core of the collective security system, which provides overall authority and control by the Security Council over a force carrying out military enforcement action.<sup>55</sup>

The last constraint of power of the delegation is that of interpreting narrowly the Security Council’s resolutions in terms of delegated powers, as there is no space

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<sup>52</sup> Prot commented on such acceptance as follows ‘ an institution becomes a relatively stable one in a social system when its activity is accepted and its members and other role-players of the social system, with which the institution has contact, know what to expect and what is expected of them. Until this stable pattern of expectations, and expectations of expectations, has established itself there is always the danger that an institution becomes dispensable and that some other means may be developed to perform its functional tasks. A good example of this is the “Military Staff Committee” of the U.N Charter (Article 47)... Not surprisingly it was soon rendered impotent, and its functions i.e the division of military were taken over by the system bloc alliance. Such devalued institutions may continue to exist on paper but can no longer be expected to perform the functions for which they were called into life.’ Prot, LV., *The Latent Power of Culture and the International Judge*, Professional Books Limited, 1979, pp 101-102.

<sup>53</sup> Weston, B., ‘Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy’, (1991) 85 AJIL 523.

<sup>54</sup> Doc.S/PV.2963. See Quigley, supra note 7, p.266.

<sup>55</sup> White, N. D., *Keeping the peace: the United Nations and the maintenance of international peace and security*, supra note 24, p.109.

for implied delegation in the Security Council resolution when delegating its Chapter VII powers.

As a final remark on the restraint of the power of delegation, one could question the nature of the decision by which the Security Council might delegate certain powers. If the delegation is synonymous with the transference of the powers of the Security Council, is it considered as a substantive matter which consequently requires a consensus between the five members in order to fulfil the requirements of the voting system as provided in Article 27(3)? If the Security Council delegates its powers by consensus, does the termination of its powers need a consensus between members? If it does, it is conceivable that the Security Council will be unable to reach a decision.<sup>56</sup> Thus, there is a strong tendency among the five permanent members not to withdraw the delegation if such a delegation is able to serve the self-interest of the five permanent members. Consequently, the nature of the decision of delegation might threaten the ability of the Security Council to control military operations, for example.

It is understandable that the reason behind delegation is to reactivate the role of the Security Council in maintaining international peace and security, and it is also understandable that there are legal constraints that must be fulfilled as preconditions for delegation. However, many pragmatic difficulties are also posed by delegation.<sup>57</sup> One difficulty is, as discussed below, whether the authorization is, in fact, correctly authorized, and consequently whether it is within the limitations on the competence of the Security Council to delegate its Chapter VII powers.<sup>58</sup>

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<sup>56</sup> See Sarooshi, D., *supra* note 1, p.39.

<sup>57</sup> See Quiegly, J., *supra* note 7, p.263.

<sup>58</sup> See Blokker, N., *supra* note 10, pp. 541-568.

However, more to the point is who makes the ultimate decision in the case where the objectives of delegation are exceeded. Indeed, these difficulties may be seen to threaten the idea of a collective security system considered as forming the very basis of the United Nations. In the case where the Security Council delegates its powers to another entity, but without certainty that this entity will undertake this action, this could not only create fear of exceeding of uncontrolled operations, but there are also the hazards of being unwilling to act under authorization. In consequence, actions taken by the Security Council would not be undertaken if the task of the Security Council to maintain international peace and security is to be endangered.

The issue of great concern is, as has already noted, the lack within the Security Council of the overall authority and the lack of control that the Security Council must exercise over any military enforcement action is considered as yet another problematic issue with regard to the delegation by the UN Security Council of its Chapter VII powers to Member States.<sup>59</sup>

Moreover, the question is raised at this juncture as to the degree to which constraints on the general competence of the Security Council to delegate its Chapter VII powers are applicable in Security Council practice.

In the first place, the very significant resolution, number 678 (1990)<sup>60</sup>, authorized the use of all necessary means. This means that decision-making is transferred to some member states. It is clear from this resolution that there is no mention of

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<sup>59</sup> See Sarooshi, *supra* note 1, pp.168.171.

<sup>60</sup> On 2 August the military forces of Iraq invaded Kuwait. On the same day, the Security Council adopted resolution 660(1990) which condemned the invasion and demanded that 'Iraq withdraw immediately and unconditionally all its force to the positions in which they were located on 1 August'. Four days later, the Security Council imposed on Iraq economic sanctions. UN. Doc. SC/RES/660 (1990).

recourse to the use of force. Nor is there any specific authorization to use force in resolution 678.<sup>61</sup> However, the authorization was intended to imply the use of force, as all the early Security Council resolutions, since the invasion of Kuwait laid out those measures not involving the use of force, which lead one to say that the force ‘ was the only measure not already authorized by the Council’.<sup>62</sup>

The main reason for analyzing the legal basis of the Security Council resolution 678 is to recognize how the Security Council delegated Chapter VII powers to Member States without taking into consideration the precondition of control over the military operations, in accordance with Articles 43, 46, and 47 of the Charter. Moreover, the main purpose of this analysis is to question the accountability for the action of the Security Council in delegating its power under Chapter VII to member states.

The debate over the characterization of the use of force in the Gulf crisis and whether it was an enforcement action by the Security Council or collective self-defence has taken place.<sup>63</sup> The first view is that the legal basis on which resolution 678 was adopted can be found under Article 42, notwithstanding that the Security Council has no disposable troops and no was there any special agreement. In other words, it is claimed that there are no requirements to be fulfilled under Articles 42, 43, 46, and 47 of the necessity to control the operations by the United Nations, as leaving the control in the hand of States is a practical reason for the absence of

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<sup>61</sup> The Resolution 678 of 29 November, adopted by 12 votes to 2(Cuba, Yemen) and 1 abstention (China). S/RES/678 (1990)).

<sup>62</sup> See Greenwood, C., ‘New World Order or Old? The Invasion of Kuwait and the Rule of Law’, (1992) 55 *Modern Law Review* 166. See also, Dinstein, Y., *War, Aggression and Self-Defence*, Third edition, Cambridge University Press, 2001, pp. 242-243.

<sup>63</sup> Schachter, O., ‘United Nations Law in the Gulf Conflict’, (1991) 85 *AJIL* 452-473; Greenwood, C.,supra note 62,p. 166. See also, Dinstein, Y., supra note 62, pp. 242-243.



Military Staff.<sup>64</sup> This view has been criticised by some commentators. Dinstein, for example, contends that in the case of Iraq there was no United Nations flag, further to this, the Security Council had no control over military operations as the command was in the hand of the United States and the financing of the operation was not considered to be from the United Nations budget.<sup>65</sup> In this respect, the Secretary General of the United Nations admitted that:

The Persian Gulf war was not a classical United Nations war in the sense that there is no United Nations control of the military operations, no United Nations flag, blue helmets, or any engagement of the Military Staff Committee...what we know about the war ...is what we hear from the three members of the Security Council which are involved –Britain, France and the United States.<sup>66</sup>

Yemen and Cuba also asserted that there was no control by the Security Council.<sup>67</sup>

On 28 November 1990, when the Security Council was debating the text that became resolution 678 (1990), member states addressed different issues with regard to use of all necessary means against Iraq in order to ensure compliance with Security Council resolution 660 (1990) and the subsequent relevant resolutions. Iraq tried to focus attention on the legal requirement which the Council must observe in authorising the use of the force.<sup>68</sup> However, the UK representative, for example, stated that:

There is no ambiguity about what the Council requires in this resolution and in previous resolutions. We require that Iraq comply fully with the terms of resolution 660 (1990) and all later resolutions and withdraw all its

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<sup>64</sup> Greenwood, C., *supra* note 62, p.166.

<sup>65</sup> Dinstein, Y., *supra* note 62, p.245.

<sup>66</sup> Security Council, Meeting of 10, February, 1991. UN Doc (S/PV. 2968).

<sup>67</sup> Mr. Al Ashutal, Yemen, objected to the draft resolution as “the Security Council will have no control over those forces, which will fly their own national flags. Furthermore, the command of those forces will have nothing to do with the United Nations, although their actions will have been authorized by the Security Council. It is a classical example of authority without accountability. Also, Mr. Malmieraca Peoli, Cuba rejected the draft resolution as “the text before us moreover violates the Charter of the United Nations by authorizing some states to use military force in total disregard of the procedures established by the Charter”. Security Council, Meeting of 29 November 1990,(do.S/PV.2963)

<sup>68</sup> See the Iraq representative, Mr Al-Anbari statement. Security Council, Meeting of 29 November 1990, UN Doc (S/PV.2963).

forces unconditionally to the positions on which they stood on 1 August. This means that withdrawal must be complete. If not, then Member States, acting with the Government of Kuwait, are authorized to use such force as may be necessary to compel compliance.<sup>69</sup>

The same reaction of the UK has been adopted by Finland. The Finland representative, Mr. Paasio stated that:

What the Security Council demands of Iraq has been clearly and openly stated on many occasions. The principal demands are: full and unconditional withdrawal of Iraqi forces from the territory of Kuwait, leading to the restoration of Kuwait sovereignty, and the release of all foreign nationals under Iraqi control held against their will.<sup>70</sup>

The second view concerning the use of force in the Gulf crisis is that the action in Iraq was collective self-defence, as the precondition of control over the military operations, in accordance with Articles 43, 46, and 47 of the Charter has not been achieved.<sup>71</sup>

However, the question arises here as to whether the collective self-defence needs approval from the Security Council to give legitimacy to actions taken by States. Moreover, if the Security Council approved the actions of the coalition in the Gulf crisis under Article 51, how can one interpret the position of the Security Council in taking up the principle of “its duties and responsibilities determined under the UN Charter to maintain and preserve international peace and security”?<sup>72</sup> The Security Council is obliged to take action even in the case of the right of individual or collective self-defence as in accordance with Article 51 of the Charter, the right of individual or collective self-defence exists ‘until the Security

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<sup>69</sup> Security Council, Meeting of 29 November 1990, UN Doc (S/PV.2963).

<sup>70</sup> *ibid*

<sup>71</sup> *Supra* p. 170. Schachter, O., *supra* note 63, pp. 452-473. See also, Dinstein, Y., *supra* note 62, pp. 242-243. See *Supra* p. 165.

<sup>72</sup> Third paragraph of the preamble of Resolution 678.

Council has taken measures necessary to maintain international peace and security'.<sup>73</sup>

Nevertheless, the real implication of the authorization mentioned in Resolution 678 needs to be considered. Dinstein maintains, for instance, that "Security Council gave its blessing in advance to the voluntary exercise of collective self-defence by the members of the coalition".<sup>74</sup>

Between the aforementioned two opinions, the delegation of the Security Council powers took place in the Gulf Crisis as the Security Council Resolution 678 authorized certain states to use force against Iraq and the action taken under authorization is considered as an action of the United Nations.

In spite of what is maintained, particularly the words "one can put aside extravagant (and incongruous) allegations that the resolution was contrary to the United Nations Charter"<sup>75</sup>, the legitimacy of resolution 678 is questionable, because it gives an unrestricted mandate to use force after 15 January 1991, as it did not contain any details as to how the states might conduct the war or the duration.<sup>76</sup> If the purpose of the delegation is to seek legitimacy, as Sarooshi states, the delegation may nonetheless violate the aforementioned limitations.

The methods by which resolution 678 was adopted aroused serious concerns as according to the legal consideration, there was no willingness to find any peaceful solutions embodied under Article 33. This opinion is expressed in a speech by

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<sup>73</sup> Article 51 of the UN Charter.

<sup>74</sup> Dinstein, Y., *supra* note 62, p. 243

<sup>75</sup> *Ibid.*

<sup>76</sup> In this regard, it is maintained that "it was widely understood in advance as giving Washington a green light to wage the war of its choice under its command. Resolution 678 does not even contain limits as to a duration or obligations to keep the Security Council informed, not even restrictions as to the level of destructive means or accountability in terms of civilian damage, and even a renunciation of weapons of mass destruction". , Riyadh al- Qaysi , legal Aspects of Security Council Resolutions on the Situation between Iraq and Kuwait , May 1999 Bagdad Conference, p. 182.

Bush “No negotiations, no compromise, no attempts at face-saving, and no rewards for aggression”<sup>77</sup>.

Furthermore, in accordance with unrestricted authorization, it is maintained that issuing “such a warrant to the United States to wage unrestricted war is completely at odds with the fundamental UN undertaking ‘to save succeeding generations from the scourge of war’ as the Preamble of the Charter provides”.<sup>78</sup>

However, the most striking issue concerns the responsibility of the Security Council or the member states of the coalitions who led the war. In this sense, Higgins maintains that:

In resolution 678, the Security Council authorized any coalition of States that chose so to act to take “all necessary measures” (everywhere understood as an authorization to use force, though whether under Article 42 or 51 remains questionable) against Iraq to end its invasion of Kuwait. Unlike the Korean precedent, there was here no UN Unified Command—rather, a finding of a Chapter VII situation warranting the use of force, the authorization to States to use such force, and an establishment of the objectives and purposes for which such action should be undertaken. The strategic objectives stipulated by the Security Council were manifestly lawful. It has not been suggested, in these particular circumstances, that the United Nations should itself be responsible for any perceived illegal acts relating to tactical objectives, nor any theoretic claims of default on contract obligations with third parties. Any responsibility was that of the volunteering coalition nations.<sup>79</sup>

One remaining difficulty resulting from the delegation is the fear of expanding the powers conferred by the delegated power. It is recognized initially that one of the restrictions derived from the non-delegation doctrine on the Security Council delegation power is that the delegated powers are to be construed narrowly.<sup>80</sup> In

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<sup>77</sup> Quoted in Osman, M., *The United Nations and peace Enforcement: Wars, terrorism and democracy*. Ashgate Publishing Limited, 2002, p. 193.

<sup>78</sup> Ibid.

<sup>79</sup> Higgins, R., ‘The responsibility of States Members for the defaults of international organisations continuing the dialogue’, in Liber Amicorum Ibrahim F.I. Shihata, 2001, p. 445.

<sup>80</sup> This restriction is under Article 39.

other words, the Security Council resolutions with regard to Iraq should be interpreted narrowly. However, this restriction is merely ignored in Iraq case, as there is no explicit authorization from the Security Council. Not only that, but the doctrine of implied authorization was also claimed in Iraq. The danger here, as seen in the cases of Iraq, is that the doctrine can be widened in scope to legitimize what would otherwise be illegal.

At this juncture, the question of whether the Security Council has the power to legitimize action after it has taken place without previous authorization could arise and consequently, can the Security Council afterward justify what might be illegal.<sup>81</sup> Furthermore, what would be the impact of this departure of the role of the Security Council on the law of international responsibility of international organisation in terms of the claims of implied authorization as a justification to enforce a fly zone and use of force? In this regard, Higgins interestingly maintains that:

What of the acts of certain western States, among the original coalition, who later patrolled no-fly zones, asserting such action to be “based on” the UN resolutions, which called for humanitarian support without in terms authorizing any such acts? *A fortiori* responsibility may be assumed to lie with the States concerned for any delicts, and not with the United Nations. But what are the implications, for the attribution of the responsibility, of the silence of the United Nations in the face of such action? Did the UN thereby take responsibility for what the States concerned said had anyway been implicitly authorized by it?<sup>82</sup>

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<sup>81</sup> See Parson, A., *From Cold War to Hot Peace: UN Interventions 1945-1995*, Penguin Books, 1995, pp.55-73.

<sup>82</sup> Higgins, R., *supra* note 79, p.446.

### **.6.3Iraq post 1991**

After the Gulf War, the United Kingdom, United States and France in the North and South of Iraq established safe havens in order to protect Kurd and Shiite refugees.<sup>83</sup> Indeed, by resolution 688, the Security Council condemned the repression of Iraqi civilians.<sup>84</sup> However, there are no solid grounds for this establishment, or the use of force to secure the no-fly zones, as the Security Council resolution 688 of April 1991 did not authorize Member States to do so. The justification for the actions of UK and USA was humanitarian necessity, on the basis of resolution 688.<sup>85</sup> The legality of the allied military intervention in Iraq to protect Kurdish refugees has been questioned by many authors.<sup>86</sup> Malanczuk, for example, raises the question of ‘whether the allied action can be justified as a case of humanitarian intervention’.<sup>87</sup> He concludes that ‘under international law armed intervention on humanitarian grounds in favour of (foreign) inhabitants of other states is legal only if the UN Security Council determines that gross violations of human rights committed by a state against its population, or a part of it, constitute a breach of the peace (or threat to the peace) within the meaning of Article 39 of the UN Charter and decides upon enforcement measures’.<sup>88</sup>

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<sup>83</sup> Katayanagi, Mari., *Human Rights Functions of United Nations Peace Keeping Operations*, the Hague: Kluwer Law International, Martinus Nijhoff Publisher, 2002, p. 246.

<sup>84</sup> In Resolution 688 of 5 April 1991 the Security Council “condemns the repression of the Iraqi civilian population in many parts of Iraq including most recently in Kurdish populated area, these consequences which threaten international peace and security in the region”. Actually, this resolution 688 did not authorize Member States to create a safe haven or no-fly zone over Iraq. UN.Doc . SC/RES/ 688 (1991).

<sup>85</sup> Katayanagi, Mari, *supra* note 83, p.247.

<sup>86</sup> See for example, Malanczuk, P., ‘The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War’, (1991) 2 EJIL 114-132; Gray,C., ‘From unity to polarization: international law and the use of force against Iraq’, (2002) EJIL1-19. Blokker, N., ‘Is the Authorization Authorized? Powers and Practice of the UN Security Council to authorize the use of force by “Coalitions of the able and willing”’, (2000) 11EJIL 541-568.

<sup>87</sup> Malanczuk, P., *supra* note 86, p.126.

<sup>88</sup> Malanczuk, P., *supra* note 86, p. 127.

Furthermore, the ambiguity of resolution 688 raised controversial issues with regard to the idea of implied authorization, and whether it might be possible to find a legal basis by using the notion of implied authorization.<sup>89</sup> Thus, Malanczuk has, persuasively, maintained that 'it is difficult to find a legal basis justifying the allied armed intervention in the Kurdish crisis'.<sup>90</sup>

Most recently, the doctrine of implied authorization was used extensively in the Operation Iraqi Freedom in March 2003.<sup>91</sup> It seems that the USA and the UK and Australia relied on Resolution 678 as having a continual effect. In this respect Gray maintains that:

Thus the coalition was not able to secure any new express Security Council authority to use force, but the USA, and the UK and Australia claimed that the sequence of Resolutions 678, 687 and 1441 in combination was enough to give Security Council authority under Chapter VII. This assumes that the authority to use 'all necessary means' in Resolution 678 continued and that it could be invoked unilaterally despite the cease-fire in Resolution 687. The main questions provoked by this line of argument are, first, how could Resolution 678 provide authority to use of force twelve years after it was originally passed and in very different circumstances? Resolution 678 was passed in response to the invasion of Kuwait by Iraq.<sup>92</sup>

In spite of the fact that the legality of this operation is considered highly controversial, the Security Council said nothing concerning such legality and

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<sup>89</sup> See footnote 86. Shaw maintains that 'whether resolution can indeed be so interpreted is unclear. What is clear that the such actions were not explicitly mandated by the UN'. Shaw, MN., *International Law*, Cambridge: University of Cambridge Press, Fifth edition, 2003, p.1137. Gray is of the view that 'this resolution was not passed under Chapter VII and did not authorize force to protect the Kurds and Shiits, Nevertheless, the USA, the UK, and France referred to this resolution in explanation of their action in intervening in Iraq to establish safe havens. The did not offer a full legal argument in justification of this action or the later establishment of no-fly zones over Iraq, first in the north, then in the south'. Gray, C., *International law and the use of force*, supra note 45, p. 264.

<sup>90</sup> Malanczuk, P., supra note 86 , p.131.

<sup>91</sup> This operation was led without an express Security Council authorization by USA, the UK and Australia to secure disarmament of Iraq of weapons of mass destruction . See Shaw, MN., supra note 80 ,pp.1087, 1138.

<sup>92</sup> Gray, C., supra note 42, p.277. the UK and the USA drafted a resolution in order for an authorization to use force against Iraq. However, ' the Security Council was divided on the need a follow-up to 1441 in order for force to be used' , Shaw, MN., supra note 89, p. 1138.

passed resolutions after the *Operation Iraq Freedom*.<sup>93</sup> In this respect, it seems that the Security Council's reaction warns of the danger of interpreting the doctrine of implied power so broadly as to weaken the role of the Security Council in maintaining international peace and security.

### **Concluding remarks**

In conclusion, this chapter has provided the legal points that may be raised as to the legal basis of delegation by the Security Council of its Chapter VII. It might be here submitted that although there is no clear legal basis under the UN Charter on the competence of the Security Council to delegate its Chapter VII powers, the principle of implied powers could be considered as a legal basis for such a competence. However, it must be asserted here that the implied powers doctrine would be a danger rather than a legal basis in the case of expanding powers under implied authorization. Moreover, justifying member states' illegal action by relying on such a doctrine, as an alternative of the failure of the Security Council to take a legal action, could threaten the Security Council role in maintaining international peace and security and the Security Council in terms of such a role might become trivial, and ultimately irrelevant.

The contemporary needs and the practice of member states in accepting acting without an implementation of Article 43 of the UN Charter led the Security Council to delegate its powers to some other entities. Although, there are constraints that must be fulfilled as preconditions for delegation flow from the general principle of law: *nemo dat quod non habet* and non-delegation doctrine,

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<sup>93</sup> Murphy, S.D., (ed), 'Contemporary Practice of United States relating to International Law', 97 (2003) AJIL 419.



many pragmatic problems may arise through delegation. Besides the fears of not acting in conformity with the conferred powers, one of the most important problems in terms of international responsibility is, perhaps, the overall control issue in the case of the delegation.

## **Chapter7: Responsibility in peacekeeping and enforcement operations.**

### **7.1 Responsibility of the United Nations for crimes committed by UN Forces**

The international responsibility of the United Nations for activities carried out by UN peacekeeping operations remains a source of concern. The risk that the peacekeeping forces commit crimes during their mission is a considerable, in that the issue of responsibility could easily arise. Also, the peace keeping forces are human in that they can commit crimes. In this Regards, the High Court explicitly held that:

*'The British Army can justifiably be proud of the operation it carried out in Kosovo. It helped to bring peace to a scarred and deeply divided community, and will have saved countless lives. It displayed professionalism and discipline of the highest quality. The soldiers on the ground had to carry out difficult and highly responsible tasks which required a combination of courage and sensitivity. In general, they discharged their duties with considerable credit. But soldiers are human; from time to time mistakes are inevitable, and even the most rigorous discipline will crack. In this case the fall from the Army's usual high standards led to tragic consequences for the victims and their families. The Queen's uniform is not a licence to commit wrongdoing, and it has never been suggested that it should be. The Army should be held accountable for such shortcomings, even where the victims are from the very community which has benefited so much from the Army's assistance. A proper system of justice requires no less'* [italic added].<sup>1</sup>

Initially, it must be ascertained whether there is any explicit legal basis for peacekeeping activities under UN Charter. Moreover, in order to determine responsibility for wrongful acts committed by these forces, the question of who

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<sup>1</sup> *Mohamet Bici and Skender Bic and Skender Bici v. Ministry of Defence*, [2004] EWHC 786 (QB) Case No: LS 290157 ,High Court Queen's Bench Division Leeds District Registry, judgement of 7<sup>th</sup> April 2004, available at : <http://www.bailii.org/ew/cases/EWHC/QB/2004/786.html>.

controls peacekeeping forces (the United Nations or its member States or regional arrangements) is highly important. Also, if responsibility is shared between the State and the United Nations, from whom might the injured party claim first, the United Nations or the State?

The issue of the establishment of UN peacekeeping force does not appear in express terms in the UN Charter.<sup>2</sup> Pogany maintained that ‘Resolutions, whether of the Security Council or the General Assembly, furnish the constitutional basis of UN peace-keeping’.<sup>3</sup> The ICJ in its Advisory Opinion in the *Certain Expenses case* found that Security Council has the implied power to establish UN peacekeeping forces.<sup>4</sup> The practice of the United Nations has developed peace keeping, and many peace-keeping operations have been carried out. The legality of such peacekeeping is as Gray maintains ‘no longer challenged by any state’.<sup>5</sup>

#### **7.1.1 Definition of peacekeeping and peace enforcement**

The Security Council has witnessed a new generation of peacekeeping operations. First and foremost, it is pertinent to mention that the mechanism of peacekeeping operations has changed since the end of the Cold War. Peacekeeping operations have evolved from the traditional principles of peace- keeping (consent of the parties, impartiality and use of force) to the third-generation peacekeeping which “envisages the use of military force beyond the principle of self- defence”.<sup>6</sup>

The third generation of peacekeeping operations extend from ‘low-level military operations to protect the delivery of humanitarian assistance to the enforcement of

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<sup>2</sup> Katayanagi, Mari., *Human Rights Functions of United Nations Peace-Keeping operations*, the Hague: Kluwer Law International, Martinus Nijhoff Publisher, 2002, p.28.

<sup>3</sup> Pogany, I., ‘the Evaluation of United Nations Peace-keeping Operations’, (1986) BYIL 357.

<sup>4</sup> The court stated that “ the implementation of its recommendations for setting up commissions or other bodies involves organisation activity”, ICJ Reports, 1962, p. 170.

<sup>5</sup> Gray, C., *International Law and the Use of Force*, Oxford University Press, Second edition, 2004, p.202.

<sup>6</sup> Katayanagi, Mari., supra note 2, p. 52.

cease-fires and, when necessary, assistance in the rebuilding of so-called failed states'<sup>7</sup>, also the significant character of this generation is 'the lack of consent by one or more of the parties to some or all of the UN mandate'.<sup>8</sup>

Through resolution 751 of 29 April 1992 the Security Council established a United Nations Operation in Somalia (UNOSOM) for humanitarian assistance. In resolution 794 of 3 December 1992 the Security Council authorized the Secretary-General to use "all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia" and called all Member States to provide military forces and other contributions.

Concepts of peacekeeping and peace enforcement are used for different occasions and events. However, there is no general agreement among scholars as to these terms.<sup>9</sup> To draw the line between the definitions of both concepts would be helpful.<sup>10</sup> An essential distinction should be drawn between peacekeeping and peace enforcement. The Blue Helmets define peacekeeping as:

An operation involving military personnel, but without enforcement powers, undertaken by the United Nations to help maintain or restore international peace and security in areas of conflict. These operations are

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<sup>7</sup> Doyle, M W., 'Discovering the limits and potential of peacekeeping', in Doyle, M w., and Otunnu, O A., (ed)s *Peacekeeping and peacemaking for the new century*, Rowman and Littlefield Publishers, INC, 1998, p.7.

<sup>8</sup> Ibid.

<sup>9</sup>Higgins stated that 'enforcement should remain clearly differentiated from peacekeeping. Peacekeeping mandate should not contain an enforcement function. To speak of the need for more "muscular peacekeeping" simply evidences that the wrong mandate has been chosen ab initio' . Higgins, R, 'Second Generation peacekeeping', (1995 ) ASIL Proceedings 279. Also, Dinstein maintains that 'a peacekeeping operation is completely different from an enforcement action. The two special attributes of a peacekeeping force are that (i) it is established and maintained with the consent of all the States concerned; and (ii) it is not authorized to take military action against any State'. Dinstein, Y., *War, Aggression and Self defence* , Cambridge University Press, Third edition, 2001, p. 266.

<sup>10</sup> White, N.D., *Keeping the peace: the United Nations and the maintenance of international peace and security*, Manchester University Press, 1993, p.187. See Sutterlin, James S., *the United Nations and the maintenance of international security: a challenge to be met*, Praeger Publishers, 1995.

voluntary and are based on consent and cooperation. While they involve the use of military personnel, they achieve their objectives not by force of arms, thus contrasting them with the 'enforcement action' of the United Nations under Article 42.<sup>11</sup>

In spite of the fact that a prominent feature of the third generation of peacekeeping is the authorization to take enforcement actions, the third generation still differs from enforcement action under Chapter VII of the UN Charter. However, it is correctly maintained that 'the divisions between observation, peacekeeping and enforcement action are unclear, as there are grey areas in which one function merges into another'.<sup>12</sup>

It is true that there is no definition of peace enforcement in the UN Charter, but it is also true to say that the use of force characterizes peace enforcement action. It is also worth noting that the evolution of peacekeeping has played a vital role in distinguishing between both terms. In order to develop a better understanding of these conceptions, the core of the mechanism of collective security system will be addressed.

#### **7.1.1.1. Peacekeeping and peace enforcement.**

The development of both of the above concepts may be traced back to the complexity of implementing a collective security system<sup>13</sup> as per the general spirit of the United Nations.<sup>14</sup> In particular, one of the avowed purposes of the United Nations is "to maintain international peace and security, and to that end: to take

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<sup>11</sup> United Nations, *the Blue Helmets, A review of United Nations Peacekeeping*, United Nations Publication, New York, Second edition, 1991, pp.4-5.

<sup>12</sup> White, N.D., *Keeping the peace: the United Nations and the maintenance of international peace and security*, supra note 10, p.187.

<sup>13</sup> Shaw. MN., *International Law*, Cambridge: University of Cambridge Press, Fifth edition, 2003, p.1107. Dinstein, Y., supra note 9, p. 266. See also, White, N.D., 'The UN Charter and Peace keeping Forces: Constitutional Issues', in Pugh, M., (ed) *the UN, Peace and Force*, Frank Cass and Company Ltd, 1997, pp43-63.

<sup>14</sup> White, N.D., *Keeping the peace: the United Nations and the maintenance of international peace and security*, supra note 10, pp.6-7.

effective collective measures for the prevention and removal of threats to the peace...”.<sup>15</sup> The elements of this system are based on Chapter VII of the UN Charter, provided for under Article 43- 47<sup>16</sup> of the UN Charter. The mechanism for achieving this collective security system is the result of a special agreement or agreements between the Security Council and contributing member States<sup>17</sup> as well as the establishment of a Military Staff Committee.<sup>18</sup> However, none of these has been structured and the core of collective security system is suspended.<sup>19</sup> Although the increase in peacekeeping and peace enforcement could be considered as an alternative to the failure in implementing the collective security system, the attitude of the members of the Security Council, especially the strongest one, has the effect of deciding on such operations.<sup>20</sup> This is particularly so because delegated authority and control have been conducted through UN operations.<sup>21</sup>

In accordance with the mechanism of the collective security system, such mechanism is clearly established with the UN Charter as follows:

#### **7.1.1.2. Special agreement or agreements**

Article 43 illustrated the framework of military operations carried out under Article 42.<sup>22</sup> Under Article 43 ‘all Members of the United Nations, in order to

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<sup>15</sup> Article 1 of the UN Charter.

<sup>16</sup> Paragraph 1 of Article 43 of the UN Charter.

<sup>17</sup> Article 43 of the UN Charter.

<sup>18</sup> Article 47 of the UN Charter .

<sup>19</sup> Rosenne, S., ‘General Course on Public International Law: the United Nations System’, Chapter XII in (2001) RCADI 446.

<sup>20</sup> Coicaud, J., ‘International democratic culture and its sources of legitimacy: the case of collective security and peacekeeping operations in the 1990s, in Coicaud, J, and Heiskanen, Veijor,(eds) *the legitimacy of International organisations*, United Nations University Press, 2001, pp 256-308.

<sup>21</sup> Ibid.

<sup>22</sup> It is worth noting that the enforcement actions are taken by the Security Council under Article 42. This article reads: “ Should the Security Council consider that measures provided for in article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or

contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements armed forces...necessary for the purpose of maintaining international peace and security'.<sup>23</sup> Such agreements have never been concluded, and the issue remains as to whether the absence of the agreements pursuant to Article 43 of the Charter does prevent the Security Council from taking action under Article 42. In this regards, different interpretations of Article 43 in terms of the possibility of the Security Council acting in the absence of agreements under Article 43 have taken place.<sup>24</sup> White, for example, maintains that 'it would appear acceptable for the Council to use the power granted to it in Article 42 without the mechanisms that were designed to make the imposition of military coercion a practical option'.<sup>25</sup> In its Advisory Opinion in the *Certain Expenses Case*, the ICJ made it clear that the absence of the agreements pursuant to Article 43 of the Charter did not prevent the Security Council from taking action under Article 42, where the ICJ stated that:

The Court cannot accept so limited a view of the powers of the Security

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land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations".

<sup>23</sup> Article 43 (1) of the UN Charter.

<sup>24</sup> Goodrich, Leland and Hambro, Edvard, *Charter of the United Nations: Commentary and Documents*, Third and revised Edition, Columbia University Press, 1969, pp. 319 and 630-631.

<sup>25</sup> White, supra note 10, p.117. Prominent legal scholars present a similar view: Kelsen maintains that "but the wording of Articles 39,42,47 and 48 does not exclude the possibility of a decision of the Security Council to the effect that members which have not concluded a special agreement under Article 43 shall take a definite enforcement action, or that members which have concluded special agreements shall provide armed forces... Article 42 refers to 'air, sea, or land forces' without providing that these forces must be armed forces placed at the disposal of the Security Council by the members. Kelsen, H., *the Law of the United Nations: A critical analysis of its fundamental problems*, 1950, p.756. Also, Professor Higgins asserts that "this writer remains of the view that, while compulsory participation in a United Nations enforcement or policing action is not possible in the absence of Article 43, the possibility does remain at the legal level at least-of enforcement action" Higgins, R., 'A General Assessment of United Nations peacekeeping', in Cassese, A., *United Nations peacekeeping : legal essays*, The Netherlands: Sijthoff and Noordhoff, 1972, pp3-4.

Council under the Charter. It cannot be said that the Charter has left the Security Council impotent in the face of an emergency when agreements under Article 43 have not been concluded.<sup>26</sup>

Therefore, one can conclude that it is not a prerequisite for the implementation of Chapter VII of the UN Charter that the agreements pursuant to Article 43 of the Charter should have been concluded.<sup>27</sup>

The issue of interpretation arises here, that is to say, interpreting the provisions of the Charter literally means that there is no legal way for the Security Council to carry out such actions and in effect, paralyze the core of the collective security system. However, the challenges faced by the Security Council led it to interpret the Charter flexibly. Indeed, its Advisory Opinion in the *Certain Expenses Case*, the ICJ asserted that:

From a formal standpoint, the constituent instruments of international organisations are multilateral treaties, to which the well-established rules of treaty interpretation apply... But the constituent instruments of international organisations are also treaties of particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and the same time institutional; the very nature of the organisation created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituents.<sup>28</sup>

This emphasises that political factors have influenced the work of the Security Council. A strict approach in interpretation would not help the Security Council to work effectively.

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<sup>26</sup> ICJ Reports, 1962, p. 167.

<sup>27</sup> For further discussions in the general view of jurist on this issue, see Schachter, O., 'United Nations Law in the Gulf Conflict', (1991) 85 AJIL 452-473.

<sup>28</sup> ICJ Reports, 1962, p.174.



### 7.1.1.3 The Military Staff Committee

As part of the machinery of the United Nations in terms of command and control of the military operations, carried out under Article 43, Articles 46 and 47, the issues of the command of forces and their strategic control are well organized. These provisions established the Military Staff Committee, consisting of ‘the chiefs of Staff of the permanent members of the Security Council or their representatives’,<sup>29</sup> in order to ‘advise and assist the Security Council’s military requirements for the maintenance of international peace and security’.<sup>30</sup>

By analogy with the previous discussion on the absence of the implementation of Article 43 of the Charter, the same argument could be raised.<sup>31</sup>

Due to the ‘lifeless letters’ of these Articles, Secretary General Boutros Boutros Gali addressed the idea of the “re-establishment of the Military Staff Committee, institutionalization of peacekeeping forces, creation of peace enforcement units, and an increased role of the International Court of Justice”.<sup>32</sup> However, the fact that consensus among the five permanent members has been achieved, has not helped this committee to be re-established as intended.

However, the use of force is unlikely to be applied to members of this Committee even if any of the five permanent members breaks the United Nations Charter, as the veto can suppress any of such a decision.<sup>33</sup> This is actually a consequence of

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<sup>29</sup> Article 47(2) of the UN Charter.

<sup>30</sup> Article 47(1) of the UN Charter.

<sup>31</sup> See supra pp182-184. In this regard White maintained that ‘it could be argued that the provisions of Articles 46 and 47(3) as well as Article 43 are simply formalities which if in operation would facilitate the use of the power contained in Article 42. They can be seen as just one method of allowing the Council to fulfil its collective role. Following from this it would be appear to be unnecessary to make these formalities a prerequisite to the use of military enforcement action by the Security Council’. White, N., *Keeping the Peace: the United Nations and the maintenance of international peace and security*, supra note 10, p. 103.

<sup>32</sup> Boutros-Gali, B., *An Agenda for peace: Preventive Diplomacy, Peacemaking and Peace keeping*, New York: United Nations, 1992, para 44.

<sup>33</sup> White, N., *Keeping the Peace: the United Nations and the maintenance of international peace and security*, supra note 10, pp 1-8. In this regard it is maintained that ‘the element of impartiality

the ‘embodiment of political agreement between the great powers in 1945’.<sup>34</sup>

## **7.2 Factors that undermine the efficiency of actions undertaken under the command of the Security Council in conformity with the scheme of the UN Charter**

No doubt it is true to say that the political culture that produced the United Nations in 1945<sup>35</sup> had a vital role in determining the effectiveness of this international organisation. This is not to say that legal obstacles have no effect in implementing the core of the collective security system and the ideology of the way that both USSA and United States are looking to the United Nations organisation.<sup>36</sup>

### **7.2.1 The end of the Cold War**

The main obstacle in establishing the Military Staff Committee and concluding a special agreement in conformity with Article 43, 46 and 46 is the conflict of interests, whether economic<sup>37</sup> or political, among member States, particularly five

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of United Nations sanctions is available in theory against the Big Five can never be decided upon, and therefore can never be implemented, because the Big Five have a veto over all the substantive decisions of the Council ( Article 27, paragraph 3). Politically, some of the Permanent Members have not hesitated to exercise their veto in killing resolutions that attempted to condemn their actions. The UK and France exercised their vetoes against resolutions that were critical of their attacks on Suez in 1956. on 13 September 1963, the UK cast veto to keep the Rhodesian situation out of UN vigilance. On 4 November 1956, the USSR vetoed a resolution critical of its action in Hungary’, Naidu, M V., *Collective Security and the United Nations: A definition of the UN Security System*, The Macmillan Press Ltd, 1974, pp. 47-48.

<sup>34</sup> Osman, M., ‘The United Nations and peace Enforcement: Wars, terrorism and democracy’, Ashgate Publishing Limited, 2002. p. 193.

<sup>35</sup> Osman, M., supra note 34, p.87.

<sup>36</sup> White, N., *Keeping the Peace: the United Nations and the maintenance of international peace and security*, supra note 10, p.25.

<sup>37</sup> An example that could be cited in this regard is the Gulf War as Iraq served American interests in the case of the protection of Western oil supplies. White, N., supra note 13, p.109. A further example of the influence of the conflict of interests that reflected the specific political character that mobilizes decisions of Security Council might that of the case of Bosnia as Shaw maintains ,in

permanent member States.<sup>38</sup> Disagreement between the representatives of the five permanent members in the discussion in 1947, as related to the implementation of Chapter VII enforcement measures<sup>39</sup>, was linked with the interests of five permanent powers.<sup>40</sup>

Not least, the Cold War era which “characterized by bipolar mistrust and competition”<sup>41</sup> has had a great effect on the fate of this committee. The bipolar era constituted a crisis in the collective security system as the effectiveness of such a system is closely linked with the consensus of the five permanent members in the Security Council and with the voting system itself.<sup>42</sup> The link between political and legal factors is of importance in enabling answers to be found regarding the failure to use such Articles. The Cold war era, as a political factor, has paralyzed the Security Council in handling the Command and control of military operations. This is not only because of a conflict of interests, but also the wide use of the

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this regard ‘ only a meaningful enforcement mandate could have given the UN a chance to put an end to the fighting. But that required a major political commitment and substantial resources that these states are rarely willing to provide unless their own vital national interests are at stake’, Shaw, MN., supra note 13, p.1142.

<sup>38</sup> As Rosenne maintains, ‘in extreme case the Security Council was able to act, or perhaps it would be more accurate to say that during the Cold War, where critical security situations arose in which the interests in the two sides coincided or coalesced, they would make use of the Security Council as the channel through which their common interests, not necessarily common aspirations, could find expression’. Rosenne, S, supra note 19. p 440. In addition, Rivlin maintains that ‘Both super-powers sought to exploit the world body in furthering their respective interests. The Soviet Union espoused the cause of the non-aligned Third World states as one way by which to undercut the United States, while the latter led in the efforts to advance UN efforts in the human rights field, as part of its counterattack. At times, both found the institutions of the UN to be convenient vehicles to help them step back from mutual confrontations, actual or potential, brought on by regional conflicts’. Rivlin, Benjamin, ‘Boutros Ghali’s Ordeal: leading the UN in age of uncertainty’ in Bourantonis, Bimitris, (ed) *A United Nations for the twenty- first century: peace, security and development*, Kluwer Law International, 1996,p.129.

<sup>39</sup> Security Council Official Records S/336., Second Year, Special Supplement, No.1, pp.1-32.

<sup>40</sup> In this regard, Bowett maintained that ‘ it is ,therefore, a trite but evidently true statement that further progress cannot really be made until this political distrust has been allayed’, Bowett, D.W., *United Nations Forces: A legal Study of United Nations Practice*, 1964, p.18.

<sup>41</sup> Murphy, Sean D., ‘The Security Council legitimacy, and the concept of collective Security after the Cold War’, (1994) 32*Columbia Journal of Transitional Law* 209.

<sup>42</sup>Article 27 of UN Charter.

veto, where such a command could be considered as a legal factor.<sup>43</sup>

The idea of re-establishing the Military Staff Committee has been suggested after the end of the Cold War. At the special Security Council Summit of Heads of States on 31 January 1992, France offered 1,000 troops to be available to the UN under the control of the Military Staff Committee.<sup>44</sup> However, it has been argued that the idea of a UN standing army could lead to confused command.<sup>45</sup> In addition, the Secretary-General submitted report with an agenda for peace to establish forces for rapid deployment but the Security Council turned down these suggestions.<sup>46</sup>

Accordingly, it seems that the attitude of some member states with regard to serving under UN command is exclusively linked with their interests. So that the USA President Clinton declared that "United States troops will participate in United Nations operations only if they serve under a United States chain of command".<sup>47</sup>

As the disuse of the collective security system has had an effect on the commanding military operations, the response of the Security Council is

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<sup>43</sup> The disagreement between the USSR and United States led the Security Council to act ineffectively during the Cold War era as the most usage of the veto was overwhelmed by the USSR, Gray, C., supra note 6, p.196. As before 1990s and over the first 45 years of the Security Council existence, the average of the Security Council resolutions was "less than eleven per year" as the Security Council passed 650 resolutions during this era'. Murphy, Sean D., supra note 43, p. 207. Looking simply at the numbers, and by contrast to the average of the Security Council resolution during Cold War, the Security Council passed 250 resolutions during 1990-1993 "an average of more than sixty per year" Murphy, Sean D., supra note 41, p.207.

<sup>44</sup> The special Security Council Summit of Heads of State on 31 January 1992, Security Council 3046 meeting, 47 UN S/PV 18(1992).

<sup>45</sup> Sheehy, Thomas P., 'A UN Army : unwise, unsafe, and unnecessary', August 16, 1993, as it is maintained that ' confused command. Another problem with a standing U.N army involves command structure. U.S troops in a U.N standing army eventually will find themselves at odds with a multinational command. Would resisting orders of a multinational command be insubordination, or merely consistent with the good order and discipline an American commander should display? To which flag would the American commander owe allegiance', available at: [http://www.heritage.org/Research/International Organizations/EM362.cfm](http://www.heritage.org/Research/International%20Organizations/EM362.cfm).

<sup>46</sup> Boutros-Gali, B, an Agenda for peace: Preventive Diplomacy, Peacemaking and Peace keeping, New York: United Nations, 1992. para-44.

<sup>47</sup> Houck, James., 'the Command and Control of United Nations Forces in the era of peace enforcement', Fall (1993) 4 *Duke Journal of Comparative and International Law* 2.

embodied by authorizing the use of force, peacekeeping operations, and peace enforcement.

### **7.3 The practice of command<sup>48</sup> and control<sup>49</sup>**

The obvious paradox in UN practice is that the responsibility for the strategic direction of armed forces and questions related to the command of such forces has never been entrusted to the Military Staff Committee. The aim of this section is to highlight various approaches adopted by the UN Security Council in controlling and commanding peace-keeping operations and peace enforcement actions.

#### **7.3.1 Command and control over UN peacekeeping<sup>50</sup>**

Unlike the scheme of the UN Charter in the issue of command and control powers over UN peace enforcement action, the Secretary General has identified three level in this respect: (a) Overall political direction, which belongs to the Security Council; (b) Executive direction and command, for which the SG is responsible; (c) Command in the field, which is entrusted by the SG to the chief of mission (special representative or force commander/chief military observer).<sup>51</sup>

##### **7.3.1.1 Models of Command and Control**

Throughout the practice of peacekeeping and peace enforcement, the Security

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<sup>48</sup> It is defined as 'the succession of commanding officers from a superior to a subordinate through which command is exercised. Also called command channel.' Available at: [Http://www.un.org/Depts/dpko/glossary/c.htm](http://www.un.org/Depts/dpko/glossary/c.htm).

<sup>49</sup> Command as a glossary means 'the authority that a commander in the military Service lawfully exercise over subordinates by virtue of rank assignment. Command includes the authority and responsibilities for effectively using available resources and for planning the employment of organizing, directing, coordinating, and controlling in military or other peace keeping force for the accomplishment of assigned mission...' also command and control defined as the exercise of command that is the process through which the activities of military forces are directed. Ibid.

<sup>50</sup> It is worth mentioning that the Security Council and the General Assembly have the power to establish peace keeping forces and the power of command and control usually is conferred on the Secretary General and the later delegates it to especial representative. See, Findlay, Trevor., *the use of force in UN peace operation*, Oxford University Press, 2002,p.11.

<sup>51</sup> Boutros-Gali, B., Supplement to An Agenda for peace, S/1995/1 , para.37.

Council has evolved models of command and control.<sup>52</sup> The Rules of Engagement for UN peacekeeping operation and SOFA determine command authority, as the UN Master List of rules of engagement contains five sets of rules: Use of force (Rule 1), Use of weapon Systems (Rule 2), Authority to carry weapons (Rule 3), Authority to Detain Search and Disarm (Rule 4) and Reaction to Civil Action/Unrest (Rule five), however, the issue of responsibility has not attracted much attention in these rules.<sup>53</sup>

In practice the models of command and control could be found, firstly, in the traditional peacekeeping operations as they have been controlled by the Secretary General.<sup>54</sup>

Another model of command and control is that of the United Task Force (UNITAF) in Somalia. UNITAF was known as Operation Restore Hope by the US military, as it was under United States command.<sup>55</sup> According to its mandate, UNITAF was to have unified command and control. UNITAF was to be commanded by 'Lieutenant-General Robert P. Johnston of the US Marine Corps, who would report direct to Commander-in-chief, CENTCOM, General Joseph P.

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<sup>52</sup> Houck, J., *supra* note 47, pp. 9-10. In this regard, Gray maintains 'for the first time the USA contributed troops to serve under UN command; this led to serious problems in securing unity of command'. Gray, *supra* note 5, p.170.

<sup>53</sup> The UN master list of numbered rule of engagement, May, 2002. Appendix 3 in Trevor's book, *supra* note 50. The rules of engagement could be defined as 'the means by which the authority and the chain of command ensures that those goals are met...the rules of engagement must ultimately be based on Security Council resolution'. Crabbe, R., 'Rules of Engagement', in Morrison, A., Fraser, D A (eds), *Peacekeeping with muscle: the use of force in international conflict resolution*, The Canadian Peacekeeping Press, 1997, p.123.

<sup>54</sup> Findlay, Trevor, *supra* note 50, p. 189. Notably, the peacekeeping mandates could be conferred with broad powers which reflected an 'unprecedented expansion of the UN's role in the protection of world order and in the promotion of basic human rights in countries torn until recently by costly civil wars. Self-determination and sovereignty were enhanced, and a modicum of peace and rehabilitation was introduced in Namibia, Cambodia, El Salvador, Haiti, and Mozambique', Doyle, M W., *supra* note, 7, p.7. See also, Whittaker, D J., *United Nations in action*, UCL Press Limited, 1995, pp. 215-225.

<sup>55</sup> Security Council Resolution 794 (1993).

Hoar, and thence through the US Department of Defence and Joint Chiefs of Staff to the president'.<sup>56</sup>

A further model of command might be the NATO model of command and control, considered as 'the best developed multinational command and control structure available'.<sup>57</sup> However, this multinational model could complicate the responsibility issues in terms of determining the responsible entity for crimes.

The wide scope of mandates of peacekeeping and peace enforcement has had the effect of raising issues of responsibility and shedding light upon gaps in these mandates that have to be filled.<sup>58</sup> The starting point in examining these issues is whether the command and control issue is addressed in the mandate, and whether there is a system for reviewing how the mandate is carried out.<sup>59</sup>

### **7.3.2 Command and control in non- enforcement situations**

The UN became involved in many operations to resolve a humanitarian crisis arising out of civil war conditions. The authorised uses of force in Somalia, Bosnia, Haiti and Rwanda will be examined in relation to command and control as the complexity of command and control has the effect of determining responsibility, to the extent that it seems difficult to determine which entity could be held responsible.

#### **7.3.2.1 Somalia**

On 23 January 1992, the Security Council passed resolution 733(1992) which

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<sup>56</sup> This chain of command quoted in Findlay, Trevor, *supra* note 52, p.169.

<sup>57</sup> Houck, J., *supra* note 47, p. 16.

<sup>58</sup> However, this section cannot deal with the details of all peacekeeping operations in different generation rather to highlight the issue of the command and control in some peacekeeping operations.

<sup>59</sup> In the Congo crisis, the Secretary General exercised control over ONUC and this clear from Regulation 11 of the ONUC Regulations as it runs as follows: 'Command authority: the Secretary General, under the authority of the Security Council and the General Assembly, has full command authority over the Force'. Secretary General ONUC regulations :ST/ SGB/ONUC/1,1 5 July 1963.

stated that ‘ it was gravely alarmed at the rapid deterioration of the situation in Somalia and the heavy loss of human life and widespread material damage resulting from the conflict in the country and aware of its consequences on the stability and peace in the region’.<sup>60</sup> In paragraph 2 of resolution 751(1992), the Council set up under its authority a peacekeeping force, the United Nations Operation in Somalia (UNOSOM) for the protection of humanitarian assistance operations.<sup>61</sup> The human tragedy caused by the conflict in Somalia led the Security Council to extend the UNOSOM mandate<sup>62</sup> and authorised the Secretary General and member states ‘to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia’.<sup>63</sup> By resolution 814 (1993), UNOSOM II was established and endowed with an enlarged mandate with enforcement powers under Chapter VII of the Charter.<sup>64</sup>

Through resolution 814, the Security Council conferred the power of command and control over the UN peacekeeping force in Somali (UNOSOM II) onto the Secretary General, as the resolution requested that the ‘Secretary General, through his Special Representative to direct the Force Commander of UNOSOM II to assume responsibility for the consolidation, expansion and maintenance of a secure environment throughout Somalia’.<sup>65</sup> The command was led exclusively by US forces<sup>66</sup> but the command of USA is questionable as the UNOSOM II mandate

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<sup>60</sup> Security Council Resolution 733 (1992), preamble.

<sup>61</sup> Security Council Resolution 751 (1992).

<sup>62</sup> The UNOSOM’s mandate was extended by resolution 767 (1992) to include four operational zones in Somalia.

<sup>63</sup> Security Council Resolution 794 (1992).

<sup>64</sup> Security Council Resolution 814 (1993).

<sup>65</sup> Security Council Resolution 814 (1993).

<sup>66</sup> There were multiple lines of control in this operation and the US forces led the chain of command, for details see, Bullok, Harold E., *Peace by Committee: Command and Control Issues in Multinational Peace Enforcement Operations*. Air University Press, Maxwell Air Force Base, Alabama, 1995, p.9.



did not authorize the external forces to carry out the enforcement action.<sup>67</sup>

#### **7.3.2.2 Bosnia**

Another approach that the Security Council used to confer command and control came under resolution 816 (1993), where NATO forces enforced a no-fly zone over Bosnia. The UNPROFOR (United Nations Protection Force) in Bosnia-Herzegovina was given the task to ensure the compliance with the arms embargo against Bosnia. Notably, a “ ‘dual key ‘ system was put into operation under which decisions on targeting and execution in the use of NATO airpower were to be taken jointly by UN and NATO commanders and the principle of proportionality of response to violations was affirmed”.<sup>68</sup> Through the Security Council resolution 1035(1995), UNPROFOR was replaced by IFOR (multinational implementation force) The command and control structure which was in place when the authority transferred to the multinational Implementation Force (IFOR) led to Operation Joint Endeavour, a ‘unique case in the history of peace operations’.<sup>69</sup>

#### **7.3.2.3 Haiti**

In resolution 45/2 (10 October 1990), the General Assembly established the United Nations Observer Group for the Verification of the Elections in Haiti. In December 1990, Jean-Bertrand Aristide was elected as President of Haiti.

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<sup>67</sup> It is maintained that ‘to the extent that these forces carried out enforcement action under the direction of the Secretary General Especial Representative , or unilaterally, both the Special Representative and UN member States were acting without a legal mandate’ Sarooshi , D., *The United Nations and the development of collective security: The delegation by the Security Council*, Oxford University, 2000, pp 41,191.

<sup>68</sup> Shaw, MN., *supra* note 13, p.1140.

<sup>69</sup> Layton, Richard L., ‘Command and Control Structure’. For details of operational command and operational control, command of air, maritime operations see [www.dodccrp.org/bosch03.htm](http://www.dodccrp.org/bosch03.htm).

However, the democratically elected government was overthrown. In response to this overthrow, the Organisation of American States (OAS) adopted sanctions against Haiti.<sup>70</sup>

The Security Council's involvement in Haiti started by resolution 841 (1993) as the Security Council acting under Chapter VII, imposed an arms and oil embargo on Haiti. By resolution 940 (1994) the Security Council authorised 'Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership...'.<sup>71</sup>

Notably, the power of command and control was delegated to the multinational force.

#### **7.3.2.4 Rwanda**

Following a civil war between the Hutu-dominated government forces and the Tutsi Rwandese Patriotic Front (RPF),<sup>72</sup> the Security Council established the 'United Nations Observer Mission Uganda- Rwanda' (UNOMUR),<sup>73</sup> which was deployed on the Ugandan side of the border in order to 'monitor the Uganda/Rwanda border to verify that no military assistance reaches Rwanda'.<sup>74</sup>

As the humanitarian crisis in Rwanda continued, the Security Council established a new peacekeeping operation integrated with UNOMUR<sup>75</sup> and expanded its mandate to include the establishment and maintenance of secure humanitarian

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<sup>70</sup> See Chapter 5.

<sup>71</sup> Security Council resolution 940 (1994), para.4.

<sup>72</sup> For Factual background, see Schweigman, D., *The Authority of the Security Council under Chapter VII of the UN Charter: legal limits and the role of the International Court of Justice*. Kluwer Law International, 2001, pp 125-130, Sarooshi, D., supra note 67., pp223-226.

<sup>73</sup> Security Council resolution 846 (1993), para. 2.

<sup>74</sup> Ibid., para. 3.

<sup>75</sup> The Security Council Resolution 872 (1993).

areas.<sup>76</sup> A multinational operation has been authorised by the Security Council for humanitarian purposes.<sup>77</sup>

It is worth mentioning that by resolution 929 (1994), the Security Council delegated the power of command and control over the operation to the member states undertaking the operation<sup>78</sup>. French forces carried out the operation known as ‘Operation Turquoise’.<sup>79</sup>

### **7.3.3 Command and Control in enforcement action**

The use of force in both Korea and Iraq is controversial in terms of its conformity to the relevant Articles of the Charter. Indeed, the question remains as to whether the use of force in both cases could be considered as enforcement action or a collective self-defence.<sup>80</sup> Military action in both cases will be examined in relation to command and control.

#### **7.3.3.1 Korea**

On 25 June 1950, North Korean forces invaded the territory of the Republic of Korea. The Security Council met at the United States request in order to make resolutions against the North Korean invasion. The Security Council adopted

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<sup>76</sup> The Security Council Resolution 918 (1994).

<sup>77</sup> Paragraph 2 of the Security Council resolution 929 (1994).

<sup>78</sup> Ibid.

<sup>79</sup> France initiated Operation Turquoise on 23 June 1994. for further details see Murphy, 240-260. See also, Sarooshi, *supra* note 67, pp. 223-226.

<sup>80</sup> In accordance with Korea, scholarly discussion has centred in two points: firstly, one of the controversial issues is the absence of the Soviet Union. As the Security Council made these resolutions during the absence of the USSR which was complained in the seating of Nationalist Chinese delegation Shaw, MN., *supra* note 16, p. 1134. In addition it is maintained that “For none of the three Korean resolutions meet the voting requirements for decisions” Stone, J., *Legal controls of international conflict- A Treatise on the dynamics of dispute*, Second impression, 1959, p. 232. Secondly, the argument has centred on the legal possibility to conduct an enforcement action without implantation of Article 43. See *supra* pp. 182-184.

three resolutions.<sup>81</sup> By Resolution 82, the Security Council ‘determined that the armed attack upon the Republic of Korea by forces from North Korea constitutes a breach of the peace’. On 27 June 1950, the Security Council recommended ‘that the Member of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area’.<sup>82</sup> By resolution 84, the Security Council recommended that ‘all Members providing military forces and other assistance pursuant to the aforesaid Security Council resolutions make such forces and other assistance available to a unified command under the United States’.<sup>83</sup>

### **Command and control on the ground of operation**

It seems clear that the United Nations subcontracted its enforcement actions to a single State member, the USA. In fact, there was no mention of command and control by the Security Council, and command was exclusively delegated to the United States. The mandate of Unified Command was very flexible. In this sense, political control and strategic direction were in the hands of USA.<sup>84</sup> On 8 July 1950, the United States designated General MacArthur<sup>85</sup> as ‘the commanding General of the military forces which the members of the United Nations place under the unified command of the United States pursuant to the United Nations’ assistance to the Republic of Korea in repelling the unprovoked armed attack

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<sup>81</sup> Security Council Resolutions 82 of 25 June (1950), 83 of 27 June (1950) and 84 of 7 July (1950)

<sup>82</sup> Security Council Resolution 83 (1950).

<sup>83</sup> Security Council Resolution 84 (1950).

<sup>84</sup> Higgins, R., *United Nations peacekeeping 1946-1967: Documents and commentary*. Asia vol 2, pp195- 196. Nkala, J., *The United Nations International Law and the Rhodesian independence crisis*, Oxford, Clarendon Press, 1985, p. 147.

<sup>85</sup> However, the command of UN action fell under three men as General MacArthur was dismissed on 11 April 1951, for details, see Higgins, *United Nations peacekeeping 1946-1967: Documents and commentary*, supra note 84, pp 202-203.

against it'.<sup>86</sup> As Higgins states 'the appointment of General MacArthur was, under paragraph 4 of resolution S/1588, within the prerogative of the United States and not subject to subsequent confirmation by any organ of the UN'.<sup>87</sup>

The relation between the United States and contributing States was established on the basis that the USA was acting on behalf of the UN Command as 'the executive agent of the United Nations Forces in Korea'.<sup>88</sup> As a result of this position, the USA concluded formal agreements<sup>89</sup> with some governments concerning participation of their forces for operations under the Commanding General of the Armed Forces in Korea.<sup>90</sup>

One of the distinguishing features of the enforcement action in Korea was that the flag of the United Nations was raised.

#### **7.3.3.2 Iraq**

After Iraq invaded Kuwait in August 1990, the Security Council determined the existence of a threat to international peace and Security under Article 39. By resolution 678, the Security Council authorized the following action:

'authorizes Member States co-operating with Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, ...to use all necessary means to uphold and implement resolution 660...

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<sup>86</sup> Sarooshi, D., *The United Nations and the development of collective security*, supra note 67, p.110. Higgins, R., *United Nations peacekeeping 1946-1967: Documents and commentary*, supra note 84, p.195.

<sup>87</sup> Higgins, *United Nations peacekeeping 1946-1967: Documents and commentary*, supra note 84 p.196.

<sup>88</sup> Higgins, *United Nations peacekeeping 1946-1967: Documents and commentary*, supra note 84, p 204. Sarooshi, D., supra note 67, p. 112.

<sup>89</sup> For example, Agreement between the US and Netherlands 177 UNTS 234, also with Belgium 233 UNTS 3 and with South Africa 177 UNTS 241. These agreements concerning the arrangements of furnishing materials and supplies for the United States. See, Higgins, R., *United Nations peacekeeping 1946-1967: Documents and commentary*, supra note 84, p. 205.

<sup>90</sup> It is worth mentioning that the contributing governments used term 'United Nations Command' as the parties involved in a UN action. Higgins R., supra note 84, p. 197.

It is debatable whether the use of force in the Gulf crisis was an enforcement action by the Security Council or collective self-defence.<sup>91</sup> However, the multinational force deployed in the Gulf provoked the issue of command and control.

### **Command and control on the ground of operation**

Unlike Korea, the Security Council did not confer command of the enforcement action to United States with regard to Iraq.

Another example of the command and control USA led coalition forces from Western and Arab States, as all neighbouring countries and Gulf States provided bases and supplies for allied forces.<sup>92</sup> Also, Syrian forces formed part of the allied forces.<sup>93</sup>

The Chain of command as it was established was as follows:

United States forces were commanded by President George Bush with the United States Central Command exercising command in the theatre. Islamic forces participated under Saudi operational Command. The dual chains of command were coordinated through a joint headquarters and operations centre where the United States and Saudi commanders, along with their staffs, worked closely to ensure a coordinated approach. Participating British and French units operated under the tactical control of both the Americans and Saudis.<sup>94</sup>

However, in spite of the chain mentioned above, practice tells us that the member States accepted 'overall US command and control through 'CENTCOM'.<sup>95</sup> It is

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<sup>91</sup>The argument has centered on the requirements of conducting enforcement action under Chapter VII of the UN Charter and whether Article 43 is considered as a prerequisite of this action in one side, on the other side whether the inherent right of self defence is needed to be authorized by the Security Council. See, Schatcher, O., *supra* note 27 ,pp 458-460. See Chapter 6, pp.170-172.

<sup>92</sup> UN doc S/2149, S/2150 1990 except Jordan and Iran. Cited in Osman, M., *supra* note 34, p.52.

<sup>93</sup> As is maintained 'although Syria did not host foreign forces, its own forces formed part of the allied forces which fight against Iraq. Therefore, Syria can only be considered as a 'host state'. Osman, M., *supra* note 34, p. 52.

<sup>94</sup> Houck, J., *supra* note 47, p 7.

<sup>95</sup> McCausland, J., *Coalition in the Desert. Peacemaking, Peacekeeping, and Coalition Warfare: The Future Role of the United Nations*, USA, Washington, DC: US Government Printing Office, 1994, p.219.

maintained that ‘the United States played a significant role in urging countries to earmark forces, though the participation of these contingents was rather symbolic and the US remained the major contributor with an incomparable presence in the Gulf’.<sup>96</sup>

Accordingly, the USA led the coalition in the Gulf crisis. In the Gulf crisis, there was no United Nations flag. Furthermore, Resolution 678 did not provide any role for the Security Council in command and control overall military operations. And the only sign of such a role is provided in ‘the States concerned ....keep the Security Council regularly informed on the progress of actions undertaken’.<sup>97</sup> In this respect, the Secretary General of the United Nations admitted that:

The Persian Gulf war was not a classical United Nations war in the sense that there is no United Nations control of the military operations, no United Nations flag, blue helmets, or any engagement of the Military Staff Committee...what we know about the war ...is what we hear from the three members of the Security Council which are involved Britain, France and the United States.<sup>98</sup>

In addition, non-permanent members Yemen and Cuba objected to the draft resolution, as they were of the view that there was no control by the Security Council.<sup>99</sup>

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<sup>96</sup> Osman, M., supra note 34, p 71.

<sup>97</sup> S/RES/678 (1990) .

<sup>98</sup> Meeting of 10, February, 1991. (S/PV. 2968)

<sup>99</sup> Mr. Al Ashutal, Yemen, objected to the draft resolution as “ the Security Council will have no control over those forces, which will fly their own national flags. Furthermore, the command of those forces will have nothing to do with the United Nations, although their actions will have been authorized by the Security Council. It is a classical example of authority without accountability’. Security Council, Meeting of 29 November 1990, do.S/PV.2963

## **7.4 Limitations on the command and control over UN peacekeeping and peace enforcement**

### **7.4.1 Acting in conformity with the resolutions adopted.**

It is noteworthy that member States are under an obligation to execute the powers delegated to them. In this sense, the objectives of the operations would be of considerable importance in determining responsibility issues, not least because the Security Council has to observe the obligations of such operations and act in conformity with the Charter.<sup>100</sup>

### **7.4.2 Reporting**

The relation between military command on the ground and the organ that has delegated such command can be verified by reporting to the Secretary General and the Security Council, as provided in the operation mandate. To allow the Security Council to be informed of the progress of action is highly significant.<sup>101</sup>

First and foremost, to leave the command and the control in the hands of States rather the UN means, *inter alia*, that the decision to conduct these operations will be exclusively restricted by the operational command in so far as reporting is essential to check compliance with the authorized powers.<sup>102</sup> In addition, the purpose of deciding such operation could be primarily violated. This kind of reporting could reserve the right to decide the effectiveness of enforcement action.<sup>103</sup>

However, the practice of UN authorized operations does not prove to a large extent that the Security Council remains informed of the process of the

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<sup>100</sup> Sarooshi, D., *supra* note 67, p.165.

<sup>101</sup> White N.D and Ulgen O., 'The Security Council and the decentralized military option: constitutionality and function', (1997) *Netherlands International Law Review* 410.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*



operation.<sup>104</sup> In the Second Gulf War, the Security Council was unable to follow the progress of enforcement action.<sup>105</sup> The Secretary General recognized this issue by declaring that ‘what we know about the war ...is what we hear from the three members of the Security Council which are involved Britain, France and the United States.’<sup>106</sup>

## **7.5 The responsibility of the United Nations for acts committed by member States**

The international responsibility of the UN could be maintained in the case where there is an element of imputability of such an act to the UN.<sup>107</sup> In other words, the UN would be responsible for unlawful acts committed under its control and command. Indeed, once the participating troops have been placed at the disposal of UN control, the UN can be held responsible,<sup>108</sup> insofar as the criterion governing this issue is that of command and control powers.<sup>109</sup> More pertinently, effective control would be significant criteria in deciding the entity responsible. However, it has been maintained that ‘the acts of forces authorized by the Council

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<sup>104</sup> However in some cases the reporting procedure was followed and the Security Council was in charge in the situation in Haiti and ALBA. White, *ibid*.

<sup>105</sup> Osman, M., *supra* note 34, p.78 as he maintained that ‘for different reasons the United States on the one hand, and the Soviet Union and France on the other hand, did not want the Council to convene to consider issues related the situation between Iraq and Kuwait 29 November 1990 and 15 January 1991...for the United States the most it needed from the Security Council at that stage was the authorization of the use of force...’.

<sup>106</sup> Security Council, Meeting of 10, February, 1991. (S/PV. 2968).

<sup>107</sup> Amrallah, B., ‘The international responsibility of the United Nations for activities carried out by U.N peacekeeping forces’, (1976) 32 *Revue Egyptienne De Droit International* 73.

<sup>108</sup> This view is also asserted by Austrian and British Courts, as two decisions in the responsibility for the UN forces rendered by them based on the ground of the control criterion. in the case of (N.K.v Austria), the Superior Provisional Court of Vienna concluded that ‘Starting from the premise that the order at issue in this case was given by the [U.N] Commander, albeit indirectly through national senior authority ...this court concurs with the view of the court of first instance that the Lance Corporal...was acting as an organ of the United Nations and of the Republic of Austria when caused the damage at issue’. *N.K. v Austria*, 77 *International Law Reports* p. 474. However, the House of Lords ruled in the Nissan case the responsibility of the British government for actions committed by British forces in Cyprus UNFICYP as concluded that ‘though national contingents were under the authority of the United Nations and subject to the instructions of the commander, the troops as members of the force remained in their national service. The British force continued, therefore, to be soldiers of Her Majesty’. *Attorney General v. Nissan*, *House of Lords (1969)* 1 *All England Law Reports* 646.

<sup>109</sup> *Ibid*.

are attributable to the UN, since the forces are acting under UN authority to establish an objective stated by the Council'.<sup>110</sup> Thus, the US rejected the complaints by the former USSR and the People's Republic of China against US government, as the US was an agent of the United Nations, and acted accordingly.<sup>111</sup> This claim is controversial for many reasons: first and foremost, it is documented under the Security Council resolution 84 (1950) in the case of Korea<sup>112</sup> that the Unified Command was exclusively from the United States and in the military field, the strategic and operational command was under the authority of the United States. Accordingly, the allegation that Unified Command established under the Security Council resolution and political control was in the hands of the Security Council contradicts the criterion of effective control in measuring the command and control powers. This criterion requires real and exclusive operational command.<sup>113</sup> Indeed, it has been maintained with some justification that:

whatever view one takes of the constitutionality or otherwise of a force established and operated by the United Nations...or of the capacity of the United Nations under general international law to conduct military operations, it is submitted that if the United Nations establishes a force and conducts military operations, and if genuine command and operational control are vested in the organisation...thus, the international representation, and responsibility for, the force must vest in the organisation.<sup>114</sup>

Secondly, the claim of overall control by the Security Council over operations contradicts the practice of the force authorized by the Security Council. To give an example, in the Gulf crisis, the United States had command and control over

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<sup>110</sup> Sarooshi, D., *supra* note 67, p.165.

<sup>111</sup> Annual Report of the Secretary General, 1950, UN Doc. S/1950-1, pp 30, 75-79.

<sup>112</sup> S/RES/ 84 (1950).

<sup>113</sup> Amrallah, B., *supra* note 109, p.65. Hirsch, Moshe., *The responsibility of International Organisations toward third parties: Some Basic Principles*, London, 1995, p. 64.

<sup>114</sup> Seyersted, F., 'United Nations Forces: some legal problems', (1961 )37 BYBIL 473-474.

coalition troops and the Security Council was kept away until the Iraqi withdrawal from Kuwait.<sup>115</sup>

In Korea and Iraq cases command and control powers were exclusively in the hands of the United States, though there was no major difference in that the established Unified Command and the flag of the UN did not change the command and control scheme in both operations.

Once the criterion for effective control has measured the degree of attribution of acts either to the organisation or to the contributing states, the responsibility would be applied to a single entity or to both entities, as in the case of joint responsibility.<sup>116</sup> Further to this, legal responsibility could concurrently be the responsibility of both of the UN and the contributing member States. However, the practice of this criterion differs from one operation to another, according to the degree of control exercised over the UN forces.<sup>117</sup> At any rate, an International Organisation could be held liable in the case that it failed to prevent the commission of unlawful act.<sup>118</sup>

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<sup>115</sup> See Chapter 6, pp.168-170.

<sup>116</sup> Hirsch, Moshe., supra note 113, p.67.

<sup>117</sup> Amarallah, B., supra note 107, p 66. Hirsch, Moshe., supra note 113, p.64.

<sup>118</sup> Sarooshi stated that ‘... where an international organisation possess a separate legal personality, then in the absence of an express provision in its constituent treaty to the contrary the international organisation always possesses constitutional control over its action-even in the case where a State is exercising *de facto* control over the organisation- such that the organisation could seek to prevent the commission of the unlawful act by issuing an order to override the instruction or other *de facto* control being exercised by the State. In such a case the failure by the organisation to exercise its constitutional control can be said to be an omission that engages a secondary responsibility of the organisation’. Sarooshi, supra note 67, p.66.

### 7.5.1 The practice of United Nations and States

Many instances of rape and sexual abuse of women have been reportedly committed by United Nations peacekeeping forces. Also, misconduct, corruption and other acts of violation have been committed by UN peacekeepers.<sup>119</sup> The General Assembly in its resolution 57/306 Paragraph 9: ‘recognized the shared responsibility, within their respective competencies, of United Nations organisations and agencies and troop-contributing countries to ensure that all personnel are held accountable for sexual exploitation and related offences committed while serving in humanitarian and peacekeeping operations’.<sup>120</sup> Also, the Secretary-General’s Bulletin determined special measures for protection from sexual exploitation and sexual abuse.<sup>121</sup> These measures are the included duties of Heads of Departments, Offices and Missions.<sup>122</sup>

The crimes committed by Somali peacekeeping operations UNOSOM<sup>123</sup> highlighted the necessity of having a set of rules governing peacekeeping operations, and at the same time, determining responsibility for such crimes.

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<sup>119</sup> It has been reported that Italian troops serving with the UN forces committed sexual abuse against Somalia girls, *The Guardian*, 19 February 1994. In addition, it is alleged that two Belgian peacekeepers in Somalia roasted a child over a fire and a “third forced another child to drink salt water and then eat worms and vomit”. In addition, in Somalia, many incidents have been reported in this sense. For instance, the Canadian soldiers in Somalia killed civilians. In Bosnia, three American police officers were removed from the Bosnian mission for sexual misconduct and exceeding their authority, *The Guardian*, 22 June 1997. Furthermore, in Bosnia, teenagers were ‘used for Sex by UN in Bosnia. Also, in Kosovo, a U.S soldier has been charged with murder, *ibid*.  
<sup>120</sup> A/RES/ 57/ 306 fifty- seventh session Agenda item 122 Resolution adopted by General Assembly Investigations into sexual exploitation of refugees by aid workers in West Africa 83<sup>rd</sup> plenary meeting 15 April 2003.

<sup>121</sup> The term ‘sexual exploitation’ means ‘any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another. Similarly, the term ‘sexual abuse’ means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions’. Special measures for protection from sexual exploitation and sexual abuse ST/SGB/2003/13, 9 October 2003 available at <http://ochaonline.un.org/DocView.asp?DocID=1083>.

<sup>122</sup> Special measures for protection from sexual exploitation and sexual abuse ST/SGB/2003/13 9 October 2003

<sup>123</sup> UNOSOM II was the first time in the history of peacekeeping operation of providing for the right to conduct enforcement action. Gray, C., *International Law and the use of force*, *supra* note

As to the practice of the UN, the UN accepted responsibility for wrongful acts committed by the peacekeeping operations during its military operation in areas of tension within the world, and has paid compensation. It is notable that the claims against the United Nations Force in Congo and Egypt were settled by the United Nations. As is stated, “although the United Nations Force under the resolutions is dispatched to the Congo at the request of the Government and will be present in the Congo with its consent, and although it may be considered as serving as an arm of the Government for the maintenance of order and protection of life...the Force is necessarily under the exclusive command of the United Nations, vested in the Secretary-General under the control of the Security Council”.<sup>124</sup>

It is worth mentioning that United Nations compensation is excluded in claims arising from ‘operational necessity’.<sup>125</sup> However one could question the criteria that might govern the ‘operational necessity’.

It is the case that the UN made certain agreements that determine the appropriate modes of settlement in accordance to Article 29 of the Convention of immunities and privileges provided that:

- a. dispute arising out of contracts or other disputes of a private law character to which the United Nations is a party;

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6, p.230.

<sup>124</sup> Security Council, Official Records 13/14 July 1960, Document S/ 4389, p. 18. However, this is not always the case, as the United Nations refused to hold responsibility in the case where effective control is not in its hands. An example could be cited in this regard is the refusal of the United Nations to assume responsibility in the case of damage caused to an aircraft employed by a contributing state in the operation in the Congo. ‘As an Ilyushin 14 aircraft of the United Arab Republic (U.A.R) was wrecked following a forced landing in bad weather conditions on 31 December 1960 in Lisala, Congo. The aircraft missions was to provide U.A.R’s contingent supplement national supplies’. The UN refused the responsibility on the ground that ‘ONUC had not advised in advance, ... and did not subsequently assume responsibility for the flight which, as indicated below was outside its authority and initiation from the outset’ cited in Hirsch .M., supra note 100, p.70.

<sup>125</sup> A/51/903 paragraph 14.

b. disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary General.<sup>126</sup>

Peacekeeping operations are conducted under agreements between the UN and States, and usually include the nature of these operations, and whether they are under the control of States or United Nations. Moreover, the settlement of claims against the force and its members are usually provided for.<sup>127</sup> Articles 51 and 53 of the Model Status of Forces Agreement (SOFA) provide a means to present claims.<sup>128</sup> The status of forces agreement between the United Nations<sup>129</sup> and the host governments has established the issue of accountability. The unique nature of the United Nations is vital in determining the applicability of the laws of war to the operations of International Organisations.<sup>130</sup> However, the Secretary General has set out fundamental principles and rules of international humanitarian law applicable to the United Nations forces while they conducting operations under

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<sup>126</sup> Article 29 of the Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15, 13 February 1946.

<sup>127</sup> Seyersted, F., 'United Nations Forces: some legal problems', *supra* note 114, p.420. As the U.N.E.F Regulation 15 provides the Secretary General 'shall make provisions for the settlement of claims arising with respect to the Force'. Cited in *Ibid*.

<sup>128</sup> A/45/594 of 9 October 1990.

<sup>129</sup> The UN organizes the conducting of peacekeeping by signing two kinds of agreement: a Status of Mission Agreement (SOMA) with the host country and the Troop Contribution Agreement (TCA). Washington Working Group on the International Criminal Court available at: <http://www.wfa.org/issues/wicc/unsc1422/UNSClaw.html>. Also, this picture has been seen in Kosovo, as a US soldier accused for raping and killing an 11-year old Kosovo girl. See <http://more.abcnews.go.com/sections/world/DailyNews/kosovo000412.html>.

<sup>130</sup> As to this, a special committee of the American Society of International Law underlined that "the use of force by the United Nations to restrain aggression is of a different nature from war making by a state...the United Nations should not feel bound by all the laws of war, but should select such of the laws of war as may seem to fit its purposes(e.g. prisoners of war, belligerent occupation)". Report of the Committee on study of Legal Problems of the United Nations, Should the laws of War Apply to United Nations Enforcement Action . Proceeding of the American Society of International Law of its forty- sixth annual meeting 1952 p 216.

United Nations command.<sup>131</sup> Moreover, the Geneva Conventions and humanitarian law are applied in peacekeeping operations.<sup>132</sup>

As a basis for tackling the question of who is responsible for actions taken by UN soldiers, the United Nations or member States,<sup>133</sup> a distinction between UN forces and a UN authorized force may be drawn.<sup>134</sup> This distinction is based on the recognition of who has control and command over the force.<sup>135</sup> To give an example, in the Korean War, the United States exercised operational command over the force and operational orders were taken from United States, and not from the United Nations.<sup>136</sup> At the same time, however, the United States rejected complaints by the former USSR on the ground that the “attacking planes were under the overall authority and control of the UN...and these should be submitted

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<sup>131</sup>As Section 1 of the UN Secretary-General's Bulletin on the observance by United Nations Forces International Humanitarian Law stated that ‘the fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to the United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence’, UN Secretary-General's Bulletin on the observance by United Nations Forces International Humanitarian Law (August 6, 1999) 38 I.L.M 1656(1999).ST/SGB/1999/13. Also, Article 7 of the SOFA with Rwanda provides that “without prejudice to the mandate of UNAMIR and its international Status: a. the United Nations shall assure that UNAMIR shall conduct its operations in Rwanda with full respect for principles and spirit of the general conventions applicable to conduct of military personnel. These international conventions include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the Event of Armed Conflict; b) The Government undertakes to treat at all times the military personnel of UNAMIR with full respect for the principles and spirit of the general international conventions applicable to the treatment of military Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977; UNAMIR and Government shall therefore ensure the members of their respective military personnel are fully acquainted with the principles and spirit of the above-mentioned international instruments”. Cited in Benvenuti, P., ‘The implementation of international Humanitarian Law in the framework of United Nations peace-keeping’, in *Law in Humanitarian crises : How can international humanitarian law be made effective in armed conflicts?*, Luxembourg: Office for Official Publications of the European Communities, 1991, vol. 1, pp 114-115.

<sup>132</sup> As the states have already under Article 1 of the 1949 Geneva Conventions an obligation to respect and ensure respect for international humanitarian law in all circumstances. ILA conference 2002, p. 12.

<sup>133</sup> Whether they are UN peacekeeper or peace-enforcer. Sarooshi, D., *The United Nations and the development of collective security*, supra note 67, p. 163.

<sup>134</sup> Ibid.

<sup>135</sup> As it is maintained that “ if it is the Council or a UN organ which exercises these powers then it is a UN force. If, however, it is a Member State or a regional organisation then it is a UN authorized force.” Ibid. ILA Report, 2002, p16.

<sup>136</sup> Seyersted, F., ‘United Nations Forces: some legal problems’, supra note 114, p 410.

to the United Nations whose agent the United States was”.<sup>137</sup> Although SOFA has determined the provisions of criminal jurisdiction and the responsibility of peacekeeping forces and the law that should impact on UN operations, as well as addressing issues like claims and custom duties, this agreement has not established a universal, effective accountability regime, as it is not used on a regular basis and depends on the consent of the sending and receiving States. The exemption of forces from domestic jurisdiction could be considered as a denial of justice, as well as not guaranteeing the responsibility of International Organisations for peacekeepers. For example, SOFA signed between East Timor and United States October 2002 “puts U.S soldiers above the law” as it exempted the United States Americans peacekeepers from the domestic jurisdiction as well as reaffirming impunity for U.S personnel from the International Criminal Court.<sup>138</sup>

Agreement between the UN and contributing States, status agreement with the host state and regulations issued by UN Secretary General are of considerable importance in viewing in practice the issue of responsibility. Under Article 29 of the 1946 Convention on the Privileges and Immunities of the United Nations, the United Nations is obliged to ‘make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party’.<sup>139</sup> Also, the model status of forces agreement (SOFA) provides in paragraph 51 that:

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<sup>137</sup> Sarooshi, D., *The United Nations and the development of collective security*, supra note 67, pp. 164-165. Hirsh, Moshe, M., supra note 113, p.68.

<sup>138</sup> Scheiner, Charels, ‘East Timor puts U.S soldiers above the law,’ 12 November 2002, <http://www.etan.org/news/2002a/11sofa.htm>.

<sup>139</sup> Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15, 13 February 1946., 260 UNTS 61.



‘except as provided in paragraph 53, any dispute or claim of a private law character to which the United Nations peace-keeping operation or any member thereof is a party and over which the courts of (host country/territory) do not have jurisdiction because of any provision of the present agreement. Shall be settled by a standing claims commission to be established for that purpose’.<sup>140</sup>

However, the standing claims commission has not been established due, perhaps, to the ‘lack of political interest on the part of host states, or because the procedure of local claims review boards has been considered as expeditious, impartial and generally satisfactory’.<sup>141</sup>

The determination of the degree of effective control of peacekeeping forces is a crucial issue, though it differs in every single case, and it requires a separate remedial mechanism.<sup>142</sup>

#### **7.5.1.1 The Case of the Congo**

The most obvious case in measuring the degree of effective command is the peacekeeping operation in the Congo. Article 11 of the regulations for the United Nations Force in the Congo runs as follows:

Command authority: the Secretary General. Under the authority of the Security Council and the General Assembly, has full command authority over the force. the Commander is operational responsible to the Secretary General through the officer-in-Charge for the performance of all functions assigned to the force by the United Nations, and for the deployment and assignment of troops placed at the disposal of the force.<sup>143</sup>

The claims against the UN in accordance with the acts carried out by participating States in the U.N operations, in the Congo were accepted by UN as

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<sup>140</sup> A/45/594 Paragraph 51 . Also, the same provision is provided in paragraph 48 in UNTS of the Status of force concerning Bosna and United Nations May1993

<sup>141</sup> Wellens, Karel., *Remedies against International Organisation*, Cambridge University Press, 2002, p.103.

<sup>142</sup> Wellens, Karel., *supra* note 141, p53.

<sup>143</sup> Secretary General ONUC regulations :ST/ SGB/ONUC/1,1 5 July 1963.

the party responsible for these actions, but the UN accepted responsibility for ‘all damages which were not justified by any military necessity such as destruction without necessity , pillage, murder, executing persons...’.<sup>144</sup> The Secretary General, Spaak and U-Thant declared that ‘ it has stated that it would not evade responsibility where it was established that the United Nations agents had in fact caused UN justifiable damage to innocent parties’.<sup>145</sup> Furthermore, the considerations of equity and humanity could be grounds for establishing UN responsibility.<sup>146</sup>

U-Thant, the Secretary General in his letter addressed to the Soviet representative to the UN, determined the responsibility for activities carried out by UN peace-keeping force as follows:

it has always been the policy of the United Nations, acting through the Secretary -General, to compensate individuals who have suffered damages for which the Organisation was legally liable. This policy is in keeping with generally recognized legal principles and the convention on Privileges and Immunities of the United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore’.<sup>147</sup>

Moreover, in the Congo operation, the Secretary General signed agreements between the United Nations and claimant states which pointed out the general principles that govern the scope of the United Nations responsibility for activities committed by ONUC personnel.<sup>148</sup>

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<sup>144</sup> Amarallah, B., supra note 107, p.72.

<sup>145</sup> 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, 1965,535 U.N.T.S.191.

<sup>146</sup> Letter dated 6 August 1965 from the Secretary General addressed to the Acting Permanent Representative of the Union of Soviet Socialist Republic

<sup>147</sup> Ibid.

<sup>148</sup> The Government of Belgium, Greece, Luxembourg and Switzerland claims against UN so that the UN signed series of the agreements between them and the UN. Switzerland 3 January 1966,

More recently, allegations of sexual misconduct by peacekeepers in the Democratic Republic of the Congo (DRC)<sup>149</sup> came to light as is maintained that ‘the sexual abuse Investigations have already turned up 150 allegations of sexual misconduct by peacekeepers and UN staff despite the UN’s official policy of “zero-tolerance”. One found 68 allegations of misconduct in the town of Bunia alone’.<sup>150</sup> Also Secretary-General Kofi Annan acknowledged that:

United Nations peacekeeping personnel in the Democratic Republic of the Congo (DRC) - both civilian and military - committed sexual exploitation and abuse, and vowed to put an end to such practices and hold the perpetrators responsible. Many of the allegations came to light last spring, and were looked into both by the UN Organisation Mission in the DRC (MONUC) itself and by the UN's own internal watchdog, the Office of Internal Oversight Services (OIOS).<sup>151</sup>

As a response to such misbehaviours, the Secretary-General requested a comprehensive report on sexual exploitation occurring in the peacekeeping missions in DRC. prepared by Prince Zeid Ra'ad Zeid Al-Hussein, Permanent Representative of Jordan prepared such a report and described the background of the problem of sexual exploitation and abuse in peacekeeping operations.<sup>152</sup> The

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564 U.N.T.S 193; Greece, 20 February 1966. 565.U.N.T.S. 3; Luxemborg, 28 December 1966, 585 U.N.T.S 147; Italy, 18 January 1967, 588 U.N.T.S 197. In the Exchange of letters constituting an agreement between the United Nations and Belgians relating to the settlement of claims filed against the United Nations in the Congo by Belgian Nationals, U-Thant Secretary General maintained that ‘ consultations have taken place with the Belgian Government. The examination of the claims having now been completed, the Secretary General shall without prejudice to the privileges and immunities enjoyed by the United Nations, pay to the Belgian Government one million five hundred thousand United States dollars in lump –sum and final settlement of all claims arising from the cases mentioned in the first paragraph of this letter’. 1965,535 U.N.T.S.191.

<sup>149</sup> Since it was set up in November 1999, MONUC has been expanded to a troop strength of 16,700, the largest single U.N. peacekeeping operation today. See resolutions 1258(1999),1468 (2003).

<sup>150</sup> Jonathan Clayton and James Bone, ‘Sex scandal in Congo threatens to engulf UN's peacekeepers’, December 23, 2004 available at: <http://www.timesonline.co.uk/article/0,,3-1413501,00.html>

<sup>151</sup> Annan vows to end sex abuse committed by UN mission staff in DR of Congo 19 November 2004, available at

<http://www.un.org/apps/news/story.asp?NewsID=12590&Cr=democratic&Cr1=congo>

<sup>152</sup> A/59/710 Letter dated 2005/03/24 from the Secretary-General to the President of the General

report makes a number of substantial recommendations including the uniform and binding standards and rules against sexual exploitation and abuse for all categories of peacekeeping personnel which would be accessible to all peacekeepers personnel<sup>153</sup>; the provision of a professional investigative mechanism to investigate allegations of 'sexual exploitation and abuse and misconduct of similar grave nature against all categories of peacekeeping personnel. The investigation body must be staffed by experts who have had experience in sex crime investigations'<sup>154</sup> Also the report recommended organisational, managerial and command measures to address sexual exploitation and abuse in that the 'organisation must require its managers to lead by example and ensure that training programmes for all categories for all categories personnel are instituted prior to deployment and during the mission assignment', and the 'Organisation must institute a programme of outreach of local community and enable alleged victims to make complaints.'<sup>155</sup>; and strengthening of individual accountability through the disciplinary process, as well as financial and criminal accountability.<sup>156</sup> This report could be considered as a first step to resolve the problem of sexual exploitation and abuse by United Nations peacekeeping personnel.

It is worth noting that a Special Committee on peacekeeping Operations begins review of report on sexual exploitation in order to submit its finding to the Fifth Committee (Administrative and Budgetary) before the end of May 2005.<sup>157</sup>

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Assembly [New York] : UN, 24 Mar. 2005 fifty-ninth session Agenda item 77. Comprehensive review of the whole question of peacekeeping operations in all their aspects'.

<sup>153</sup> A/59/710 p.13 paragraphs 23-26.

<sup>154</sup> A/59/710 p. 17 paragraph.36.

<sup>155</sup> A/59/710 p. 23 paragraphs 62-65.

<sup>156</sup> A/59/710 , pp 30-. 31 par 91-93.

<sup>157</sup> Special Committee on peacekeeping Operations begins review of report on sexual exploitation GA/PK/186, 5 April 2005 available at:

### 7.5.1.2 The case of Korea

As has been mentioned previously, command and control during military operations in Korea were accorded to the United States through unified command. In this sense, there was no legal possibility of attributing illegal acts to the United Nations. Thus, effective control was applied and the United Nations never accepted legal responsibility for actions committed by the unified command.<sup>158</sup> By reviewing the agreements conducted between United States as the 'executive agent of the United Nations Forces in Korea'<sup>159</sup> with the contributing states, there was no provision to deal with the determination of the responsibility. However, some provisions dealt with the settlement of claims. Article 4 of the Agreement between the US and the Netherlands concerning participation of Netherlands Forces, 18 May 1952 provided that:

Each of the parties to this agreement agrees not to assert any claim against the other party for injury or death of members of its armed forces or for loss, damage, or destruction of its property or property of members of its armed forces caused in Korea by members of the armed forces of the other party. Claims of any other Government or its nationals against the Government or nationals of the Government of the Netherlands or vice versa shall be a matter for disposition between the Government of the Netherlands and such third government or its nationals'.<sup>160</sup>

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<http://www.unis.unvienna.org/unis/pressrels/2005/gapk186.html>

<sup>158</sup> Hirsch, Moshe., *supra* note 113, p. 69. Seyersted, F., 'United Nations Forces: some legal problems', *supra* note 114, p. 422. Amarallah, B., *supra* note 107, pp 66-67.

<sup>159</sup> Higgins, R., *supra* note 84, p. 204.

<sup>160</sup> 177 UNTS 234. It is worth mentioning that the same provision is found in the agreement between the United States and the Belgium, 233 UNTS 3 and in the agreement between the United States and the Federal Republic of Germany concerning assistance to be rendered by a German Red Cross Hospital in Korea, 12 Feb., 1954, 223 UNTS. Article 4. Article III of the agreement between the United States and Korea on 18 December 1958 provided that: '1-The Republic of Korea forever releases and agrees to hold harmless the United States of America, in its capacity as the Unified Command and on its own behalf, and the governments of those nations furnishing military forces or field hospitals to the Unified Command, and their nationals, from any and all claims arising from the rendition of utilities services in Korea, incident to the action to repel aggression in Korea, during the period from 25 June 1950 to and including 30 September 1955, against the Unified Command, the governments of those nations furnishing military forces or field hospitals to the Unified Command, or their nationals, by the Republic of Korea, or other persons owing property, rendering services, or residing in Korea. 2- the United States of America, in its capacity as the Unified Command and on its own behalf,

### 7.5.1.3 Recent practice

The recent practice of the United Nations and its member States with regard to cases brought against it concerning UN responsibility for actions taken by UN soldiers, whether they be peacekeepers or peace enforces, seems to be rare. However, the complexity of the structure of peacekeeping as well as the parties involved in peacekeeping operation 'are likely to continue to give rise to a large number of claims'.<sup>161</sup>

Bosnia is a case in point, where a claim was submitted by Bosnia and Herzegovina against United Nations liability.<sup>162</sup>

Another example has arisen between the government of Bosnia and Government of Netherlands concerning the responsibility of Dutch troops<sup>163</sup> on the ground, namely that the Dutch troops failed to prevent the Srebrenica massacre, where approximately 7,500 Muslims were slaughtered by Bosnian Serb troops in the safe

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and the governments of those nations furnishing military forces or field hospitals to the Unified Command forever release and agree to hold harmless the Republic of Korea and its nationals from any and all claims arising from the rendition of utilities services in Korea, incident to the action to repel aggression in Korea, during the period 25 June 1955 to and including 30 September 1955 against the Republic of Korea, or its nationals by the United States of America, in its capacity as the Unified Command and on its own behalf or the governments of those nations furnishing military forces or field hospitals to the Unified Command, and their nationals.

3- the United States of America, in its capacity as the Unified Command and on its own behalf, and the governments of those nations furnishing military forces or field hospitals to the Unified Command, and the Republic of Korea agree to the settlement of all claims and counterclaims arising from the rendition of utilities services in Korea for the period 1 October 1955 to and including 30 June 1957 by payment of \$7,250,000 which will be made by the respective responsible governments to the Republic of Korea. The obligation to reimburse the Republic of Korea will be the responsibility of the respective responsible governments, who will settle on terms and in currencies to be regarded upon.' 325 UNTS 240. See also, *ibid*.

<sup>161</sup> Wellens, K., *supra* note 141, p.162.

<sup>162</sup> As cited in D. Shrager this claim in the amount of \$70 million of which \$64 million was for damage caused in the normal roads, bridges, and parking places by UN vehicles. In receiving notice of the claim, the Advisory Committee on Administrative and Budgetary Questions noted: "this sort of information is, in the view of the Committee, compelling evidence of the need for the United Nations to develop, as quickly as possible, effective measures which could limit its liability", D. Shrager., 'UN peacekeeping operations: Applicability of international humanitarian law and responsibility for operations-related Damage', (2000) 94 AJIL 410.

<sup>163</sup> As Dutch Prime Minister Wim Kok admitted responsibility of the Netherlands as he maintained that 'we as the government of the Netherlands, as part of the international community, feel responsibility to be present and active as far as Srebrenica is concerned', available at: <http://www.islamonline.net/english/News/2002-06/13/article42.shtml>.

haven which was protected by Dutch U.N troops.<sup>164</sup> In this case, the question has arisen as to whether the UN was complicit in genocide at Srebrenica.<sup>165</sup> In answering this question, Robertson<sup>166</sup> has acknowledged that the ‘orders not to bomb and it is still not clear exactly who was responsible for these, although French General Janvier and the Dutch Government remain prime suspects and the rule of silence imposed by the UN and Dutch government on those involved, constitute evidence that the UN was complicit’.<sup>167</sup> Accordingly, a claim for compensation could arise against the UN.

Furthermore, Bosnia and Herzegovina stated on 24 November 1993 their intention to establish legal proceeding against the United Kingdom for violation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.<sup>168</sup> However, as Wellens maintains, ‘the intention was never carried out’.<sup>169</sup>

Another example of a claim for compensation against the contributing states is that the case brought in the Canadian courts against Canada by the family of a Somali allegedly beaten to death by Canadian troops during the UN operation in Somalia.<sup>170</sup> On the other hand, States might also accept responsibility for crimes

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<sup>164</sup> Srebrenica and five other Bosnian towns were designated by the UN in May 1994 as ‘safe havens’ and put under United Nations Protection Force (UNPROFOR) .

<sup>165</sup> Robertson, G., ‘UN complicity in Bosnia : who shall forget Srebrenica?’ Organized by the City Circle in association with the women of Srebrenica at the London School of Economics, Friday 20 July 2001. [Http://dSPACE.dail.pipex.com/srebrenica.justice/Roberston.htm](http://dSPACE.dail.pipex.com/srebrenica.justice/Roberston.htm).

<sup>166</sup> Robertson, G., ‘Crimes against Humanity, the struggle for global Justice’ Organized by the City Circle in association with the women of Srebrenica at the London School of Economics, Friday 20 July 2001. [Http://dSPACE.dail.pipex.com/srebrenica.justice/Roberston.htm](http://dSPACE.dail.pipex.com/srebrenica.justice/Roberston.htm).

<sup>167</sup> Ibid.

<sup>168</sup> A/48/659 cited in Wellens, K., *supra* note 141, p. 53.

<sup>169</sup> Wellens, K., *supra* note 141, p 53., ‘On 16 March 1994 the Federal Republic of Yugoslavia presented an application against the member states of NATO for having breached Articles 2(4) and 53(1) of the UN Charter, basing the Court’s jurisdiction on Article 38(5) of the Rules of the Court. The application was not entered in the Court’s General List’. Cited in Wellens, K. *supra* note 141, p.53.

<sup>170</sup> *Abukar Arone Rage and Dahabo Omar Samow by their Litigation Guardian Abdullahi Godah Barrre V. The Attorney General of Canada*, (unreported, 6 July 1999, Ontario Superior Court of Justice, Cunningham) cited in Chanaka Wickremasinghe and others., ‘Responsibility and liability

committed by its peacekeeping troops. Canada admitted responsibility and paid 15,000 dollars to three Somali families as a compensation for injuries that the Canadian troops perpetrated.<sup>171</sup>

The issue of joint liability was raised in case of Yugoslavia and such issue is likely to arise again.<sup>172</sup>

More recently, Mohamet Bici and Skender Bici (Claimants) won their claims against the British Ministry Of Defence (Defendants).<sup>173</sup> In this regard, the High Court stated that:

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for violations of human rights in the course of an field operation', in Scott, Craig, (ed), in *Torture as Tort: Comparative Perspective on the development of Transnational Human Rights Litigation*, Oxford-Portland Oregon: Hart Publishing, 2001, p.474.

<sup>171</sup> As on 26 April 1993, the Minister of National Defence ordered a military board of inquiry as 'some soldiers were also court-martialled for their actions in Somalia. According to the report of the Commission, during the deployment of Canadian troops, events transpired in Somalia that included the shooting of Somali intruders at the Canadian compound in Betet Huen, the beating to death by two Canadian commandos of 16-year-old Somali Shidane Arone, who was caught sneaking into the compound, and an apparent suicide attempt by one of the commandos. In addition, videotapes of "repugnant hazing activities" was also uncovered. The Canadian military also paid the family of Mr. Arone compensation of \$15,000, which is the equivalent of 100 camels'. Report of the Special Rapporteur, Ms. Mona Rishmawi, submitted in accordance with Commission on Human Rights resolution 1997/47, Question of the violation of human rights and fundamental freedoms in any part of the world, with particular reference to colonial and other dependent countries and territories, commission on human rights fifty-fourth session. E/CN.4/1998/9616 January 1998.

<sup>172</sup> The case of *Yugoslavia v. Canada* 1999, *Request for Interim Measures*. .

<sup>173</sup> The background of this incident was as follows 'At about midnight on July 2<sup>nd</sup> 1999, three British soldiers involved in a United Nations peacekeeping operation in Kosovo shot and killed two men, Fahri Bici and Avni Dundi, and injured another two. The men, all Kosovar Albanians, were travelling together in a car in the city of Pristina. The shooting took place near a building known as Building 42. The first claimant in this action, Mohamet Bici, was injured by a bullet which struck him in the face. It entered his mouth and exited the lower left side of his jaw. Apart from the not inconsiderable pain, it has also caused longer term problems with eating and speaking. The second claimant, his cousin Skender Bici, did not suffer any direct physical injury but alleges that he has suffered psychiatric illness as a consequence of being in the car, both as a result of being put in personal fear, and from witnessing the incident. Both claimants sue for damages both in negligence and trespass. The soldiers say that they were acting in self-defence being in fear of their own lives. As in June 1999 Kosovo was liberated from Serb occupation by international forces acting under the authority of the United Nations. The 1<sup>st</sup> Battalion Parachute Regiment was part of that UN mandated multinational force. The battalion had entered Kosovo from Macedonia on 12th June 1999 and it reached the provincial capital of Pristina on the following day. Its objective was to ensure that Pristina was a secure environment. This involved controlling the withdrawal of the Yugoslav National Army, the Interior Military Police and other forces from Pristina. That withdrawal was to take effect in accordance with the military technical agreement that had been entered into between NATO and the Serbian Government in Belgrade. Prior to that agreement being reached, there was a real risk that the forces would have had to take the province by force.' Quoted from the judgement of 7<sup>th</sup> April 2004, *supra* note 1.



‘In my judgment the claimants succeed in establishing that the defendant is liable to them in negligence and also, in the case of Mohamet Bici, in trespass to the person. The amount of damages will have to be assessed at a separate hearing’.<sup>174</sup>

Most importantly, this judgment could signal how widespread the problem of the misconduct of UN peacekeeping missions is. Moreover, the High Court judgment considered the damages by peacekeeping forces and this would be of significance in dealing with the issue of the responsibility of peacekeeping troops. In this respect it is maintained that ‘the April 7 judgment was the first successful high court damages claim won by civilians injured by UK peacekeeping forces in services abroad’.<sup>175</sup> However, in the counter argument, the shadow defence secretary, Nicholas Soames, said: "Whilst recognising that this case is going to appeal, many fair-minded people will consider this a bad judgment and one that will make life extremely difficult for our troops who have to work in some of the most dangerous of situations".<sup>176</sup>

The British Ministry of Defence may face second legal action relating to the same incident.<sup>177</sup>

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<sup>174</sup> Mohamet Bici and Skender Bic and Skender Bici v. Ministry of Defence, *supra* note 1.

<sup>175</sup> Fatos Bytyci and Jeta Xharra BCR No 492, 16-Aprile-04. Balkan Crises Report Kosovo: UK may face second legal action Institute for war and peace reporting available at: [http://www.iwpr.net/index.pl?archive/bcr3/bcr3\\_200404\\_492\\_2\\_eng.txt](http://www.iwpr.net/index.pl?archive/bcr3/bcr3_200404_492_2_eng.txt).

<sup>176</sup> Quoted in Clare Dyer and Richard Norton-Taylor Kosovans fired on by British peacekeepers win damages Thursday April 8, 2004 the Guardian available at: <http://www.bailii.org/ew/cases/EWHC/QB/2004/786.html>

<sup>177</sup> Fatos Bytyci and Jeta Xharra, *supra* note 175.

## **7.6 The effect and consequences of the international responsibility of the Security Council**

Having established that both the Security Council, through the UN, and the member states could be responsible for illegal actions, the most striking point is the remedies that available for redressing. However, there is no adequate remedy to invoke international responsibility. As is rightly maintained ‘the question of judicial remedies had generally been regarded as peripheral to the main study of international law; attention had been centred on the substantive rules with little consideration given to the consequences of their violation in general or judicial remedies in particular’.<sup>178</sup>

As has already stated, if there is a violation of duties under international law, or any element of international responsibility for International Organisations, a remedial outcome should be taken into consideration, as an accountability regime could not be envisaged without specific remedial effects being implemented.<sup>179</sup> As “an alternative to annulment”<sup>180</sup>, compensation may be used as a pecuniary remedial outcome in order to recover damages, as well as to provide an additional remedy for additional damage. Furthermore, where restitution as a natural redress is deemed impossible, compensation may also be awarded. However, it is clear that the ICJ does not determine the actual amount of compensation. Rather, this is ascertained in accordance with the rules of international law<sup>181</sup>, particularly in view of the difficulty of deducing a standard principle to determine the amount of compensation that covers the damages, whether material or

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<sup>178</sup> Gray, C., *Remedies in International Law*, Oxford University Press, 1987 p.1.

<sup>179</sup> Wellens, K., *supra* note 141, p.151.

<sup>180</sup> *Ibid.*

<sup>181</sup> ICJ Reports, 1949, p.181.

moral, or both.<sup>182</sup> However, the determination of the compensation may depend upon political considerations and motivations.<sup>183</sup>

Due to the increasing possibility of claims for compensation against United Nations, the General Assembly adopted resolution 52/247 on 17 July 1998 about third party liability against the United Nations resulting or arising from peacekeeping operations conducted by the organisation.<sup>184</sup> This resolution was mainly based on a comprehensive report by the Secretary General dated 21 May 1997(A/51/903) as to third- party liability.<sup>185</sup> This report determines the scope of temporal and financial limitations. The General Assembly decided, in respect of the duration of the limitation period of the third-party claims against the Organisation for personal injury, illness or death resulting from peace keeping operations that:

[T]he organisation will not pay compensation in regard to such claims submitted after six months from the time of damage, injury or loss was sustained, or from the time it was discovered by the claimant, and in any event after one year from the termination of the mandate of the peacekeeping operation, provided that in exceptional circumstances, such as described in paragraph 20 of the report of the Secretary-General, the Secretary- General may accept for consideration a claim made at a later date.<sup>186</sup>

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<sup>182</sup> Wellens, K., *supra* note 141, p.153.

<sup>183</sup> The Secretary- General justified the limitation on the liability of the Organisation as is premised on 'the assumption that consensual peacekeeping operations are conducted for the benefit of the country in whose territory they are deployed, and that having expressly or implicitly agreed to the deployment of a peacekeeping operation in its territory, the host country must be deemed to bear the risk of the operation and assume, in part at least, liability for damage arising from such an operation. As a practical matter, limiting the liability of the Organisation is also justified on the ground that the funds from which third-party claims are paid are public funds contributed by States Members of the United Nations for the purpose of financing activities of the Organisation as mandated by those Member States'. A/51/903 paragraph 12., p.5

<sup>184</sup> A/RES/52/247, Fifty-second session, Agenda item 142(a).

<sup>185</sup> A/51/903 General Assembly, fifty-first session, Agenda item 140(a), Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations.

<sup>186</sup> A/Res/52/247 paragraph 8. Paragraph 20 of the report of the Secretary- General stated that a time of six month for the submission of claims is proposed, running from the time the damage was caused, or from the time it was discovered by claimant, and in any event not later than one year after the termination of the mandate of the operation).

Also with the regard to personal injury ‘the compensation amount payable would be determined by reference to local compensation standards, not to exceed a maximum compensation ceiling of \$50,000’.<sup>187</sup>

The actual amount of compensation payable to third-party claimants by the United Nations in the case of peace keeping operations is based on the types of injury and loss. In this regard, the General Assembly decided that

A. compensable types of injury or loss shall be limited to economic loss, such as medical and rehabilitation expenses, loss of earnings, loss of financial support, transportation expenses associated with the injury, illness or medical care, legal and burial expenses

b. No compensation shall be payable by the United Nations for non-economic loss, such as pain and suffering or moral anguish, as well as punitive or moral damages

c. No compensation shall be payable by the United Nations for homemaker services and other such damages that, in the sole opinion of the Secretary-General, are impossible to verify or are not directly related to the injury or loss itself

d. the amount of compensation payable for injury, illness or death of any individual, including for the types of loss and expenses described in subparagraph (a) above, shall not exceed a maximum of 50.000 United States dollars, provided, however, that within such limitation the actual amount is to be determined by reference to local compensation standards.

e. in exceptional circumstances, the Secretary-General may recommend to the General Assembly, for its approval, that the limitation of 50.000 dollars provided for in subparagraph d above be exceeded in a particular case if the Secretary-General, after carrying out the required investigation, finds that there are compelling reasons for exceeding the limitation.<sup>188</sup>

Accordingly, it is worth mentioning that not only the General Assembly determined the factual amount of the compensation payable to third part but also

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<sup>187</sup> A/51/903 . See Annex pp.262-271.

<sup>188</sup> A/Res/52/247 paragraph 9.

restricted it to certain circumstance as a means of allocating the responsibility between the United Nations and host States. Furthermore, it is maintained that ‘in limiting the liability of the Organisation with regards to third-party claims arising from peacekeeping operations it is expected that the host Government will assume responsibility for providing any additional compensation that may appear warranted under circumstances’.<sup>189</sup>

A further example of an outcome remedy for an applicant could be embodied in a satisfaction mode, which aims to redress moral reparation for damage caused by States<sup>190</sup> to injured parties, usually another State. Satisfaction may be seen in different modes, such as judicial declarations, apologies and guarantees of non-repetition.<sup>191</sup>

Notably, the rules that govern remedies against International Organisations depend on the forms of responsibility for International Organisations, and whether that responsibility is contractual or tort, direct or indirect, intentional or non-intentional, or concurrent or otherwise. More pertinently, such rules depend on the concept and the form of accountability, as there are many forms that accountability might present.<sup>192</sup>

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<sup>189</sup> A/51/903 Paragraph 12 .. P.5

<sup>190</sup> Wellens, K., *supra* note 141, p.143.

<sup>191</sup> Wellens, K., *supra* note 141, p. 143. In the Chorzow Factory Case, the PCIJ declared that ‘ the essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals- is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-established the situation which would, in probability, have existed if the act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it- such are the principles which should serve to determine the amount of compensation due for an act contrary to international law’, (1928), P.C.I.J., Series. , NO. 17, p. 47.

<sup>192</sup> The accountability present itself in different forms: legal, political, administrative, and financial. ILA Report, 1998, p602.

## **Conclusion remarks**

The previous analysis has highlighted that the United Nations has conducted both peacekeeping operations and enforcement actions. The UN has in practice evolved peacekeeping operations to the extent of using force, as was clear in cases of UNPROFOR and UNOSOM II. These operations and enforcement actions have, in effect, raised many controversial issues, one of them being the command and control of such actions, as well as the responsibility for them.

In accordance with the control issue, one may discern that command and control is governed by the mandate of every operation and other legal documents that rule the conducting of operation as they differ from one operation to another.

In both the enforcement actions of Korea and the Gulf War, the USA had the command and control over the operations. Although the Korean War lay under the aegis of the UN, the Unified Command remained exclusively under the supervision of the USA. In this sense, the value of the UN flag is at issue. Indeed, in terms of determining responsibility, the flag of the UN did not help in rejecting legal responsibility for the crimes committed during military operation in Korea as the most significant issue was who had effective control in the operation.

However, it is for political considerations, perhaps, that the decision to conduct military operations in the name of the UN is taken, and to have such backing seems to be important. In terms of unilateral action, being covered by collective response in order to maintain international peace and security is of significant practical importance as a means of avoiding international responsibility.

It is here submitted that the responsibility of the UN for acts committed by

member states in cases of Security Council authorised operations depend on the command and control criterion as this criterion would measure the degree of attribution of wrongful acts as to whether is attributable to the UN or to the contributing states.

This chapter has shown the widespread nature of the crimes committed by UN peacekeeping forces such as rape, sexual abuse of women and children, and other human rights violations. As to the practice of the UN, the UN has paid compensation wherever the forces were under the exclusive command of the UN. The issue of responsibility is, in practice, ruled by an agreement between UN and contributing States, SOFA, and Status agreement with host state.

The recent practice shows that there is an increasing possibility of raising claims against the UN and contributing states concerning the responsibility for actions taken by UN soldiers.

## Conclusion

As discussed in Chapter One, the Security Council has moved away from what was originally intended by the UN Charter. Since the end of the Cold War, the Security Council has played an unprecedented role in invoking Chapter VII of the UN Charter in order to maintain international peace and security and has adopted extraordinary decisions both in terms of numbers and substance.<sup>1</sup> In practice, the Security Council has developed its own powers, in spite of there having been no constitutional changes to the UN Charter in that regard.

This thesis has demonstrated that the Security Council's response to inter-state conflicts indicates that changes in international practices have taken place. The doctrine of domestic jurisdiction has been altered through Security Council practices. Article 2 (7) of the UN Charter has evolved in that it has narrowed down the scope of domestic jurisdiction.<sup>2</sup> The understanding of the Security Council in dealing with civil war and humanitarian crisis has changed. Moreover, the Security Council has reinterpreted its powers by widening its understanding of the meaning of a threat to international peace and security. However, there are no solid grounds for distinguishing between these different terms, and there is no clear definition of any of them. In addition, such a determination is not a legal one, but rather a political one.

The first part of this thesis focused on the elements of the international responsibility of the UN for the internationally wrongful acts of the Security Council. As was noted in Chapters three and four, these elements are a breach of an international obligation and the attribution of the unlawful conduct to an international organisation. As was

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<sup>1</sup> See Chapter One, pp 15-19. Also, see Schweigman, D., *The Authority of the Security Council under Chapter VII of the UN Charter: legal limits and the role of the International Court of Justice*. Kluwer Law International, 2001, p.1.

<sup>2</sup> Ibid.



stated in Chapter three, the obligations that bind the UN are derived from the fact that the UN exists under international law and is subject to its rules.<sup>3</sup> A breach of Security Council obligations can occur by acting *ultra vires* or through the abuse of rights and negligence.

The second part of this thesis focused on the responsibility of the United Nations for Security Council authorised operations and noted that the question of effective control criteria in Security Council authorised operations could be a determining factor in incurring international responsibility. Moreover, the relationship between member states and international organisations in considering the member states' responsibility is a highly relevant factor in establishing such a responsibility.

In both parts of the thesis, an attempt has been made to show that there is a direct link between the development of the Security Council's powers and accountability as the greater the powers, the greater the need for accountability. The Security Council is not beyond control, and is not unaccountable. There is an urgent need to clarify the legal rules for the international responsibility of the UN for internationally wrongful acts of the Security Council. Indeed, against wrongful acts committed by the Security Council and could therefore enhance the Security Council's legitimacy and transparency.

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<sup>3</sup> See, Chapter Three, pp. 50-51.

## **2. Dilemmas and limitations in establishing UN international responsibility for the wrongful acts of the Security Council and some suggestions for future developments**

As noted in this thesis, the most difficult issues with regard to the responsibility of international organisations are related to the existence of divergent views on the responsibility of member states of such international organisations. These dilemmas and limitations could be summarised as follows:

### **2.1 The deficiency of rules that deal with the responsibility of member states of international organisations**

As examined in Chapter Five, the judicial decisions rendered in the *Westland* and the *Tin Council* cases did not establish definite attitudes as to the question of the responsibility of member states. Different approaches have been adopted by scholars in this regard.<sup>4</sup> However, it is submitted that the allocation of responsibility between an international organisation and its members could be established by combining these various views into an alternative approach in light of member states' responsibility. This approach would offer a possibility of piercing the organisational veil and holding member states internationally responsible, regardless of the degree of their responsibility.<sup>5</sup> According to this approach, the international organisation is responsible unless it has been established that the command and control criterion has fallen fully into the hands of member states and/or it has been shown that an agency relationship between the member states and the international organisation exists. This approach would leave a space to invoke the responsibility of member states of

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<sup>4</sup> See Chapter Five, pp. 122-125.

<sup>5</sup> Ibid, pp. 150-152.

international organisations. This would minimise violations of international obligations by member states.

Thus, with regard to establishing the rules of international responsibility of international organisations, it is suggested that such an approach could help in determining the relationship between international organisations and their members. This question should not be neglected during the formulating of such rules.

### **2.1.1 The usefulness of adopting an agency relationship between member states and international organisations**

As discussed in Chapter Five, the preconditions for establishing an agency relationship between UN member states' and the UN with regard to operations conducted under Chapter VII of the UN Charter could be met.<sup>6</sup> Thus, it is here submitted that the agency relationship is of considerable importance in establishing member States' responsibility, international organisations' responsibility and the nature of that responsibility. Thus, by establishing an agency relationship, not only does responsibility for illegal acts committed by international organisations primarily lie with the member states, but the nature of such a responsibility would be a direct one. Moreover, in such a case, the responsibility of the international organisation would be of a secondary nature, which means that the injured party should initially sue the member states.<sup>7</sup>

## **2.2 Issues relating to the question of attribution**

First and foremost, throughout the practice of peacekeeping and enforcement action, the Security Council has developed the concept of command and control powers over

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<sup>6</sup> See Chapter Five, pp. 121-126.

<sup>7</sup> Ibid.

UN peace keeping and enforcement actions.<sup>8</sup> Establishing responsibility varies from one operation to the other depending on command and control powers. Indeed, the effective control criterion both governs the command and control issue and measures the degree of attribution of acts either to the organisation or to its member states. Thus, it is important to clarify a clear command and control structure in order to determine the entity(ies) responsible for crimes committed during such operations.

Also, it is suggested that effective command and control could be achieved by reactivating relevant UN Charter provisions. Although the five permanent member states have accepted the Security Council practice regarding Chapter VII despite the lack of conformity with Article 43 of the UN Charter, there has been a consensus between the five permanent member states confirmed by the ICJ, which emphasises that the Charter has not left the Security Council impotent in the absence of any agreements under Article 43.<sup>9</sup> This acceptance, however, implies that command and control as a criterion in determining the responsible entity for wrongful acts would be applicable to member states rather than to the UN. Thus, by reactivating Articles 43, 46 and 47 of the UN Charter, the power of command and control over a military enforcement force would be achieved so that the responsibility of the UN for the internationally wrongful acts of the Security Council in a military enforcement action could be envisaged.<sup>10</sup>

Another issue relating to the question of attribution concerns the complexity of the structure of peacekeeping or peace enforcement forces. The multinational nature of such structures could give rise to serious claims as many entities could be involved in

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<sup>8</sup> See, footnote 25 and accompanying text of chapter 7.

<sup>9</sup> ICJ Reports, 1962, p. 167.

<sup>10</sup> See, pp. 165-166 of Chapter 6.

responsibility actions, for instance through regional arrangements.<sup>11</sup> Moreover, the question arises as to the determination of the entity the injured party should seek reparation from.

Thus, it is suggested that the legal documents relating to any operation consisting of Security Council resolutions, peacekeeping and enforcement action mandates and SOFA agreements should have precise provisions regarding the responsibility of the UN and its member states for Security Council authorised operations should crimes be committed.

The last and no less important issue relating to attribution regards the specificity of the Security Council voting system. First and foremost, since the decision-making process lies at the heart of the Security Council, the requirement of Article 27 in making decisions constitutes an important factor in determining the responsibility of the five permanent member states. The five permanent member states are a minority of the UN member states. Nevertheless, this minority can have effective command and control through the decision-making process. It has been shown in this thesis that there is a direct link between the role of the Security Council and the political will of powerful members.

Thus, it would be questionable in cases of *ultra vires* or illegal decisions to hold the majority of UN member states responsible to the same extent as the five permanent member states. It is argued that the five permanent member states should share the major part of the responsibility.<sup>12</sup> However, it is not always the case that the five member states bear the major part of the responsibility. The member states of the UN might be deemed liable in cases where the third party claims compensation for

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<sup>11</sup> See Chapter 5, pp.128-135.

<sup>12</sup> Ibid, pp.125-126.

damages arising from the non-implementation of Security Council decisions or the implementation of illegal decisions. Furthermore, the member states could be held liable for negligence in their supervision and surveillance of the Security Council and in particular as regards the failure of the Security Council to promote its primary responsibility in the maintenance of international peace and security. Bearing in mind the fact that there is no hierarchy between the organs of the UN, member states through the General Assembly, have a concurrent competence in maintaining international peace and security.

To overcome this dilemma it is not suggested that one should change the voting system in the Security Council or increase the numbers of permanent members seats on the Security Council as these suggestions have long been put forward by prominent scholars but without responses.<sup>13</sup> Rather it is suggested that when designing the rules on the international responsibility of international organisations, the issue of the voting system should be one of the determining factors in establishing the international responsibility of member states. Furthermore, one might suggest that the possibility of internal supervision on the way the decisions are made would be of significant importance in this regard.

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<sup>13</sup> See, Schweigman, D., *supra* note 1, pp. 288-297. It is worth mentioning that the 2005 World Summit have put proposals to reform the Security Council back on the table, however the outcome of the Summit was rather limited in scope. In this regard, see Roger Coate, 'UN. World Summit Set to Begin, The UNand changing World Politics, 2005, available at: <http://www.washingtonpost.com/wp-dyn/content/discussion/2005/08/30/DI2005083001391.html> Also, see 'The 2005 World Summit: What's At Stake for Women', Centre for Women's Global Leadership, available at: [http://www.peacewomen.org/un/September\\_Summit/atstake.html](http://www.peacewomen.org/un/September_Summit/atstake.html)

### 2.3 Issues relating to the absence of remedies against international organisations

The absence of any judicial system for the review of UN acts is considered to be one of the most serious limitations to a remedial regime. An essential element in establishing any internationally wrongful act committed by an international organisation is the existence of a breach of an international obligation by the international organisation concerned. Any acts beyond international obligations or powers conferred on the organisation would constitute *ultra vires* acts. In spite of there being a presumption that acts of the Security Council are *intra vires*, the Security Council could nonetheless commit *ultra vires* acts. The constitutional relationship between the Security Council and the ICJ in terms of the lawfulness of the Security Council actions is not clear in that there has been no straightforward answer to the questions raised before the Court concerning the legality of actions taken by the Security Council. In both the *Lockerbie* and *Bosnia* cases, the issue of judicial review has been raised by the parties but the Court did not address such an issue.<sup>14</sup>

The question of who is entitled to determine the *ultra vires* nature of acts the Security Council is still debatable. In this regard, however, the continuing controversy arising from the uncertainty as to the position the ICJ might adopt on this issue and how the Court would avoid establishing a hierarchical relationship between itself and the Security Council when determining whether acts are *ultra vires*, bearing in mind that the ICJ is fully aware of the sensitivity of this matter.<sup>15</sup> To these questions, one might answer that the ICJ is cautious not to be in conflict with the Security Council or not to invalidate Security Council actions. Furthermore, the question of how the issue of

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<sup>14</sup> See, footnote 105 and accompanying text of Chapter 4.

<sup>15</sup> See, footnote 118 and accompanying text of Chapter 4.

international responsibility could be raised in relation to *ultra vires* acts or omissions is made more difficult by Article 34 of ICJ Statute which does not grant direct standing to international organisations before the ICJ. Proposals to amend Article 34 of the Statute of the ICJ have been tabled on different occasions.<sup>16</sup> The usefulness of such an amendment is considerable as it is suggested that, by amending Article 34 of the Statute of the ICJ, a direct remedial action by states against a respondent organisation would exist.

However, by way of requesting an advisory opinion, an indirect remedial action could exist as the ICJ, by its authoritative pronouncements, could establish a remedial action extending beyond the member state(s) which requested an advisory opinion. In this regard, Wellens persuasively maintains that:

the practical remedial consequences that would flow from the Advisory Opinion in terms of damages or otherwise would be a matter for the organisation to consider, although the principle of it being required to take such measures may have been included in both the request and the Opinion.<sup>17</sup>

As discussed in chapter two, another serious dilemma is related to the procedural obstacle common to remedial actions by non-state claimants. When resorting to remedial action, the injured party faces the procedural obstacles of jurisdictional immunity before the domestic courts which is granted to international organisations. The ILA has shed light on such a procedural obstacle by stating that ‘a successful claim to jurisdictional immunity combined with the absence of adequate alternative methods of protection could easily amount to denial of justice’.<sup>18</sup> To contribute to

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<sup>16</sup> Footnote 36 of chapter 2.

<sup>17</sup> Wellens, Karel, *Remedies against International Organization*, Cambridge University Press, 2002, p.230.

<sup>18</sup> ILA Report 2004 which has been adopted in the ILA Conference held in Berlin August 2004, p. 41.



addressing this dilemma, one may recall the functional immunity approach which allows for restrictions to the scope of immunity by waiving immunity in a given case.<sup>19</sup>

### **3. Future developments regarding the rules on the international responsibility of international organisations**

This thesis has highlighted that the law on the international responsibility of international organisations is still in its early stages and remains in the process of being shaped. This subject continues to be the focus of the ILC as it adopts Draft Articles on Responsibility of International Organisations (Articles 1-7)<sup>20</sup> these would be of major importance to future developments in the area under scrutiny. The rules governing the responsibility of states may be applied equally to the responsibility of international organisations as long as they are relevant, such as the rules regarding the establishment of the elements of international responsibility and the legal effects and consequences of such responsibility. However, one has to be careful in transferring the rules of state responsibility to international organisations as the unique characteristics of international organisations in comparison with sovereign states<sup>21</sup> play a significant role in determining such rules, and this is in fact what the ILC has to take into consideration.

In developing rules on the responsibility of international organisations, it is of a great significance that the ILC takes into consideration the nature of operations and missions that the UN undertakes, such as authorizing the use of force, peacekeeping

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<sup>19</sup> For detailed discussion see *ibid* and Wellens, Karel, *supra* note 17, pp.220-230.

<sup>20</sup> A/CN.4/541

<sup>21</sup> See, Chapter 2, p.40, 45 and p.46.

and peace enforcement activities.

Recent practice in the international responsibility of peacekeeping operations signals how widespread the problem of the misconduct of members of UN peacekeeping forces is. For instance, allegations of sexual exploitation and abuse in peacekeeping operations are currently under investigation by the UN special Committee on peacekeeping refer to the report prepared by Prince Zeid Ra'ad Zeid Al-Hussein, Permanent Representative of Jordan to the UN, as this report adopts a comprehensive strategy to eliminate future sexual exploitation and abuse in UN peacekeeping operations.<sup>22</sup> This report, in fact, recommends measures to be taken immediately in order to solve this problem such as the standardization of rules against sexual exploitation and abuse for all categories of peacekeeping personnel and the provision of a professional investigative capacity for peacekeeping operations. This report proposes radical changes in the way of handling these issues. For instance, a vital perspective to the role of UN peacekeeping operations as an integral part of the world's effort to maintain peace and security would be of considerable importance in resolving the problem of sexual exploitation and abuse by United Nations peacekeeping personnel.<sup>23</sup>

The time has now come to pay attention once more to the establishment of rules on the international responsibility of international organisations. In this regard, it is hoped that comprehensive report on the accountability of international organisations will be adopted<sup>24</sup> as well as a standard Model-Status-of Forces Agreement (SOFA) and articles on legally binding remedial instruments. Establishing a set of rules

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<sup>22</sup> See, Chapter 7, pp.213-214.

<sup>23</sup> See, Comprehensive review of the whole question of peacekeeping operations in all their aspects'. A/59/710, pp. 1-5.

<sup>24</sup> For example, ILA Report, *supra* note 18.

governing the international responsibility of international organisations would be compatible with the general principles of international responsibility, so that any injured party can obtain reparation from the responsible entity, whatever that entity might be.

### **3.1 Further areas of research**

This thesis suggests further areas of research. These include a legal study of the remedies against the United Nations, given that the evolution of the law of international organisations' responsibility has to be connected with the issue of remedies.

The need to explore alternative remedial mechanisms is highly relevant in this area, regardless of whether the models are non-judicial alternatives remedies or judicial ones. Different models of non-judicial alternatives remedies, such as the ombudsman and an inspection panel<sup>25</sup> could grant private parties direct access to a particular mechanism or office.<sup>26</sup> The ombudsman and an inspection panel are open to individual claimants or requesters to protect their individual interests.<sup>27</sup> Other models of non-judicial alternatives remedies, such as an international commission of inquiry could fulfil a remedial function relating to collective interests.<sup>28</sup>

Remedial legal instruments would ensure better respect for the principles of international law, such as the principle of good faith, the principle of supervision and control, the principle of constitutionality and the principle of due diligence.

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<sup>25</sup> In this regard it is maintained that 'the ombudsman is a complaint-handing mechanism, the remedial impact of which is dependent upon the independence, impartiality and broad powers of investigation of the office.' ILA Report, *supra* note 18, p.46.

<sup>26</sup> ILA Report, *supra* note 18, p.45.

<sup>27</sup> See Wellens, K, *supra* note 17, pp 176-197.

<sup>28</sup> *Ibid*

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# **Consolidated claim form for third-party personal injury or death and/or property damage**

**Part 1: Identification of claimant** (Attach documentation confirming your identity, such as a certified photocopy of your passport or national identity card)

1. Claimant's full name: family name -----First name-----
2. Sex: Male-----Female-----
3. Status: Single-----Married-----Divorced-----Widowed-----
4. Nationality:-----
5. Date of Birth (Day/Month/Year):
6. Place of Birth (City/Town/Country):
7. Occupation and employer's name:
8. Earnings during the twelve (12) months prior the occurrence of the personal injury /death and/or property loss/damage for which the claim is being submitted (specify currency):
9. Present residence:  
Street:  
City:  
Area:  
Country:
10. Mailing address (if different than present residence address):  
Street/P.O. Box:  
City/Town:  
Area:  
Country:
11. Telephone number: Home----- Work-----
12. Fax number-----

## **Part 2: Identification of victim (injured, deceased or damaged party) (Completely only if the victim is a different person than the claimant)**

1. Relationship of victim to claimant: Spouse-----Child-----Parent-----

(Attach documentation to show family relationship to victim, such as a certified photocopy of a marriage document, birth certificate or any other official record)

2. Victim's full name: family name-----first name-----

3. Victim's sex: Male-----Female-----

4. victim's status Single-----Married-----Divorced-----Widowed-----

5. Victim's nationality:-----

6. Victim's date of birth (Day/Month/Year):

7. Victim's place of birth (City/Country):

8. Victim's occupation and name of victim's employer:

9. Victim's earnings during the twelve (12) months prior the occurrence of the personal injury /death and/or property loss/damage for which the claim is being submitted (specify currency):

10. Victim's present residence:

Street:

City/Town:

Area:

Country:

11. Victims mailing address (if different than present residence address):

Street/P.O. Box:

City/Town:

Area:

Country:

12. Telephone number: Home----- Work-----

13. Fax number-----

### **Part 3: Nature and Amount Of Claim**

1. Indicate whether you are presenting a claim for any of the following by inserting a check in the applicable space:
  - a. Personal injury----- (please also complete part 4/section A below)
  - b. Death----- (please also complete part 4 section A below)
  - c. Damage/loss to real property (such as land or structures)----- (please also complete part 4/section C below)
  - d. Damage/loss to personal property (such as clothing, personal effects, household furnishings or motor vehicle)----- (please also complete part 4/section D below)
2. Indicate whether the claim relates to any of the following by inserting a check in the applicable space:
  - a. an accident involving a United Nations vehicle-----
  - b. an accident involving a non- United Nations vehicle-----
  - c. premises/land occupied by the United Nations under a lease agreement----- (attach a certified photocopy of the signed lease agreement)
  - d. other-----
3. indicate the total amount of the compensation claimed (specify currency) for any of the following by inserting the figure in the applicable space:
  - a. for personal injury-----
  - b. for death-----
  - c. for damage/ loss to real property-----
  - d. for damage/loss to personal property-----

## Part 4: Particulars of claim (complete only the section(s) below that is applicable to the claim)

### Section A: Claim for personal injury

1. provide the following details relating to the occurrence of the personal injury:
  - a. Date and time when injury occurred:
  - b. Place where injury occurred:
  - c. Identity of any United Nations personnel who were involved (give names, identification numbers, nationality, component, etc., to the extent possible):
  - d. Identify of any witness( give names, addresses and telephone numbers, to the extent possible):
  - e. Licence plate number of any United Nations vehicle involved:
  - f. Licence plate number of any non-United Nations vehicle involved and name and address of insurance company and policy number (if known):
2. Describe the nature and extent of the injury incurred:  
(Attach appropriate supporting documentation, such as certified photocopies of medical reports from treating physicians and hospitals or insurance records showing the nature and extent of injury, the nature and extent of treatment an the prognosis)
3. provide the name, address and telephone number of any physician who examined or provided treatment for the injury and any hospital where the injured was admitted:
4. describe the cause and circumstances of the injury incurred:  
(attach a separate statement together with a diagram of the accident/incident if appropriate and where possible, (1) a signed statement from any witness(es), (2) a certified photocopy of any local police investigation report on the injury and (3) photographs relating to the injury)
5. Indicate whether the claimant/victim carries an insurance policy to cover the injury and, if so, specify:
  - a. Name and address of insurance company:
  - b. Insurance policy number:
  - c. Whether any claim has been filed with the insurance carrier in this case and, if so, what action has been taken by the carrier with reference to the claim, including amounts received from the insurance company, along with settlement documentation provided by the insurance company:
6. Provide a breakdown of the total amount of compensation sought with appropriate justification:  
(attach all relevant supporting documentation, such as signed itemized invoices for



medical and hospital expenses actually incurred and receipts of payment)

## **Section B: claim for death**

1. Provide the following details relating to the occurrence of the death:
  - a. Date and time when the death occurred (attach supporting documentation, such as a certified photocopy of a death or burial certificate):
  - b. Place where the death occurred:
  - c. Identity of any United Nations personnel who were involved (give names, identification numbers, nationality, component, etc., to the extent possible):
  - d. Identity of any witnesses (give names, addresses and telephone numbers, to the extent possible):
  - e. Licence plate number of any United Nations vehicle involved:
  - f. Licence plate number of any non-United Nations vehicle involved and name and address of insurance company and policy number (if known)
2. Provide the name, address and telephone number of any physician who examined or provided treatment to the deceased and any hospital where the deceased was admitted.
3. Describe the cause and circumstances of the death:

(Attach a separate statement together with a diagram of the incident/accident if appropriate and, where possible, (1) assigned statement from any witness(es), (2) a certified photocopy of any local police investigation report on the death and (3) photographs relating to the death)
4. Indicate whether the claimant/victim carries an insurance policy to cover the death and, if so, specify:
  - a. Name and address of insurance company:
  - b. Insurance policy number:
  - c. Whether any claim has been filed with the insurance carrier in this case and, if so, what action has been taken by the carrier with reference to the claim, including amounts received from the insurance company, along with settlement documentation provided by the insurance company:
5. Provide a breakdown of the total amount of compensation sought with appropriate justification:

( Attach all relevant supporting documentation, such as signed itemized invoices for medical, hospital or burial expenses actually incurred and receipts of payment)

## **Section C: Claim for damage/loss to real property**

**1. Provide the following details relating to the occurrence of the damage/loss to real property:**

- a. Date and time when damage/loss occurred.
- b. Place where damage/loss occurred.
- c. Identity of any United Nations personnel who were involved (give names, identification numbers, nationality, component, etc. to the extent possible).
- d. Identity of any witness (give names, address and telephone numbers, to the extent possible)
- e. Licence plate number of any United Nations vehicle involved.
- f. Licence plate number of any non-United Nations vehicle involved and name and address of insurance company and policy number (if known).

**2. Provide the following details regarding the real property involved:**

- a. Type of property that was damaged or destroyed (such as residential structure, commercial structure or land):
- b. Name of owner of property as it appears on the title (attach a certified photocopy of title and any other proof of ownership):
- c. Date of purchase or acquisition of property by claimant-victim and per cent of his/her ownership (if ownership is less than 100 per cent, attach a statement identifying the other owners and their respective percentages of ownership):
- d. Address where property is located:  
street No.:  
city-town:  
Area:  
Country:
- e. official registration number (block, lot, house, building), if available:
- f. Age of the structure and its condition prior to the damage-loss (attach appropriate documentary evidence to show the prior condition, including photographs if available):
- g. floor space of structure or size of land (specify in square metres), as applicable:
- h. purchase cost of property by claimant/victim:
- i. estimated cost of repair work not yet completed (attach appropriate documentation showing repair cost estimates from one or more competent and independent companies):
- j. Actual cost of any repair work already completed (attach appropriate documentation showing repair expenses actually incurred, such as signed itemized invoices and receipts of payment):

**3. Describe the cause and circumstances of the loss/damage to the property:**

(Attach a separate statement together with a diagram of the incident/accident if

appropriate and, where possible, (1) a signed statement from any witness(es), (2) a certified photocopy of any local police investigation report on the damage/loss and (3) photographs of the property in its damaged conclusion)

4. Indicate whether the claimant/victim carries an insurance policy to cover the loss/damage to the property and, if so, specify:
  - a. Name and address of insurance company:
  - b. Insurance policy number:
  - c. Whether any claim has been filed with the insurance carrier in the case and, if so, what action has been taken by the carrier with reference to the claim, including amounts received from the insurance company, along with settlement documentation provided by the insurance company:
5. Provide a breakdown of the total amount of compensation sought with appropriate justification:

(attach all relevant supporting documentation)

## **Section D: Claim for damage/loss to personal property**

1. Provide the following details relating to the occurrence of the damage/loss to personal property:
  - a. Date and time when damage/loss occurred:
  - b. Place where damage/loss occurred:
  - c. Identify of any United Nations personnel who were involved ( give names, identification numbers, nationality, component, etc., to the extent possible):
  - d. Identity of any witnesses (give names, addresses and telephone numbers, to the extent possible):
  - e. Licence plate number of any non- United Nations vehicle involved and name and address of insurance company and policy number (if known):
2. Provide the following details regarding the personal property involved:
  - a. Identify each property item(s) that was damaged under the following category headings (Attach appropriate documentary evidence ownership of the property items):
    - Clothing
    - Personal effects:
    - Household furnishings:
    - Motor vehicle:
    - Other

For this purpose, attach a list of the property items under each applicable category and specify the following for each item:

    - (1) Date of purchase by claimants/victim, purchase price and place of purchase (Attach signed invoice and receipt of payment):
    - (2) Age of item and its condition prior to the damage/loss (attach appropriate documentary evidence to show the prior condition, including photographs if available):
    - (3) A description of the extent of the damage/loss to the item:
    - (4) Estimated cost of repair work not yet completed ( attach appropriate documentation showing repair cost estimates from one or more reputable and independent companies):
    - (5) Actual cost of any repair work already completed (attach appropriate documentation showing repair expenses actually incurred, such as signed itemized invoices and receipts of payment):
    - (6) Estimated cost of replacement of any item that has already been purchased

(attach appropriate documentation showing the cost estimates for a comparable item from one or more competent and independent companies)

- (7) Actual cost of replacement of any non-repairable item that has already been purchased (attach appropriate documentation showing the cost of the replacement item actually paid, such as a signed itemized invoice and receipt of payment, and its comparability to the original item):

3. Describe the cause and circumstances of the loss/damage to the property:

(attach a separate statement together with a diagram of the incident if appropriate and, where possible, (1) a signed statement from any witness(es), (2) a certified photocopy of any local police investigation report on the damage/loss and (3) photographs of each property item in its damaged condition)

4. indicate whether the claimant/victim carries an insurance policy to cover the loss/damage to the property and, if so, specify:

- a. name and address of insurance company:
- b. insurance policy number:
- c. whether any claim has been filed with the insurance carries in this case and, if so, what action has been taken by the carrier with reference to the claim, including amounts received from the insurance company, along with settlement documentation provided by the insurance company:

5. Provide a breakdown of the total amount of compensation sought with appropriate justification:

## Part 5: Signature and affirmation

1. I hereby acknowledge that, in calculating the amount of compensation payable, consideration shall be given by the United Nations to such amounts as the claimant/victim might have recovered or might be entitled to recover under insurance arrangements or from any other source.
2. I hereby affirm that, to the best of my knowledge, the information that has been presented in this claim is accurate.
3. I hereby further affirm that, if I am presenting this claim on behalf of a family member (spouse, child, parent), I am duly authorized to submit the claim.

.....

...

signature of claimant

.....

....

Name of claimant

(print in block letters)

.....

Date

.....

place

City of.....

Country of .....

On the.....day of.....19.....before me personally  
came.....

(Claimant's

name)

to me known, and known to me to be the individual described in, and who executed the foregoing  
instrument, and he acknowledged to me that he executed the  
same.....

Notary Public