

THE TIES THAT BIND: THE EU, THE UN AND INTERNATIONAL LAW***Nigel D. White****

1. Introduction
2. Values and principles
3. Shared values
 - 3.1 Peace
 - 3.2 Justice
4. Fundamental principles
5. Subjects of, and subject to, International Law
6. Core obligations arising under human rights law
 - 6.1 Application of core rights
 - 6.2 Self-determination
 - 6.3 Anti-terrorist measures
 - 6.4 Article 103 and the core obligations of states
 - 6.5 Article 103 and economic sanctions
7. Core obligations arising from the principles and rules governing peace and security
 - 7.1 The EU as a regional arrangement within the UN Charter?
 - 7.2 Hierarchies
 - 7.3 Non-forcible measures
 - 7.4 Military measures
 - 7.5 The legitimacy of the Security Council
8. Conclusion
Abstract

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1. INTRODUCTION

The United Nations (UN) has, since its inception in 1945, acted in the sphere of peace and security, while the European Community (EC) has been a more recent entrant into this field, especially after the Maastricht Treaty of 1992 created a wider European Union (EU). Over the years the UN has developed the concept of peace to include human rights promotion and more recently democracy assistance. The EU's foreign policy has also been driven by these concerns. Increasingly, the activities of the EU and the UN overlap in matters of peace, security, human rights and democracy. This overlap has the potential to result in confrontation, as well as what would normally be aspired to – co-operation.

The questions to be considered in this article include the rights and duties of the EU and the UN in international law in the related areas of peace and security, human rights and democracy, as well as the legal relationship between the two bodies. This will then provide a framework within which co-operation can better be achieved. The article will give many examples of the exercise of rights or powers by the EU and the UN in the field of security and human rights. Though these can be controversial and may raise issues of *ultra vires* in relation to the constitutive treaties of the two organizations, this article will concentrate on the duties found in international law since the process of situating both organizations within the international legal order should enhance the legitimacy and arguably the effectiveness of the two organizations whether they act singly or together. It is important to identify the underlying principles governing the organizations and their activities. It will be argued that there are fundamental (legal) principles underlying the issues that have to be recognized and reinforced if we are to have organizational activity that is more than discretionary or arbitrary.

The focus of the article will be on the organizations' activities in the field of peace and security, human rights and democracy. These represent not only crucial issues uniting both the EU and the UN in their 'external' actions,¹ but are also founded upon, or at least affected by, fundamental principles of international law. It will be argued that a coherent strategy for achieving long term peace and stability in regional and international relations must be based on respect for these fundamental principles as well as rules of international law derived from these principles. Such principles are not just abstract legal constructs but are a reflection of the values that international actors – states, organizations and others – have held since the UN Charter ushered in a new world order in 1945.

1. On the sometimes blurred distinction between 'internal' and 'external' institutional law-making see J.E. Alvarez, *International Organizations as Law-Makers* (Oxford, Oxford University Press 2005) pp. 143-145.

2. VALUES AND PRINCIPLES

Although international law focuses on the text of a treaty and its objects and purposes,² it is possible to talk about the ‘values’ that these institutional and legal regimes are designed to further and protect.³ Discussions on values are not the sole province of the policy school, where ‘human dignity’ is the goal or value against which international law must be measured.⁴ Allott writes about international society’s ‘ideas about itself and its high values’.⁵ Koskenniemi has written, ‘international law certainly seeks to realise the political values, interests, preferences of various international actors’.⁶ He also points out that those very same values being advocated by often powerful international actors may become international legal standards of criticism or, as has been described elsewhere as ‘benchmarks’, against which the decisions and actions of international actors are evaluated.⁷ This does not appear as contradictory as first appears to be the case for the straightforward reason that although law is a product of political debate and compromise, the very act of putting these values and interests in legal form establishes general standards that, depending upon the significance of those laws, often outlast the politics that have gone into forming them. As Alvarez has written with somewhat less optimism – ‘law is a tool of power, as well as on occasion, its master’.⁸ Of course laws can be changed with changing political circumstances, but this is not so easy in the case of foundational laws.

At various constitutional moments in history groups of states have set down in legal terms, normally in foundational treaties, the values they wish to promote and the methods of achieving those values. Historically states in the process of forming these key texts have been increasingly concerned with establishing mechanisms to ensure that the values are being protected or progress toward them is being made. More recently considerable debate on the need for mechanisms of accountability

2. ‘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’, Art. 31(1) Vienna Convention on the Law of Treaties 1969.

3. Alvarez, *supra* n. 1, at p. xvi; P. Sands, ‘Unilateralism, Values and International Law’, 11 *EJIL* (2000) p. 291 at pp. 300-301; R.St.J. MacDonald, ‘Fundamental Norms in Contemporary International Law’, 25 *Canadian YBIL* (1987) p. 115 at pp. 115-116.

4. On which see R. Higgins, *Problems and Process* (Oxford, Clarendon Press 1994) p. 4.

5. P. Allott, *Eunomia* (Oxford, Oxford University Press 2001) p. xx. On the distinction between ideas and values Allott states that ‘to mediate between ideas and action, consciousness uses the idea of *value*. A value is an idea which serves as a ground for choosing between possibilities’ (p. 48).

6. M. Koskenniemi, ‘What is International Law For?’, in M. Evans, ed., *International Law*, 2nd edn. (Oxford, Oxford University Press 2006) p. 57.

7. N.D. White, *The UN System: Toward International Justice* (Boulder CO, Lynne Rienner 2002) p. 47.

8. Alvarez, *supra* n. 1, at p. 199.

has been generated as the institutions established by the treaties have increased the range and intrusiveness of their activities.⁹

Such debates are not the focus of the discussion in this article, rather the concern will be to identify the values of the UN and the EU, and to consider their relationship to the fundamental international legal principles that should shape the actions of all actors on the international stage. In order to achieve this it is first of all necessary to discuss those values common to such institutions and then to evaluate whether they are reflected in fundamental principles of international law. It may be that those values have helped to re-shape the basic principles. As Rosemary Foot has asked in the context of international relations discourse ‘how wide a global consensus on values does there have to be before we embark on the widespread promotion of those values?’¹⁰ In international legal terms some elements of those key values help to develop the axioms or basic principles of international law by process of practice, reiteration, innovation and the magical ingredients of *opinio juris* and *pacta sunt servanda*.¹¹ In a sense though, those basic principles have the air of presuppositions – they reflect the nature of international relations though they may be embodied in treaties and custom and developed by practice. The significance and impact of these principles on the activities of the EU and UN will then be evaluated.

While the policy school sees values as something the law is aiming towards,¹² there is arguably a more complex relationship between values and law. When the UN was set up in 1945 its Charter encapsulated both the values and principles of international relations at the time, and formulated rules and institutions to protect and further them. In very general terms those values centred around the two pillars of ‘order and justice’. The relationship between these oft-competing values has changed over the years, with the early emphasis on order – peace and security – prevailing during the Cold War over issues of justice (including issues of human rights and democracy). With the end of that period though there has been a ‘revitalization of the liberal vision that order cannot be sustained in the absence of justice’.¹³ The issue discussed in this article is whether the leading international organizations that have a broad competence over these issues,¹⁴ ‘in their provision

9. See generally N.D. White, *The Law of International Organisations*, 2nd edn. (Manchester, Manchester University Press 2005) pp. 189-229; C. Harlow, *Accountability in the European Union* (Oxford, Oxford University Press 2002).

10. R. Foot, ‘Introduction’, in R. Foot, J. Gaddis and A. Hurrell, eds., *Order and Justice in International Relations* (Oxford, Oxford University Press 2003) p. 2.

11. I. Brownlie, *Principles of Public International Law*, 6th edn. (Oxford, Oxford University Press 2003) pp. 8-10, 591-592.

12. Higgins, *supra* n. 4, at p. 10.

13. Foot, *supra* n. 10, at p. 2.

14. Thereby excluding a direct analysis of the more technical or functional organizations.

of a platform for normative debate or as producers of certain outcomes in world politics, have mediated successfully between 'order and justice, 'or have they merely underscored the areas of disagreement on values and consequences that flow from an unequal distribution of power in international society'?¹⁵ Have such organizations developed these values, universalized and constitutionalized in 1945, and, if so, are they a reflection, a development, or do they contradict the fundamental international legal principles? While there is almost inevitably a gap between the values and the fundamental legal principles, not the least because such principles are slow to change, such institutions must be seen as failing if they have not furthered and developed and enhanced those values both in a normative sense and in a practical manner.

It will be argued that the fundamental principles which underpin certain of the core values of the UN and EU are a product of what Hart has described as 'our concern ... with social arrangements for continued existence, not with those of a suicide club'.¹⁶ At the international level these lie somewhere between what Allott refers to as society's ideals,¹⁷ and the fact of 'world-wide *social evil*'. The ideals enable us to 'say what is wrong with our world' and contain 'ideas of justice, social justice, equality, human dignity, self-determination, self-expression, self-fulfilment, human flourishing, good health, happiness, the good life in society'.¹⁸ These enable us to make judgements about the facts of 'human misery and social chaos of every kind – war and civil war; genocide; mass deportations; poverty; hunger, and disease on a massive scale; every kind of abuse of public power; every kind of social oppression, economic exploitation, and moral degradation'. Although Allott prefers the route of a 'new ideal international society' – 'the ideal of the human social world',¹⁹ a path not chosen here, there is little doubt that we must always balance the ideals and values of international legal and political regimes against their achievements in a world characterized by Allott as one of social evil. While such evil abounds we have not yet reached the level of a global suicide club. It is the function of organizations, principally the UN and increasingly the EU, to ensure that we do not descend to that level, and indeed to improve the human condition. It is also important, and this is the focus of this article, that in promoting these values, in the exercise of their powers whether express or claimed, they respect the fundamental principles that permeate the international legal system.

15. Foot, *supra* n. 10, at p. 2.

16. H.L.A. Hart, *The Concept of Law* (Oxford, Clarendon Press 1961) p. 188.

17. Allott, *supra* n. 5, at p. xxii, – 'Among the ideas which help to constitute a society are ideas of a particular kind, ideas which have been referred to traditionally as *ideals*.'

18. *Ibid.*, p. xxiii.

19. *Ibid.*, pp. xxvi-xxvii.

3. SHARED VALUES

It is not the intention here to go through the European Treaties and the UN Charter's provisions in tremendous detail, analysing every nuance in order to ascertain their values. In a sense values do not work that way, they are general overarching ideals that have not yet become legal in the sense of legal principles or more detailed rules and are thus not amenable to detailed legal analysis. A straightforward look at the preamble and Article 1 of the UN Charter gives some depth to the ideals of peace and justice by positing peace and security, human rights, self-determination of peoples, and economic and social advancement as the aims and purposes of the UN.

In 1945 though, the values were less developed than would be recognized today. Peace was seen as the absence of war, and security as the absence of the risk of war. Human rights were not yet made concrete and were phrased in aspirational terms.²⁰ The extent and meaning of the value of self-determination was not yet clear. Economic and social advancement was seen as a function of existing and future specialized agencies, and not an issue of human rights.

3.1 Peace

Yet these values have been subject to considerable constitutional development and in that process have taken on more legal forms. On the subject of peace, the General Assembly has adopted a series of resolutions over the years. As early as 1949 the UN General Assembly did not define peace as simply the absence of international conflict, but also the absence of civil conflict. Further, the Assembly included respect for human rights and the promotion of a higher standard of living in its conception of peace.²¹ Thus the link between order and justice is not only a post-Cold War phenomenon, it occurred very early in the life of the UN at least at the normative level. Crossing into the post-Cold War era, in 1991 the Assembly adopted the Promotion of Peace Resolution that stated:

'Peace is not merely the absence of war, but that interdependence and co-operation to foster human rights, social and economic development, disarmament, protection of the environment and ecosystems and the improvement of the quality of life for all are indispensable elements for the establishment of peaceful societies.'²²

20. See Arts. 55 and 56 of the UN Charter.

21. GA Res. 290 (IV), 1 December 1949.

22. GA Res. 46/14, 31 October 1991.

The post-Cold War period has seen the Assembly developing aspects of positive peace to include respect for democracy,²³ as well as updating the international community's concern to eliminate extreme violence with, for example, the 1994 Declaration on Measures to Eliminate International Terrorism. This stated that 'acts, methods and practices of terrorism' violate the principles of the Charter and may constitute a threat to international peace. Furthermore, the resolution was clear in maintaining the relationship between order and justice by stating that terrorist activities 'aim at the destruction of human rights, fundamental freedoms and the democratic bases of society'.²⁴

The General Assembly has thus attempted a fusion of peace and justice so that a positive peace includes the protection of human rights (including economic, social and cultural rights) and the promotion of democracy. However, it must be the case that though this attempted fusion started to occur at a much earlier stage than is commonly assumed, no amount of constitutional practice can achieve complete compatibility between the two values. At the level of abstract values it may be perfectly possible to speak of these values as complimentary, but when it comes to their application in any given situation that will not necessarily be the case.²⁵ Though the desire is to achieve both in practice, there will be instances when a choice has to be made. To a certain extent this will be shown in the later part of the article when considering the concrete rules that can be traced to these values. Sometimes breaches of the peace have to be endured if justice is to be achieved. On other occasions injustices might be permitted in order to secure the achievement of a negative peace (the absence of war). Sometimes even the achievement of justice might not prevent the outbreak of conflict. Furthermore, conflicts might flare up because of a variety of factors that have little to do with justice such as border disputes, or conflicts arising out of a mistake. Peace and justice are, in this sense, both relative values, necessitating constant adjustment in the light of situations, societal development and the importance attached to each value at different stages of history.

Of course peace as a value pervades the UN system, most evident in the way that the Security Council has developed the concept of 'threat to the peace', the threshold to the coercive powers of chapter VII,²⁶ to cover most acts of 'extreme violence'.²⁷ At the other end of the spectrum there is the connection made between

23. GA Res. 51/101, 12 December 1996.

24. GA Res. 49/60, 9 December 1994.

25. H. Bull, *The Anarchical Society: A Study of Order in World Politics* (London, Macmillan 1977), pp.16-18, pp. 227-228.

26. Art. 39 of the UN Charter states, in part, '[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression'

27. J. Frowein and N. Krisch, 'Article 39', in B. Simma, ed., *The Charter of the United Nations: A Commentary*, 2nd edn. (Oxford, Oxford University Press 2002) p. 725. See further K. Wellens, 'The UN Security Council and New Threats to the Peace: Back to the Future?', 8 *JCSL* (2003) p. 15.

the role of the UN's specialized agencies and the value of peace. For instance, the Chicago Convention of 1944 that established the basic rules governing civilian aviation and which instituted the International Civil Aviation Organisation (ICAO), expresses in the preamble that 'the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, *yet its abuse can become a threat to general security*' [emphasis added]. Unintentionally these sentiments can be seen as an eerie premonition of the horrific terrorist attacks on the United States of 11 September 2001. Other constituent treaties link the functions of specialized agencies to the value of peace. The 1946 Constitution of the UN Educational, Scientific and Cultural Organization (UNESCO) declares that 'since wars begin in the minds of men, it is in the minds of men that the defences to peace must be constructed'. The preamble of the 1946 WHO Constitution declares that the 'health of all peoples is fundamental to the attainment of peace and security', while the 1919 ILO Constitution proclaims that 'universal and lasting peace can be established only if based upon social justice'.

Though built solidly on economic foundations, the EU's concern for peace and security is evident from the original treaty establishing a coal and steel community in 1951. That European integration was started out of a desire to prevent further European conflagrations is made clear in the preamble of the treaty, parts of which state that the founding member states:

'Considering that world peace can be safeguarded only by creative efforts commensurate with the dangers that threaten it ...

Convinced that the contribution which an organized and vital Europe can make to civilization is indispensable to the maintenance of peaceful relations.

Resolved to substitute for age-old rivalries the merging of their essential interests to create by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts, and to lay the foundations for institutions which will give direction to a destiny henceforward shared ...

Have decided to create a European Coal and Steel Community.'

Deliberately and directly linking the values of peace and justice (here in an economic sense), the founders of the Community were in accord with the early efforts of the UN General Assembly, again belying the contention that a just peace has only been on the international agenda since the end of the Cold War. Although the six founding states of the Community managed to draft and sign the European Defence Community Treaty in 1952 which proposed a radical integrated and supranational defence organization, it did not come into force and instead interlocking defence pacts were created – first the North Atlantic Treaty Organisation (NATO) by the Washington Treaty of 1949 and then the Western European Union (WEU) in the Brussels Treaty of 1954.

The separation of the machinery of security (in NATO and the WEU) from the Community's value of peace continued in the period 1956-1992, from the Treaty of Rome establishing the Common Market to the Maastricht Treaty establishing the European Union. In that period although there was the continued claim that European peace was dependent on economic prosperity and integration,²⁸ the European Community 'was set to become a very important force in the global economy, an economic giant. But this did not, at this stage, extend to foreign or defence policy. She was not a political giant.'²⁹ The member states did institute a process of European Political Cooperation (EPC) in the 1970s under which foreign policy issues, for example in response to the Argentinian invasion of the Falklands in 1982, were sometimes channelled into legal regulations under Community Law.³⁰

It was not until the Maastricht Treaty that a European foreign and security policy was brought clearly under the treaties for the first time, but in the inter-governmental elements of the newly constituted Union rather than the supranational European Community (EC) with competence over economic integration. This was still a long way from the supranational defence community envisaged in 1952, but in terms of values, the current Treaties on the European Community (TEC) and on European Union (TEU) place the value of peace centrally in the European order. According to the TEC's preamble the member states 'resolved by thus pooling their resources to preserve and strengthen peace and liberty', while in the TEU's preamble they resolved to establish a Common Foreign and Security Policy (CFSP) 'thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world'.

Though there have been many documents developing the value of peace within the EU order, the European Security Strategy entitled 'A Secure Europe in a Better World' prepared by the EU's High Representative Javier Solana and approved by the European Council on 12 December 2003 is perhaps the most far-reaching, reflecting as it does the shift towards confronting terrorism that has occurred after the events of 11 September 2001. The Strategy commences by declaring that 'Europe has never been so prosperous, so secure nor so free', and asserts that the EU 'has been central to this development'. The link between democracy and peace is

28. In the preamble to the 1957 Treaty of Rome, the state parties 'resolved by thus pooling their resources to preserve and strengthen peace and liberty'. The preamble to the Single European Act of 1986 reads, in part, 'aware of the responsibility incumbent upon Europe to aim at ever increasingly to speak with one voice and to act with consistency and solidarity in order more effectively to protect its common interests and independence, in particular to display the principles of democracy and compliance with the law and with human rights to which they are attached, so that together they may make their own contribution to the preservation of international peace and security in accordance with the undertakings entered into by them, within the framework of the United Nations Charter'.

29. D. Weigall and P. Stirk, eds., *The Origins and Development of the European Community* (Leicester, Leicester University Press 1992) p. 115.

30. EC Regulation 877/82, *OJ L* 102/1.

also strong with the introductory section stating that since the EU's creation 'the progressive spread of the rule of law and democracy has seen authoritarian regimes change into secure, stable and dynamic democracies'.³¹ The impact of this document will be returned to, but at this stage the value of peace in both institutions, the UN and the EU, has been established, as has a clear understanding, even in the decade after the Second World War, that peace cannot be separated from justice in all its forms – political, economic and democratic. It is to the issue of justice that this review of values now turns.

3.2 Justice

In this section the value of justice will be considered, with focus on the issues of human rights, self-determination and democracy, or human rights broadly conceived, given that if these values are properly understood, they can be seen as constituting more than just a liberal vision of the good life.

The human rights provisions in the UN Charter are relatively few and far between. The preamble reaffirms 'faith in human rights, in the dignity and worth of the human person, in the equal rights of men and women', and further aspires to 'social progress and better standards of life in larger freedom', and 'the economic and social advancement of all peoples'. In the purposes of the UN in Article 1 the 'self-determination of peoples' is mentioned in the context of developing friendly relations among nations. Article 1(3) states another purpose to be the achievement of international co-operation in solving problems 'of an economic, social or humanitarian character, and in encouraging respect for the principle of human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. That these are by and large aspirational treaty provisions, and therefore suitably categorized as values, is confirmed by Article 55 which states that the UN shall 'promote', *inter alia*, solutions to international economic, social and health related problems; international cultural and educational co-operation and 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'.³²

Familiarity with these provisions sometimes leads to their import being overlooked. First of all human rights are listed alongside the provisions of the preamble and purposes that cover what is often seen as the 'primary' purpose of the United Nations,³³ namely the maintenance of international peace and security.³⁴ Secondly,

31. Approved by the European Council held in Brussels on 12 December 2003.

32. See further Art. 56 that states that 'all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55'.

33. *Certain Expenses of the United Nations*, ICJ Rep. (1962) p. 167.

34. See for example Art. 1(1), UN Charter.

the provisions mentioned provide a basis for the future development of all three generations of human rights, though, self-determination and non-discrimination apart, no specific rights are mentioned. Thus although it was not until the Universal Declaration of Human Rights was adopted by the General Assembly in 1948 that the UN developed a more specific set of human rights,³⁵ the origins of such rights were embedded as values in the UN Charter in 1945.

Although human rights and human rights issues did seem to receive (almost) equal billing with peace and security concerns in the preamble and Article 1,³⁶ their equal status is not followed through in the institutional structures of the Charter. While Chapter IX of the Charter on International and Economic Co-operation is the foundation of a relatively weak system for the supervision of the protection and promotion of human rights by member states, ECOSOC and a number of the Specialized Agencies, Chapter VII of the UN Charter, in combination with the 'hard' treaty obligations in Articles 2 and 25, underpin the value of peace and security with significant institutional powers.³⁷

The European Union's concern with human rights and democracy is traceable to earlier forms of the organization.³⁸ However, the EEC/EC's primary concern with economic or, more accurately, market freedoms meant that it was the Council of Europe, through its Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, and European Social Charter of 1961, that was responsible not only for promoting the value of justice in the form of human (including democratic) rights, but also protecting it through the establishment of the European Court of Human Rights and other human rights mechanisms. However, with the adoption of the CFSP at Maastricht in 1992, and with the prospect of enlargement, the EU has made the values of human rights and democracy central to its order. The TEU confirms member states' 'attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law' and to 'fundamental social rights'. Furthermore, human rights and democracy are brought into the substantive provisions of the TEU, with Article 6(1) declaring that 'the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'. The objective of the Union's foreign and security policy, according to Article 11(1), is not only 'to preserve peace and international security', but also 'to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms'. Both the Commission and the Council have adopted significant docu-

35. GA Res. 217(A), 1948.

36. Peace and security issues are listed first.

37. Art. 25 provides that '[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

38. See extract from the preamble to the European Single Act of 1986, see *supra* n. 28.

ments on human rights and democracy and have linked them to other external actions of the Union, such as development.³⁹

As well as developing an external policy based on human rights and democracy, the Union has set about enhancing its internal legitimacy. The Charter of Fundamental Rights adopted at Nice in 2000,⁴⁰ promised further entrenchment of human rights in the EU's legal order, though its progress towards being fully part of the European legal order has been halted by the failure to adopt the Constitution in 2005, in which the Charter is an integral part.⁴¹

Unlike the EU, which has promoted human rights *and* democracy together since 1992, the UN's original concern for human rights has only been recently supplemented by the promotion of democracy. Though the Universal Declaration of Human Rights embodied certain democratic rights, primarily the right to vote in genuine periodic elections,⁴² it was not until the end of the Cold War that the Assembly started a series of normative resolutions on elections and more widely on democracy. These resolutions not only supported elections within consenting states but made it clear that 'the rights of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment of all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social and cultural rights'.⁴³ The value of democracy reinforces other core values in the UN. Democracy is recognized within the UN as the 'political framework in which human rights can best be safeguarded'.⁴⁴ Furthermore, the inter-linkage is not only with human rights but with peace – 'the right to democracy can readily be shown to be an important subsidiary of the community's most important norm: the right to peace'.⁴⁵

Though democracy seems a late-comer to the UN's legal order, its inter-meshing with the other key aspects of justice and order show its importance as a value. Furthermore, the following sections will show that it is also a reflection of deeper

39. Commission Communication on human rights, democracy and development co-operation, SEC (61)91, 25 March 1991; Resolution of the Council and of the Member States on human rights, democracy and development, 28 November 1991, Bull. EC 11/1991, 122-123.

40. *OJ* 2000/C 364/01, 18 December 2000.

41. *OJ* 2004/C 310/01, 16 December 2004, Part II. See T. Ahmed and I. Butler, 'The European Union and Human Rights: An International Law Perspective', 17 *EJIL* (2006) p. 771 at pp. 772-775 on community law relating to human rights.

42. Art. 21 Universal Declaration of Human Rights 1948.

43. GA Res. 46/137, 17 December 1991. See also GA Res. 49/190, 23 December 1994; GA Res. 50/185, 22 December 1995; GA Res. 52/129, 12 December 1997; GA Res. 60/162, 16 December 2005.

44. Boutros Boutros-Ghali, 'Human Rights: The Common Language of Humanity', opening statement made at the UN Vienna Conference on Human Rights 1993.

45. T.M. Franck, 'The Emerging Right of Democratic Governance', 86 *AJIL* (1992) p. 46, at p. 87.

fundamental legal principles, which tie the political values outlined above to the institutional and international legal order.

4. FUNDAMENTAL PRINCIPLES

Moving from values to legal principles, and ultimately legal rules, a strong argument can be made that law is in itself a value, but primarily its purpose is to help achieve the values of peace and justice. Its instrumentalist function signifies that law in general (including legal principles) are of a different order to the values. Law is often seen as the practical application of the value of justice, but law also performs the basic function in any society of controlling and limiting violence. Law is concerned both with peace and justice, and arguably many other facets of society as well. The UN Charter appears to recognize that justice and international law are distinct when stating in Article 1(1) that one of the purposes of the United Nations is the settlement of disputes ‘in conformity with the principles of justice and international law’. Furthermore, in helping to realise the values of peace and justice, legal principles and rules may reveal the tensions that were to a certain extent hidden at the higher levels of abstraction, where the Assembly can speak of peace and justice without any apparent contradiction. The point is that law is not a perfect instrument for the achievement of these values. Sometimes the development of detailed rules can provide certainty and thus facilitate order and justice, for example by providing clear rules and robust mechanisms for the delimitation of boundaries thus helping to resolve territorial disputes. On the other hand, if those clear rules are breached this can intensify a sense of injustice and potentially exacerbate a conflict. Furthermore, when legal rules are uncertain they may be a cause of conflict and injustice. In this sense rules are an imperfect but practical attempt to implement principles and values.

Before examining the application of international legal rules to the UN and EU, it is necessary to understand the nature and role of fundamental principles within the international legal order. Tomuschat presents a rounded picture of the international legal order in the following terms:

‘Like a modern constitution, the international legal order comprises not only principles and rules, but also basic values which permeate its entire texture, capable of indicating the right direction when new answers have to be sought for new problems.’⁴⁶

46. C. Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’, *Receuil des Cours* (1999) p. 23, at p. 28.

Values are posited as something worth protecting and enhancing. They help shape debate about politics and law. A fundamental legal principle,⁴⁷ as defined by Zemanek, ‘is the expression of a meta-legal value which the law-giving community wishes to observe, but its abstract formulation does not order a *specific* conduct for its implementation’.⁴⁸ A legal rule is more concrete and specific. Again according to Zemanek ‘a legal rule prescribes conduct in defined circumstances; if the command is disobeyed, it may be enforced’.⁴⁹ Many, if not all rules, can be traced to the basic principles. According to Schwarzenberger the principles ‘represent the highest common denominator of relevant rules and which, for this reason, may claim to be fundamental principles of international law’.⁵⁰

Thus there is the value of peace which takes legal shape in the principle that prohibits the threat or use of force, and flowing from that there are detailed rules on the use of force – for example those governing indirect uses of force in cases of intra-state conflicts,⁵¹ and the exceptions to the prohibition, for example the requirements of ‘armed attack’, ‘necessity’, ‘immediacy’ and ‘proportionality’ in the case of self-defence.⁵² Although ‘principles’ are not part of the language of the two main sources of international law – treaties and custom⁵³ – they are in a sense abstractions from them, or more accurately postulates that underpin the development of customary and treaty rules. They are related to the concepts of *jus cogens* and obligations *erga omnes*, but these concepts are not necessarily the same and their functions differ. *Jus cogens* can be narrowly construed,⁵⁴ though they can be viewed more widely as an exception to the requirement of consent,⁵⁵ and *erga omnes*

47. These are more abstract than the international legal principles identified by writers such as Brownlie – see generally Brownlie, *supra* n. 11, at pp. 18-19.

48. K. Zemanek, ‘Basic Principles of UN Charter Law’, in R.St.J. Macdonald and D.M. Johnston, eds., *Towards World Constitutionalism* (Leiden, Nijhoff 2005) p. 401.

49. Zemanek, *supra* n. 48, at p. 401.

50. G. Schwarzenberger, ‘The Fundamental Principles of International Law’, 87 *Recueil de Cours* (1955 I) p. 195, at p. 195. This is not to portray a strict hierarchy of norms in the way Kelsen constructed his ‘pure’ theory of law. For Kelsen’s application of this hierarchy to international law see H. Kelsen, *Principles of International Law* (London, Rinehart and Winston, 1967) pp. 551-588.

51. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, ICJ Rep. (1986) p. 14.

52. Y. Dinstein, *War, Aggression and Self-Defence*, 2nd edn. (Cambridge, Cambridge University Press 2005) pp. 235-243.

53. Art. 38(1)(a) and (b) Statute of the International Court of Justice. Not to be confused with Art. 38(1)(c) which uses the phrase ‘general principles of law recognized by civilized nations’. Brownlie states that Oppenheim’s view on 38(1)(c) is the most accurate – ‘the intention is to authorize the Court to apply the general principles of municipal jurisprudence, in particular of private law, in so far as they are applicable to the relations of states’ – Brownlie, *supra* n. 11, at p. 16. In other words the principles being referred to are principles of domestic law. But see Zemanek, *supra* n. 48, at p. 402.

54. Art. 53 of the Vienna Convention on the Law of Treaties 1969 states that ‘[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law ...’.

55. Brownlie, *supra* n. 11, at pp. 488-490.

goes to the right or interest in enforcement of the norm.⁵⁶ Fundamental principles play a wider,⁵⁷ different, role reflecting values and underpinning rules. In a sense they are the axioms of international law and provide a bridge between those rules and the wider politics and values present in international relations.⁵⁸ As Schwarzenberger states in outlining tests for the existence of a fundamental principle:

‘The principle must be one which is either so typical of international law that it is an essential part of any known system of international law or so characteristic of existing international law that if it were ignored, we would be in danger of losing sight of an essential feature of modern international law.’⁵⁹

Cassese’s definition of fundamental principles as the ‘pinnacle of the legal system’ that ‘are intended to serve as basic guidelines for the life of the whole community’, follows the same pattern as those given above, except he then goes on to incorporate the values and some element of obligation within the principles themselves. He states that ‘besides imposing general obligations, they also set out the policy lines and the basic goals’.⁶⁰

Although Cassese states that the principles of the world community do not evolve in quite the same way as those pertaining to a national legal system, given that classically rules emerged only with the consent of states,⁶¹ he states that the position changed with the adoption of the UN Charter. Article 2 of the Charter laid down ‘a set of fundamental principles by which all the members of the UN were to abide’.⁶² These have been developed by ‘expanding and updating of the Charter principles, with a view to turning them into standards of universal value’,⁶³ through

56. *Barcelona Traction* case, *ICJ Rep.* (1970) p. 3, at p. 32. The concept of *erga omnes* refers to the extent of the interest that other states have in seeing fundamental rules complied with. Not only the victim state of a violation of a fundamental rule, but all states have an interest in invoking the responsibility of the state in breach. See further M.N. Shaw, *International Law*, 5th edn. (Cambridge, Cambridge University Press 2003) pp. 116-118.

57. See MacDonald, *supra* n. 3, at p. 139. See also Tomuschat, *supra* n. 46 who states that *jus cogens*, obligations *erga omnes* and international crimes, ‘strike at conduct which not only constitutes a breach of international norms, but seriously compromises the foundations of a peaceful international order inspired by values of humaneness’.

58. Zemanek, *supra* n. 48, at p. 429.

59. Schwarzenberger, *supra* n. 50, at p. 204.

60. A. Cassese, *International Law*, 2nd edn. (Oxford, Oxford University Press 2005) p. 46. For discussion see R. Mullerson, *Ordering Anarchy: International Law in International Society* (The Hague, Nijhoff, 2000) pp. 155-164.

61. See *Lotus* Judgment No. 9, 1927 PCIJH Series A, No. 10, at p. 18.

62. Cassese, *supra* n. 60, at p. 47.

63. *Ibid.*

normative declarations such as the 1970 Declaration of Friendly Relations.⁶⁴ The current principles, according to Cassese are: the sovereign equality of states; non-intervention in the internal or external affairs of other states; prohibition of the threat or use of force; peaceful settlement of disputes; respect for human rights and self-determination of peoples.⁶⁵ Though, as will be seen at various points below, the first three principles can have a significant effect on the issues raised by this article, it is the last three that reflect, in legal terms, the values of peace and justice. It would of course be foolish to portray the relationship between values and principles as a simple one: principles reflect and also contribute to values, but they also start to reveal more starkly the tensions between the values. The principles of respect for human rights and self-determination are not necessarily fully compatible with the principle on the non-use of force. There thus arises the potential for conflicting laws.

For Cassese, such principles ‘represent the fundamental set of standards on which [states] are not divided and which allow a modicum of relatively smooth international dealings. They make up the apex of the whole body of international legislation. They constitute *overriding legal standards* that may be regarded as the *constitutional principles* of the international community.’⁶⁶ Such principles though are formulated at a high level of abstraction that permits agreement by states. It is clear though that by themselves the principles mask a level of disagreement about their content, but more specifically about which principles prevail in the event of conflict. That explains why Cassese states that they allow a ‘modicum’ of unproblematic state intercourse. In a sense though this is the function of abstract constitutional principles in that they reflect the level of consensus in any society. The more abstract the principles, it may be argued, the more profound the underlying disagreements, though the disagreements are not so serious as to result in a failure to agree on any principles. Further, it is entirely possible that constitutional practice will help identify and remedy these deficiencies in content and in hierarchy.

Whatever the nature of the consensus behind these principles, their emergence shows that states have moved away from the classical conception of freedom to

64. GA Res. 2625, 24 October 1970.

65. Cassese, *supra* n. 60, at ch. 5. Zemanek, *supra* n. 48, at pp. 403-409 also follows Art. 2 of the UN Charter and the 1970 Declaration on Friendly Relations to arrive at a similar set of fundamental principles. Schwarzenberger deduces his principles from ‘individual cases or legal rules of an apparently more limited scope’. The seven principles are: ‘sovereignty, recognition, consent, good-faith, self-defence, international responsibility and freedom of the seas’. – Schwarzenberger, *supra* n. 50, at pp. 201, 372. Tomuschat, *supra* n. 46, at pp. 161-304 identifies the following ‘founding principles of the international legal order’: sovereign equality, the non use of force and non-intervention, self-determination and international solidarity, international responsibility and liability.

66. Cassese, *supra* n. 60, at p. 48.

contract with each other towards the recognition of a basic system of constitutional law. This was identified by McNair as existing even during the period of the UN's predecessor – the League of Nations – when he stated that 'the society of States has not yet got a complete Constitution, but it has a great deal of Constitutional Law', including not only the Covenant but also other 'constitutional treaties' that 'create a kind of public law transcending in kind and not merely in degree the ordinary agreements between States'.⁶⁷

The features of such principles according to Cassese are that they are 'basic guidelines' for conduct; they apply (with the exception of sovereign equality) to all international subjects including international organizations; they confer '*community*' rights so that any subject whether the direct victim of a breach or not is entitled 'to claim compliance by any other international subject'; they are, by and large, *jus cogens* or 'standards from which no derogation is permitted'; and finally 'although valid for and applicable to every state, they rely heavily for their implementation and enforcement on the UN'.⁶⁸

Rather than describing the content of the relevant fundamental principles at this stage, the article will now progress on to a consideration of how these principles apply to the decisions and actions of the UN and the EU. In so doing, the content and applicability of the fundamental principles, and the rules flowing from them will become clearer. As stated before the intent is not to examine the powers of these organizations in the areas of peace and justice, but their obligations. Of course examples will be given of the EU and UN exercising their powers, but the focus will not be on whether these are *intra vires* or *ultra vires* their constituent treaties, but will be on their compatibility with international law which might apply to the activities themselves, but also might be directed at the relationship between the organizations in the fulfilment of those activities.

5. SUBJECTS OF, AND SUBJECT TO, INTERNATIONAL LAW

Before identifying how the fundamental principles are applicable to the UN and the EU and then addressing the question of whether they assist or hinder the two

67. A.D. McNair, 'The Functions and Different Legal Character of Treaties', XI *BYBIL* (1930) p. 100, at p. 112. The idea of international constitutional law is not new. See for example A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna, Spinger 1926). See also A. Verdross and B. Simma, *Universelles Völkerrecht*, 3rd edn. (Berlin, Duncker and Humblot 1984). For more recent discussion see A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental Norms and Structures', 19 *Leiden JIL* (2006) p. 579; E. de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order', 19 *Leiden JIL* (2006) p. 611.

68. Cassese, *supra* n. 60, at pp. 64-66.

organizations in protecting or enhancing their shared values, it is necessary to establish that the principles are not simply there to guide the UN and EU, as is the case with values, but that they and the rules derived from them bind both organizations in a legal sense. This is important because it signifies that the organizations, while pursuing their goals and values to the best of their ability, may legitimately fall short, but they should respect the fundamental principles of law binding on them. It must be remembered that while there is a similarity in the values and principles, values are often much broader and general in scope as well as being aspirational in nature.

Traditionally the basic principles of international law reflect a world made up of sovereign states, having equal standing.⁶⁹ However, the post-1945 legal and institutional order differed with the creation of stronger international organizations, which increasingly became concerned with conditions within states, not just relations between states. Human rights, self-determination and democracy became values at the international level and the fundamental principles identified above reflect this evolution, so that basic human rights and self-determination exist as principles alongside, and in apparent contradiction to, sovereignty and non-intervention.

Traditionally too international law was made by, and applied to, states.⁷⁰ The post-1945 institutional development challenged this notion too with international organizations increasingly making law.⁷¹ Furthermore, it became clear that by creating organizations, states were not just establishing meeting places, but were potentially creating legally separate entities, with their own rights and duties. In anodyne legal terms the label international legal personality is used to signify that organizations meeting certain criteria are separate corporate legal entities capable of acting independently in law from states.⁷² That the UN has such a legal nature has not been in doubt since 1949 when the International Court recognized it.⁷³ Its significance is sometimes lost though. What it means is that, for instance, the UN Security Council representing the UN in security matters is capable of making wide-ranging decisions that potentially extend beyond any that could have been made by the member states either individually or collectively. The creation of international criminal tribunals,⁷⁴ of post-conflict administrations,⁷⁵ and, the raft of

69. See Schwarzenberger's principles, *supra* n. 50.

70. For a classical statement of international law see the *Lotus Case*, 1927, PCIJ Series A, No. 10, at p. 18.

71. Alvarez, *supra* n. 1, at pp. 184-257.

72. N.D. White, 'Discerning Separate Will', in W.P. Heere, ed., *From Government to Governance* (The Hague, TMC Asser Press 2004) p. 31.

73. *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Rep. (1949) p. 174, at pp. 178-179.

74. SC Res. 827, 25 May 1993 (ICTY); SC Res. 955, 8 November 1994 (ICTR).

75. SC Res. 1272, 25 October 1999 (East Timor); SC Res. 1244, 10 June 1999 (Kosovo).

anti-terrorist measures,⁷⁶ are the main recent examples. Some of these may be controversial, but the controversy is about the extent of the corporate power of the Council, rather than its existence.

The continuing debate about the legal personality of the EU since the Maastricht Treaty of 1992 has arguably weakened the EU as an actor on the international stage.⁷⁷ Though there now seems to be agreement on the EU having such independence,⁷⁸ the lack of any express recognition is a reflection of a core of doubt at a political, rather than legal, level. The failure of the 2004 Treaty Establishing a Constitution for Europe with its explicit recognition of legal personality has continued this uncertainty.⁷⁹ It can be contended that for the EU to be a credible security actor it is better viewed as an international legal person. Otherwise it will just be an unincorporated association of states, with no separate rights and duties from member states. It would for all intents and purposes be no stronger legally than the Commonwealth or the OSCE, which merely act as conduits for the member states. As security actors the Commonwealth and the OSCE are relatively weak.⁸⁰

Of course the Union is more than an unincorporated association of states, more than a modern day Concert of Europe. It has separate powers and separate responsibilities from the member states.⁸¹ For instance the EU's administration of Mostar in the period 1994-6 shows its ability to take security action. Although the EU clearly has international legal personality, the lack of political will to express this unequivocally reflects the EU's difficulty in forging a foreign policy distinct from that of its member states. To date some of the EU's security policies appear to have been characterized by confusion as to whether it is the member states (or some of them) acting collectively or whether it is the organization taking action. This has happened both internally, for instance in the case of Austria and democracy in 2000,⁸² and externally, for instance in the case of Iran and nuclear technology from 2003.⁸³

While personality allows an organization to take separate decisions, in some cases to make law, it also brings with it duties. There appears to be no doubt that

76. For example SC Res. 1373, 28 September 2001.

77. K.P.E. Lasok, *Law and Institutions of the EU*, 7th edn. (London, Butterworths 2001) p. 31.

78. J. Klabbers, 'Presumptive Personality: The European Union in International Law', in M. Koskenniemi, ed., *International Legal Aspects of the EU* (Aldershot, Ashgate 1998) p. 243; R. Wessel, 'Revisiting the International Legal Status of the EU', 5 *EFAR* (2000) p. 507.

79. *OJ*, C310/47, 24 December 2004, Art. I-7.

80. P. Sands and P. Klein, *Bowett's Law of International Institutions*, 5th edn. (London, Sweet and Maxwell 2001) pp. 145-146, 199-201.

81. A. Orakhelashvili, 'The Idea of European International Law', 17 *EJIL* (2006) p. 315 at p. 346.

82. M. Happold, 'Fourteen Against One: The EU Member States' Response to Freedom Party Participation in the Austrian Government', 49 *ICLQ* (2000) p. 953.

83. W.Q. Bowen and J. Kidd, 'The Iranian Nuclear Challenge', 80 *International Affairs* (2004) p. 257.

organizations possessing international legal personality and being active in international relations are subject, at the very least, to *jus cogens* and the applicable fundamental principles already discussed, such as those relating to the use of force, basic human rights and self-determination.⁸⁴ Looking at it from the member states' point of view, it is unacceptable for them to establish organizations that are not bound by the basic principles of international law and the rules derived from them that bind states.⁸⁵ Although organizations are not generally parties to treaties – certainly not the main treaties on human rights for instance that are only open to states to ratify, there is no reason why organizations should not be bound by rules of customary law.

Of course in practice an organization may not be sufficiently active in international affairs to encounter any principles or rules of international law. But as organizations have increasingly moved from debate and standard setting, towards application and operation, they are increasingly encountering rules of international law. It is now accepted that the World Bank, when funding a large dam project in a developing state, is bound by basic axioms of environmental and human rights law. Can it be argued that the EU, if it uses military might to match its economic might, is not subject to the rules governing the use of force in international relations as well as the principles of international humanitarian law? Of course, there are issues of when responsibility lies with the organization and when liability is with the member states. In general terms though, an organization that has international legal personality bears responsibility for acts carried out in its name and under its authority.

In 2003 the International Law Commission (ILC) commenced discussions on the responsibility of international organisations. Draft Article 3 recognizes that 'every internationally wrongful act of an international organization entails the international responsibility of the international organization'. Further, it declared that 'there is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) is attributed to the international organization under international law; and (b) constitutes a breach of an international obligation of that international organization'.⁸⁶ By mirroring the provision in its 2001 Articles on State Responsibility,⁸⁷ the ILC indicates that by viewing institutions as being similarly responsible for breaches of international law, it must be the case that they are bound by international law.

The Final Report of the International Law Association (ILA) Committee on Accountability of Organisations in 2004 makes it clear that acts of organizations

84. See also Sands and Klein, *supra* n. 80, at pp. 458-459.

85. See European Court of Human Rights Judgment in *Matthews v. United Kingdom*, (1999) 28 EHRR 361 at para. 22.

86. ILC, Report of the 55th Session 2003, UN Doc. A/58/10, 31.

87. Articles on Responsibility of States for Internationally Wrongful Acts 2001, Arts. 1-2.

‘may be in accordance with the letter or spirit of the constituent instrument ... but this does not prevent them from being wrongful under international law because of their non-conformity with other applicable rules of international law’.⁸⁸ The ILA Committee’s examples include organizations incurring ‘internationally legal responsibility if their use of force and their imposition of economic coercive measures are not in conformity with relevant rules of international law, and in particular the humanitarian law principles of proportionality and of necessity’. Further, organizations ‘may incur international legal responsibility if the exercise of discretionary powers entails a sufficiently serious breach of a superior rule of law such as the right to life, food and medicine of the individual or guarantees for due process of law’.⁸⁹ Thus, according to the ILA, organizations have to comply with basic principles of human rights law, an issue which this article now details.

6. CORE OBLIGATIONS UNDER HUMAN RIGHTS LAW

According to the International Court of Justice (ICJ):

‘International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.’⁹⁰

The principles and rules of international law applicable to an international organization depend, in the words of the ILA Committee on the Accountability of International Organizations, on its ‘institutional acts, operational activities, as well as the omissions’ of the organization.⁹¹ Human rights obligations are normally applicable to institutional activities that have an effect on the lives of individuals within countries. According to the ILA the:

‘Human rights obligations, which are increasingly becoming an expression of the common constitutional traditions of States, can become binding upon [organisations] in different ways: through the terms of their constituent instruments; as customary international law; or as general principles of law or if an [organisation] is authorised to become a party to a human rights treaty.’⁹²

88. ILA Committee on the Accountability of International Organizations, Final Report (Berlin, 2004) p. 34.

89. *Ibid.*

90. *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Rep. (1980) p. 73 at pp. 89-90.

91. See *supra* n. 88.

92. *Ibid.*, p. 27.

Respect for human rights, one of the fundamental principles, and the core of customary rules derived from it, constitute obligations for organizations. Though there may be some disagreement over what constitutes the core human rights,⁹³ Brownlie authoritatively identifies genocide; slavery or the slave trade; the murder or causing the disappearance of individuals; torture or cruel, inhuman or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and a 'consistent pattern of gross violations of internationally recognized human rights' as constituting breaches of core rights.⁹⁴ It will be argued below that there are also certain core economic rights that are applicable to international organizations. It can also be contended that discrimination on grounds of sex, ethnicity, language or religion is also a breach of core rights.⁹⁵ In addition, the non-derogable rights in the International Covenant on Civil and Political Rights would add equality before the law and freedom of thought, conscience and religion to the core rights.⁹⁶ Though the UN and EU are not parties to the human rights treaties,⁹⁷ the identification of non-derogable rights within a treaty is an indication that they represent core rights.

This article is concerned with identifying clear basic principles and rules of international law applicable to the UN and EU, hence its approach in identifying those core human rights that exist in customary law. This is without prejudice to the argument developed by this author elsewhere,⁹⁸ that those organizations, as promulgators and sponsors of documents and treaties such as the UDHR, the Charter of Fundamental Freedoms in Europe and the two International Covenants, should, as an application of the rule of law, be bound by the contents, not on the basis of treaty obligation but on the basis of a theory of constitutionalism. In this article we will look at actions of the EU and UN from the perspective of whether they breach the core rights. If the actions potentially are a breach of other rights, then institutional responsibility is much less clear. Certainly the European Court of First Instance in the *Kadi* and *Yusuf* cases of 2005, reviewed below, did not see liability extending beyond the core.

93. Zemanek, *supra* n. 48, at p. 420.

94. Brownlie, *supra* n. 11, at p. 537, citing the American Law Institute's *Restatement of the Law: The Third* (1987) p. 161. See also Ahmed and Butler, *supra* n. 41, at p. 799.

95. Arts. 1(3) and 55 of the UN Charter; Brownlie, *supra* n. 11, at pp. 546-549.

96. Art. 4 International Covenant on Civil and Political Rights 1966. A slightly different list of non-derogable rights is in the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art. 15.

97. See ECJ *Opinion 2/94 re Accession to ECHR* [1996] ECR I-1759 at para. 27 where the Court opines that the EC had no competence to conclude treaties in this field.

98. N.D. White and D. Klaasen, 'An Emerging Legal Regime?', in N.D. White and D. Klaasen, eds., *The UN, Human Rights and Post Conflict Situations* (Manchester, Manchester University Press 2005) p. 17.

6.1 Application of core rights

When the Security Council or the Council of the EU mandates the temporary administration of territory (as in Kosovo, or in Mostar),⁹⁹ or when they impose non-military measures against states, they are bound by basic provisions of human rights law, and are responsible for any breach caused by their actions.¹⁰⁰ On sanctions, for instance, the ILA Committee recommends that wherever possible non-forcible measures should be ‘directed against particular individuals and entities rather than against the population as a whole’. But when listing individuals and entities for the purpose of targeted sanctions the organization should establish the ‘necessary mechanisms to ensure compliance with basic human rights guarantees’.¹⁰¹

In relation to peacekeeping and peace enforcement activities undertaken by the UN and EU, there is potential responsibility for violations of human rights law and, where appropriate, international humanitarian law when it is engaging in activities of the kind regulated by that legal regime.¹⁰² The ILA Committee declares that ‘troop-contributing countries remain responsible for violations of the applicable international humanitarian laws, but [organizations] bear a coordinate responsibility with troop-contributing states for ensuring compliance with the applicable principles of international humanitarian law in peacekeeping or other operations conducted under the control or authority’ of the organization. The same argument must apply to human rights law. Peacekeeping forces have responsibility to uphold basic human rights, although the protection of these rights will arguably only be an obligation in areas or situations under their ‘effective control’.¹⁰³

Although the ILA Committee’s general principles provide the framework for apportioning responsibility between organization and member states in peacekeep-

99. SC Res. 1244, 10 June 1999 (re Kosovo); Council decision 96/744/CFSP OJ L 340, 30 December 1996 on phasing out of EU operations in Mostar. See generally R. Wilde, ‘From Danzig to East Timor and Beyond’, 95 *AJIL* (2001) p. 383.

100. This is in addition to the obligations (if any) placed on the Security Council under Art. 50 of the UN Charter which states that ‘if preventive or enforcement measures against any state are taken by the Security Council, any other state ... which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems’.

101. See *supra* n. 88, at pp. 28-29.

102. For a wider discussion see M.C. Zwanenberg, *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations* (Leiden, E.M. Meijers Institute of Legal Studies 2004); I. Scobbie, ‘International Responsibility’, in R.-J. Dupuy, ed., *A Handbook on International Organizations*, 2nd edn. (Dordrecht, Nijhoff 1998) p. 886.

103. Discussed in the context of occupation by the European Court of Human Rights in *Loizidou v. Turkey*, (1995) 20 EHRR 99. On the application of the International Covenants on Civil and Political and Economic, Social and Cultural Rights in situations of military occupation see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep. (2004) paras. 108-111.

ing operations, the final answer as to where responsibility lies will depend on the circumstances of control in each specific case. As Hirsch states:

‘Each individual case must be examined as to whether the specific legal act was performed under the control of the organization or the sending state. If a member of such a force performs an act under the direction of its national government, that government will be the proper addressee of any claim arising from that act; this conclusion will not be altered even in cases where the contingent to which that member belongs is generally under the operational control of the organization.’¹⁰⁴

There will often be issues in the activities of peacekeeping operations of whether it is the organization or the state that is responsible for activities carried out on the ground, though in the case of a refugee camp under the control of the UN for instance, that body can have no excuse for discriminating against women and girls in the provision of basic education.¹⁰⁵

At the level of organizational decision-making though, human rights obligations are directly applicable to the UN or EU. The fact that the principal decision-making bodies in these areas – the Councils – are made up of states and that, in the case of the UN Security Council, the permanent members may have too great an influence on particular decisions, does not shift responsibility for decisions from the organization to the member states. Once a decision of the Council is made it is a reflection of its will, not just an amalgam of the wills of member states.¹⁰⁶

In considering the UN Security Council’s and EU Council’s actions in human rights terms, it can be seen that their decisions can be directed at individuals such as the Lockerbie suspects,¹⁰⁷ or individuals suspected of belonging to certain terrorist groups discussed in the next section. Though this may not necessarily result in violations of core rights *per se*, they may together constitute a ‘consistent pattern of gross violations of internationally recognized human rights’, thus breaching the core.¹⁰⁸ Decisions may directly affect individuals as with economic measures imposed on states or targeted at individuals. This clearly has direct relevance to the core economic rights discussed below.¹⁰⁹

104. M. Hirsch, *The Responsibility of International Organizations to Third Parties: Some Basic Principles* (Dordrecht, Nijhoff 1995) pp. 64-65. See also K. Wellens, *Remedies against International Organizations* (Cambridge, Cambridge University Press 2002) pp. 52-53; G. Gaja, ‘Second Report on Responsibility of International Organizations’, ILC 55th session, UN Doc. A/CN.4/541, 2 April 2004, paras. 33-41.

105. G. Verdirame, ‘UN Accountability for Human Rights Violations in Post-Conflict Situations’, White and Klaasen, *supra* n. 98, p. 81, at pp. 89-92.

106. N.D White, ‘The Will and Authority of the Security Council After Iraq’, 17 *Leiden JIL* (2004) p. 645.

107. SC Res. 731, 21 January 1992.

108. Brownlie, *supra* n. 11, at p. 537.

109. Section 6.5.

6.2 Self-determination

Furthermore, it must not be forgotten that Council decisions may directly affect a group's right to self-determination, in its political and economic, as well as external and internal aspects. The Councils should ensure that their decisions protect a peoples' right to sovereignty over its natural resources as an aspect of economic self-determination,¹¹⁰ and to ensure that they only endorse elections that 'guarantee the free expression of the will of the people'.¹¹¹ These obligations are due to developments in the fundamental principle of self-determination and thus can be seen as sufficiently core to be binding on organizations.

Any doubts about the status and content of the principle of self-determination are removed when reflecting upon its development. From relatively few references to self-determination in the Charter,¹¹² the UN General Assembly has helped develop it as a fundamental principle of international law, recognized by the International Court of Justice.¹¹³ The development of the right has occurred primarily through two seminal General Assembly resolutions – the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960,¹¹⁴ and the Declaration on Friendly Relations of 1970.¹¹⁵ In addition, the two UN sponsored International Covenants on Human Rights of 1966, both guarantee in the first article the right of peoples to self-determination.

The self-determination of peoples must be respected by international actors, in both its economic (which includes sovereignty over natural resources)¹¹⁶ and political aspects. The content of the latter aspect is accurately summarized by Harris, who states that there is a 'rule of international law by which the political future of a colonial or similar non-independent territory should be determined in accordance with the wishes of its inhabitants, within the limits of the principle of *uti possidetis*'.¹¹⁷ While identifying this as the 'external aspect' of self-determination, Harris goes on to say that its 'internal aspect' *may* 'require that governments generally have a democratic base, and that minorities be allowed political autonomy'.¹¹⁸ The

110. See for example A. Orakhelashvili, 'The Post-War Settlement in Iraq: The UN Security Council Resolution 1483 (2003) and General International Law', 8 *JCSL* (2003) p. 307.

111. Art. 25(b) International Covenant on Civil and Political Rights 1966.

112. Arts. 1(2) and 55 of the UN Charter.

113. *Namibia* opinion, *ICJ Rep.* (1971) at p. 31; *Western Sahara* opinion, *ICJ Rep.* (1975) at pp. 31-33.

114. GA Res. 1514, 14 December 1960.

115. GA Res. 2625, 24 October 1970.

116. GA Res. 1803, 14 December 1962.

117. D.J. Harris, *Cases and Materials on International Law*, 6th edn. (London, Sweet and Maxwell 2004) p. 112.

118. *Ibid.* Arts. 25 and 27 of the International Covenant on Civil and Political Rights. See further Tomuschat, *supra* n. 46, at p. 258.

value of democracy promoted consistently by the General Assembly since the end of the 1980s and the end of the Cold War,¹¹⁹ has helped to develop the fundamental principle of self-determination to include a *possible* democratic element. The roots for this legal development can be traced back to Article 21 of the UDHR of 1948 and Article 25 of the International Covenant on Civil and Political Rights 1966. Article 21 provided that ‘everyone has the right to take part in the government of his country directly or through freely chosen representatives’. Franck concludes that ‘self-determination is the historic root from which the democratic entitlement grew’. However, unlike self-determination, democracy is not the source of peoples’ rights but is the source of individual rights. ‘While democracy invokes the right of each *person* to participate in governance, self-determination is about the social right of a *people* to constitute a nation state.’¹²⁰

In summary, a full-blown right to democracy is not yet part of the right to self-determination, in part because of the lack of genuine consensus on the form and content of democracy. However, aspects of a right to democracy can be said to be part of the right to self-determination, primarily those aspects derived from the above mentioned provisions of the UDHR, and the Covenant as developed by the Human Rights Committee.¹²¹ These are primarily rights revolving around the electoral process, which has genuinely to reflect the will of the people.¹²² Of course not all states comply with these minimum requirements, though the UN General Assembly has consistently supported the holding of periodic free and fair elections as well as promoting and consolidating democracy.¹²³

6.3 **Anti-terrorist measures**

Furthermore, there are human rights issues raised by the UN Security Council acting increasingly and controversially as a judicial body as well as a legislator,¹²⁴ in addition to its executive function of dealing with threats to and breaches of the peace. While there are of course tremendous institutional and constitutional problems with one organ being capable of acting as judge, jury and executioner, it is

119. See N.D. White, ‘The United Nations and Democracy Assistance: Developing Practice within a Constitutional Framework’, in P. Burnell, ed., *Democracy Assistance* (London, Frank Cass 2000) p. 67 at pp. 74-76.

120. Franck, *supra* n. 45, at p. 92.

121. See General Comment No. 25 (57) on Article 25, 1510th mtg of the Human Rights Committee, 57th session, 12 July 1996, UN Doc. CCPR/C/21/Rev. 1/Add. 7.

122. *Ibid.*

123. See most recently GA 60/162, ‘Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization’, 16 December 2005.

124. For a discussion on the Council as legislator see M. Happold, ‘Security Council Resolution 1373 and the Constitution of the United Nations’, 16 *Leiden JIL* (2003) p. 593; S. Talmon, ‘The Security Council as World Legislature’, 99 *AJIL* (2005) p. 175.

contended here that when the Council is performing a judicial function, such as endorsing the listing of individuals suspected of being in the Taliban or Al-Qaeda,¹²⁵ or implicating Libya in the Lockerbie bombings of 1988,¹²⁶ it should respect basic principles of natural justice and due process when carrying out that function. If the Council wants to sit as a court on occasions and judge states and individuals, then it should give them a fair trial. This puts to one side the issue of whether it has the legal competence in terms of the UN Charter to act as a court.¹²⁷ However, denial of fair trial, though a breach of human rights, is not necessarily a breach for which the Security Council or EU Council is responsible, since it is not a breach of a core right as identified above. Nevertheless, if the Councils persist in these actions without respecting these rights then this may amount to a pattern of abuse of recognized rights and by this standard will constitute a breach. Furthermore, denial of institutional responsibility for human rights abuses flies in the face of the constitutional argument mentioned above, but in any case, even if the Councils may not be bound by obligations to respect due process, and in the event of seizure of an individual's funds, his or her property rights, the fact that they are not respecting rights is still important when assessing the legitimacy of these actions.

The European Court of First Instance has tackled these issues in the *Yusuf* and *Kadi* cases in 2005,¹²⁸ when it was faced with claims of abuse of power by the EC Council and Commission, and violations of fundamental rights of individuals targeted by EC Council Regulations that implemented UN Security Council resolutions concerning alleged terrorists and their supporters.¹²⁹ The individuals, whose assets and income had been frozen as a result of the regulations to prevent them from giving financial support to Al-Qaeda and the Taliban, failed in their application, but the reasoning of the Court was interesting for it placed the EC/EU within the international legal order, and further it recognized the role of fundamental principles (preferring the terminology of *jus cogens*), though it felt that core rights had not been violated on this occasion.¹³⁰

125. See SC Res. 1267, 15 October 1999.

126. SC Res. 748, 31 March 1992.

127. For views see E. Lauterpacht, *Aspects of the Administration of International Justice* (Cambridge, Grotius 1991) pp. 37-47.

128. *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, T-306/01, unreported case, 21 September 2005; *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, T-315/01, unreported, 21 September 2005. All references are to the first case hereinafter referred to as *Yusuf*. For discussion see R.A. Wessel, 'The UN, The EU and *Jus Cogens*', 3 *IOLR* (2006) p. 1.

129. Council Regulation (EC) No. 467/2001, 6 March 2001; Council Regulation (EC) No. 881/2002, 27 May 2002, implementing SC Res. 1267, 15 October 1999; SC Res. 1333, 19 December 2000; SC Res. 1390, 16 January 2002.

130. See further the European Court of Human Rights decision in *Bosphorus Hava Yollari Turizm v. Ireland* (2006) 42 EHRR 1; discussed in C. Costello, 'The *Bosphorus* Ruling of the European Court of Human Rights, Fundamental Rights and Blurred Boundaries in Europe', 6 *HRLR* (2006) p. 87.

The Court found that the Council regulations were within the powers of the EC,¹³¹ and that they did not violate the fundamental rights of the applicants. In arriving at its decision on the issue of fundamental rights, the Court found that due to Articles 25 and 103 of the UN Charter the obligations of member states arising under that treaty prevailed over obligations arising under the European Convention on Human Rights and under the EC Treaty.¹³² Further, the Court held that ‘the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, that in the exercise of its powers it is bound, by the very treaty by which it is established, to adopt all the measures necessary to enable its Member States to fulfil those obligations’.¹³³ The Court felt that it did not have the jurisdiction to review the resolutions of the UN Security Council that were the source of states’ obligations, and so could not ‘review indirectly the lawfulness’ of Security Council resolutions ‘according to the standard of protection of fundamental rights as recognized by the Community legal order’.¹³⁴ Although not recognising the applicability of ‘fundamental’ rights in the Community sense, the Court, at this point, recognized the overarching application of fundamental rights in an international law sense, using the concept of *jus cogens*:

‘None the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.’¹³⁵

Furthermore, the Court recognized the existence of ‘mandatory principles of international law’ presupposed in the UN Charter and binding on the Security Council by virtue of Article 24(2).¹³⁶ In applying these fundamental international rules and principles to the case before it, the Court found that the alleged denial of property rights would only have been a breach of these standards if it was an arbitrary deprivation of property or resulted in inhuman or degrading treatment of the applicants.¹³⁷ That was not the situation in the case before it. On the alleged breach of

131. By innovatively taking together the EC’s sanctioning and residual powers – see *Yusuf* paras. 165-166.

132. *Yusuf*, paras. 231, 233-234. Citing case C-124/95 *Centro-Com* [1997] ECR I81, para. 56.

133. *Ibid.*, para. 254.

134. *Ibid.*, paras. 270, 272.

135. *Ibid.*, para. 277.

136. Art. 24(2) of the UN Charter provides that ‘[i]n discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations ...’

137. *Yusuf*, paras. 289, 291-293, relying on Art.17(2) Universal Declaration on Human Rights 1948.

the right to a fair hearing, the Court did not directly comment on whether this constituted a mandatory rule in international law, instead it found that the Security Council had put in place sufficient measures to protect the applicant's rights, measures that relied primarily on the exercise of diplomatic protection by the applicant's state.¹³⁸ This might be seen as an implicit recognition that the right to a fair hearing has some content at the level of *jus cogens* in the sense used by the Court, though not to the extent of receiving a fair 'trial'. On the alleged breach of the right to an effective judicial remedy, the Court felt that it had reviewed the legality of the Security Council's decisions as much as it could, and that in any case, the denial of an effective remedy was not contrary to any *jus cogens* or fundamental principles or rules of international human rights law.¹³⁹

Though an intriguing decision in many ways, the Court's reasoning on Article 103 of the UN Charter is the issue considered here. It is interesting to note that in its resolutions on terrorism, the UN Security Council reminds states of their obligation to respect human rights law in implementing measures to combat terrorism, but does not explicitly recognize that these standards apply to it as well. In more general terms the Security Council has declared that 'terrorism can only be defeated in accordance with the Charter of the United Nations and international law, by a sustained comprehensive approach, involving the active participation and collaboration of all States, [and] international and regional organizations ...'.¹⁴⁰ This falls short though of a full acceptance of the Council's own responsibilities as regards human rights.

Nevertheless, reminding states of their obligations under human rights law suggests that the Security Council is not attempting to extend the effects of Article 103 of the Charter, discussed below, which gives priority to the obligations of the Charter over inconsistent treaty obligations under other treaties. From its statements above, and contrary to the Court of First Instance's approach in the *Yusuf* and *Kadi* cases, the Council does not appear to be attempting to use this provision to usurp the human rights obligations of states. Despite this reassurance, it is necessary to consider whether the Security Council has the competence to overrule human rights treaties if it so desired.

6.4 Article 103 and the core obligations of states

Given the Security Council's extraordinary supranational powers under Chapter VII, powers that it has exercised to a significant degree since 1990, it is necessary

138. *Yusuf*, paras. 311-318, 321 citing the 'Guidelines of the [Security Council's Sanctions] Committee for the conduct of its work', 7 November 2002.

139. *Yusuf*, paras. 337-338, 340, 342 citing Art. 4(1) of the International Covenant on Civil and Political Rights where access to a court is viewed as a derogable right.

140. SC Res. 1456, 20 January 2003, 'Declaration on Combating Terrorism'.

to consider how these impact on the human rights obligations of states. We have seen in the *Kadi* and *Yusuf* cases how the European Court of First Instance tackled the issue of the obligations of the UN and EU, but in so doing it seemed to accept the effect of Article 103 as an over-riding provision, subject though to the protection provided by what it labelled as *jus cogens* or mandatory rules of international law. This section will look at this issue from the perspective of a state's obligations under human rights law, with particular reference to economic sanctions.

Article 103 of the Charter provides that the obligations of the UN Charter shall prevail over inconsistent treaty obligations. Article 103 was a little used provision during the Cold War but it is one that has come into the spotlight with the increasing number of Chapter VII decisions made by the Security Council in the last fifteen years. By its terms Article 103 can be read as permitting the Security Council to override inconsistent human rights treaty obligations of states.¹⁴¹ For example this may allow the Security Council to impose economic sanctions on a state under Chapter VII, and override any inconsistent human rights obligations of the target state and member states obliged by the resolution to embargo the target state, just as its measures against Libya in 1992 overrode the obligations of Libya under the Montreal Convention of 1971, and obliged member states to deal with Libya in a restricted manner.¹⁴²

Clearly, Article 103 is directed at states not at any obligations on the Security Council itself. However, the possibility of the Security Council being able to override the human rights obligations of states, including EU member states, needs consideration for if this argument is accepted it would give the Council considerable discretionary power over human rights.¹⁴³ It would also be a recognition that the Council itself is of the view that it can disregard core rights since although the obligations are upon states themselves, it is the Council by its resolution that is ordering states to disregard them, resulting in imputation to the Council as well as to any state that is party to human rights treaties. Given that this article concentrates on the core rights applicable to the UN and EU, we will focus on the effect of Article 103 on those core rights.

The deliberate use by the Security Council of the combined effect of Articles 25 (which provides that Council decisions are binding), and 103 of the UN Charter to

141. Alvarez, *supra* n. 1, at p. 207. This seems to have been the interpretation of the English Court of Appeal in *R (Al-Jedda) v. Secretary of State for Defence* (2006) EWCA Civ 327.

142. *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, ICJ Rep. (1992) p. 114, at p. 126.

143. For a discussion on this matter in relation to international humanitarian law see R. Cryer, 'The Security Council and International Humanitarian Law' (British Institute of International and Comparative Law, forthcoming). It is recognized that while international humanitarian law creates obligations for both states and individuals, human rights law mainly creates obligations for states. See generally H.J. Steiner, 'International Protection of Human Rights', in Evans, *supra* n. 6, at pp. 772-3. Thus human rights law is susceptible to the full effect of Art. 103.

override or supplement existing treaty obligations was certainly not fully realised in earlier commentaries on the Charter. In these, Article 103 was seen as being merely ‘designed to exclude the possibility of a member state being impeded in carrying out its obligations or enforcing its rights under the Charter by conflicting obligations which it may have accepted under other international agreements’.¹⁴⁴ Nevertheless, the intent was not to confine the effects of Article 103 to the ‘primary’ obligations of the Charter. The drafters certainly seem to envisage the effects of Article 103 applying to the ‘secondary’ obligations imposed by the Security Council under Articles 25 and 41 in the case of sanctions regimes,¹⁴⁵ where member states must accept the obligations imposed by the UN Charter and the Security Council over conflicting obligations in trade agreements, for instance. Even if confined to having a specific impact on directly applicable obligations between the target state and other states whereby ‘an aviation ban would apply irrespective of prior aviation agreements, and a travel ban would be operative despite a treaty on the free movement of persons’,¹⁴⁶ and a trade embargo would be operative despite treaties on bilateral trade (and presumably multilateral obligations derived from the WTO), it can be seen that this can effect human rights obligations of the target state and its treaty partners.

Goodrich, Hambro and Simons assert that this overriding effect applies to all binding decisions of the Security Council.¹⁴⁷ Earlier commentaries on the Charter agree, however, that Article 103 only came into play in particular cases of conflict ‘between the two categories of obligation’, in contrast to the much wider provision in the League’s Covenant that purported to automatically abrogate obligations inconsistent with those arising from the constituent treaty.¹⁴⁸ Nevertheless even limiting the Charter’s obligations to particular cases of conflicting norms still allows the Council to override the obligations of member states derived from human rights treaties.

144. N. Bentwich and A. Martin, *A Commentary on the Charter of the United Nations* (London, Routledge & Kegan Paul 1950) p. 179.

145. UNCIO, Vol. XIII 707. Art. 41 of the UN Charter provides that: ‘The Security Council may decide what measures not involving the use of armed force are to be deployed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations’.

146. J.A. Frowein and N. Krisch, ‘Article 41’, in Simma, *supra* n. 27, at p. 745.

147. L.M. Goodrich, E. Hambro and A.P. Simons, *Charter of the United Nations*, 3rd edn. (New York, Columbia University Press 1969) p. 616.

148. *Ibid.*, 615; Bentwich and Martin, *supra* n. 144, at p. 180. See Art. 20 of the League of Nations Covenant 1919 paragraph 1 of which provided that ‘members of the League severally agree that this Covenant is accepted as abrogating all obligations and understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof’.

6.5 Article 103 and economic sanctions

In terms of economic, social and cultural rights, the imposition of economic sanctions against a target state may well conflict with the obligations of the target state under the Covenant on Economic, Social and Cultural Rights to uphold basic rights to food, water, medicine and shelter for instance. Although in general terms, economic social and cultural rights are programmatic in nature, in that the level of protection achieved varies with the level of development within a state, the basic rights listed are in the nature of core obligations deriving from the right to life.¹⁴⁹ The Committee on Economic, Social and Cultural Rights makes a similar statement:

‘... the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would largely be deprived of its *raison d’être*.’¹⁵⁰

Here the Committee is concerned with core obligations on state parties under the Covenant. Accepting this core as customary, it must be the case that the Security Council is bound to respect these rights, and should ensure that target states are not excused from their obligations under custom or treaty. The Council has on several occasions stated that it will try to avoid ‘negative humanitarian consequences as much as possible’,¹⁵¹ but this seems an inadequate basis upon which to argue it has accepted that it must not violate human rights.

It seems clear that by its terms, at least, Article 103 only applies to treaty rights. It was seen to be the intent of the drafters that it was not to apply to customary international law.¹⁵² It has been argued, however, that ‘Article 103 must be seen in connection with Article 25 and with the character of the Charter as the basic document and “constitution” of the international community’ so that ‘the ideas underlying Art. 103 are also valid in the case of conflict between Charter obligations’ and

149. The rights to food, water, shelter and health are derived from Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights, while the right to life is contained in Art. 6 of the International Covenant on Civil and Political Rights. For their linkage see N.D. White, ‘Towards a Strategy for Human Rights Protection in Post-Conflict Situations’, in White and Klaasen, *supra* n. 98, at p. 465.

150. ‘The Nature of States Parties Obligations: Article 2(1) of the Covenant’, General Comment No. 3, UN Doc. E/1991/23, para. 10.

151. UN Doc. S/PRST/1999/34, 30 November 1999.

152. R. Bernhardt, ‘Article 103’, in Simma, *supra* n. 27, at p. 1293.

those arising for instance in customary international law.¹⁵³ It is not necessary to equate the constitutional character of the Charter with an absolute supremacy interpretation of Article 103. Article 103 has to be interpreted in the context of the values and principles identified in the opening sections of this article.¹⁵⁴

The UN Charter embodies values and fundamental principles upholding peace, security and human rights. Although the human rights obligations contained in the UN Charter are weaker than those protecting the value of peace and security, it cannot be the case that the human rights elements of the Charter and all those laws derived from them are swept away in the face of an inconsistent Security Council decision. To allow an executive body the discretionary power to push aside fundamental guarantees would clearly be to permit the undermining of fundamental principles and core values underpinning international relations. It would amount to accepting a hierarchy provision (Art. 103) of potentially limitless content, which would undermine the development of a hierarchy of substantive principles and rules. To allow Article 103 to have this effect would be the antithesis of a constitutional approach. It is argued here that like states, the Security Council and other organs of the UN as well as other organizations such as the EU, are bound by obligations not to violate core economic and social rights, especially those specified by the Committee on Economic, Social and Cultural Rights mentioned above.¹⁵⁵

Sanctions regimes with their humanitarian exceptions and increasing use of smarter sanctions are designed to avoid the use of starvation as a weapon. The obligation to protect the basic economic rights of the population of the target state is still upon that state itself, but it is also an obligation on both the UN and the EU to ensure that its sanctions regimes are properly designed to minimise their impact on the population.¹⁵⁶ Arguably too, if the target state fails to use the humanitarian exceptions correctly, for instance by distributing food and medicine only to favoured

153. *Ibid.*, p. 1299.

154. See MacDonald, *supra* n. 3, at p. 125 who states that in debates leading up to the drafting of Art. 30 of the Vienna Convention on the Law of Treaties (which addresses Art. 103 of the UN Charter), states 'took the view that Article 103 was an early forerunner of the *jus cogens* doctrine' in that the Charter contained 'peremptory norms', or 'incontestable norms', or 'a quasi-universal set of norms', rendered binding on states by virtue of Art. 103. In this context, Art. 103 was seen as supporting the fundamental rules not as a means of undermining them.

155. For support that the Universal Declaration of Human Rights of 1948 (which contains civil and political, and economic, social and cultural rights) has become customary law see *Filirtiga v. Pena-Irala*, (1980) 19 *ILM* 966. But see C. Chinkin, 'International Law and Human Rights', in T. Evans, ed., *Human Rights Fifty Years On: A Reappraisal* (Manchester, Manchester University Press 1998) p. 105, at p. 113.

156. On the development of smart sanctions see D. Cartwright and G.A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Boulder CO, Lynne Rienner 2000) pp. 3-5; D. Cartwright and G.A. Lopez, *Sanctions and the Search For Security: Challenges to UN Action* (Boulder CO, Lynne Rienner 2002) pp. 63-84.

groups within the state, the organizations have a duty to try and ensure that it is corrected. This follows from the fact that the Council itself is bound by fundamental customary human rights so that its actions have to respect those rights.

7. CORE OBLIGATIONS ARISING FROM THE PRINCIPLES AND RULES GOVERNING PEACE AND SECURITY

When considering the duties of the UN and the EU under human rights law, both organizations are in a similar position, except where the security function of the UN's executive body might impact by virtue of Article 103. Even here it was argued that a constitutional interpretation of the Charter precluded the Security Council from overriding fundamental principles of human rights law. The purpose of the following sections will be to consider the rights and duties under international law of the UN and EU as international legal persons taking coercive measures in the field of peace and security. Here it will be seen that the hierarchical aspects of the UN Charter impinge more greatly on the competence of the EU in international law, especially where they are underpinned by fundamental principles of international law. This will be turned to later in the chapter. Before doing that, though, it is necessary to consider whether the EU is also subject to the limitations upon regional organizations found in the provisions of the UN Charter.

7.1 The EU as a regional arrangement within the UN Charter?

The issue to be considered in this section is whether the EU is a 'regional' collective security organization in the sense of Chapter VIII of the UN Charter. Chapter VIII purports to govern the relationship between the UN and regional arrangements or agencies in issues of peace and security. Schermers and Blokker include regional organizations within a somewhat wider category of 'closed' organizations which 'seek only membership from a closed group of states and no members from outside the group will be admitted.'¹⁵⁷ Of course there may be some debate about whether an applicant country is within the group or not, as with the case of Turkey and Russia and the EU, but the contrast with universal organizations, which are normally open to all states,¹⁵⁸ is clear. It would seem that attempts at further refinement of the concept of regional organization are fraught with difficulty. To define regionalism in terms of geographical proximity is immediately appealing but in practice very difficult to judge as the endless debates about where Europe ends in

157. H.G. Schermers and N.M. Blokker, *International Institutional Law*, 4th edn. (Leiden, Nijhoff 2003) p. 42.

158. See for example Art. 4 UN Charter.

a geographical sense illustrate only too well. Furthermore, 'the criterion of common cultural, linguistic, or historical relations'¹⁵⁹ is also imprecise and likely to cause as many disputes as it solves.¹⁶⁰

In reality, regional organizations are non-universal groupings of states that are essentially self-defining in terms of membership and objects and purposes, but generally have as their aim the protection or achievement of certain values, such as peace and security or economic prosperity among their membership. The principal ones often share similar goals and values to the UN, ranging across peace and security, human rights and justice, to economic and social well being, but on a regional level. Thus the potential for overlap between the functions and activities of the UN and regional organizations is considerable.

The EU is certainly a regional body in the economic sense having a well-developed level of integration between members especially under the first pillar (the EC). It is also developing its competence with regard to foreign and security policy.¹⁶¹ Unlike the established regional organizations of the Americas and Africa, which are often concerned with controlling their membership, the EU's security policy is principally external to its membership, relating to threats to or breaches of the peace within or by states that are not members of the EU. This, though, does not disqualify it as a regional organization. The relative harmonious state of European affairs means that its main concern in security matters is external, though one should not underestimate the propensity of the continent towards violence as history shows. The election of an extreme right-wing government in Austria in 2000 and the reaction of the EU to it, as well as the threat from terrorism as illustrated by the Madrid bombings of 11 March 2004 and London of 7 July 2005, show that European security is as much an internal issue as an external one.

In general terms although the EU has not expressly stated that it comes within Chapter VIII (unlike for instance the OAS and the OSCE),¹⁶² it has not tried to opt out of the UN Charter system for collective security. Nevertheless, the proposition that the EU comes within Chapter VIII of the UN Charter is not necessarily that

159. W. Hummer and M. Schweitzer, 'Article 52', in Simma, *supra* n. 27, at p. 821.

160. For further discussion see P. Taylor, *International Organisations in the Modern World* (London, Pinter 1993) p. 7; A. Abass, *Regional Organisations in the Development of Collective Security* (Oxford, Hart 2004) pp. 1-26; E.D. Mansfield and H.V. Milner, 'The New Wave of Regionalism', in P.F. Diehl, ed., *The Politics of Global Governance* (Boulder CO, Lynne Rienner 2001) pp. 314-316; M.P. Karns and K.A. Mingst, *International Organisations: The Politics and Processes of Global Governance* (Boulder CO, Lynne Rienner 2004) pp. 145-153.

161. See R.A. Wessel, 'The State of Affairs in EU Security and Defence Policy: The Breakthrough in the Treaty of Nice', 8 *JCSL* (2003) p. 265.

162. OAS Charter Art. 1 reads in part: 'Within the United Nations, the Organisation of American States is a regional agency'. In 1992, the member states of the OSCE (then CSCE) declared the organisation to be a 'regional arrangement in the sense of Chapter VIII of the Charter of the United Nations', 31 *ILM* (1992) p. 976 and p. 1390.

clear cut. In the text of the TEU, there is a clear statement that the Union in defining and implementing a foreign and security policy shall safeguard its values and preserve peace and security 'in conformity with' and 'in accordance with' the principles of the United Nations' Charter.¹⁶³ The principles of the UN Charter are contained in Article 2 of that treaty. Although there is no specific reference to Chapter VIII of the Charter (Arts. 52 to 54) in the TEU, it is argued later in the Chapter that conformity with the principles of the Charter requires compliance with the rules governing the use of force (contained in Art. 2(4)), an integral element of which is the UN Security Council's power to authorize states to use force under Chapter VII (Art. 42), or regional arrangements under Chapter VIII (Art. 53).

Interestingly though, in the two Security Council authorizations to EU forces to date – Althea in Bosnia (2004) and Artemis in the D.R. Congo (2003), the Security Council authorized the forces under Chapter VII (i.e., Art. 42) rather than Chapter VIII (i.e., Art. 53) of the UN Charter.¹⁶⁴ Such practice is not incompatible with the presupposition that the EU is a regional arrangement within the meaning of Chapter VIII, for as past Security Council resolutions of the mid 1990s authorising NATO in Bosnia show,¹⁶⁵ the important issue is gaining Security Council authority to use force, and Chapter VII is the normal method of granting this. This may also be explicable given that both the Bosnian and Congolese forces contained troops from outside the EU and it was therefore more sensible to direct the authorization at the member states of the UN (including EU states) undertaking the military action. The normal method for the Security Council to authorize member states to use force is to act under Chapter VII.

Although its future is now in serious doubt, it is still important to consider the Treaty Establishing a Constitution for Europe of 2004, in order to see whether it constitutes a clearer signal on the issue of whether the EU is a regional organization within the meaning of Chapter VIII of the UN Charter. The Treaty has a more elaborate set of security provisions and also has an increased number of references to the EU acting in conformity with the principles of the UN Charter and international law.¹⁶⁶ Again though there are no specific references to Chapter VIII of the UN Charter, the only specific Charter provision mentioned is Article 51 (Chapter VII), which preserves the right of individual or collective self-defence in response to an armed attack and reference to which is found in the Constitution's mutual

163. Art. 11 TEU, *OJ C* 325/5, 24 December 2002.

164. SC Res. 1525, 22 November 2004 (Bosnia); SC Res. 1484, 30 May 2003 (DRC).

165. SC Res. 770, 13 August 1992.

166. See *supra* n. 41, Art. I-3(4), in relation to upholding and promoting its values; Art. I-41(1) in relation to peace-keeping and conflict prevention; Art. III-292(1) in relation to the principles that should guide EU action on the international scene; Art. III-292 (2) in relation to common policies and actions of the EU.

defence clause.¹⁶⁷ The Constitution does state that the Union ‘shall promote multilateral solutions to common problems, in particular within the framework of the United Nations’,¹⁶⁸ and that the Union ‘shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies’,¹⁶⁹ but these are not specific enough obligations to expressly incorporate Chapter VIII.

On balance though, as the following analysis will show, it is difficult for the EU to deny that it is subject to Chapter VIII. Although it is clearly within the founding states’ competence to establish a closed organization by delimiting membership in certain ways, once such an organization is created having as one of its objects and purposes the maintenance or restoration of peace and security, then it is subject to the principle of the non use of force and the rules of international law governing the use of force, which include the provisions of Chapter VIII of the UN Charter.

7.2 Hierarchies

Debates about the legal relationship between the UN and regional organizations have tended to focus on Article 53 of Chapter VIII of the UN Charter, which provides that ‘enforcement’ action by regional bodies has to be authorized by the UN Security Council.¹⁷⁰ A great deal of debate has surrounded issues of interpretation of Article 53, concerning for instance issues of implicit authorization, acquiescence amounting to authorization and retrospective authorization.¹⁷¹ Further debate focuses on Article 103 of the UN Charter, discussed in relation to human rights obligations above. The range of Article 103 clearly extends to the treaties establishing regional organizations so that if there is a conflict between obligations created by them then UN Charter obligations prevail, so long as any secondary

167. Ibid., Art. I-41(7).

168. Ibid., Art. III-292(1), 2nd para.

169. Ibid., Art. III-327(1). See further Art. III-305 of the Constitution which deals with EU’s member states’ obligations when acting within other international organizations, including the obligation on states that are members of the Security Council to ‘defend the positions and interests of the Union, without prejudice to their responsibilities under the UN Charter’. This is similar to Art.19 of the existing TEU.

170. Art. 53 of the UN Charter provides in part that ‘the Security Council shall ... utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements without the authorization of the Security Council’. In contrast to enforcement action, when regional organizations take action to defend one of their members from external armed attack, Art. 51 of the UN Charter permits the right of collective self-defence ‘until the Security Council has taken measures necessary to maintain international peace and security’.

171. See most recently U. Villani, ‘The Security Council’s Authorization of Enforcement Action by Regional Organisations’, 6 *Max Planck UNYB* (2002) p. 535; E. de Wet, ‘The Relationship between the Security Council and Regional Organisations during Enforcement Action under Chapter VII of the United Nations Charter’, 71 *Nordic JIL* (2002) p. 1; C. Walter, ‘Security Council Control over Regional Action’, 1 *Max Planck UNYB* (1997) p. 129.

obligations created by the UN Security Council do not violate fundamental principles and the accompanying rules of customary international law.

In traditional international legal terms, the presumption has been against hierarchies. They smack too much of a constitutional system, rather than the traditional contractual system of inter-State relations. In an international system which is still state dominated and horizontally constructed there must be legitimate reasons for hierarchy within bodies set up by states. Hierarchies are antithetical to the Westphalian paradigm of sovereign equal nation states recognising no superior. Even in the post-1945 era of the growth of international organizations there is a presumption against hierarchies. Nevertheless, in those two key constitutional provisions mentioned above, Articles 53 and 103, the founders of the UN Charter, the representatives of the international community at the time, not only created an international organization, they provided legal structuring both to the relationship between the UN and regional bodies such as the EU, and the UN and its member states (including member states of the EU).¹⁷²

The distinctive features of the hierarchy provisions in the UN Charter must be borne in mind. While Article 53 is referring to enforcement action by other international organizations within a collective security context, and places authority in the hands of the Security Council, Article 103 refers to obligations on states under international agreements. There is no clear institutional arbiter of Article 103, though the Security Council is relying increasingly on its effect to drive through its anti-terrorist legislation, first against Libya in 1992,¹⁷³ and then more widely after the terrorist attacks of September 11, 2001.¹⁷⁴ Thus in practice the hierarchy provisions of the UN Charter are being moulded by the Security Council. This is explicitly provided for in Article 53 regarding regional bodies and enforcement action, while the combination of Articles 25 and 103 has in practice given the Security Council crude supranational powers over Member States.

Nevertheless, in most collective security matters, Chapter VIII of the UN Charter makes it clear that regional organizations such as the EU have autonomy in diplomacy, in peaceful settlement, and implicitly in the case of consensual peace-keeping, subject to a reporting requirement.¹⁷⁵ It is not proposed in this chapter to look in detail at the whole range of security activities that can be undertaken by the EU, but to consider the issues where there are disputes about hierarchy under the formal provisions of the UN Charter, regarding both non-forcible and forcible measures taken in a security context. These disputes show that there is a complex interplay between the formal provisions of the UN Charter and fundamental prin-

172. Bernhardt, *supra* n. 152, at p. 1295.

173. SC Res. 748, 31 March 1992.

174. SC Res. 1373, 28 Sept. 2001.

175. See Arts. 52 and 54 UN Charter.

ciples and basic rules of international law to which all organizations with international legal personality are bound.

7.3 Non-forcible measures

Regional organizations have a great deal of autonomy in economic matters internal to their regions and membership. International laws are sometimes kept at bay for policy reasons,¹⁷⁶ but there is an acceptance that they are applicable. However, when regional organizations start to flex their economic muscles problems arise particularly when they may be trying to coerce non-member states into changing their behaviour.

It may be argued that in some of these instances of external action regional organizations such as the EU are simply pooling the existing international legal rights of member states to take collective non-forcible countermeasures to combat breaches of obligations owed *erga omnes*.¹⁷⁷ Normally under international law non-forcible countermeasures are taken bilaterally, by a state that has been the victim of a violation of international law against the state in breach. They are temporary measures aimed at seeking to restore normal relations between the parties. Essentially what would otherwise be a temporary breach of international law by the victim state is permitted as a proportionate response to the initial breach by the responsible state.¹⁷⁸ However, if the violation constitutes a breach of a fundamental norm, for example aggression or genocide, then it has been argued that all states have a right to take countermeasures against the state in breach.¹⁷⁹ If those countermeasures do not go beyond the accepted limitations upon that doctrine, then although they are enforcing *international* community obligations, international law arguably recognizes the right of *regional* organizations like the EU to do so. It is a controversial right though.¹⁸⁰ While the International Law Commission (ILC) recognized the existence of *erga omnes* obligations in its 2001 Articles on State Responsibility, it was largely silent on how to enforce them.¹⁸¹ In addition, a great

176. S. Peers, 'Fundamental Rights or Political Whim? WTO Law and the European Court of Justice', in G. de Burco and J. Scott, eds., *The EU and the WTO: Legal and Constitutional Issues* (Oxford, Hart 2001) p. 111, at p. 130.

177. See *supra* n. 56.

178. D. Alland, 'Countermeasures of General Interest', 13 *EJIL* (2002) p. 1221, at p. 1221.

179. J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge, Cambridge University Press 2002) p. 283.

180. See Alland, *supra* n. 178; P. Klein, 'Responsibility for Serious Breaches of Obligations Deriving From Peremptory Norms of International Law and United Nations Law', 13 *EJIL* (2002) p. 1241; E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry NY, Transnational 1984) pp. 104-105; Cassese, *supra* n. 60, at p. 275.

181. Arts. 41 and 54 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts (2001). See Crawford, *supra* n. 179, at p. 302.

deal of regional practice is not so clear. In a number of instances it goes beyond the limited doctrine of countermeasures and in reality constitutes sanctions. While countermeasures are aimed at encouraging the restoration of a legal relationship sanctions have more punitive and coercive aims.¹⁸²

If regional organizations are exercising sanctioning powers beyond the application of collective countermeasures then they appear to be claiming to have separate and perhaps greater rights than the combined rights of the member states.¹⁸³ It could be argued that when they are exercising the power to impose economic sanctions *inter partes*, within the regional membership, then the members of the regional organizations have consented to this. But upon what basis can such organizations exercise these sanctioning powers externally, for instance in the case of the EU sanctions against Burma in 2000 and Zimbabwe in 2002, both taken without any Security Council authority?¹⁸⁴ From where does a regional organization claim to get its power of global governance when imposing sanctions against third states outside its region?

In general terms the enforcement of international law is not by any means wholly centralized in international institutions, but at the same time self-help by states has been severely restricted since 1945. The lacuna in the enforcement of fundamental rules that this process has left has arguably been filled by states taking collective countermeasures, and by regional organizations, along with the UN, when it is able to act, enforcing international law by non-forcible means. Following this line of argument, in principle when fundamental rules of international law are being breached, regional communities of states should be able to take global action. On this basis non-forcible sanctioning power, not clearly belonging to individual states, can be claimed by a regional actor such as the EU for the enforcement of fundamental rules.

182. N.D. White and A. Abass, 'Countermeasures and Sanctions', in Evans, *supra* n. 6 at pp. 524-526; Zoller, *supra* n. 180, at p. 106; G. Abi-Saab, 'The Concept of Sanction in International Law', in V. Gowlland-Debbas, ed., *United Nations Sanctions and International Law* (The Hague, Kluwer 2001) p. 32.

183. But see F.L. Morrison, 'The Role of Regional Organisations in the Enforcement of International Law', in J. Delbrück, ed., *The Allocation of Law Enforcement Authority in the International System* (Berlin, Duncker and Humblot 1995) p. 39, at pp. 46-47, where he states that organizations cannot have more powers than member States.

184. For Burma see Regulation No. 1081/2000, 22 May 2000 (*OJL* 122, 24 May 2000) – covering equipment for suppression, freezing of funds of persons related to important government functions – due to human rights violations. For Zimbabwe see Regulation 310/02, 18 February 2002 – relating to the freezing of funds and assets of members of government and ban on export of suppression equipment – due to human rights violations (*OJL* 050, 21 February 2002 – see also Council Regulation 313/2003, *OJL* 046, 20 February 2003). The measures against Zimbabwe were in addition to those taken under the Cotonou Agreement of 2000 regarding development aid, imposed in furtherance of the human rights clause in that agreement – see P. Eeckhout, *External Relations of the European Union* (Oxford, Oxford University Press 2004) p. 481.

Again the argument is controversial since the enforcement of international law by the taking of non-forcible coercive measures has been much reduced for the state as shown by the narrow doctrine of countermeasures codified by the ILC in 2001. If this is the case why should it be less restrictive for the regional actor? The answer might be because of the greater legitimacy action by a regional grouping of states brings. This must then depend upon the level of constitutional development in the relevant regional organization, for the more checks and balances and the greater the democratic development, the more legitimate the decision, and the less likely that a regional hegemon will dominate the decision.¹⁸⁵ Although there is clearly a democracy deficit with the EU,¹⁸⁶ it has greater legitimacy in this regard, evidenced by the fact that it has direct elections to the European Parliament, though that body's role in foreign policy is very limited.¹⁸⁷

There is certainly practice by regional organizations that suggests economic sanctions do not require the authorization of the Security Council under Article 53,¹⁸⁸ but it is only the EU's practice in this matter that has been consistently external to it. The EU's ability to undertake external non-forcible enforcement action is not argued to be a unique competence, but is a product of its more advanced constitutional development, and its concern with developing an external foreign policy (which is also an issue of advanced regional development).

Regional organizations such as the EU are claiming external competence over international matters, competence that states do not have. Or to put it more subtly, when the EU engages in economic coercion, it is not subject to so much criticism as when individual states engage in such activity. The UN's position on economic measures undertaken by regional bodies is equivocal – from San Francisco to the debates in the 1960s about sanctions imposed by the OAS, it has never been clear that Article 53 covers non-forcible measures, requiring the authorization of the Security Council. It is of course possible that the UN (Council or Assembly) could censure sanctions that it felt went beyond the Charter or the fundamental international legal principle of non-intervention,¹⁸⁹ just as it has done for individual states, for example in relation to the US embargo of Cuba.¹⁹⁰ Many of the internal (Haiti

185. For criticisms of regional organizations in this regard see S.N. MacFarlane and T.G. Weiss, 'Regional Organisations and Regional Security', 2 *Security Studies* (1992) p. 16, at pp. 29-34.

186. R. Burchill, 'The Future or Failure of Democracy in the EU', 7 *European Public Law* (2001) p. 307.

187. Art. 21 TEU; Eeckhout, *supra* n. 184, at pp. 416-417.

188. Comments by R. Wolfrum in Delbrück, *supra* n. 183, at p. 91.

189. 'The principle of non-intervention is part of customary international law and founded upon the concept of respect for the territorial sovereignty of states. Intervention is prohibited where it bears upon matters which each state is permitted to decide freely by virtue of the principle of state sovereignty. ... Intervention becomes wrongful when it uses methods of coercion in regard to such choices, which must be free ones' – Shaw, *supra* n. 56, at p. 1039.

190. See for example GA Res. 56/9, 4 December 2001.

– OAS) and external (Iraq, Federal Republic of Yugoslavia – EU) regional sanctions regimes imposed in the 1990s,¹⁹¹ have actually complemented to a large degree the UN's own measures, even though they may have technically preceded them. This signifies that the precise nature of the relationship between the UN and regional organizations on non-forcible measures has not been fully developed.

The situation appears to be that there is a presumption in favour of the EU possessing a power to impose economic sanctions against members and in certain circumstances (where fundamental principles are being breached) against third states. While it might have been the intention of the drafters of the UN Charter to put any coercive enforcement measures (whether forcible or not) under the authority of the Security Council, this has not been the case in practice.¹⁹² The main reason for this is because the basic freedom to trade or to shape economic relations between states has not been prohibited, though it has been curtailed, in the post-1945 era. Against this background of international law where there is no clear prohibition on economic coercion unless it breaches the denuded principle of non-intervention,¹⁹³ other international legal persons can utilise such freedoms. Or to put it another way, the clouds of obscurity that surround economic coercion when undertaken by a state, are largely lifted when undertaken by an organization. Of course the universal organization is endowed with such powers without any doubt,¹⁹⁴ but because universal rules do not prohibit economic coercion, it is also the case that in certain circumstances, regional organizations have a similar power.¹⁹⁵ Attempts to argue that the prohibition on the use of force in Article 2(4) of the Charter also covered economic force or coercion, as well as armed force, failed.¹⁹⁶ Thus against the background of a lack of a clear prohibition, regional organizations such as the EU have asserted a right of economic coercion.

7.4 **Military measures**

Just as a state's right to take non-forcible measures has been restricted (but not prohibited) in the post-1945 era, a state's right to take military action has also been

191. See White and Abass, *supra* n. 182, at pp. 518-519. See EC Regulation 2340/90, *OJL* 213/1 re Iraq; EC Regulation 3300/91, *OJL* 315/1 and EC Regulation 1432/92 *OJL* 151/4 re the Federal Republic of Yugoslavia.

192. C. Dominicé, 'Co-ordination Between Universal and Regional Organizations', in N.M. Blokker and H.G. Schermers, eds., *Proliferation of International Organizations: Legal Issues* (The Hague, Kluwer 2001) p. 82.

193. O.Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford, Clarendon Press 1988) pp. 212-213.

194. Art. 41 of the UN Charter.

195. Though they might be restricted by the principle of non-intervention – see White and Abass, *supra* n. 182, at pp. 523-524.

196. J. Paust and A.P. Blaustein, 'The Arab Oil Weapon – A Threat to International Peace', 68 *AJIL* (1974) p. 410, at p. 417.

(more severely) restricted in the new world order following the second world war. In their unilateral military actions, once states have gone beyond the right of self-defence, they are acting beyond what is clearly permitted by a fundamental principle of international law.¹⁹⁷ There may be attempts to develop further exceptions to the prohibition on the use of force to allow for defence of individuals in other countries,¹⁹⁸ or to defend against imminent or indeed latent threats,¹⁹⁹ but the presumption of illegality of such unilateral operations must be contrasted with the presumption of legality if the Security Council authorizes such operations.²⁰⁰ Even after NATO's military action against Serbia for its repressive actions in Kosovo in 1999, the unilateral, or indeed in that case the multilateral use of force to prevent gross violations of human rights is viewed as unlawful though arguably legitimate, whereas if the Security Council is persuaded to authorize such actions then they are viewed as lawful.²⁰¹ In this way the rules favour the value of peace over justice, and the principle prohibiting the use of force over that outlawing gross violations of human rights. Whether this hierarchy will continue in the face of Security Council inaction in the face of grave atrocities will be returned to in the section below that deals with the legitimacy of the Security Council. The question for now is why regional organizations like NATO or the EU do not have a similar competence to the UN Security Council.

Here the debate is no longer about the interpretation of Article 53, which, as will be recalled, requires enforcement action by regional bodies to be authorized by the UN Security Council. If 'enforcement action' has any meaning at all it must cover aggressive military action, action that would otherwise be unlawful if it were not permitted. The very idea of authorization in Article 53 assumes that otherwise the action would be illegal, a situation which applies to military enforcement

197. Arts. 2(4) and 51 of the UN Charter.

198. For discussion of the arguments for humanitarian intervention as providing for a further lawful means of using force see S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford, Oxford University Press 2002); J.L. Holzgrefe and R.O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge, Cambridge University Press 2003); B.D. Leppard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles* (Pennsylvania, Penn. State University Press 2003).

199. C. Henderson, 'The Bush Doctrine from Theory to Practice', 9 *JCSL* (2004) p. 3.

200. Arts. 42 and 53 of the UN Charter.

201. N.D. White, 'The Legality of Bombing in the Name of Humanity', 4 *JCSL* (2000); N. Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq and the Security Council', 3 *Max Planck UNYB* (1999), p. 59. See also the resolution of 133 non-industrialized states (meeting as the G77) condemning unilateral humanitarian intervention as illegal under international law – Declaration of the Group of 77 South Summit, Havana Cuba, 10-14 April 2000 cited in M. Byers, 'The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq', 13 *EJIL* (2002) p. 21, at p. 28.

action which is prohibited by Article 2(4) of the UN Charter,²⁰² but not economic enforcement (or at least not all of it).²⁰³ While ‘enforcement’ action may have been interpreted more restrictively than the 1945 consensus to exclude (at least presumptively) economic sanctions, if it still retains its core meaning, it must cover military enforcement action, thus requiring Security Council authorization.

The continued application of Article 53 to military enforcement action by regional organizations is not just a result of the terms of the provision itself, but is underpinned by the other hierarchy provisions of the Charter. More profoundly it is underpinned by the fundamental and peremptory nature of the prohibition on the threat or use of force.²⁰⁴ Some regional military enforcement (including robust peacekeeping) practice appears contrary to Article 53, for example the action of the OAS in the Dominican Republic in 1965, the Arab League in Lebanon in 1976, and of ECOWAS in Liberia and Sierra Leone in the 1990s and beyond.²⁰⁵ This practice might be argued to have undermined Article 53 if it were not part of the more basic hierarchies of the UN Charter and international law: first as found in Article 103 as relates to the Charter obligation to refrain from the use of force, and second, as located in international law, namely the *jus cogens* obligation to refrain from the use of force. The Security Council, by virtue of Article 42 of the UN Charter, is specifically allowed to take military action in response to threats to the peace, breaches of the peace and acts of aggression.²⁰⁶ The Council’s power is part of the Charter rules governing the use of force, as is the right of self-defence belonging to individual states, and both are part of the peremptory norm as well.²⁰⁷ Thus it is the case that backed by the hierarchy provisions of the Charter (Arts. 53, 103), by the hierarchy provisions of international law, and underpinned by the values of peace and security, the Security Council has powers of military enforcement not possessed by states or by regional organizations.²⁰⁸

202. Art. 2(4) of the Charter provides: ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations’.

203. Villani, *supra* n. 171, at p. 539.

204. Brownlie, *supra* n. 11, at pp. 488-489; Shaw, *supra* n. 56, at pp. 117-118.

205. C. Gray, *International Law on the Use of Force*, 2nd edn. (Oxford, Oxford University Press 2004) pp. 282-327.

206. Art. 42 provides in part that: ‘Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security ...’

207. *Jus cogens* are not confined to customary rules according to Bernhardt, *supra* n. 152, at p. 1294.

208. See J. Delbrück, ‘The Impact of the Allocation of International Law Enforcement Authority on the International Legal Order’, in Delbrück, *supra* n. 183, at p. 158 – ‘International law is increasingly developing elements of a hierarchical order as is evidenced by the way international law enforcement authority is allocated, and even more so by [the way] its exercise is conceptualized i.e. by police-like enforcement of norms of “public interest”’.

In other words, there are two basic hierarchies in international law. First of all those provisions in the UN Charter that provide for Council authority over non-defensive uses of force, and that provide that Charter obligations including the obligation to refrain from the threat or use of force, prevail over other treaty obligations. Secondly, there are the recognized fundamental norms of the international community, also in this case *jus cogens*, which include the prohibition of the threat or use of force. These two combine to effectively protect the rules governing the use of force from any real erosion by contrary regional practice, unlike the rules governing economic sanctions where the ambiguous term ‘enforcement action’ in Article 53 is not backed up by clear customary rules, and certainly not by any peremptory rules, to prohibit non-forcible measures by regional organizations.

There may be greater leeway in the case of economic measures (where a state has some freedom on trading matters), allowing a collection of states in a region powers of coercion. However, there is no real freedom in use of force matters where there is a clear prohibition on the use of force – a fundamental restriction in international law, allowing only limited exceptions. This is bolstered by Articles 103 and 53 of the Charter. In other words it is a combination of universal international law,²⁰⁹ and the powers of the universal organization (the UN) that gives universalism a certain supremacy over regionalism in use of force matters. In military matters regional organizations thus only have autonomy in collective self-defence (a right clearly belonging to states collectively as well as individually),²¹⁰ and peacekeeping (if consensual), but not in enforcement action including that undertaken to prevent breaches of other fundamental principles.

7.5 The legitimacy of the UN Security Council

The argument that in matters of use of force the UN has a certain supremacy over the EU and other regional actors is countered by criticism of the legitimacy of the decision-making process in the Security Council.²¹¹ Can the authority of the UN be undermined by the undoubted selectivity and lack of representation in Security Council decision-making? Furthermore, does this signify that the failure to take military enforcement measures by the Security Council allows states or regional bodies to take action in its stead – as occurred in the case of NATO military en-

209. J. Charney, ‘Universal International Law’, 87 *AJIL* (1993) p. 529.

210. Art. 51 was drafted to accommodate the rights of regional organizations to undertake actions in collective self-defence – I. Brownlie, *International Law and the Use of Force by States* (Oxford, Oxford University Press 1963) p. 270.

211. See N. Tsagourias, ‘The Shifting Laws on the Use of Force and the Trivialization of the UN Collective Security System: The Need to Reconstitute It’, 34 *NYIL* (2003) p. 55. But see comments by C. Schreuer in Delbrück, *supra* n. 183, at p. 86 where he argues that the Council is more representative than the Assembly where small States that contribute very little to the budget can win a vote.

forcement action to bring an end to the repression in Kosovo in 1999?²¹² There seem to be some implications of this type of approach in the EU's Security Strategy of 2003,²¹³ as well as the 1999 Security Protocol of ECOWAS,²¹⁴ and the 2000 Constituent Treaty of the AU.²¹⁵ While claims to be able to take pre-emptive military action in a vastly expanded version of the right of self-defence have not been accepted, claims to take military action in the face of breaches of fundamental rules against genocide and crimes against humanity are less easy to dismiss, though as Zemanek states a 'modification of the norms of *jus cogens* concerning the non use of force ... would require acceptance by the international community as a whole'.²¹⁶ While this may be seen as putting the value of security over that of justice, what it really requires is that the Security Council should use its undoubted power to authorize military action to deal with threats to the peace arising out of breaches of fundamental principles of justice, and if it is not so prepared, then arguably residual authority should devolve to the General Assembly.²¹⁷

It may be judged that the European Council of 25 States, normally deciding by consensus, is more representative than the UN Security Council of 15 states with

212. See the debate between Simma and Cassese. B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999) p. 1; A. Cassese, '*Ex Injuria ius Oritur*: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community', 10 *EJIL* (1999) p. 23.

213. 12 December 2003. At p. 7 the Strategy states that 'we should be ready to act before a crisis occurs', tackling such threats not 'by purely military means'.

214. See Arts. 3(a), 22(c) and 25(c). Art. 22(c) provides for 'humanitarian intervention in support of humanitarian disaster'.

215. Art. 4(h) provides for 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. However, it is worth noting that in the 2002 Protocol Relating to the Establishment of the Peace and Security Council of the African Union, there are provisions that show greater deference to the UN Charter rules. Art. 17(1) provides that 'in the fulfilment of its mandate in the promotion and maintenance of peace, security and stability in Africa, the Peace and Security Council shall cooperate closely with the United Nations Security Council, which has primary responsibility for the maintenance of international peace and security ...'. Art. 17(2) further states that 'where necessary, recourse will be made to the United Nations to provide the necessary financial, logistical and military support for the African Union's activities in the promotion and maintenance of peace, security and stability in Africa, in keeping with the provisions of Chapter VIII of the UN Charter on the role of Regional Organisations in the maintenance of international peace and security'.

216. Zemanek, *supra* n. 48, at p. 416. On this see also A. Linklater, 'The English School', in S. Burchill et al., eds., *Theories of International Relations*, 3rd edn. (Basingstoke, Palgrave 2005) p. 96. On hierarchies see further J.H.H. Weiler and A.L. Paulus, 'The Structure of Change in International Law or Is there a Hierarchy of Norms in International Law', 8 *EJIL* (1997) p. 545; M. Koskenniemi, 'Hierarchy in International Law: A Sketch', 8 *EJIL* (1997) p. 566; J.A.C. Salcedo, 'Reflections on the Existence of a Hierarchy of Norms in International Law', 8 *EJIL* (1997) p. 583.

217. GA Res. 377, 3 November 1950. See further S.D. Bailey and S. Daws, *The Procedure of the UN Security Council*, 3rd edn. (Oxford, Clarendon 1998) p. 296.

an in-built hierarchy. However, it must be pointed out that the European Council represents European States only, while the Security Council, for all its defects, represents the international community.²¹⁸ At the UN's founding constitutional moment in 1945,²¹⁹ it was the international community as a whole creating something unique,²²⁰ that only the international community (i.e., all states acting together in another constitutional moment) could subsequently take away. The founders also established fundamental universal rules such as the non-use of force, which can only remain valid if they are ultimately regulated by universal organizations. This signifies that only the UN can authorize any derogations from the prohibition of the use of force beyond a state's inherent right of individual or collective self-defence. Regional self-authorization would be subject to too much abuse – the genie of a regional police force would be let out of the lamp, and it would be very difficult to banish.²²¹ Indeed, the likelihood of competing regional police forces would be great. Consequently, instead of having universal rules governing the use of force, there would emerge potentially conflicting regional rules.

Unfortunately, the inaction of the Security Council to deal with the crimes against humanity being committed in the Darfur region of Sudan²²² from 2003 onwards is evidence of the continued failure of the Council to take action in all cases of serious violations of international law. The smokescreen sent up by its reference of the matter to the International Criminal Court in March 2005,²²³ should not distract from the fact that all the Council could achieve, in the sense of taking meaningful action to prevent crimes being committed, was a threat of non-forcible measures followed by some targeted measures.²²⁴ By locking up the rules on the use of force on the matter of enforcing fundamental rules of international law in the Security Council, the drafters created an inherently selective and weak system. To unlock those rules in favour of regional organizations, however, may prove to be more disastrous. The better course is for a reformed and legitimate Council to emerge

218. Art. 24(1) of the UN Charter states that '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'.

219. See D. Sarooshi, *The United Nations and the Development of Collective Security* (Oxford, Oxford University Press 1999) pp. 26-32.

220. See comments by C. Schreuer in Delbrück, *supra* n. 183, at p. 82, who states that 'the evolving regime of the United Nations now goes beyond the sum total of the powers of individual states'.

221. Simma, *supra* n. 212.

222. That this level of abuse has occurred is determined by a commission set up by the Council itself. See report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur (UN Doc. S/2005/60).

223. SC Res. 1593, 31 March 2005.

224. SC Res. 1556, 30 July 2004; SC Res. 1564, September 2004; SC Res. 1591, 29 March 2005.

out of the current pressure for change.²²⁵ Though the recent World Summit (14-16 September 2005) does not move the issue of structural reform of the Security Council forward, the EU and its Member States (including the two permanent members of the Council) should actively promote and support such reform.

The World Summit did, however, endorse the idea that the Security Council had some responsibility to protect in instances of crimes against humanity and similar offences. The actual commitment was less forthright than that recommended by the High Level Panel in 2004²²⁶ but welcome nonetheless:

‘We are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the UN Charter, including Chapter VII, on a case by case basis in co-operation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.’²²⁷

While this falls short of constituting a clear legal obligation, the partial recognition of a duty to protect will mean that in the future, in certain situations of grave human rights abuses, the Security Council should be less able to hide behind its hitherto discretionary facade. It can be strongly argued that the fundamental principles and norms outlawing genocide and crimes against humanity require not only that international actors should refrain from committing them, but that those actors with competence to take measures are required to take them. In the case of the EU this would be non-forcible measures as well as military measures if authorized by the Security Council, while the Security Council should take those measures, whether non-forcible or forcible, which are necessary to halt the violations. In this way the requirements of peace and justice can be reconciled. If the Security Council fails to act it is not only arguably responsible in law for the consequences but it will erode its legitimacy to the point of no return. It is also interesting to note the reference in the Summit Outcome Document to co-operation with regional organization in ensuring that vulnerable populations are protected. Potentially this may become important if the Council is blocked or is otherwise unwilling to grant authority to a regional organization that is prepared to take measures in genuine cases of crimes against humanity.

225. See Report of the Secretary General, ‘In Larger Freedom: Towards Security, Development and Freedom for All’ (UN 2005) paras. 167-170.

226. Report of the High Level Panel on Threats, Challenges and Change (UN 2004) recommendation 55.

227. GA Res. 60/1, 24 October 2005.

8. CONCLUSION

It could well be argued that there are too many contradictions in the above argument; in particular the argument that the EU is a regional organization subject to the authority of a body – the Security Council – that has been heavily criticized. Does not this decrease effectiveness of the EU as a regional actor? It is difficult enough to get agreement within the EU to take action without submitting to international requirements. The answer to these questions is that in instances where fundamental principles govern then the EU or any other actor has no choice, if it wishes its actions to be accepted by the international community, but to comply with these principles and basic rules derived from them. It can argue to change the rules and the mechanisms. It should lobby strongly for a clearly demarcated right of humanitarian intervention and a reformed Security Council. In this way the conflict between the values of peace and justice, and between the rules prohibiting the use of force and those upholding human rights, can be reduced. While conflict between peace and justice can never be removed entirely, it can surely be restricted. In a sense the debate about whether the Security Council's discretion can be limited by recognising a duty to protect in cases of massive injustice, epitomizes the desire to try and harmonize the requirements of peace and justice. As the first part of this article shows, at the abstract level, both the UN and the EU see the values of peace and justice as compatible, and therefore recognising a clear duty to act on the part of the Security Council would be consistent with the constitutional law of both organizations. By relying on the unique competence of the Security Council to take military enforcement action in the face of grave injustice, the fundamental principles and the rules based on them are respected.

It is not suggested that the EU is actively considering circumventing international law, but circumstances will arise in which it is faced with the issue. As Zemanek states more darkly US practice is 'characterized by an increasingly assertive policy towards the outside world and a penchant for unilateral action – features which the European Union might try one day to emulate'.²²⁸ It is important that the EU respects the fundamental principles of international law. Although we speak of a democracy deficit in the EU it is not hard to imagine regional organizations with little or no democracy, dominated by a hegemon, willing to intervene by force in states with little justification or provocation. Furthermore, if it is accepted that regional organizations can act autonomously in military matters, there is little validity in arguing that universal laws are somehow still applicable to *ad hoc* groupings of states, or indeed an individual state that declares it is acting on behalf of the international community. The invasion of Iraq in 2003 might seem to have been just such a case with the UK and US acting without UN authority, but the impor-

228. Zemanek, *supra* n. 48, at p. 429.

tance of the reaction of most of the rest of the world in not recognising the legality of such actions should not be underestimated.

With its recent activities in the security field, what could be labelled 'hard' security action of a military nature, to add to its pattern of practice in sanctions over the years, the EU has entered onto the regional and international security stage. But as an international legal person it, like any other subject of international law, is subject to the obligations of international law, as well as the rights conferred upon it. Furthermore, the autonomy that legal personality brings enables a security organization to take action over and above that possessed by individual member states. This helps to explain the EU's sanctioning competence in its external relations. However, the duties of international law mean that the EU must comply with the fundamental principles governing human rights and the use of force. The rules emanating from the principle on the non use of force prevail over any inconsistent EU obligations (whether created by the TEU or by secondary legislation), by virtue of Article 103 of the UN Charter in relation to treaty obligations, and by virtue of the peremptory nature of the rules governing the use of force in relation to customary duties. This means that to take military enforcement action (as opposed to defensive or consensual action), the authority of the Security Council must be secured. States can gain Security Council authority under Chapter VII, while regional organizations can do so under Chapter VIII. It follows then that the EU, as a regional security actor with separate will, is bound by the provisions of Chapter VIII.

Thus in the matter of military enforcement action, the UN Security Council still has constitutional authority on its side, by dint of the Charter and by reason of the peremptory rules of international law, but as with other constitutional systems it is dependent upon issues of legitimacy, authority and loyalty. If the UN Security Council cannot respect and uphold the fundamental principles of the Charter and of international law including principles of human rights law,²²⁹ then authority may pass elsewhere not only to regional organizations that we may have confidence in but also ultimately to individual powerful states. This would lead to a degradation of the most basic rules in any system, namely those governing the use of force. It may be argued that the values of the international community may shift away from the current preference in certain circumstances of peace over justice in military enforcement action. Indeed NATO action in Kosovo, and UN inaction in relation

229. The Security Council is not restricted in its actions under Chapter VII to dealing with breaches of international law – see H. Kelsen, *The Law of the United Nations* (London, Stevens 1950) p. 294. However, as Vera Gowlland-Debbas argues 'the development of the concept of fundamental community norms logically calls for centralized and institutionalized mechanisms to ensure their respect and compliance' – V. Gowlland-Debbas, 'Introduction', in V. Gowlland-Debbas, ed., *United Nations Sanctions and International Law* (The Hague, Kluwer Law International 2001) p. 8. See further V. Gowlland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility', 43 *ICLQ* (1994) p. 55.

to Darfur, have greatly increased pressure for a re-assessment of the relationship between peace and justice and the principles and rules emanating from them. However, until a consensus is reached on a right of military intervention outside of the authority of the Security Council, then the emphasis must be upon making the Security Council work more effectively, including recognising that it has a duty to act when faced with violations of human rights of the magnitude of genocide, crimes against humanity or large-scale commission of war crimes.

It follows that the EU must resist temptation to seek short-term gains by taking military action outside the framework of international law, or flout other fundamental principles governing human rights and self-determination, for the longer-term consequences for the fragile international legal order may be profound and destabilising. It is better for the EU to use its considerable influence to improve the universal organization and to deepen its co-operation with it.

ABSTRACT

The focus of the article is on the activities of the European Union and the United Nations in the fields of peace and security, human rights and democracy. These represent not only crucial issues uniting both the EU and the UN in their external actions, but are also founded upon, or at least affected by, fundamental principles of international law. It is argued that a coherent strategy for achieving long term peace and stability in regional and international relations must be based on respect for these fundamental principles as well as rules of international law derived from these principles. Such principles are not just abstract legal constructs but are a reflection of the values that international actors – states, organisations and others – have held since the UN Charter ushered in a new world order in 1945. Situating both organisations within the international legal order should enhance the legitimacy and arguably the effectiveness of the two organisations whether they act singly or together. Increasingly, the activities of the EU and the UN overlap in matters of peace, security, human rights and democracy. This overlap has the potential to result in confrontation, as well as what would normally be aspired to – co-operation. It is therefore essential to identify the underlying principles and rules governing the organisations and their activities. It is argued that these principles and rules should be recognised and reinforced if we are to have organisational activity that is more than discretionary or arbitrary.

