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The Logic of Sliding Scales in the Law of International
Responsibility

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**HUMAN RIGHTS AND THE RISE OF INTERNATIONAL ORGANIZATIONS:
THE LOGIC OF SLIDING SCALES
IN THE LAW OF INTERNATIONAL RESPONSIBILITY**

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Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of International Responsibility

The proliferation of international agencies is a result of the interdependency of States as well as of a growing recognition that, without collective action, global problems cannot be solved effectively. Collective action is needed, if we want to combat growing inequalities between countries.¹ It is needed if we want to control private actors, particularly transnational corporations who thrive on the recent wave of globalization. And it is needed, if we want to make progress towards a world governed by an international rule of law.² International organizations are established as a means to institutionalize such forms of inter-State cooperation.³ Many of them fulfill a crucial function in contributing to the promotion and protection of human rights, which have become a shared responsibility of the international community.

¹ See the United National Millenium Declaration, adopted by the UN General Assembly on 8 September 2000 (A/55/L.2); and the ‘road-map’ for implementing goals, including Millennium Development Goals (MDGs) and Millennium Human Rights Goals, related to the Declaration, presented by the UN Secretary-General (A/RES/56/95). The ‘road-map’ contains a list of goals for each chapter of the Declaration, including eight Millennium Development Goals and six Millennium Human Rights Goals. On the relevance of human rights to the achievement of the Millenium Development Goals, see *The Millenium Development Goals and Economic, Social and Cultural Rights. A Joint Statement by the UN Committee on Economic, Social and Cultural Rights and the UN Commission on Human Rights’ Special Rapporteurs on Economic, Social and Cultural Rights* (29 November 2002); and P. Alston, ‘Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals’, *27 Human Rights Quarterly* (2005) pp. 755-829.

² See, on these different arguments in favor of international cooperation and the establishment of international agencies, J.-M. Coicaud, ‘International organizations, the evolution of international politics, and legitimacy’, in J.-M. Coicaud and V. Heiskanen (eds), *The Legitimacy of International Organizations* (Tokyo-New York-Paris, United Nations University Press 2001) pp. 545-546. On the role of international organizations as fora for the development of international law, see also José E. Alvarez, *International Organizations as Law-Makers* (Oxford, Oxford University Press 2005) pp. 601-608 (suggesting that, due to the large representation within modern international organizations of both states and non-state actors, treaties may be negotiated within that framework which are ‘intended to codify, but that also progressively develop, the fundamental constitutive rules of the international system – such as the rules governing treaties, the way states ought to conduct their diplomatic relations, of those governing the global commons’, such legislative treaties in addition having the capacity to influence the formation of general customary rules).

³ In this article, the notion of ‘international organizations’ is understood as under Article 2(1)(i) of the Vienna Convention on the Law of Treaties (United Nations, *Treaty Series*, vol. 1155, p. 331) or under Article 2(1)(i) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986 (A/CONF.129/15), as organizations set up by States in order to favor intergovernmental cooperation. In principle, the members of such international organizations are States, who conclude among themselves a treaty in order to establish the organization. While these characteristics are not necessarily inherent to all international organizations, they are sufficiently common for us to build an approach to the problems of international responsibility which presumes that such characteristics are present. This has also been approach to the work of the International Law Commission on responsibility of international organizations: see ILC, First report on responsibility of international organizations by Mr. G. Gaja, Special Rapporteur, A/CN.4/532, 26 March 2003, paras. 12-14. Article 2 of the Draft Articles on responsibility of international organizations defines the term ‘international organization’ for the purpose of the Articles as referring to ‘an organization which includes States among its members insofar it exercises in its own capacity certain governmental functions’.

At the same time, the development of international organizations brings about its own problems. The problem most discussed is the lack of accountability for human rights violations. With few exceptions, only States are bound under international human rights treaties, while the exercise of powers by international organizations risks going unchecked and therefore, we face the classical problem of the transfer of powers unmatched by corresponding responsibilities.⁴ However, while the problems over accountability are indeed real, the almost exclusive focus on such issues risks obfuscating other potential difficulties that can emerge once we seek to make the requirement of accountability operational. For once we turn to the institutional implications of requiring accountability, we encounter the following dilemma: on the one hand, the need to ensure accountability when measures are adopted by international organizations that threaten human rights, may lead to affirm the international responsibility of their member States for such measures. But such an insistence on member States' responsibility could jeopardize the ability of international organizations to fulfill their functions effectively, since such a development may lead States to tighten their control on the decision-making of the international organization, or to reserve the right not to comply with its decisions. If, however, we seek to impose upon international organizations that they comply directly with human rights obligations, we run another risk: such organizations may be tempted to act beyond their attributed powers in order to promote and protect human rights, in conditions which may be neither legitimate nor compatible with the instrument setting them up in the first place.

In the face of this dilemma, Dan Sarooshi has proposed establishing a clear distinction between *delegations of powers* to international organizations and *transfers of powers*. According to this distinction, the former case enables States to retain the right to exercise powers on a unilateral basis; they are not bound to comply with any measure adopted by the organization on the basis of the delegation of powers; and, in principle, they may put an end to the conferral of powers. In the latter case, by contrast, States are bound to comply with obligations flowing from the exercise by the organization of the powers which have been transferred to it.⁵ Hence, Sarooshi suggests that a possible way to avoid that the transfer of powers will result in a conflict between different international obligations is 'for the negotiating States to decide to 'delegate' and not 'transfer' their powers to an organization so that they will not be bound to comply with decisions taken by the organization when exercising conferred powers'.⁶ This would ensure that no attribution of powers to international

⁴ See generally on this question I. Brownlie, 'The Responsibility of States for the Acts of International Organizations', in M. Ruggazi (ed.), *International Responsibility Today. Essays in memory of Oscar Schachter* (Leiden/Boston, Martinus Nijhoff Publ. 2005) p. 355; A. Reinisch, 'Securing the Accountability of International Organizations', 7 *Global Governance* (2001) pp. 131-149; A. Reinisch, 'Governance without Accountability', *German Yearbook of International Law* (2001) pp. 270-306; H.G. Schermers, 'Liability of International Organizations', 1 *Leiden Journal of International Law* (1988) pp. 3-14; W.E. Holder, 'Can International Organizations be Controlled? Accountability and Responsibility', 97 *ASIL Proceedings* (2003) pp. 231-240.

⁵ See D. Sarooshi, *International Organizations and their exercise of sovereign powers* (Oxford, Oxford University Press 2005) chapter 5, sect. II pp. 58-64.

⁶ At p. 103. For instance, 'the World Health Organization, the Universal Postal Union, and the International Civil Aviation Organization are given powers such that an organ of the organization can adopt binding regulations by majority decision, but in such cases the Member States have an express right to contract out of, or make reservations to, the application of a specific regulation to them, usually before it enters into force' (p. 59; reference is made for these examples to A. Chayes and A.

organizations will result in States circumventing their international obligations. But the price we pay is high: it disables the international organization, by providing an easy 'exit' to States unwilling to comply with certain measures it may adopt. There is no pooling of sovereignty here: rather, a simple *à la carte* form of inter-State cooperation.⁷

In order to address the dilemma effectively, however, we need to take seriously both horns. We have to ensure that the transfer of powers does not become a vehicle for its members avoiding their international obligations. But we must also do so without depriving the organization from the power to oblige its members, and not run the risk of the organization moving beyond its mandate, even when under the pretext of better complying with human rights obligations. This article seeks to address the question of human rights accountability in the activities of international organizations by exploring solutions that overcome this dilemma. In exploring this question, a distinction has to be made between the content of the human rights obligations of international organizations and the question of accountability *per se*. Part I addresses the question of whether or not international organizations are bound, under international law, to respect human rights. It examines whether such obligations can be derived from the preexisting human rights obligations of the member States in establishing or acceding to the international organization or, conversely, whether such organizations should be grounded upon customary international law or on the general principles of law. The conclusion of this inquiry is that, while it would be possible to build a theory deriving the obligations of the international organization from the preexisting obligations of its member States - particularly those imposed under the human rights treaties to which these States are parties - this line of reasoning ultimately fails on practical grounds, as it results in excessive obstacles being imposed upon international co-operation. In contrast, grounding the human rights obligations of international organizations on general public international law, independently of any commitments of their member States under human rights treaties, appears both feasible and compatible with the requirements of international co-operation.

However, accountability requires not only that certain human rights obligations are recognized to exist. It also requires mechanisms to be established that provide remedies to potential victims, whether before national or international courts. Parts II and III turn to that separate question of accountability. Part II explores the international responsibility of the member States of an international organization, where measures adopted by the latter result in a violation of human rights. This initial focus on State responsibility is justified by two reasons. First, since they are grounded in general international law rather than in human rights treaties, the human rights obligations imposed on international organizations are less far-reaching than those imposed on the States to which they owe their existence. Second, only in a limited range of situations will it be possible for a victim to file a claim directly against the international organization for an act resulting in a violation of human rights since, in

Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass, Harvard University Press 1995) pp. 226-227.

general, no international court will have jurisdiction over the issue, whereas national courts typically will be barred from adjudicating such claims, because of the immunity of jurisdiction enjoyed by international organizations. In order to evaluate the emerging regime of State responsibility for the acts of international organizations of whom it is a member, Part II considers the three moments which characterize such membership: it distinguishes (1) the initial attribution of competences to the international organization; (2) the participation in the decision-making procedures within the organization; and (3) the implementation, by its member States, of any acts adopted within the international organization. The following thesis is put forward: while the international law of State responsibility has offered answers concerning whether a responsibility may exist at each of these moments, it has failed to consider their interrelationship. This segmented approach to State responsibility constitutes the main source of its insufficiencies. As an alternative, a 'sliding scales' theory of State responsibility is presented. Accordingly, the role of the State at any of the three junctures distinguished above is evaluated by taking into account its role at the other junctures: in particular, the more a State retains influence on the decision-making process within the international organization, or the more it may obstruct implementation of the decisions of the organization, the easier it will be to justify the delegation of extensive powers to the international organization, even in circumstances where such a transfer of powers could result in the adoption by the international organization of measures that infringe upon human rights.

Part III then examines the mechanisms that allow for international organizations to hold accountable any violations of human rights in which they contribute to or commit. Three such mechanisms are discussed in turn: self-regulation, accession of the international organization to treaty-based international regimes, and judicial control exercised by national courts. The respective strengths and weaknesses of each of these mechanisms are highlighted. On the basis of this review, the logic of sliding scales for the evaluation of State responsibility is expanded further to include the emergence of those mechanisms. It is argued that the standards used for evaluating the responsibility of the member States of international organizations for the acts of the latter should take into account whether or not accountability mechanisms have been set up ensuring that the organization will comply with any human rights standards equivalent to those imposed on the member States. This results in a reverse principle of proportionality: the more the international organization is subject to monitoring mechanisms, whether internal or external, the more it would be acceptable for States to transfer large competences to the organization and to renounce controlling the organization from within or blocking the implementation of any decisions adopted within the organization.

⁷ In the remainder of this paper, I will not distinguish between the two expressions.

1. THE HUMAN RIGHTS OBLIGATIONS OF INTERNATIONAL ORGANIZATIONS

At present, the following will examine whether or not international organizations are bound by human rights obligations under international law. This inquiry should not be confused with the broader question of accountability in cases of human rights violations committed by international organizations. The former is more precise, as well as logically prior to the question of 'accountability' - which connotes whether or not victims of human rights violations may seek remedies before international or national instances, as well as hold either the international organization itself or its member States to account for the said violations. Accordingly, these two questions deserve distinct treatment, although in specific instances a certain overlapping between the two occurs. Indeed, the imposition of human rights obligations directly upon international organizations is neither a necessary nor a sufficient condition for accountability to exist. Its lack of necessity is due to the potential existence of a forum before which victims of human rights violations by the organization may seek a remedy against one or more of the member States of the organization, where the organization itself cannot be targeted. Its insufficiency - independent, even of our mutual agreement that international organizations have certain human rights obligations - does not ensure that there will exist such a forum before which victims may file claims. Part III of this article examines the mechanisms through which international organizations can be held accountable for human rights violations. In this Part, focus is on the exclusive question of the normative bases for imposing human rights obligations on international organizations.

The principle is of course that, as subjects of international law, international organizations 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'.⁸ For the moment the specific case wherein an international organization has acceded to an international human rights treaty is bracketed and focus upon it will resume below.⁹ Focus is instead upon the classical situation where the international organization is not a party to any such treaty and where, and thus, we must identify elsewhere the source of any human rights obligation it may be imposed. In any case, since most human rights treaties are not open to the participation of international organizations, it is in principle only by identifying sources of human rights obligations in general international law that we can hope to impose on them such obligations. Happily, this task is far from insuperable. While it seems difficult to argue that international organizations should be considered to inherit the human rights obligations imposed on their member States (1.), there is indeed a growing consensus in legal doctrine that most, if not all, of the rights enumerated in the Universal Declaration on Human Rights have acquired the status of legally binding norms (2.). The debate has now shifted, from the question of whether or not these rights have such status, to the question of the foundations for recognizing them their status.

⁸ Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion (20 December 1980), I.C.J. Reports 1980, p. 73, at pp. 89-90 (para. 37).

1.1. THE INTERNATIONAL ORGANIZATION ‘SUCCEEDING’ TO THE HUMAN RIGHTS OBLIGATIONS OF ITS MEMBER STATES

It has sometimes been argued that, when States transfer certain competences to an international organization - seeking to establish a further means in pursuing international cooperation - the organization ‘succeeds’ to the international obligations of its member States, as stipulated in the treaties in force vis-à-vis those States.¹⁰ Both the term of such arguments as well as its doctrines are misleading. Since international organizations are not sovereign entities, they do not ‘succeed’ to the their member States as happens in situations of succession of States.¹¹ International organizations do not become parties to international human rights treaties - that are binding upon their member States - simply because they have been attributed certain powers that could be exercised in violation of the rights recognized under those treaties. The question of succession, in this context, is of a limited nature. Either international organizations are bound by the preexisting substantive international

⁹ See Part III, sect. 2.

¹⁰ The discussion in this section is restricted to human rights obligations imposed under international *treaties* concluded by the member States of an international organization. In theory, the question of the impact of such preexisting obligations of member States is also posed as regards obligations imposed under customary international law or general principles of law, since not all such obligations imposed on States will *ipso facto* be obligatory for an international organization: subjects of international law may differ, even under general international law, as regards the scope and content of their rights and duties (*Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p. 174 (11 April 1949), at 178: ‘The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community’). But deriving obligations of the international organization from the preexisting obligations of its member States is less relevant as regards these other sources of international obligations, since the principle of the relative effect of treaties (which are *res inter alios acta* for third parties, thus also for any international organization not a party to treaties concluded by States) would not apply. On the contrary, as detailed in the next section, international organizations are in principle bound by human rights obligations under general international law, whether through customary international law or through the general principles of law.

¹¹ See the Vienna Convention on Succession of States in respect of Treaties, UN doc. A/CONF.80/31 of August 22, 1978, as corrected by A/CONF.80/31/Corr.2 of October 27, 1978. As is well known, the Human Rights Committee has taken the view under the International Covenant on Civil and Political Rights that ‘once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant’. It follows, according to the Committee, that ‘international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it’ (Human Rights Committee, *General Comment No. 26: Continuity of obligations* (8 December 1997) (UN doc. CCPR/C/21/Rev.1/Add.8/Rev.1), paras. 4-5). The view adopted by the Committee on the question of State succession to the ICCPR is not in conformity with general public international law (comp., for example, American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987) (St. Paul, Minn., American Law Institute Publishers 1987), para. 210(3), Reporters’ Note 4; I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford, Oxford University Press 1998) p. 663; A. Cassese, *International Law*, 2nd ed. (Oxford, Oxford University Press 2005) p. 78; M. Shaw, *International Law*, 5th ed. (Cambridge, Cambridge University Press 2003) p. 875). It is clearly based on the idea that international human rights treaties are specific, and that questions such as the denunciation by States parties of the ICCPR or of State succession should take this specificity into consideration (see M. Kamminga, ‘State Succession in Respect of Human Rights Treaties’, 7 *EJIL* (1996) p. 469, at pp. 482-483; R. Higgins, ‘The International Court of Justice and Human Rights’, in K. Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy* (The Hague, Nijhoff 1998) p. 691, at pp. 696-697). A member of the Committee, Mr Nisuke Ando, expressed doubts about this doctrine (see his individual opinion appended to Human Rights Committee, *Kuok Koi v. Portugal*, Communication No. 925/2000 (final views of 22 October 2001) (UN doc. CCPR/C/73/D/925/2000)). Whether or not the position of the Human Rights Committee is correct as a matter of international law, this position seems difficult to transpose to international organizations ‘succeeding’ to States parties to international human rights treaties when competences are transferred to international organizations, since participation of the latter in the Covenant’s monitoring system is not envisaged by the text of the Covenant. At most, this position amounts to stating that States parties to the ICCPR may not divest the population under their jurisdiction from the rights they enjoy under the Covenant, by transferring powers to an international organization not offering a similar protection. This is also the position adopted in this paper.

obligations of their member States (apart from the participation in the human rights regime), or by contrast, they are separate subjects of international law, they may in principle disregard any such preexisting obligations.

We should not confuse the question of ‘succession’ within the larger, circumscribed inquiry of whether or not an international organization should ensure that it will not impose obstacles, upon its member States, in fulfilling its obligations - even when such international organizations have been attributed certain exclusive competences and it must exercise those competences in order for the member States to comply with their international obligations.¹² It is axiomatic that States may not escape preexisting treaty-based commitments by the conclusion, with other parties, of another treaty covering the same subject, whose provisions would in some way conflict with the earlier treaty: the posterior treaty could not be invoked against the parties to the earlier treaty, for whom it is a *res inter alios acta*.¹³ This rule, which is directly derived from the principle of the obligatory character of international treaties (*pacta sunt servanda*), applies also to treaties concluded by States in order to establish international organizations in which certain powers are delegated, to the extent such delegations of power may have an impact on the ability of the member States to comply with their preexisting obligations. Therefore, the rule may lead the international organization to provide that its member States will not be imposed obligations, as members of the organization and as a result of the internal decision-making process within that organization, which would lead them to have to disregard such prior commitments.

Until the recent Kadi judgment delivered on appeal by the European Court of Justice¹⁴, Article 307 of the EC Treaty used to provide a perfect example of such a practice.¹⁵ By stipulating that the rights and

¹² One way to read to interesting attempt of Tawhida Ahmed and Israel de Jesús Butler to locate the human rights obligations of the European Union in general public international law, is to see this as an attempt to use the theory of ‘succession’, as derived from Article 307 of the EC Treaty (referred to hereunder, see text corresponding to nn. 13-21) as implying that, *as a matter of general public international law*, the European Union would somewhat ‘inherit’ the human rights obligations of its member States. I would resist reliance on that specific argument, although I share their view that there are other grounds to impose human rights obligations on the EU. See T. Ahmed and I. de Jesús Butler, ‘The European Union and Human Rights: an International Law Perspective’, 17 *EJIL* (2006) pp. 771-801.

¹³ See Art. 30 of the Vienna Convention on the Law of Treaties of 23 May 1969 (1155 UNTS 331), entitled ‘Application of successive treaties relating to the same subject-matter’ (see, specifically, Article 30 § 4, b)). As explained by Special Rapporteur Fitzmaurice : ‘Since anything that some of the parties to a treaty do *inter se* under another treaty is clearly *res inter alios acta*, it cannot in law result in any formal diminution of the obligation of these parties under the earlier treaty, or affect juridically the rights or position of the other parties, which remain legally intact and subsisting’ (G. Fitzmaurice, ‘Third Report’, *ILC Yearbook* (1958), vol. II, p. 43). For further discussions of the rule, see in particular Ch. Rousseau, ‘De la compatibilité des normes juridiques contradictoires dans l’ordre international’, 39 *Revue générale de droit international public* (1932) pp. 133-192; E.W. Vierdag, ‘The Time of the Conclusion of a Multilateral Treaty : Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions’, 59 *British Yearbook of International Law* (1988) pp. 92-111; W. Czaplinski and G.M. Danilenko, ‘Conflict of Norms in International Law’, 21 *Netherlands International Law Review* (1990) pp. 12-28; J. B. Mus, ‘Conflicts Between Treaties in International Law’, 29 *Netherlands International Law Review* (1998) pp. 208-232.

¹⁴ Joined Cases C-402/05 P & C-415/05, *Kadi & Al Barakaat International Foundation v Council and Commission*, judgment of 3 September 2008.

¹⁵ This provision (adapted from what was originally Article 234 of the EEC Treaty) states:

‘The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.’

obligations arising from agreements concluded with third States by the member States before the date of their accession of the European Union¹⁶ 'shall not be affected' by the obligations imposed on the member States under EU law, this provision sought to 'lay down, in accordance with the principles of international law, that the application of the Treaty does not affect the duty of the member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder'.¹⁷ As had been noted by the European Court of Justice in the *Burgoa* case, while Article 307 EC refers only to the obligations the member States owe to third countries, 'it would not achieve its purpose if it did not imply a duty on the part of the institutions of the Community not to impede the performance of the obligations of member States which stem from a prior agreement'.¹⁸ Therefore, the useful effect of the rule requires that the institutions of the EU do not seek to impose on the EU member States that they comply with obligations under EU law that would run counter to their other, preexisting, international undertakings. However, the Court emphasized that 'that duty of the Community institutions is directed only to permitting the member State concerned to perform its obligations under the prior agreement *and does not bind the Community as regards the non-member country in question*'.¹⁹ This had been reaffirmed in recent cases, particularly in the *Kadi* and *Yusuf* judgments delivered by the Court of First Instance of the European Communities on 21 September 2005.²⁰ In those cases, the question was raised whether Regulation (EC) No 881/2002²¹ adopted by the European Community in order to put into effect certain restrictive measures against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities, in accordance with Security Council Resolutions 1267 (1999), 1333 (2000) and 1390 (2002), were compatible with the fundamental rights protected in the EU legal order. In

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.'

¹⁶ For the sake of convenience, reference will be made here to the 'European Union', although, in the current state of the European treaties, a reference to the European Community would be technically more appropriate.

¹⁷ Case 10/61, *Commission v. Italy*, [1962] ECR I (judgment of 27 February 1962).

¹⁸ Case 812/79, *Attorney General v. Burgoa*, [1980] ECR 2787 (judgment of 14 October 1980), at para. 9. See also Case T-315/01, *Kadi v. Council and Commission*, judgment of 21 September 2005, para. 197; Case T-306/01, *Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, judgment of 21 September 2005, para. 247.

¹⁹ Case 812/79, *Attorney General v. Burgoa*, op. cit. n. 18, para. 9 (emphasis added). See also, for a reaffirmation of this statement, Case T-184/95, *Dorsch Consult v Council and Commission* [1998] ECR II-667, para. 74. For other examples where Article 307 EC was invoked, see Case C-324/93, *Evans Medical and Macfarlan Smith* [1995] ECR I-563, paragraph 27; Case 10/61, *Commission v Italy* [1962] ECR I; Case C-158/91, *Levy* [1993] ECR I-4287; and Case C-124/95, *Centro-Com* [1997] ECR I-81, paragraph 56.

²⁰ Case T-315/01, *Kadi v. Council and Commission*, judgment of 21 September 2005, para. 192; Case T-306/01, *Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, judgment of 21 September 2005, para. 242. In these two companion cases, the applicants sought the annulment of Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban. The Court of First Instance had to address the question whether the EU was bound to contribute to the implementation of the sanctions decided by the UN Security Council, under the resolutions referred to above.

²¹ Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the

order to address the question, the Court of First Instance first had to ask itself whether the EU is bound by the UN Security Council resolutions. It answered:

...unlike its Member States, the Community as such is not directly bound by the Charter of the United Nations and that it is not therefore required, as an obligation of general public international law, to accept and carry out the decisions of the Security Council in accordance with Article 25 of that Charter. The reason is that the Community is not a member of the United Nations, or an addressee of the resolutions of the Security Council, or the successor to the rights and obligations of the Member States for the purposes of public international law.²²

In other terms, it was one thing to impose on an international organization that it did not create obstacles to the compliance by its member States with preexisting international obligations which they remained bound by, and which they may not derogate from simply by joining the international organization; it was quite another for the international organization as such to be bound vis-à-vis third parties, in the international legal order. The cases of *Kadi* and *Ali Yusuf* emphasized this very distinction. In these cases, the Council of the EU and the European Commission had defended the view that it followed from Article 103 of the Charter of the United Nations (hereafter the UN Charter) that ‘the Community, like the Member States of the United Nations, is bound by international law to give effect, within its spheres of competence, to resolutions of the Security Council, especially those adopted under Chapter VII of the Charter of the United Nations’.²³ The CFI concluded that the argument was valid, ‘subject to this reservation that it is *not under general international law*, as those parties would have it, *but by virtue of the EC Treaty itself*, that the Community was required to give effect to the Security Council resolutions concerned, within the sphere of its powers’.²⁴ The Court did consider in these cases that ‘in so far as the powers necessary for the performance of the Member States’ obligations under the UN Charter have been transferred to the Community, the Member States have undertaken, pursuant to public international law, to ensure that the Community itself should exercise those powers to that end’.²⁵ But this public international law obligation is imposed on the EU member States, not on the European Community itself. It is only by virtue of EC law that the Community has an obligation to contribute to the fulfillment, by the EU member States, of their obligations under the UN Charter.

flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, *OJ* 2002 L 139/9.

²² Case T-315/01, *Kadi v. Council and Commission*, judgment of 21 September 2005, para. 192; Case T-306/01, *Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, judgment of 21 September 2005, para. 242. In these two companion cases, the applicants sought the annulment of a Council Regulation prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban. The Court of First Instance had to address the question whether the EU was bound to contribute to the implementation of the sanctions decided by the UN Security Council, under the resolutions referred to above. The cases are now pending before the European Court of Justice.

²³ Case T-315/01, *Kadi*, para. 153 ; Case T-306/01, *Ali Yusuf*, para. 206.

²⁴ Case T-315/01, *Kadi*, para. 207; Case T-306/01, *Ali Yusuf*, para. 257 (emphasis added).

²⁵ Case T-315/01, *Kadi*, para. 198; Case T-306/01, *Ali Yusuf*, para. 248.

It is precisely this distinction which is missed by Pierre Pescatore, when he writes that '[b]y transferring certain powers and responsibilities to the Community, the member States could not free themselves from the observation of standards agreed to in relation with third States; respect for the stability of international agreements and good faith in international relations make it essential therefore to admit that the transfer of powers has *ipso jure* entailed a succession to certain treaty rights and obligations in relation to third States'.²⁶ But the second sentence does not follow from the first. Contrary to what is asserted, the transfer of powers from the EU member States to the EU may be ignored by the third States, parties to prior international agreements binding on the EU member States. For these third States, the EU treaties are a *res inter alios acta*: unless they agree to the substitution of the EU to its member States for the fulfilment of the latter's obligations towards them, such 'succession' cannot take place, and it certainly does not constitute the automatic result of the transfer of powers. The position of P. Pescatore may be contrasted with that adopted by the Court of First Instance in the *Kadi* and *Yusuf* cases, where it found that, 'first, 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 was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations'.²⁷ Stating that, *under the EC Treaty*, the Community is bound to exercise its powers so as to enable its member States to fulfil their international obligations, is not equivalent to stating that, *as a matter of general public international law*, the Community itself is bound to comply with those international obligations.

This is not to say, of course, that the preexisting obligations of the member States, as defined in the human rights treaties to which those States are parties, have no impact on the obligations of the international organization in the international legal order; it means, simply, that the obligations of the international organization do not derive from the mere prohibition imposed on the member States to set aside their preexisting obligations by setting up, or acceding to, an international organization. A distinct, but potentially more powerful, argument in favor of a link between the two sets of obligations is that no subject of international law may transfer to another subject more powers than those which it possesses: *nemo plus juris transferre potest quam ipse habet*.²⁸ In that sense, *as a matter of*

²⁶ P. Pescatore, 'External relations in the case-law of the Court of justice of the European Communities', *C.M.L.R.* (1979) pp. 615-645, at pp. 637-638.

²⁷ Case T-315/01, *Kadi*, para. 204 ; Case T-306/01, *Ali Yusuf*, para. 254.

²⁸ M. H. Arsanjani, 'Claims against international organizations: *quis custodiet ipsos custodes*', *Yale Studies in World Public Order* (1981) pp. 131-176, at p. 132; F. Morgenstern, *Legal Problems of International Organizations* (Cambridge, Grotius 1986) p. 32; and other authors cited by P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruylant, Bruxelles 1998) p. 341. In his dissenting opinion to the Advisory Opinion of the International Court of Justice on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, delivered on 21 June 1971, Judge Fitzmaurice thus mentioned that 'In so far as (...) the United Nations could legitimately exercise any supervisory powers [on South Africa in respect of its mandate on South West Africa], these were perforce *derived* powers – powers inherited or taken over from the League Council. They could not therefore exceed those of the Council, – for *derived* powers cannot be other or greater than those they derive from. There could not have been transferred or passed on from the League what the League

international law, the international organization would not be allowed to act in violation of the preexisting obligations of its member States, not precisely because it would be bound by the same obligations, but rather because it would thereby be acting beyond its powers, so that any acts violating those obligations should be considered void. This argument has been put forward by Henry Schermers:

As no one can transfer more powers than he has, the Member States were not competent to transfer any powers conflicting with these [treaties they were parties to prior to their accession to the EC] to the Communities when they were established. [...] All government power was restricted in the sense that it could not go beyond the lines drawn in the [European] Convention [on Human Rights]. [...] In transferring power to a newly established Community, the Member States could not grant the Community any possibility to infringe the rights guaranteed by the Convention. Any rules made by the Community contrary to the Convention are therefore void.²⁹

It is crucial to note that this prohibition imposed on the international organization does not depend on the organization having been attributed any specific powers to *implement* the said preexisting obligations of its member States. Such a capacity would be required, of course, if the organization were to substitute itself to its member States for the execution of those obligations – a substitution which, again as exemplified by European Community law, may be allowed under specific circumstances, so narrowly defined however that this would in any event remain exceptional.³⁰ But, insofar as the obligation of the international organization is simply defined as a *prohibition* to take measures which, if they were adopted by its member States, would constitute a violation of the international obligations of the latter, there is no need for the organization to have been delegated powers in the domain considered: rather, the prohibition applies to the exercise by the organization of

itself did not have, – for *nemo dare potest quod ipse non habet*, or (the corollary) *nemo accipere potest id quod ipse donator nunquam habuit*’ (at para. 65). In the *Kadi* case referred to above, the Court of First Instance refers to this principle, and cites in that respect, ‘by analogy’, its 1972 judgment delivered in the International Fruit Cases (see n. 29 hereunder): see Case T-315/01, *Kadi v. Council and Commission*, judgment of 21 September 2005, para. 196.

²⁹ H. G. Schermers, ‘The European Communities bound by Fundamental Human Rights’, 27 *CMLRev* (1990) p. 249, at pp. 251-252.

³⁰ See Joined cases 21 to 24/72, *Internationale Fruit Company and others v. Produktschap voor Groenten en Fruit*, [1972] ECR 1219 (judgment of 12 December 1972). The Court concludes in that judgment that the European Economic Community is bound by the General Agreement on Tariffs and Trade (GATT), since (a) ‘at the time when they concluded the Treaty establishing the [EEC] the Member States were bound by the obligations of the [GATT]’; (b) ‘the Community has assumed the functions inherent in the tariff and trade policy’; (c) ‘by conferring those powers on the Community, the Member States showed their wish to bind it by the obligations entered into under the [GATT]’; (d) the transfer of powers to the Community ‘has been put into concrete form in different ways within the framework of the [GATT] and has been recognized by the other Contracting Parties’ (paras. 10-18). This example is not unique, but it remains quite exceptional, even for a supranational organization such as the European Community. See also Case 38/75, *Douaneagent der NV Nederlandse Spoorwegen*, [1975] ECR 1439 (as regards the EC substituting itself to its member States for the implementation of the Convention on the Nomenclature of Goods in Customs Tariffs, 347 UNTS 127); and Joined Cases 3, 4, and 6/76, *Kramer*, [1976] ECR 1279 (as regards the EC substituting itself to its member States for the implementation of the North-East Atlantic Fisheries Convention, 486 UNTS 157). For further references and a discussion, P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, op. cit. n. 28, pp. 332-340; and T. Ahmed and I. de Jesús Butler, ‘The European Union and Human Rights: an International Law Perspective’, op. cit. n. 12, at pp. 783-792.

the powers it has been attributed, however broadly or narrowly such powers have been defined.³¹

Grounding the international obligations of the organization on the rule according to which ‘*derived* powers cannot be other or greater than those they derive from’ – to borrow from the formulation of judge Fitzmaurice³² – also has an impact on the identification of the obligations concerned. In principle, such obligations should correspond to any international obligation of *any* member State of the organization, without it being necessary that *all* the member States are bound by the said obligation.³³ In other terms, when they establish an international organization, the member States set it up with an implicit understanding that the organization is not attributed any power beyond those possessed by the member States at the time it is established, and that such powers as have been transferred shall not be exercised in violation of the obligations of the member States, including those which are not common to all the member States concerned.

The problem is that this doctrine, defensible as it is in theory, is unworkable in practice as regards multilateral organizations with an evolving membership, i.e., to which new member States may accede after the entry into force of the treaty establishing the organization. Indeed, its consequence would be – if taken literally – that, by agreeing to any supplementary State acceding to the organization, all the other member States would be accepting that the competences of the organization will be implicitly limited to whichever measures it may take without violating the international obligations of that new member State. It is precisely in order to avoid a situation in which the institutions of the European Union would thus become straightjacketed by the combination of all the human rights commitments of the member States of the EU that the European Court of Justice has declined to include among the general principles of law it upholds human rights instruments which have not been ratified by all the member States, or which impose only *à la carte* obligations on the member States.³⁴ Indeed, this too

³¹ I return to this distinction further. See text corresponding to n. 188-192.

³² See above, n. 28.

³³ In this respect also, the doctrine functions in a remarkably different fashion than the doctrine of substitution, as exemplified by the *International Fruit* cases referred to above (see n. 30).

³⁴ The Court considers that, apart from the European Convention on Human Rights – which Article 6 § 2 of the Treaty on the EU in any case refers to explicitly –, whose ‘special significance’ in EU law it recognizes and which it applies as if it were binding on the EU, the International Covenant on Civil and Political Rights should be complied with (Case 374/87, *Orkem v. Commission* [1989] ECR 3283, para. 31; Joined Cases C-297/88 and C-197/89, *Dzodzi* [1990] ECR I-3763, para. 68), and that ‘[t]his also true of the Convention on the Rights of the Child [of 20 November 1989] which, like the Covenant, binds each of the Member States’ (emphasis added) (Case C-540/03, *European Parliament v. Council*, judgment of 27 June 2006, para. 37). This statement was made in a judgment rejecting as ill-founded the action of the European Parliament for the annulment of certain provisions of the Family Reunification Directive (Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12)), which, in the view of the Parliament, violated a number of international human rights instruments as well as the EU Charter of Fundamental Rights. In contrast to the European Convention on Human Rights and the International Covenant on Civil and Political Rights, the Court notes about the Council of Europe Social Charter that: ‘So far as concerns the Member States bound by these instruments, it is also to be remembered that the Directive provides, in Article 3(4), that it is without prejudice to more favourable provisions of the European Social Charter of 18 October 1961, the amended European Social Charter of 3 May 1987 [*sic*; while the Court here reproduces a mistake of the European legislator itself, the actual name and date of this instrument is the Revised European Social Charter of 3 May 1996], the European Convention on the legal status of migrant workers of 24 November 1977 and bilateral and multilateral agreements between the Community or the Community and the Member States, on the one hand, and third countries, on the other’ (para. 107). However, since it, too, has been accepted by all the EU Member States, the European Social Charter in more recent cases was recognized to constitute a source of inspiration for the development of the fundamental rights included by the European Court of Justice among the general principles of law (see, as regards the right

may explain the insertion of Article 234 in the EEC Treaty (now Article 307 of the EC Treaty), as well as the interpretation by the European Court of Justice of its implications: whereas, in accordance with general public international law, it was agreed that the EEC Treaty should not impose on the member States of the Community that they violate pre-existing international obligations, it was at the same time *not* assumed that those obligations would be shifted on the European Community itself, since this could have resulted in endangering the deepening of European integration itself.³⁵ That Article 307 EC was a compromise provision, aimed of course at avoiding the imposition on the member States of conflicting international obligations, but also and at the same time at facilitating the pursuit of intergovernmental cooperation, is well illustrated by the reference made to that provision by the European Court of Human Rights, which invokes Article 307 EC as showing that States have ‘recognised the growing importance of international co-operation and of the consequent need to secure the proper functioning of international organizations’.³⁶ It is precisely the possibility of further international co-operation and the proper functioning of international organizations which would be put in jeopardy if, following the principle *nemo plus juris transferre potest quam ipse habet*, we were led to conclude that the international organization, insofar as it is transferred certain powers, is also imposed the full set of international obligations imposed on the States having made such a transfer. We must therefore look elsewhere for the source of human rights obligations imposed on international organizations under international law.

However, the recent judgment delivered by the European Court of Justice on 3 September 2008 in *Kadi and Al Barakaat* on appeal from the CFI has thoroughly revisited the relationship between European Community law and international law.³⁷ The ECJ asserted the constitutional hegemony of the EU, explaining that an international agreement cannot affect the allocation of powers fixed by the

to take collective action, Case C-438/05, *International Transport Workers’ Federation, Finnish Seamen’s Union, v. Viking Line ABP, OÜ Viking Line Eesti*, nyr, para. 43 (judgment of 11 December 2007); and Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet*, nyr, para. 90 (judgment of 18 December 2007)). Admittedly, the Court refers here to the fundamental rights it considers included among the general principles of law which it ensures respect for, without implying that there would exist an international law obligation imposed on the EU or the EC to comply with the said instruments. But the practical concerns would be the same, whatever the status of the obligation and its normative foundation: it would be imposing excessive constraints on the international organization, to require from it that it complies with the preexisting obligations of each and every member State.

³⁵ Quite to the contrary, in situations of conflict between one member State’s international obligations and the requirements of EC law, the member State is obliged to put an end to the conflict, if necessary, by denouncing the preexisting treaty: see Article 307 al. 2 EC, quoted above n. 14, and in the case-law, see Case C-324/93, *Evans Medical and Macfarlan Smith* [1995] ECR I-563, paragraph 27; Case C-158/91, *Levy* [1993] ECR I-4287; and Case C-124/95, *Centro-Com* [1997] ECR I-81, paragraph 56.

³⁶ Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, para. 150.

³⁷ Joined Cases C-402/05 P & C-415/05, *Kadi & Al Barakaat International Foundation v Council and Commission*, judgment of 3 September 2008. For comments, see D. Halberstam and E. Stein, ‘The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order’ (5 December 2008), *Common Market Law Review*, Forthcoming; University of Michigan Public Law Working paper No. 134, available at <http://ssrn.com/abstract=1312082>; P. d’Argent, ‘Arrêt “Kadi”: le droit communautaire comme droit interne’, *J.D.E.* (2008) p. 265; T. Tridimas and J. A. Gutiérrez-Fons, *EU Law, International Law and Economic Sanctions against Terrorism: The Judiciary in Distress?*, Research Papers in law, n°3/2008, College of Europe, available at www.coleurope.eu; G. De Burca, ‘The EU, the European Court of Justice and the International Legal Order after Kadi’ (28 December 2008), available at <http://ssrn.com/abstract=1321313>.

Treaties or, consequently, the autonomy of the Community legal system.³⁸ An international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty.³⁹ The Court placed the emphasis on the need for implementation of UNSC Resolutions to be in accordance with the EC legal order. Indeed, the Court stated that ‘the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement. The question of the Court’s jurisdiction arises in the context of the internal and autonomous legal order of the Community...’⁴⁰ The Court recognized that ‘the powers provided for in Articles 60 EC and 301 EC may be exercised only in pursuance of the adoption of a common position or joint action by virtue of the provisions of the EC Treaty relating to the CFSP which provides for action by the Community. Although, due to adopting such an act, the Community is bound to take, under the EC Treaty, the measures necessitated by that act. This obligation entails that, when the object is to implement a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations, drawing up such measures the Community is to take due account of the terms and objectives of the resolution concerned and of the relevant obligations under the Charter of the United Nations relating such implementation.’⁴¹ The Court noted that the UN Charter does not impose the choice of a particular model for the implementation of resolutions.⁴² The ECJ stated that ‘is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested Regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.’⁴³ Moreover, Article 307 shall not take precedence over fundamental rights, the protection of which the ECJ ensures in fulfilling its function under Article 220 of the Treaty. ‘Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights.’⁴⁴

The ECJ concluded that, if the UN Charter and the Security Council Resolutions *were to be classified as part of the hierarchy of norms within the Community legal order*, they would rank higher than secondary law but lower than primary law, in particular to the general principles of which fundamental principles form part.⁴⁵ Given that the Court found the contested measures to be in breach of the right to a hearing, the right to judicial protection and the right to property, it annulled Regulation No 881/2002.

³⁸ Joined Cases C-402/05 P & C-415/05, para. 282.

³⁹ Joined Cases C-402/05 P & C-415/05, para. 285.

⁴⁰ Joined Cases C-402/05 P & C-415/05, paras. 316-317.

⁴¹ Joined Cases C-402/05 P & C-415/05, paras. 295-296.

⁴² Joined Cases C-402/05 P & C-415/05, para. 298.

⁴³ Joined Cases C-402/05 P & C-415/05, para. 299.

⁴⁴ Joined Cases C-402/05 P & C-415/05, Para. 304.

While the CFI had showed that the European Community was bound by the UN Charter, the ECJ did not pronounce itself on this issue. The latter avoided ruling on this question since it established the primacy of primary law, in particular the general principles of which fundamental rights form part on the UN Charter. Therefore, its implications rather concern the question of implementing decisions of international organizations which will be analysed in point II.3 of this paper.

1.2. HUMAN RIGHTS AS PART OF GENERAL PUBLIC INTERNATIONAL LAW

Some have alleged that human rights, at least those which are recognized universally, have acquired a customary status in international law.⁴⁶ In this section, I examine this claim. I conclude that a more promising normative source of human rights in general public international law – allowing to impose on international organizations certain human rights obligations – is in the general principles of law, also mentioned in Article 38(1) of the Statute of the International Court of Justice among the sources of international law.

1.2.1. Human rights as customary international law

Custom requires establishing both consistent identifiable state practice, and evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (*opinio juris sive necessitatis*).⁴⁷ Yet, it has been argued that, in the field of human rights, evidence of custom could be based on the resolutions of the General Assembly of the United Nations and other international organizations, demonstrating a clear commitment of the international community towards certain values,⁴⁸ while inconsistent State practice would not be an obstacle in identifying such custom.⁴⁹

⁴⁵ Joined Cases C-402/05 P & C-415/05, Paras. 305-308.

⁴⁶ See, in particular, L. Henkin, *The Age of Rights* (New York, Columbia University 1990) p. 19; N. S. Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court', 38 *International and Comparative Law Quarterly* (1989) p. 321 at p. 333; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford, Clarendon Press 1989); L. B. Sohn, 'The Human Rights Law of the Charter', 12 *Texas International Law Journal* (1977) pp. 129-140 at pp. 132-134; H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', 25 *Georgia Journal of International and Comparative Law* (1995-1996), pp. 287-395.

⁴⁷ *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. the Netherlands)*, ICJ Reports 1969, p. 44, para. 77 ('Not only must the acts concerned amount to settled practice, but they must also be such or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The states concerned must therefore feel that they are conforming to what amounts to their legal obligation. The frequency or even habitual character of the acts is not in itself enough').

⁴⁸ In the Case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, the International Court of Justice seeks to determine the legal status of the obligation imposed on States to 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. It attaches an important weight in this regard to U.N. General Assembly resolutions: 'The Court has ... to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention ... This *opinio juris* may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions ... The effect of consent to the text of such resolutions cannot be understood as merely that of a reiteration or elucidation of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves' (at para. 188). The reasoning of the Court on this point, however, may be explained by the need to establish a rule on the basis of State practice which consists in an abstention (to

Alternatively, it has been suggested that State ‘practice’, for the purposes of custom determination in the field of human rights, is composed of official declarations⁵⁰ and participation in the negotiation of human rights instruments, as well as of incorporation of human rights within the national legal orders. At least three arguments have been put forward in favor of this position. First, it may be in any case artificial to dissociate, within the evidence of the emergence of a rule of customary international law, the ‘practice’ from the ‘*opinio juris*’, since the State practice which matters is one which is legally significant (as it testifies to the emergence of the rule), and since the *opinio juris* can only be identified from State practice itself.⁵¹ This, for instance, is the attitude adopted by the 1987 *Restatement (Third) of the Foreign Relations Law of the United States*, which finds State ‘practice’ to result from support by States for declarations or resolutions invoking human rights, or from condemnation of violations committed by other States.⁵² But, in addition, since they concern the relationship between a State and its own citizens, human rights violations are difficult to document. They trigger fewer reactions from other States than might violations of international law which infringe upon the interests of the latter States, so that ‘custom’ in the field of human rights would emerge only with difficulty.⁵³

Thus, a ‘modern’ view of custom has gained some acceptance in the field of human rights.⁵⁴ This view presents itself as a substitute to the classical view as reflected in Article 38(1) of the Statute of the International Court of Justice. In the ‘modern’ approach, State ‘practice’ in the usual sense of ‘behavior’ is less determinative than authoritative statements made by governments or intergovernmental bodies. In general, this turn (favored in part by a general identity crisis of custom as a source of international law) has been encouraged by well-intentioned authors, eager to provide human rights law with a standing in customary law which would compensate for what was perceived in the 1970s and 1980s as the lack of enthusiasm of States in the ratification of human rights treaties. However, this ‘modern’ view results in distorting the classical notion of custom in such a way that that the notion is barely even recognizable under its new disguise. It is also ideologically biased towards the recognition of certain particular human rights as forming part of customary international law. The

rely on the use of force). In that context, statements, such as UN General Assembly resolutions, necessarily must play a role, in order for the abstention to be interpreted as stemming from a sense of obligation. I thank H el ene Ruiz Fabri for drawing my attention to this point.

⁴⁹ T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, op. cit. n. 46, pp. 106-114.

⁵⁰ A particularly important statement in that regard is the Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968), where it was stated unanimously that the Declaration ‘states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for all members of the international community’ (para. 2).

⁵¹ See P.-M. Dupuy, ‘L’unit e de l’ordre juridique international. Cours g en eral de droit international public’, *Recueil des cours* t. 297 (2002) p. 166 (‘La coutume est l’expression d’une *opinio juris* manifest ee dans et par une pratique. Elle ne r esulte pas de l’adjonction des deux  l ements mais de la r ev elation de l’un par l’autre’).

⁵² American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, op. cit. n. 10, § 701, n. 2. For the background, see O. Schachter, ‘International Law in Theory and Practice: General Course in Public International Law’, *Recueil des cours* vol. 178 (1982-V) p. 2 at pp. 333-342. For a quite similar view of human rights as forming part of customary international law, see T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, op. cit. n. 46.

⁵³ C. Tomuschat, *Human Rights Between Idealism and Realism* (Oxford, Oxford University Press 2003) p. 34; and O. Schachter, ‘International Law in Theory and Practice’, op. cit. n. 52 at p. 334.

result of the 'new' approach emphasizes deducing from statements rather than a method of induction from State behavior. In turn, this results in those civil and political rights which are recognized in United States constitutional law and which the United States invokes against other States are included, while other rights, equally essential and whose status is identical within the international bill of rights, are excluded.⁵⁵

A certain dissatisfaction has therefore emerged with the substitution of a 'modern' view of custom to the 'traditional' view. This in turn has led to two reactions. One part of the doctrine has sought to accommodate the competing claims of the 'traditional' and the 'modern' views of custom. For instance, Frederic Kirgis has put the requirements of State practice and *opinio juris*, which compete for influencing the emergence of custom, on a sliding scale: whereas, on one end of the scale, highly consistent State practice should suffice to establish the existence of *opinio juris*, conversely and at the other end, strong indications that there exists a consensus among States about the unacceptability of certain forms of behavior may establish custom, even if State practice is inconsistent.⁵⁶ But, alternatively, we may turn to other arguments in order to ground human rights law in general international law. The most promising avenue in this direction is to identify human rights as general principles of law, which may be derived from the national legal systems.

1.2.2. Human rights as general principles of law

This means of recognizing the Universal Declaration of Human Rights as a source of legal obligations is encouraged by the approach adopted by the International Court of Justice itself. The Court has refrained from stating that the Declaration as such, in the totality of its articles, should be considered as customary international law. But it did refer to the Declaration on a number of occasions, albeit always with respect to a specific right and without always clarifying the source of the authority of the Declaration. For instance, alluding to the prohibition of arbitrary arrest or detention stipulated in Article 9 of the Universal Declaration of Human Rights, it stated in the *Hostages* case that 'Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights'.⁵⁷ The language referring to such 'fundamental principles' is not new. Already in the *Corfu Channel* Case, the Court mentioned 'obligations [...] based [...] on certain general and well-

⁵⁴ For a useful discussion, see Michael Akehurst, 'Custom as a Source of International Law', *British Yearbook of International Law* (1974-5) p. 1; L. Henkin, 'Human Rights and State "Sovereignty"', 25 *Georgia Journal of International Law* 37 (1995-1996).

⁵⁵ See B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Yearbook of International Law* 82 (1988-1989) pp. 94-95.

⁵⁶ F. Kirgis, 'Custom on a Sliding Scale', 81 *American Journal of International Law* 146 (1987). This proposal has been built upon, in particular by John Tasioulas ('In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', 16 *Oxford Journal of Legal Studies* 85 (1996)) and by A. E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *American Journal of International Law* (2001) p. 757).

recognized principles', among which it mentioned what it labelled 'elementary considerations of humanity'.⁵⁸ In the Advisory Opinion it delivered on the issue of *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, it referred to 'the principles underlying the Convention' as 'principles which are recognized by civilized nations as binding on States, even without any conventional obligation'.⁵⁹ Almost identical language may be found in later cases. In its Advisory Opinion on the *Legality of threat or use of nuclear weapons*, referring to the *Corfu Channel* dictum, the Court stated that 'it is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' [...], that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law'.⁶⁰ Similarly, in the *Nicaragua v. United States* Case, the Court had mentioned the 'fundamental general principles of humanitarian law' as the source of obligations for the defendant State.⁶¹ The Case *Concerning East Timor* similarly referred to the 'principle' of self-determination as 'one of the essential principles of contemporary international law'.⁶²

These statements should be taken with a degree of caution. They refer alternatively to general principles of international law which may be derived both from custom and from treaties, or which are so fundamental to the international legal order that they are, in the view of the World Court, axiomatic; or to general principles of law, common to all the main legal traditions.⁶³ But it is at least arguable that these statements qualify human rights among the 'general principles of law recognized by civilized nations' mentioned by Article 38(1)(c) of the Statute of the International Court of Justice.⁶⁴ Indeed, enthusiastic as they are about the grounding of international human rights law in customary international law, the reporters of the *Restatement (Third) of the Foreign Relations of the United States* note that 'there is a willingness to conclude that prohibitions [against human rights violations] common to the constitutions or laws of many states are general principles that have been absorbed into international law'.⁶⁵ This conclusion also may be seen to follow from the fact that the Universal Declaration of Human Rights has been implemented, or even sometimes almost literally reproduced, in a large number of bill of rights in the world.⁶⁶

⁵⁷ *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ Reports 1980, at 42.

⁵⁸ I.C.J. Reports 1949, p. 4 at p. 22.

⁵⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 19 (28 May 1951).

⁶⁰ I.C.J. Reports 1996, p. 226 at p. 257 (para. 79).

⁶¹ I.C.J. Reports 1986, p. 14 at pp. 113-114.

⁶² I.C.J. Reports 1995, p. 90 at p. 102 (para. 29).

⁶³ I owe this remark to Pierre d'Argent.

⁶⁴ See B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', op. cit. n. 55, pp. 102-108; H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', op. cit. n. 46, pp. 351-352; T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, op. cit. n. 46 at p. 88.

⁶⁵ American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, op. cit. n. 10, at § 701, n. 1, at p. 154.

⁶⁶ For a sample, see the appendix to H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', op. cit. n. 46.

We may conclude that international organizations, as subjects of international law, must comply with general public international law in the exercise of their activities, and that this includes a requirement to comply with the Universal Declaration on Human Rights as general principles of law. But it is here that we encounter the problem of accountability, as defined above⁶⁷: if indeed international organizations are bound to comply with human rights obligations, before which instances may remedies be exercised by victims of their activities ? And whether or not international organizations as such are bound by human rights obligations, are not their member States internationally responsible for any of their acts which lead to human rights violations, under the international human rights treaties to which the States themselves are parties or under other, non conventional mechanisms ? I turn now to such problems of accountability.

2. THE PROBLEM OF ACCOUNTABILITY – ONE: STATE RESPONSIBILITY

The problem may be stated fairly concisely. States are bound by human rights obligations under international law, which are imposed on them by treaties to which they are parties, or under general international law. If they transfer certain powers to international organizations which are authorized to exercise these powers by adopting binding decisions, or by developing certain activities which impact negatively upon human rights, which entity will be found internationally responsible? The State may legitimately assert that, since the international organization has a distinct legal personality,⁶⁸ the State should not be imputed by the acts that the organization itself adopts unless exceptional circumstances prevail. In principle, the veil of the organization should not be lifted. But the international organization may consider that, precisely because it is a separate legal person, it is not bound by the international obligations of the States to which it owes its coming into existence. We may seek to assert that the international organization nevertheless may not adopt measures which would violate the human rights its member States were bound to respect according to their preexisting international obligations, and that the international organization in any case should comply with human rights as these are part of the

⁶⁷ See the introduction to part I of this paper.

⁶⁸ Not any international agreement, even endowed with an institutional structure for its implementation, shall be recognized an international legal personality, however. But the existence of a certain autonomy of will of the international organization – a will distinct from that of its member States – shall in principle be deemed sufficient for there to exist a separate legal personality. It has been acknowledged that international legal personality results from the capacity of the subject to hold rights or to be imposed duties under international law, and to exercise those rights or be held accountable to such duties in the international legal process. This was the position of the International Court of Justice in the *Reparations for Injuries Suffered in the Service of the United Nations* case, where it ruled that the United Nations is a ‘subject of international law and capable of possessing international rights and duties, and that it has the capacity to maintain its rights by bringing international claims’. This conclusion that the United Nations have an international legal personality was based on the finding that ‘the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane’ (ICJ Reports 1949, p. 179). Problems of accountability resulting from inter-State cooperation in situations other than those that lead to the establishment of an international organization fall outside the scope of this paper and shall not be discussed here.

general principles of international law.⁶⁹ But these answers are only partially satisfactory. While the first answer is far from consensual, the second answer remains inadequate, since the human rights included among those principles may not correspond to the full list of human rights binding upon the member States of the organization (most of these rights will be stipulated in human rights treaties to which those States are parties, rather than have a pedigree under general public international law). In addition, whereas, by acceding to human rights treaties, States often have agreed to submit to certain dispute settlement mechanisms, some of which are of a jurisdictional or quasi-jurisdictional nature, similar fora typically do not exist before which the individual aggrieved by the acts adopted by an international organization can bring forward his or her claim.

A first solution to this predicament has been to assert the responsibility of States of the acts of international organizations. As illustrated by the hesitations of the International Law Commission when it prepared its Articles on the Responsibility of States for internationally wrongful acts,⁷⁰ the circumstances in which such responsibility may arise are still the subject of an intense debate within mainstream legal scholarship. Yet, a consensus seems to be emerging on six situations where such a responsibility might occur. Presented in the order in which these hypotheses appear in the International Law Commission's 2001 Articles on Responsibility of States for internationally wrongful acts and in the draft Articles on responsibility of international organizations provisionally adopted by the International Law Commission,⁷¹ there are in particular a number of classical instances, already similar to situations where State responsibility is alleged in situations in which they enter into relationships with other States. These circumstances whereby a State may be responsible for wrongful acts adopted by an international organization are: (1) where a State puts its organs at the disposal of the organization, but retains effective control over these organs, which commit a violation of human

⁶⁹ See, for a discussion of the affirmations above, Part I, sections 1 and 2 respectively, where I express doubts about the first proposition, while supporting the second.

⁷⁰ See International Law Commission, *Articles on State responsibility for internationally wrongful acts*, adopted in 2001 by the ILC (UN Doc A/56/10 2001) and taken note of by the UN General Assembly (Res 56/83). The ILC ended up agreeing simply on a 'non-prejudice' clause. Under the slightly misleading title of 'Responsibility of an international organization', Article 57 of the draft Articles reads: 'These articles [listed in the text adopted by the ILC in August 2001] are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization' (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 and corrigendum (A/56/10 and Corr.1)*, chap. IV, sect. E.1, para. 76).

⁷¹ International Law Commission, Report on the work of its fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006), *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, chapter VII, paras. 77-91. Hereinafter, the draft articles on responsibility of international organizations provisionally adopted by the International Law Commission, in the state in which they were presented to the sixty-first session of the UN General Assembly, will be referred to as the 'ILC draft articles on Responsibility of international organizations (2006)'. Although structured along largely similar lines, the ILC Articles on Responsibility of States for internationally wrongful acts and the ILC draft Articles on responsibility of international organizations focus, respectively, on the responsibility of States (including in their relationships with other States: see chapter IV) and the responsibility of international organizations. In principle, the provisions related to the responsibility of States in their relationship to international organizations (whether or not they are members of those international organizations) should be dealt with exclusively in the former set of articles. However, due to the hesitations of the ILC when it worked on that topic, this gap had to be covered in certain provisions of the ILC draft Articles on Responsibility of international organizations. Thus, articles 25 to 27 of this more recent text largely correspond to articles 16 to 18 of the Articles on the Responsibility of States for internationally wrongful acts, but they focus on the relationships between a State and an international organization; and articles 28 and 29 are specific to this topic, without corresponding to any equivalent in the Articles on State responsibility for internationally wrongful acts. See International

rights⁷²; (2) where a State is complicit of a violation of human rights committed directly by the international organization by providing aid and assistance to the organization in the commission of the violation⁷³; (3) where a State directs and controls an international organization in the commission of an internationally wrongful act by the latter⁷⁴; (4) where a State coerces the commission of a wrongful act by the international organization⁷⁵; or (5) where a State accepts international responsibility for an act directly attributable to the international organization.⁷⁶ In addition – and this has been the most controversial provision to be included in the draft articles on responsibility of international organizations – it is provided by article 28 that the member States of an international organization may be responsible (6) where a member State circumvents one of its international obligations by providing the organization with a competence in relation to that obligation, which the organization exercises in a way which results in a human rights violation which, if it had been directly attributable to the State, would have constituted a violation of its international obligations.

Is this sufficient ? Whether or not this regime of State responsibility (as now expanded upon by the discussions on State responsibility which took place in the context of the debate on the responsibility of international organizations for internationally wrongful acts) ensures that victims of human rights violations committed by international organizations will have an effective remedy at their disposal depends, of course, on which remedies are available to victims against the international organization itself, where the act is directly attributable to the organization.⁷⁷ However, for the reasons detailed in part III of this paper, only in highly exceptional cases, or within certain regional organizations, will it be possible for a victim to file a claim directly against the international organization for an act resulting in a violation of human rights. The problem is not only that, since they are grounded in general international law rather than in human rights treaties,⁷⁸ the human rights obligations imposed on international organizations are less far-reaching than those imposed on the States to which they owe their existence. The problem is also of a jurisdictional nature. In general, no international court will have jurisdiction over the issue. And national courts typically will be barred from adjudicating

Law Commission, *Report on the work of its fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006)*, op. cit. n. 71, at para. 86.

⁷² ILC draft articles on responsibility of international organizations (2006), art. 5.

⁷³ ILC draft articles on responsibility of international organizations (2006), art. 25.

⁷⁴ ILC draft articles on responsibility of international organizations (2006), art. 26.

⁷⁵ ILC draft articles on responsibility of international organizations (2006), art. 27.

⁷⁶ ILC draft articles on responsibility of international organizations (2006), art. 29. While this is presented by G. Gaja, the Special Rapporteur of the International Law Commission on the question of the responsibility of international organizations, as an original provision having no equivalent in the 2001 articles on the Responsibility of States for internationally wrongful acts, it is in fact modelled closely on Article 11 of the ILC Articles on Responsibility of States for internationally wrongful acts.

⁷⁷ This is the reason why grounding the discussion of State responsibility for the internationally wrongful acts of the international organization on the specific example of the responsibility of the EU member States under the European Convention on Human Rights, as adjudicated by the European Court of Human Rights, brings about a serious distortion in perspective. The EU has developed sophisticated internal mechanisms of accountability, including through judicial review, which go far beyond those usually found within international organizations (see below, text corresponding to n. 160-167). In addition, the European Court of Human Rights has taken into account the existence of such mechanisms in developing its approach to the responsibility of the EU Member States under the European Convention on Human Rights. On the difficulty of generalizing from this specific case, see also hereafter, text corresponding to n. 90-94..

such claims, because of the immunity of jurisdiction enjoyed by international organizations.⁷⁹ Therefore, we are justified in taking as our departure point that any regime of State responsibility for internationally wrongful acts which may result in allowing the State to evade certain obligations imposed on it under the human rights treaties to which it is a party should be considered in principle as insufficiently protective.

In order to evaluate the emerging regime of State responsibility for the acts of international organizations of which it is a member, we might consider three moments that characterize such membership. First, there is the moment of attributing competences to the international organization, when it is set up by the adoption of an intergovernmental agreement. Second, there is the participation in the decision-making procedures within the organization: the State may, or may not, have the capacity to exercise a decisive influence on such decision-making. Third, comes the moment of implementation of any acts adopted within the international organization: in general, the organization is dependent upon its member States for such implementation, since it does not have at its disposal the necessary means to ensure implementation of its decisions without the assistance of the member States. My thesis is that, while the international law of State responsibility has offered answers concerning whether a responsibility may exist at each of these moments, it has failed to consider their interrelationship, and that this is the main source of its insufficiencies.⁸⁰

2.1. THE ESTABLISHMENT OF THE INTERNATIONAL ORGANIZATION AND THE INITIAL TRANSFER OF POWERS

Consider first the moment at which an international organization is set up, and certain powers are transferred to it by its member States in order to allow it to fulfil its objectives. Under the title 'International responsibility in case of provision of competence to an international organization', Article 28 of the draft articles on responsibility of international organizations provisionally adopted by the International Law Commission states:

1. A State member of an international organization incurs international responsibility if it circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation.
2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the

⁷⁸ On the possible normative foundations for imposing human rights obligations on international organizations, see above, Part I.

⁷⁹ See below, part III, section 3.

⁸⁰ This idea was initially put forward in O. De Schutter and O. Lhoest, 'La Cour européenne des droits de l'homme juge du droit communautaire : Gibraltar, l'Union européenne et la Convention européenne des droits de l'homme', *Cahiers de droit européen* (2000) pp. 141-214.

international organization.⁸¹

Despite its perhaps ambiguous use of the concept of ‘circumvention’, this provision does not limit the responsibility of States to the situation where there exists a proven specific *intention* to circumvent the international obligation by attributing certain powers to an international organization, or where the member State may be said to be abusing its rights by setting up the international organization. Conversely, the use of this concept ‘is meant to exclude that international responsibility arises when the act of the international organization, which would constitute a breach of an international obligation if taken by the State, has to be regarded as an unwitting result of providing the international organization with competence’.⁸² In other words, while excluding that a State may escape its pre-existing international obligations by setting up an organization to which powers are attributed which the organization will be authorized to exercise in a way which results in a violation of those obligations,⁸³ this provision allows for the transfer of powers if precautions have been taken to ensure that these powers will be exercised in compliance with those obligations. While this does not necessarily require that the international organization be imposed upon the same international obligation as that imposed on the member State, imposing such an obligation on the organization is of course the most efficient means to ensure that it will exercise its powers in accordance with the international obligations of its member States, i.e., that the member States will not be accused of ‘circumventing’ their international obligations by setting up the organization. ‘Circumvention is more likely to occur when the international organization is not bound by the international obligation’; however, ‘the sheer existence of an international obligation for the organization does not necessarily exempt the State from international responsibility’.⁸⁴

The rule contained in draft Article 28 is directly borrowed from the case-law of the European Court of Human Rights. This case-law developed when questions were raised about the compatibility with the requirements of the European Convention on Human Rights of transfers of powers to the European Union. The European Court of Human Rights has emphasized in this context that the Convention ‘does not exclude the transfer of competences to international organizations provided that Convention rights continue to be ‘secured’. Member States’ responsibility therefore continues even after such a transfer’.⁸⁵ However, the Court at the same time has sought not to discourage the development in the future of intergovernmental cooperation, and to offer a reading of the Convention, to the fullest extent possible, in the light of any relevant rules and principles of international law applicable in relations

⁸¹ ILC draft articles on responsibility of international organizations (2006), art. 28.

⁸² International Law Commission, Report on the work of its fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006), op. cit. n. 71, pp. 283-284.

⁸³ To the extent the obligations of the State have their source in international treaties to which it is a party, Article 28 is a mere application of the *pacta sunt servanda* rule, one implication of which is that a State may not escape obligations imposed under one treaty by the conclusion, with other parties, of another international agreement: see above n. 12.

⁸⁴ International Law Commission, Report on the work of its fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006), op. cit. n. 71, p. 286.

⁸⁵ Eur. Ct. HR (GC), *Matthews v. the United Kingdom* (Appl. N° 24833/94) judgment of 18 February 1999, § 32.

between the Contracting Parties.⁸⁶ In its recent case-law, it therefore concluded that it would presume the compatibility with the European Convention on Human Rights of acts adopted by States in fulfilment of the obligations imposed upon them as members of an international organization, to the extent that these acts may be adequately reviewed for their compatibility with fundamental rights in the system set up within that organization itself. It stated in the *'Bosphorus Airways'* case⁸⁷ that:

State action taken in compliance with such legal obligations [deriving from commitments of a State party to the Convention under a treaty concluded subsequently to their accession to the Convention] is justified as long as the relevant organization [set up by such subsequent treaty] is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (...). By 'equivalent' the Court means 'comparable': any requirement that the organization's protection be 'identical' could run counter to the interest of international co-operation pursued.⁸⁸

Such State action implementing obligations imposed under treaties entered into by States parties to the Convention after their accession to this latter instrument will be presumed compatible with the Convention : 'If such equivalent protection is considered to be provided by the organization, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organization'⁸⁹ – that is, when the State is deprived of any margin of appreciation in the implementation of those obligations. Such a presumption may not be absolute, however. The Court reiterates its view according to which 'absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its

⁸⁶ In conformity with Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969 and as according to the well-established case-law of the Court : see Eur. Ct. HR (GC), *Al-Adsani v. the United Kingdom* (Appl. N° 35763/97), § 55, ECHR 2001-XI.

⁸⁷ Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005. The case concerned the impounding of an aircraft, which was the property of the Yugoslav Airlines (JAT), the national airline of the former Yugoslavia, and had been leased by the applicant Turkish company. The impounding was decided in implementation of UN Security Council Resolution 820 (1993) of 17 April 1993, which provided that States should impound, *inter alia*, all aircraft in their territories 'in which a majority or controlling interest is held by a person or undertaking in or operating' from the FRY. That Resolution had been implemented by EC Regulation 990/93 which entered into force on 28 April 1993 (OJ L 102/14 (1993)), and implemented in turn in Ireland by the European Communities (Prohibition of Trade with the Federal Republic of Yugoslavia (Serbia and Montenegro)) Regulations 1993 (SI 144 of 1993). In a judgment of 30 July 1996 delivered in answer to a referral from the Irish Supreme Court, the European Court of Justice had confirmed that Article 8 of EC Regulation 990/93 applied to the aircraft concerned and that the impounding did not violate the fundamental rights of the applicant company : the restriction to the right to property of the company, in particular, was proportionate to the fulfilment of 'an objective of general interest (...) fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina' (Case C-84/95, *Bosphorus v. Minister for Transport, Energy and Communications and others*, [1996] ECR I-3953 (para. 26)).

⁸⁸ Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, § 155.

peremptory character and undermining the practical and effective nature of its safeguards'. It follows not only that the State 'is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention',⁹⁰ but also that the presumption of compatibility with the Convention of acts adopted by States parties by which they implement obligations resulting from their membership of international organizations where fundamental rights are recognized a protection equivalent to that provided under the European Convention on Human Rights 'can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights'.⁹¹

The due diligence obligation imposed on the member States of an international organization when setting up the organization and transferring to it certain powers thus emerged in a highly specific context : one in which a number of States parties bound by the European Convention on Human Rights decided to establish a supranational organization – the European Community, now progressively absorbed by the European Union – within which a judicial control of compliance with fundamental rights has emerged since the late 1960s.⁹² The position of the European Court of Human Rights clearly was inspired by the attitude of the German Federal Constitutional Court (*Bundesverfassungsgericht*) towards European Community law. Only after it surmounted its initial hesitations and was convinced that fundamental rights are adequately protected in the legal order of the Community did the German Federal Constitutional Court agree to recognize the supremacy of European Community law, without a scrutiny of its compatibility with the fundamental rights protected under the German Basic Law (*Grundgesetz*).⁹³ It is already that attitude of the German courts

⁸⁹ Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, § 156.

⁹⁰ Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, § 154.

⁹¹ Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, § 156.

⁹² Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419; Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125. The Court recognizes not only that the EU institutions are bound to comply with fundamental rights, but in addition that the EU Member States may invoke the need to protect fundamental rights as general principles of law even where this may lead them to derogate from their obligations under EU Law (see, e.g., Case C-368/95, *Familiapress*, [1997] ECR I-3689 (para. 24) ; Case C-112/00, *Schmidberger*, [2003] ECR I-5659 (para. 81)). This is crucial, since it renders unlikely, if not impossible, a situation where a State might have to forego its human rights obligations in order to comply with its obligations under EU law.

⁹³ This case-law has been developing in different phases, to which judgments adopted respectively in 1974 ('Solange I') (BverfGE 37, 271 (280)), 1987 ('Solange II')(BverfGE 73, 339 (379)), 1993 (the 'Maastricht' decision) (BverfGE 89, 155 (174)) and 2000 (the 'Bananas' decision)(2 BvL 1/97, EuGRZ 2000, p. 328 (333)) correspond. The development of this case-law has been abundantly commented upon; I will therefore be excused for not describing it in detail. The main lesson is that, having been reassured by the development of a case-law of the European Court of Justice ensuring that fundamental rights will be protected within the legal order of the European Community at a level substantially equivalent to that provided by the German Basic Law – this case-law being itself an answer to the doubts raised by certain national constitutional courts about the compatibility of the doctrine of supremacy of EC Law with the protection of fundamental rights under national constitutions –, the *Bundesverfassungsgericht* now applies a presumption of compatibility with the requirements of fundamental rights of EC Law. It will therefore agree to review the compatibility of EC/EU law with those requirements only in situations where the applicant brings forward elements tending to demonstrate that the level of protection of fundamental rights has not been maintained at the level at which it was found by the *Bundesverfassungsgericht* to be satisfactory in its

which had led the European Commission of Human Rights, in 1990, to develop the doctrine of an 'equivalent protection', according to which the monitoring bodies set up by the European Convention on Human Rights should not control acts adopted by States parties as Member States of the European Community in fulfillment of their Community obligations insofar as the legal order of the Community provided for its own system of protection of fundamental rights which could be considered to be generally satisfactory.⁹⁴ That doctrine has been relied upon in later cases by the European Court of Human Rights, even before its spectacular reaffirmation in *Bosphorus Airways*. Most notably, it appears at least implicitly in two judgments the Court delivered on 18 February 1999 where it considered that the application by the German courts of the rule on immunity of jurisdiction of the European Space Agency does not constitute a violation of Article 6 § 1 of the Convention, which guarantees in principle a right of access to court. Indeed, the Court considered there that, insofar as it corresponds to a long-standing practice established in the interest of the good working of international organizations and fits within a 'trend towards extending and strengthening international cooperation in all domains of modern society',⁹⁵ applying a rule on immunity of jurisdiction of international organizations is permissible under the Convention, insofar as 'the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention'.⁹⁶ It thus recognized that the setting up of remedies within the internal structures of the European Space Agency could ensure compatibility with the requirements of Article 6 § 1 of the Convention, although the immunity of jurisdiction of the ESA implied that it could not be sued before the domestic courts of Germany.

The case-law of the European Court of Human Rights leading to the *Bosphorus Airways* judgment seeks to ensure that the Convention will not constitute an obstacle to further European integration by the creation among the Member States of the Union of a supranational organization – a development which, as the representatives of the European Commission argued in their submissions to the Court in that case, would be seriously impeded if the Member States were to verify the compatibility with the European Convention on Human Rights of the acts of Union law before agreeing to apply them, even in situations where they have no margin of appreciation to exercise. But the Court stops short of stating that, as the Member States have transferred certain powers to a supranational organization, the European Union, their international responsibility could not be engaged for situations resulting directly from the application of European Community acts. The Convention remains applicable to

'Solange II' decision of 22 April 1987. See on these developments, *inter alia*, J. Limbach, 'La coopération des juridictions dans la future architecture européenne des droits fondamentaux. Contribution à la redéfinition des rapports entre la Cour constitutionnelle fédérale allemande, la Cour de justice des Communautés européennes et la Cour européenne des droits de l'homme', 12 *Revue universelle des droits de l'homme* (2000) pp. 369-372.

⁹⁴ Eur. Comm. HR, *M. & Co v. Germany*, (Appl. N° 13258/87), decision of 9 February 1990, Decisions and Reports (DR) 64, p. 138; Eur. Comm. HR, *Heinz v. the Contracting Parties also parties to the European Patent Convention* (Appl. N° 21090/92), decision of 10 January 1994, DR 76-A, p. 125.

⁹⁵ Eur. Ct. HR (GC), *Beer and Regan v. Germany* (Appl. N° 28934/95) judgment of 18 February 1999, § 53; Eur. Ct. HR (GC), *Waite and Kennedy v. Germany* (Appl. N° 26083/94) judgment of 18 February 1999, § 63. Both judgments were decided by a unanimous Court.

such situations, and the States parties remain fully answerable to the supervisory bodies it sets up. It is only the level of scrutiny exercised by the European Court of Human Rights which is influenced by the circumstance that the alleged violation has its source in the application of an act adopted within the European Union. The Court considers that, insofar as the legal order of the European Union ensures an adequate level of protection of fundamental rights, and unless it is confronted with a ‘dysfunction of the mechanisms of control of the observance of Convention rights’ or with a ‘manifest deficiency’,⁹⁷ it may be allowed to presume that, by complying with the legal obligations under this legal order, the EU Member States are not violating their obligations under the ECHR.

But this creates two problems. First, it will be noted that the Court considers that a protection may be ‘equivalent’ to that provided by the European Convention on Human Rights although it remains *internal* to the international organization concerned. But, however adequate the remedies available to individuals within the European Union legal order when they complain about violations of their fundamental rights, ‘it remains the case that the Union has not yet acceded to the European Convention on Human Rights and that full protection does not yet exist at European level’.⁹⁸ therefore, by asserting that the EU member States were in effect ensuring an ‘equivalent protection’ of the fundamental rights of the individual within the EU legal order, since the European Court of Justice protects these rights within the scope of its jurisdiction, the European Court of Human Rights in effect obliterates the added value that a form of judicial control *external* to the legal order concerned might represent. One concern is that this doctrine may lead, in the future, to allow for similar presumptions to apply as regards States parties to the European Convention on Human Rights which ensure effective judicial remedies against national measures and apply directly the European Convention on Human Rights.⁹⁹ But another problem is that its assimilation of both forms of monitoring, respectively internal and external to the legal order concerned, may not be justified. Indeed, it is doubtful whether this approach is compatible with the general international law of human rights, where it is traditionally emphasized that the object and purpose of international human rights treaties is not only to impose

⁹⁶ Eur. Ct. HR (GC), *Beer and Regan v. Germany* (Appl. N° 28934/95) judgment of 18 February 1999, § 58; Eur. Ct. HR (GC), *Waite and Kennedy v. Germany* (Appl. N° 26083/94) judgment of 18 February 1999, § 73.

⁹⁷ Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, § 166.

⁹⁸ See the joint concurring opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebalsky, and Garlicki, to the *Bosphorus Hava* judgment of 30 June 2005. These six members of the Court, while agreeing with the operative provisions of the judgment, expressed a strong disagreement with the reasoning behind the *Bosphorus Hava* judgment, focused on the conditions under which a ‘presumption’ such as the one benefiting measures adopted by the EU could be justified.

⁹⁹ The doctrine of ‘equivalent protection’ may indeed be extended further, to any situations where, at national level, such ‘equivalent’ protection is provided. This ‘contamination’ of the doctrine would clearly manifest the principle of subsidiarity in the system of the European Convention on Human Rights – i.e., the principle according to which the protection of the rights and freedoms of the Convention must primarily take place at national level, the intervention of the European Court of Human Rights being only justified where those internal mechanisms have failed to prevent violations from occurring or, if they do occur, from being remedied. Some might see this as a welcome development, in a context where the European Court of Human Rights manifestly cannot manage its increasing case-load, and where even the solutions offered by Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (CETS no. 164, opened for signature in Strasbourg on 13 May 2004) will have a limited impact on that situation.

substantive obligations on the States parties, but also to submit them to monitoring mechanisms ensuring a collective enforcement of these obligations.¹⁰⁰

A second problem is that the doctrine developed by the European Court of Human Rights in *Bosphorus Airways*, and which inspired the formulation of draft Article 28 of the articles on responsibility of international organizations by the International Law Commission, allows for the possibility that a member State of an international organization will not be considered responsible for a violation of its international obligations, even where that State has transferred powers to an international organization which the organization then exercises by adopting measures which would constitute a violation of the international obligations if they had been adopted by the member State itself. It will be sufficient for a State, in order to avoid being found internationally liable, to show that it has been taken by surprise: if the said violation could not have been reasonably anticipated, the mere fact that competences have been attributed to the international organization in a domain in which the State was under certain international obligations cannot by itself trigger the international responsibility of that State. In other words, the obligation to ensure, when an international organization is established, that it will not exercise its competences in a way which results in violations of the international obligations of States if the measures adopted were attributable to them, is not an obligation of ends: it is a mere obligation of means. And, for a State to escape international responsibility, it is enough that it has sought to ensure that the international organization will not exercise its powers in violation with the international obligations of that State, even if it later appears that, in fact, the precautions taken were not sufficient. Of crucial importance, the liability of the State will thus be limited whether or not the State has reserved the right to veto the decision within the internal decision-making procedures of the organization, or to block the implementation of the decision.

Is this satisfactory? The *Bosphorus Airways* doctrine was articulated by the European Court of Human Rights only following a long and searching examination of the level of protection of human rights achieved within the legal order of the European Union. Indeed, the Court distinguishes the *Bosphorus Airways* situation from *Pellegrini v. Italy* – where Italy was found to have violated the right to a fair trial guaranteed in Article 6 § 1 of the Convention for having enforced a judgment delivered by the Vatican courts in violation of the rights of defence of the applicant¹⁰¹ – on the basis that ‘enforcement of a judgment not of a Contracting Party to the Convention [¹⁰²] (...) is not comparable to compliance with a legal obligation emanating from an international organization to which Contracting Parties have

¹⁰⁰ For instance, the Human Rights Committee states that the object and purpose of the International Covenant on Civil and Political Rights is not only to ‘create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify’, but also ‘to provide an efficacious supervisory machinery for the obligations undertaken’ (Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 4 November 1994 (CCPR/C/21/Rev.1/Add.6)).

¹⁰¹ Eur. Ct. HR (4th sect.), *Pellegrini v. Italy* (Appl. N° 30882/96) judgment of 20 July 2001, § 40.

transferred part of their sovereignty'.¹⁰³ The implied suggestion is that, when States parties to the European Convention on Human Rights co-operate with one another, or implement decisions of international organizations offering an equivalent level of protection of human rights, they may subject the acts of the other States or emanating from such international organizations to only minimal review; instead, where they cooperate with States not parties to the European Convention on Human Rights, or when they implement secondary legislation adopted within international organizations not offering a protection of human rights at a level similar to that guaranteed by the European Convention on Human Rights, there could be no presumption that the measures adopted in the framework of such co-operation comply with the requirements of the Convention, and a strict scrutiny of such compliance therefore would be required. But the formulation of draft Article 28 of the articles on responsibility of international organizations makes no reference to such a verification. Instead of allowing a presumption of compatibility to be established in the presence of an 'equivalent protection' being ensured within the international organization to which certain competences are being attributed, such presumption becomes the rule, and the presumption is reversed: only when such transfer of competences constitutes a 'circumvention' of a State's obligations shall it be treated as suspect. Admittedly, the International Law Commission's articles on responsibility of international organizations are not focused on the human rights obligations of States. Instead, they are wider in scope, and they intend to be applicable to any international obligations of States, whatever their nature. But this alone should not justify transforming into a rule (that a State cannot be held responsible for having transferred certain powers to an international organization, which this organization then exercises by the adoption of measures which, if these had been adopted by that State, would constitute a violation of its obligation) what was, in *Bosphorus Airways*, an exception (applying only to the case of an international organization ensuring a protection of fundamental rights deemed equivalent to that offered by the European Convention on Human Rights). This is especially so since the State's responsibility which might result from the transfer of certain competences to the organization is tailored neither on the degree of control it may exercise on the internal decision-making procedures of the organization, nor on the ability of the State to obstruct the implementation of the decision after its adoption.

2.2. THE DECISION-MAKING PROCESS WITHIN THE ORGANIZATION

The ILC's draft articles on responsibility of international organizations contain provisions closely inspired by the equivalent clauses of the articles on Responsibility of States for internationally wrongful acts, which relate to complicity (aid or assistance provided by a State in the commission of an internationally wrongful act by an international organization : Article 25); to direction and control by a State over the commission of an internationally wrongful act by an international organization

¹⁰² The Holy See is not a Contracting Party to the European Convention on Human Rights.

(Article 26); or to coercion (Article 27).¹⁰⁴ However, these instances of State responsibility do not refer to the situation where, by participating in the decision-making process within the organization, a State would be contributing to the adoption of a measure which, if that measure had been adopted by that State, might constitute a violation of its international obligations. Except in very exceptional circumstances, they will therefore be useless as regards the risk that a State uses the form of the international organization in order to have measures adopted which would constitute human rights violations if such measures were adopted directly by that State.

More precisely, the draft provisions cited above suffer from two limitations. First, for the State to be internationally responsible, we must be in presence of an act which is an internationally wrongful act *of the international organization itself*, or (under Article 27) which ‘but for the coercion’, would constitute an internationally wrongful act or the organization.¹⁰⁵ Therefore, where the organization is not imposed international obligations identical to those of its member States – in particular, where only the States are parties to international human rights treaties – no State responsibility will result from any ‘coercion’ being exercised on the international organization, or from the complicity of the State with the act of the international organization or the direction and control it has exercised on the commission of that act. Of course, this is based on an *a contrario* reading of the ILC Draft Articles, which postulates that, where the responsibility of the Member States for the acts of the organization cannot be engaged under those articles, it shall not exist. Whether this is a fair reading of the intentions of the ILC is debatable. But there is hardly any doubt that the ILC Articles, if adopted in their current form, will be used in this very way: to seek to exempt the member States of an organization when the acts of the latter are not in violation of its own obligations under international law, even if the same acts would have been in violation of the obligations of the member States if they, rather than the organization itself, had adopted such acts.¹⁰⁶

Second, as regards member States of the organization, mere ‘participation in the decision-making process of the organization according to the pertinent rules of the organization’ shall not *per se* constitute complicity, direction and control, or coercion, unless an additional element is present. However, this latter rule may be delicate to apply. On the one hand, the legality of the participation of the State in the decision-making process of the international organization does not necessarily exclude that such participation may amount to a form of complicity, direction and control, or coercion. On the

¹⁰³ Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, § 157.

¹⁰⁴ This latter notion refers to a form of behavior which may be deemed abusive, for instance the threat of withholding financial contributions in order to force the organization to commit an internationally wrongful act: see J. d’Aspremont, ‘Abuse of the Legal Personality of International Organizations and the Responsibility of Member States’, *International Organizations Law Review* (2007) pp. 91-119 at p. 100.

¹⁰⁵ According to Article 27 of the draft articles on responsibility of international organizations (Coercion of an international organization by a State): ‘A State which coerces an international organization to commit an act is internationally responsible for that act if: (a) The act would, but for the coercion, be an internationally wrongful act of that international organization; and (b) That State does so with knowledge of the circumstances of the act.’

¹⁰⁶ I am indebted to Pierre d’Argent for drawing my attention to this point.

other hand, mere participation in such decision-making process is not sufficient: ‘The factual context such as the size or membership and the nature of the involvement will probably be decisive’.¹⁰⁷ In sum, the degree of influence a State is exercising in fact on the international organization may lead to the conclusion that it is aiding or assisting the organization in the commission of an internationally wrongful act¹⁰⁸; that it is directing or controlling the organization in the commission of such act; or that it is coercing the organization to commit such act. However, the mere circumstance that a State is a member of an international organization and has certain voting rights within the organization does not entail that it will be internationally responsible, even if the organization (whether aided or not by its vote) adopts an act which would be internationally wrongful if that act were attributable to the State.

This approach is significantly less requiring on States than the approach adopted by certain human rights treaty bodies, in particular the UN Committee on Economic, Social and Cultural Rights. Already in its 1990 General Comment on Article 22 of the International Covenant on Economic, Social and Cultural Rights, which relates to international technical assistance measures, this committee noted that ‘States parties to the Covenant, as well as the relevant United Nations agencies, should [...] *make a particular effort to ensure* that [the protection of the most basic economic, social and cultural rights] is, to the maximum extent possible, built-in to programmes and policies designed to promote adjustment’.¹⁰⁹ This implied that States parties to the Covenant had obligations, *as member States* of the international financial institutions in general and of the International Monetary Fund in particular, insofar as such institutions impose on indebted States certain austerity programmes as a condition for access to the international financial markets. In the General Comment on the right to the highest attainable standard of health, which it adopted in 2000,¹¹⁰ the Committee on Economic, Social and Cultural Rights adopted an even stronger formulation, moving from the affirmation of an obligation of means to an obligation of result. It noted that ‘States parties have an *obligation to ensure* that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international

¹⁰⁷ International Law Commission, Report on the work of its fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006), op. cit. 71, p. 279 (commentary to article 25 of the draft articles on responsibility of international organizations, to which the commentaries to articles 26 and 27 refer).

¹⁰⁸ It has sometimes been stated that the exercise of voting rights, while not in itself a violation by the State of its international obligations, could result in that State being an accomplice in the commission by the international organization of an internationally wrongful act, at least where the State concerned knows or should have known that the adoption of the act was a violation of international law. See Pierre Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles, Bruylant 1998) pp. 468-470.

¹⁰⁹ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 2 (1990), *International technical assistance measures (Art. 22)*, UN doc. E/1990/23, at para. 9.

¹¹⁰ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2000/4 (2000), para. 39 (‘In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health’).

measures of these institutions'.¹¹¹ A very similar formulation appears in the General Comment on the right to water.¹¹²

We may convey a better idea of the specific regime of international responsibility of States for the acts of international organizations of which they are members by contrasting this with a recent contribution to the debate on the issue of the 'abuse' by States of the international legal personality of the organization. In this context, the expression of 'abuse' refers to the tendency of States to shield themselves behind the separate legal personality of the organization in order to avoid international responsibility whereas in fact (just like the parent company behind its subsidiary) they dominate the organization which is a mere instrument in their hands. In such circumstances, should not the acts of the organization be attributed to its master - the State exercising a decisive influence on the organization? Or, apart from any question of attribution, should we not consider that the States should be held internationally responsible for the acts by which they commit the abuse?

This was the question Moshe Hirsch had in mind, in his discussion of the situations where the 'veil' of the international organization should be lifted – and its member States be held internationally responsible for the wrongful act of the organization.¹¹³ His approach was a cautious one. Hirsch did consider that direct actions against the members of the organization should be open in cases of 'abuse of the separate personality of the international organization for illegal acts or in order to evade some legal obligations'.¹¹⁴ But he was hesitant about transposing per analogy the doctrines allowing the piercing of the veil of corporations in order to reach directly the shareholders, since this would lead to a too broad understanding of the responsibility of the member States of an international organization. Rather, his proposal was that we limit the doctrine to 'cases in which a single member State has in fact complete, or almost complete, control over the activities of the organization. Considerable influence on the activities of the organization will not be sufficient to justify ignoring the legal personality of an international organization. Only where the degree of control exercised by a single member has led to a situation in which the organization is functionally identical with that member would it be justified to see the controlling state and the organization as one'.¹¹⁵ Because Hirsch seemed to require a specific intention for such an abuse to exist, this hypothesis seems more narrowly defined than the

¹¹¹ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2000/4 (2000), para. 39.

¹¹² See U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2002/11 (26 November 2002), para. 36: 'States parties should ensure that their actions as members of international organizations take due account of the right to water. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures'.

¹¹³ See M. Hirsch, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles* (Dordrecht-Boston-London, Martinus Nijhoff Publ. 1995) pp. 169-172.

¹¹⁴ M. Hirsch, op. cit. at p. 170.

¹¹⁵ M. Hirsch, op. cit. at pp. 171-172.

‘circumvention’ criterion proposed by professor G. Gaja, the Special Rapporteur of the International Law Commission on international responsibility of international organizations.¹¹⁶

More recently, Jean d’Aspremont has put forward the view that ‘when member States effectively and overwhelmingly control the decision-making process of an international organization, [...] the legal personality of that organization can no longer constitute a shield behind which member States can evade a responsibility that they would have incurred if they had themselves committed the contested action’. Such abuse over the decision-making process, we are told, exists ‘when one or a few member States overrule(s) the whole process, thereby stifling any adverse opinion that could be expressed’.¹¹⁷ The separate international legal personality of the organization in other terms becomes a mere fiction, an instrument in the hands of States exercising ‘overwhelming control’ on the organization: such abuse should give rise to an international responsibility of the States which commit it.

While it presents itself as a significant expansion of the circumstances in which State responsibility may arise for participation in an international organization – a claim I beg to be sceptical about¹¹⁸ – the proposal in fact is not sufficiently protective of the interests corresponding to the international obligations of the member States of an international organization. It is indeed noteworthy that such ‘overwhelming control’ as would give rise to the ‘abuse’ of the international legal personality of the organization, requires in d’Aspremont’s view ‘resort to types of pressure that are not expressly provided for by the constitutive treaty of the organization concerned. In other words, if a member state overrules the decision-making process of an organization thanks to the procedural rights that it has been granted under the constitutive treaty of the organization, this cannot be considered overwhelming control. [...] For instance, if a permanent member of the Security Council persistently blocks the lifting of sanctions that have proved to infringe on some basic human rights, it cannot be deemed to be abusing the legal personality of the organization in the sense used in this Article and cannot accordingly be held jointly or concurrently responsible of the persistent violations of human rights’.¹¹⁹

¹¹⁶ On the notion of ‘circumvention’ in the ILC’s Draft Articles on responsibility of international organizations, see above, text corresponding to n. 81-84.

¹¹⁷ J. d’Aspremont, ‘Abuse of the Legal Personality of International Organizations and the Responsibility of Member States’, op. cit. n. 104, at 109.

¹¹⁸ It is in fact doubtful whether this proposal goes beyond what is envisaged by the draft articles on responsibility of international organizations of the International Law Commission. Commenting on article 28 of the draft articles on responsibility of international organizations, J. d’Aspremont writes that this provision is, ‘eventually, unsatisfactory as it only embodies situations of the provision of competence to the organization with the aim of circumventing international obligations binding the member States. It boils down to a very narrow understanding of the abuse of the legal personality at the level of the creation of the organization. It fails to embody cases where member States abuse the legal personality of international organizations at the decision-making level when exerting overwhelming control over the decision-making process of the organization’ (id., p. 100). In fact, on this precise point, the commentary to draft article 28 refers back to the distinction made under the commentaries to articles 25 to 27 between mere ‘participation in the decision-making process of the organization according to the pertinent rules of the organization’, and decisive influence being exercised within the organization by one or more member States. Although they relate to complicity, to direction and control, or to coercion, may also be invoked in the context of decision-making within the organization.

¹¹⁹ J. d’Aspremont, ‘Abuse of the Legal Personality of International Organizations and the Responsibility of Member States’, op. cit. n. 104, at p. 110.

This last example is particularly illustrative. When, in 1997, it adopted its General Comment on the relationship between economic sanctions and respect for economic, social and cultural rights,¹²⁰ the Committee on Economic, Social and Cultural Rights took the view that States imposing sanctions should not, in doing so, jeopardize the economic, social and cultural rights of the population in the targeted State, since this would constitute a violation of their obligations under the International Covenant on Economic, Social and Cultural Rights and, indeed, since the Universal Declaration on Human Rights may be considered as binding under general international law, whether or not they have ratified the Covenant. The Committee stated the following:

While this obligation of every State is derived from the commitment in the UN Charter to promote respect for all human rights, it should also be recalled that every permanent member of the Security Council has signed the Covenant, although two (China and the United States) have yet to ratify it [¹²¹]. Most of the non-permanent members at any given time are parties. Each of these States has undertaken, in conformity with article 2, paragraph 1, of the Covenant to ‘take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means ...’. When the affected State is also a State party, it is doubly incumbent upon other States to respect and take account of the relevant obligations. To the extent that sanctions are imposed on States which are not parties to the Covenant, the same principles would in any event apply given the status of the economic, social and cultural rights of vulnerable groups as part of general international law, as evidenced, for example, by the near-universal ratification of the Convention on the Rights of the Child and the status of the Universal Declaration of Human Rights.¹²²

This passage is of course highly ambiguous, for it does not identify clearly the normative basis of the obligation of States adopting economic sanctions, particularly under chapter VII of the UN Charter. The notion that an obligation would be ‘doubly’ incumbent upon a State, in particular, may be a source of confusion. At face value, the use of this expression would seem to betray a certain hesitation among the members of the Committee about whether the obligations of the States adopting sanctions have their source in the international undertakings of those States, or instead in the rights recognized to the population in the targeted State. The reality however, is that it can be both, as well as at the same time. Of course, all that matters, where sanctions adopted by one State have an impact on the population of another State, are the obligations of the first State under international law, which may or

¹²⁰ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 8 (1997): The relationship between economic sanctions and respect for economic, social and cultural rights, U.N. doc. E/1998/22.

¹²¹ China ratified the International Covenant on Economic, Social and Cultural Rights in 2001, after the date at which this General Comment was adopted.

¹²² U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 8 (1997), op. cit. n. 120, para. 51.

may not include the obligation not to violate the rights of populations outside its borders. And the General Comment clearly implies not only that a State party to the International Covenant on Economic, Social and Cultural Rights is under an obligation not to violate the rights stipulated in the Covenant in other countries, but also that such an obligation could be violated by that State voting in favor of adopting or upholding economic sanctions which have a severe impact on the realization of economic and social rights in the targeted country. But this does not mean that the obligations of the targeted State towards its own population are irrelevant to the determination of the question whether or not the State adopting sanctions has violated its own obligations. For, *in addition*, States parties to the International Covenant on Economic, Social and Cultural Rights may be violating their international obligations by coercing other States into violating their own obligations under either the Covenant or under other rules of international law.¹²³

As illustrated by the example of the responsibility of UN Security Council members for the adoption of economic sanctions under Chapter VII of the UN Charter, there is a significant gap between the regime of State responsibility for the acts of international organizations of which a State is a member as it is currently emerging under general international law, and the way this same question is treated under certain human rights treaties.¹²⁴ The two approaches also create very different incentives for the States concerned. In a system in which States cannot be held internationally liable for the use they make of their voting powers within an international organization, unless their influence on the decision-making process is decisive due to the weight of their vote,¹²⁵ they may be tempted to attribute

¹²³ This is of course the hypothesis envisaged under Article 18 of the International Law Commission's 2001 articles on Responsibility of States for internationally wrongful acts (op. cit. n. 70), under the heading 'Coercion of another State': 'A State which coerces another State to commit an act is internationally responsible for that act if: (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and (b) The coercing State does so with knowledge of the circumstances of the act'.

¹²⁴ It is not suggested here that the approach of human rights bodies has been consistent in the past, nor that they are all aligned on the position of the UN Committee on Economic, Social and Cultural Rights. Comp. the position adopted by the UN Committee on Economic, Social and Cultural Rights on economic sanctions with, e.g., Eur. Comm. HR, *Ilse Hess v. the United Kingdom* (Appl. N° 6231/73), 2 DR 73; 18 *Yearbook of the ECHR* 174 (1975). In this early case, the European Commission of Human Rights noted that, while the United Kingdom could in principle be held responsible for the situation of the Spandau prison, located in the British sector of West Berlin, and which the four allied powers controlled jointly, the application nevertheless was inadmissible *ratione personae*, as the United Kingdom alone could not, without the consent of the other three allied powers, modify the regime applied in the prison. Thus, the fact that the UK could not exercise decisive influence on the management of the prison of Spandau was the crucial factor in excluding its international responsibility under the European Convention on Human Rights. It should be added however that – although this is not alluded to in the decision of the Commission – the fact that the arrangement between the Allied Powers predated the signature and entry into force of the European Convention on Human Rights might have played a role in this outcome. The position of the UN Committee on Economic, Social and Cultural Rights also seems to contrast with that of the Human Rights Committee under the International Covenant on Civil and Political Rights, as illustrated by the case of *H. v.d.P. v. The Netherlands*, Communication No. 217/1986, views of 8 April 1987, U.N. Doc. Supp. No. 40 (A/42/40) at 185 (1987). In this case, the Human Rights Committee found a communication by a civil servant of the European Patent Office (Munich) to be inadmissible: the Committee, it stated, '...can only receive and consider communications in respect of claims that come under the jurisdiction of a State party to the Covenant. The author's grievances, however, concern the recruitment policies of an international organization, which cannot, in any way, be construed as coming within the jurisdiction of the Netherlands or of any other State party to the International Covenant on Civil and Political Rights and the Optional Protocol thereto. Accordingly, the author has no claim under the Optional Protocol'. Here again however, it is unclear whether this is in straightforward opposition to the UN Committee on Economic, Social and Cultural Rights: recruitment policies are decided by the international organization without any role in the decision-making process for the member States of the organization; the outcome might have been different if the contested measure had been adopted thanks to the votes of the member States, parties to the International Covenant on Civil and Political Rights.

¹²⁵ See above, text corresponding to n. 107-108.

to the organization wide areas of competence without retaining a power to veto the decisions adopted within the organization, knowing that the organization can ignore their own international obligations. Instead, in a system where a State's international responsibility may result both from the delegation of powers to an international organization and from the exercise by that State of its voting powers within the organization once it is established, the States concerned will take care not to attribute to the international organization competences without reserving for themselves the power to control the exercise by the international organization of the powers it has been attributed. Perhaps because of the impact of international agencies such as the international financial institutions on the enjoyment and realization of economic and social rights – an impact which is widely recognized as decisive – it is this latter regime that the UN Committee on Economic, Social and Cultural Rights that seeks to establish in the specific context of the International Covenant on Economic, Social and Cultural Rights. This regime may be 'self-contained', in the sense that it may not correspond to the emerging orthodoxy of general public international law; it may still be best suited to obligations imposed under international human rights treaties. In particular this pertains to where competences are transferred to international organizations which they may exercise by the adoption of measures which will take their member States by 'surprise', with the result that any breaches of the international obligations of the States resulting from the adoption of such measures will be seen as the 'unwitting result' of the transfer of competences to the international organization.

2.3. THE IMPLEMENTATION OF DECISIONS ADOPTED BY INTERNATIONAL ORGANIZATIONS

Turning now to the third moment which characterizes the contribution of States to the activities of international organizations, we are confronted with the question whether a State may be internationally responsible for complying with decisions adopted by the organization in compliance with its internal rules of procedure, by implementing those decisions insofar as they are addressed to the State or by putting its organs at the service of such implementation – for example, by executing any judicial decision adopted within the organization, or by adopting laws which implement decisions obligatory for the members of the organization.

As confirmed by the work of the International Law Commission's articles on responsibility of international organizations which relates to the responsibility of States cooperating with international organizations, a State (whether or not a member of the organization) may be internationally liable if it has put its organs at the disposal of the organization, and these organs commit an internationally wrongful act, in situations where the organs remain controlled by the State. But the decisive question in such situations in relation to attribution of a given conduct is not who controls the organs, but rather

‘who had effective control over the conduct in question’.¹²⁶ While this rule may be particularly relevant for UN peace-keeping operations to which member States of the UN voluntarily commit troops, it could also be extended to situations where States put their Executive powers at the disposal of an international organization in order to ensure that its decisions are effectively implemented. This would include, for instance, the execution of decisions of the international organization which are addressed to individuals, whose rights may be violated as a result. However, when a State is obliged under the rules of the organization to execute certain decisions – i.e., the State would be internationally responsible if its organs did not comply with those decisions and did not faithfully implement them – it is doubtful whether its responsibility could be engaged under general international law even where the acts of the organization would constitute a violation of its international obligations if they had been adopted by that State. Indeed, in such situations, it seems clear that the organization exercises ‘effective control’ over the conduct of the organ, in the meaning attached to that expression by the draft articles on responsibility of international organizations, even though the organ remains that of the State and not that of the organization itself.¹²⁷

Again however, this regime does not correspond to what seems required under international human rights law. Unless it can be demonstrated that the measures adopted by the international organization fully comply with the requirements imposed on its member States under any human rights obligations imposed on them, these States should refuse to implement such measures, since they would engage their international responsibility by not doing so. This is clearly affirmed in the case-law of the European Court of Human Rights, certainly since the 1996 case of *Cantoni v. France*.¹²⁸ As already noted, in the 2005 *Bosphorus Airways* case, the Court reiterates its view according to which ‘absolving Contracting States completely from their Convention responsibility in the areas covered by [the transfer of powers to an international organization] would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards’. Therefore, the Court articulated that the State ‘is considered to retain Convention liability

¹²⁶ Second report on responsibility of international organizations, by Giorgio Gaja, Special Rapporteur to the International Law Commission, A/CN.4/541, 2 April 2004, para. 40.

¹²⁷ Article 5 of the draft articles on responsibility of international organizations (2006) (Conduct of organs placed at the disposal of an international organization by a State or another international organization) states: ‘The conduct of an organ of a State or an international organization that is placed at the disposal of another international organization for the exercise of one of that organization’s functions shall be considered under international law an act of the latter organization to the extent that the organization exercises effective control over the conduct of the organ.’ See Second report on responsibility of international organizations, by G. Gaja, Special Rapporteur to the International Law Commission, A/CN.4/541, 2 April 2004, para. 50.

¹²⁸ In this case, the applicant, a retailer who had been facing proceedings for unlawfully selling pharmaceutical products, complained that the statutory definition of ‘medicinal product’ lacked sufficient clarity and precision to satisfy the requirements of Article 7 para. 1 of the Convention, which embodies the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*), and from which it follows that an offence must be clearly defined in the law. The provision of the French Public Health Code under which the applicant had been prosecuted, however, was reproduced almost literally from an EC Directive. The Court considered this to be irrelevant: ‘The fact [...] that Article L. 511 of the Public Health Code is based almost word for word on [Community Directive of 26 January 1965 (Directive EEC 65/65, OJ no. L. 369 of 9 February 1965), as amended on several occasions] does not remove it from the ambit of Article 7 of the Convention’ (Eur. Ct. HR, *Cantoni v. France* (Appl. N° 17862/91) judgment of 15 November 1996, para. 30).

in respect of treaty commitments subsequent to the entry into force of the Convention'.¹²⁹ Even in situations where a State does no more than faithfully implement decisions adopted by the organization (and binding on that State), it may therefore be internationally responsible under the European Convention on Human Rights: it is irrelevant at this stage whether or not the State has any discretion in the adoption of such implementation measures.¹³⁰

Of course, we could achieve the same result – in effect, affirming the primacy of human rights obligations of States over the obligations they are imposed as members of international organizations – through other means. Human rights, we might say, occupy a hierarchically superior position among the norms of international law.¹³¹ First, since one of the purposes of international economic and social cooperation under the UN Charter is to promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’ (Article 55 c)), and since Article 56 of the UN Charter clearly imposes obligations both on the organization itself and on its Member States to contribute to the fulfilment of this objective, it would follow from Article 103 of the UN Charter¹³² that any international obligation conflicting with the obligation to promote and protect human rights should be set aside, in order for this latter objective to be given priority. Second, *jus cogens* norms are hierarchically superior to any other rules of international law – including, but not limited to, international treaties.¹³³ A number of prohibitions formulated in international human rights law have already been recognized as having the character of *jus cogens*.¹³⁴ These include at a minimum the prohibition of slavery and the slave trade, genocide,¹³⁵ racial discrimination, apartheid and torture,¹³⁶ as well as basic rules of international humanitarian law

¹²⁹ Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, § 154.

¹³⁰ In the case-law of the European Court of Human Rights, whether or not the implementing State has a margin of discretion only becomes relevant when determining the degree of scrutiny to be exercised on the measures adopted by the State : where the international organization guarantees a protection of human rights deemed ‘equivalent’ to that of the European Convention on Human Rights, and the State has no discretion in the adoption of implementation measures of decisions adopted within the organization, the European Court of Human Rights will exercise a less demanding level of scrutiny. See above, text corresponding to n. 87-91.

¹³¹ See generally I. Seiderman, *Hierarchy in International Law. The Human Rights Dimension* (Antwerpen-Groningen-Oxford, Intersentia-Hart 2001).

¹³² Article 103 of the UN Charter provides that ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail’.

¹³³ In the context of the law of treaties, the Vienna Convention on the Law of Treaties (op. cit. n. 12) states that any treaty which, at the time of its conclusion, is in violation of a peremptory norm of general international law, is to be considered void. A peremptory norm of general international law is defined as ‘a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’ (article 53). Article 64 of the Vienna Convention on the Law of Treaties adds that ‘If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates’.

¹³⁴ For an extensive discussion, see I. Seiderman, *Hierarchy in International Law. The Human Rights Dimension*, op. cit. n. 131, at pp. 66-105.

¹³⁵ International Court of Justice, Case of the *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, judgment of 3 February 2006 (Jurisdiction of the Court and Admissibility of the Application), at para. 64.

¹³⁶ *Siderman De Blake v. Republic of Argentina*, 965 F.2d at 717 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993); *In re Estate of Ferdinand E. Marcos Litigation (Trajano v. Marcos)*, 978 F.2d 493, 500 (9th Cir. 1992), cert. denied, *Marcos Manto v. Thajane*, 508 U.S. 972 (1993); *In re Estate of Ferdinand Marcos Human Rights Litigation (Marcos v. Hilao)*, 25

applicable in armed conflict, and the right to self-determination.¹³⁷ Other candidates for future recognition as peremptory norms of international human rights law are the application of the death penalty to juveniles (if not the precise age of majority for purposes of capital punishment)¹³⁸ and the prohibition of *refoulement*, i.e., of returning a person to a territory where she runs a risk of torture or of being ill-treated.¹³⁹

These doctrines imply that, when confronted with a choice between two conflicting international obligations – one imposed under international human rights law, the other resulting from a decision adopted by an international organization to which the State has transferred certain powers which this organization may exercise by adopting decisions binding on its member States – a State is not only allowed to set aside the latter obligation in order to comply with the former : it is obliged, under international law, to recognize such primacy of human rights obligations. Although, in theory, the sanctions attached to the hierarchical principle will differ according to whether it is based on Article 103 of the UN Charter or on the nature of the superior norms recognized as *jus cogens*,¹⁴⁰ in the situation envisaged here, the result will be the same: if an organization adopts a decision in violation of a *jus cogens* norm, the treaty establishing the organization will not be considered void, but such decision will be considered illegal and disapplied.¹⁴¹ Indeed, the power of *jus cogens* is such that,

F.3d 1467, 1475 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 934 (1995). These precedents in turn prompted the International Criminal Tribunal for former Yugoslavia to characterize torture as a *jus cogens* prohibition (see below).

¹³⁷ International Court of Justice, Case Concerning *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90, at p. 102 (para. 29); and *Official Records of the General Assembly, Fifty-sixth Session, Supplement 10 (A/56/10)*, commentary to article 40 of the draft articles on State Responsibility, paras. (4)-(6) (also reproduced in J. Crawford (ed), *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge, Cambridge Univ. Press, 2002) at p. 188). See also the consequences the International Court of Justice attaches to this characterization of the right to self-determination in its Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports 2004, p. 136, at 172 (para. 88).

¹³⁸ See Inter-American Commission on Human Rights, Res. No. 3/87, Case 9647, [1987] *Inter-American Yearbook on Human Rights* 260. See the comments by I. Seiderman, *Hierarchy in International Law*, op. cit. n. 131, at pp. 89-92.

¹³⁹ It is, indeed, well established that even where an extradition treaty would in principle allow for, or prescribe, the extradition of a person to another State, the extraditing State is prohibited from doing so in the presence of such a risk. The Institute of International Law noted that 'extradition treaties should not be enforced if enforcement would violate a human rights norm external to the treaty. This argument, premised on the notion that there are certain higher norms in the field of human rights which take precedence over extradition treaties owes its origin to the notion of *jus cogens* (...)' (60 *Yearbook of the Institute of International Law* 214 (1983), at pp. 223-??4). See I. Seiderman, *Hierarchy in International Law*, op. cit. n. 131, at pp. 101-105.

¹⁴⁰ Whereas a treaty found to be in violation of a *jus cogens* norm is void and must be considered to have never existed, a treaty incompatible with obligations flowing from membership in the United Nations does not disappear ; however, as a result of Article 103 of the UN Charter, it shall not be applied to the extent of such an incompatibility : see P.-M. Dupuy, 'L'unité de l'ordre juridique international. Cours général de droit international public', op. cit. n. 51, p. 305 ; and see also the Report of the Study Group of the International Law Commission (chaired by M. Koskeniemi), *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, U.N. doc. A/CN.4/L.702, 18 July 2006 (also reproduced in the Report on the work of the fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006) of the International Law Commission to the UN General Assembly, Official Records, Sixty-first Session, Supplement No. 10 (A/61/10), chapter 12), para. 41: '(a) A rule conflicting with a norm of *jus cogens* becomes thereby *ipso facto* void; (b) A rule conflicting with Article 103 of the United Nations Charter becomes inapplicable as a result of such conflict and to the extent of such conflict'. Comp. J. Combacau, 'Logique de la validité contre logique d'opposabilité dans la Convention de Vienne sur le droit des traités', in *Mélanges M. Virally* (Paris, Pedone 1991) pp. 195-203.

¹⁴¹ See in this respect the position adopted by the International Law Commission in the course of the discussion of the Draft Articles on State Responsibility, in *Official Records of the General Assembly, Fifty-sixth Session, Supplement 10 (A/56/10)*, commentary to article 40 of the draft articles on State Responsibility, para. (3) (also reproduced in J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries*, op. cit. n. 137, at p. 187) ('...one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its

should there be a conflict between the primacy asserted by Article 103 of the UN Charter – which extends to the decisions adopted by the Security Council acting under the UN Charter¹⁴² – and *jus cogens* norms,¹⁴³ they should be resolved in favor of the primacy of *jus cogens* even over the UN Charter or measures adopted in accordance with the UN Charter. Article 103 of the UN Charter, after all, has the status of a provision included in a treaty establishing an international organization, whatever the unique character of this organization: it should thus be disapplied, as any other treaty rule, if it conflicts with *jus cogens* norms.¹⁴⁴

In a way, therefore, Article 103 of the UN Charter and the characterization of human rights norms as forming part of *jus cogens* may be seen to act as safeguard clauses: even where a State has inadvertently attributed certain powers to an international organization in domains which may present a danger to human rights (and which domain, after all, doesn't present such a danger?), and where the organization exercises these powers in ways which may lead to human rights violations, the State should always be justified in refusing to comply with any decisions adopted by the international organization which result in such a consequence. But there are at least two problems with this.

First, both doctrines are fragile. Scholars have sometimes questioned whether Articles 55 and 56 of the UN Charter, which refer to human rights as an aim of the organization and impose on the member States that they contribute to the achievement of that aim,¹⁴⁵ in fact impose legal obligations, or whether instead, since they are drafted in such general terms, they merely define a programme of

face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen').

¹⁴² International Court of Justice, Order of 14 April 1992 (provisional measures), *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)*, ICJ Reports, 1992, p. 16, paragraph 42, and Order of 14 April 1992 (provisional measures), *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, ICJ Reports, 1992, p. 113, para. 39.

¹⁴³ It has been stated that such a conflict was 'difficult to contemplate': see Report of the Study Group of the International Law Commission, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, op. cit. n. 140, at p. 24, para. (40) of the conclusions: 'The United Nations Charter has been universally accepted by States and thus a conflict between *jus cogens* norms and Charter obligations is difficult to contemplate. In any case, according to Article 24 (2) of the Charter, the Security Council shall act in accordance with the Purposes and Principles of the United Nations which include norms that have been subsequently treated as *jus cogens*'. Even at the time when those conclusions were written, this was a far too optimistic view for times such as ours when the UN Security Council may use its powers in ways which may lead to violations of internationally recognized human rights, as illustrated by the *Kadi* litigation referred to in the following footnote. See also, on the need to impose human rights obligations on the UN in order to take into account the new role of the UN as an organization entrusted with tasks of global governance and the administration of territories through quasi-sovereign powers F. Megret and F. Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', 25 *Human Rights Quarterly*, May 2003, pp. 314-342. See also, in the same vein, S. Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence', *European Journal of International Law* (2005) pp. 695-719.

¹⁴⁴ See, e.g., the separate opinion of judge *ad hoc* Elihu Lauterpacht to the Order of 8 April 1993 of the International Court of Justice on the Request for the Indication of Provisional Measures in the Case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 1993 I.C.J. Reports, p. 440, para. 100; or the reasoning followed by the Court of First Instance of the European Communities, Case T-315/01, *Yassin Abdullah Kadi v. Council of the EU and Commission of the European Communities*, judgment of 21 September 2005, paras. 226 and ff.

¹⁴⁵ Article 55 of the Charter imposes on the United Nations a duty to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'; under Article 56, all Members of the United Nations 'pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55'.

action for the organization.¹⁴⁶ These views often seem to be confusing the question whether the UN Charter's provisions are self-executing, with the question whether they are legally binding; and they are premised on the indeterminate character of the content of the 'human rights and fundamental freedoms' referred to in the UN Charter, which the adoption in 1948 of the Universal Declaration of Human Rights precisely sought to make explicit.¹⁴⁷ In addition, the International Court of Justice seems to have definitively put an end to the controversy when it delivered its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, notwithstanding Security Council Resolution 276 (1970), where it stated that 'to establish (...), and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter'.¹⁴⁸ The views sceptical about the usefulness of Articles 55 and 56 of the UN Charter – and, hence, of using Article 103 of the UN Charter as an argument for the recognition of the primacy of human rights – nevertheless remain influential. As to the reliance on the doctrine of *jus cogens*, it is impeded by the persistent controversies surrounding both the precise contours of norms belonging to this category – controversies which statements by the International Court of Justice fed rather than put an end to – and the consequences resulting from the recognition of certain norms as having such character.

Second, even if both doctrines were successful at seeking to achieve the recognition of the primacy of human rights obligations of States over any of their other obligations – and we know that there have been noted instances of failure in this regard¹⁴⁹ – this would still only concern a relatively limited range of human rights – those which are universally recognized, in contrast to those which are stipulated in specific treaties in force as regards the member State concerned. Moreover, even more importantly, we should bear in mind the difference between a decision adopted by an international organization which is in direct conflict with any human rights obligations of its member States, and such a decision which merely impedes the realization of human rights by the member States

¹⁴⁶ See, e.g., M. O. Hudson, 'Integrity of International Instruments', 42 *American Journal of International Law* (1948) pp. 105-108; H. Kelsen, *The Law of the United Nations*, The London Institute of World Affairs, London (1950) pp. 29-32. In favor of seeing in these provisions of the UN Charter the source of legal obligations, see in particular H. Lauterpacht, *International Law and Human Rights*, (New York, Frederick Praeger Inc. 1950) pp. 147-149.

¹⁴⁷ G.A. Res. 217, U.N. GAOR, 3d sess., U.N. doc. A/810 (1948) (adopted by 48 votes to none, with 8 abstentions).

¹⁴⁸ I.C.J. Reports 1971, p. 16. While the statement was made in relation to the obligations of South Africa as a Mandatory power in South West Africa, it would seem to follow from the Opinion that the UN Charter imposes on all States that they comply, at a minimum, with a core set of human rights, which the Charter refers to without listing them exhaustively: see Egon Schwelb, 'The International Court of Justice and the Human Rights Clauses of the Charter', 66 *American Journal of International Law* (1972) pp. 337-351, esp. pp. 348-349.

¹⁴⁹ See in particular Eur. Ct. HR (GC), *Al-Adsani v. the United Kingdom* (Appl. No. 35763/97), judgment of 21 November 2001, § 61 ('Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged'). In a joint dissenting opinion to this judgment, six members of the Court stated that this was in violation of the principle according to which: 'In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the preemptory rule'. However, it could be argued that, in *Al-Adsani*, the conflict was not between the prohibition of torture, on the one hand, and the immunity of

concerned. Direct, 'open' conflicts will not occur frequently. Much more frequent will be the situations where the law-making or dispute-settlement activities of the international organization will restrict the policy space available to its member States, which they need in order to realize a number of human rights under their jurisdiction – for instance, to improve the affordability of education, to provide a decent work to all members of its active population, or to make medicine more accessible. This is, for instance, why international financial institutions, or the law of the World Trade Organization, are seen by a rapidly expanding literature as a threat to human rights : the concern is not that rules contained in the Articles of Agreement of the IFIs or in the WTO agreements are in conflict with the requirements of human rights, in the sense that they cannot be reconciled with one another; it is that the policies pursued by the IFIs, or the clarification of the WTO rules through adjudication, are making it more difficult for States to achieve certain objectives which correspond to what the full realization of human rights, especially economic and social rights, would require.

In its *Kadi* judgment¹⁵⁰, the European Court of Justice opened a new breach into the obligation of member States to implement an international organization's decision. Indeed, though the Court recognized that the Community must respect international law and attach 'special importance'¹⁵¹ to United Nations Security Council Resolutions, there is no special status to be granted to Community measures implementing these resolutions when submitted to judicial review. The Court of Justice ruled that the EC legal order is an autonomous order from that of international law.¹⁵² It placed the emphasis on the need for implementing Security Council Resolutions to be in accordance with the EC legal order.¹⁵³ No provision of the Treaty abrogates the application of fundamental rights and Article 307 may not take precedence over fundamental rights. The European Court of Justice recalled that effective judicial protection is a general principle within Community law enshrined in constitutional traditions of member States and established in Articles 6 and 13 of the European Convention on Human Rights.¹⁵⁴ This protection notably requires the communication to the persons concerned of the grounds for their names being included on the sanctions lists.¹⁵⁵ Moreover, these persons have a right of defence and a right to be heard.¹⁵⁶ Given that the ECJ found the contested

foreign States from civil proceedings, on the other; it was rather between the right of access to a court – whose status a *ius cogens* is quite unclear – and that immunity.

¹⁵⁰ Joined Cases C-402/05 P & C-415/05, *Kadi & Al Barakaat International Foundation v Council and Commission*, judgment of 3 September 2008.

¹⁵¹ Paras. 293-294 state that 'Observance of the undertakings given in the context of the United Nations is required just as much in the sphere of the maintenance of international peace and security when the Community gives effect, by means of the adoption of Community measures taken on the basis of Article 60 EC and 301 EC, to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations. In the exercise of that latter power it is necessary for the Community to attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them.'

¹⁵² Joined Cases C-402/05 P & C-415/05, paras. 316-317.

¹⁵³ See above, text corresponding to n. 46-57.

¹⁵⁴ Joined Cases C-402/05 P & C-415/05, para. 335.

¹⁵⁵ Joined Cases C-402/05 P & C-415/05, para. 336.

¹⁵⁶ Joined Cases C-402/05 P & C-415/05, paras. 337-338.

regulations in breach of the right to be heard, the right to judicial protection and the right to property, it annulled Regulation No 881/2002 insofar as it concerned Yassin Abdullah Kadi and the Al Barakaat International Foundation.

At the same time, the Court ordered the effects of Regulation 881/2002 to be maintained for a period of maximum three months in order to allow the possibility to remedy the infringements found. Following this judgment, the Commission communicated the narrative summaries of reasons provided by the UN Al-Qaida and Taliban Sanctions Committee to Mr Kadi and to the Foundation and gave them the possibility to comment on these grounds. It received comments, examined them and considered that the listing was justified. Therefore, a new Regulation was adopted on 28 November 2008.¹⁵⁷

2.4. THE LOGIC OF SLIDING SCALES IN EXAMINING QUESTIONS OF STATE RESPONSIBILITY

As long as we remain within the orthodox understanding of the conditions of State responsibility, as embodied by the provisions of the International Law Commission's draft articles on responsibility of international organizations which relate to the responsibility of States cooperating with international organizations, a State may escape international responsibility if it transfers certain powers to an international organization, not realizing at that time that such powers could be exercised in violation of the human rights obligations of that State; if it then participates in the decision-making process within the organization, while remaining unable to decisively influence the outcome of that process; and if it then faithfully implements any measures adopted by that international organization, even though such measures could make it more difficult for the State concerned to comply with those human rights obligations. The problem, it seems, is that we adopt a segmented view of the State's international responsibility. We reason as if such responsibility must have its origin *either* in the initial transfer of powers, *or* in the participation in the decision-making process, *or* in the contribution a State makes to the life of the international organization by implementing its decisions. Instead, a holistic view might be more appropriate, according to which these three moments could be considered together, and evaluated as a whole – as a sequence of events, the *combined effect* of which alone results in a violation of human rights. Under this competing logic, the transfer of powers to an international organization would be acceptable, even if it results in a risk that the organization will adopt certain measures conflicting with the international obligations of its member States, to the extent that the member States retain a power to veto such measures, or at least to influence their content to a decisive extent; or at least, failing that, to the extent that they can refuse to comply with such measures when

asked to take measures of implementation, without engaging their responsibility under the law of the organization. The precise formula according to which the responsibility of a State resulting from the acts of the international organization of which it is a member cannot be detailed here. The basic idea, however, can be stated quite easily: instead of examining separately what a State may or may not do when transferring competences to an international organization, whether or not it may be internationally responsible for how it exercises its voting powers within the organization, or whether such responsibility may follow from the implementation of the decisions adopted by the organization, we should consider these acts together, as both mutually reinforcing and mutually dependent upon one another. The logic of portioning should give way to the logic of sliding scales: the more a State takes risks at one segment of the chain, for instance by transferring large powers to the organization and by renouncing any veto power on the decisions it may take in exercising them, the more that State should reserve its right not to implement such decisions if they violate its human rights obligations.

However, such logic should not be limited to evaluating State responsibility. It should include in the equation of State responsibility any other mechanisms through which human rights are taken into account in the activity of international organizations. It is to these mechanisms that we now turn.

3. THE PROBLEM OF ACCOUNTABILITY – TWO: THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

As we have seen, it is increasingly recognized that, since they are part of general public international law, universally recognized human rights are binding upon international organizations as on any other subject of international law. However, a separate question is that of the mechanisms which would allow to hold international organizations accountable for any violations of human rights which they commit, or which they contribute to. In this Part, I distinguish three such mechanisms: self-regulation, accession of the international organization to international regimes (in particular treaty-based regimes), and judicial control exercised by national courts. I discuss each of these mechanisms in turn, highlighting their respective strengths and weaknesses.

3.1. SELF-REGULATION

In recent years, we have seen a proliferation of initiatives through which international organizations voluntarily choose to develop procedures which aim to ensure that they will comply with human rights, or at least, with certain standards related to human rights but which are better adapted to their specific areas of activity. The examples are many, and they are striking in their diversity. Certain mechanisms are purely voluntary, without any reference to external forms of control or pre-existing

¹⁵⁷ Commission Regulation (EC) No 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with

standards. Thus, the World Bank¹⁵⁸ and the International Monetary Fund have developed a set of operational policies, rather comparable to internal codes of conduct regulating their activities, which integrate human rights considerations. In addition, institutional mechanisms have been set up for monitoring compliance. Both the World Bank and the IMF have set up ‘independent’¹⁵⁹ internal evaluation units to enhance accountability and improve the effectiveness of the strategies of these institutions: these are the Independent Evaluation Group (IEG) for the of IBRD/IDA, IFC and MIGA; and the Independent Evaluation Office (IEO) for the Fund. In addition, alleged breaches of the aforementioned operational policies may be examined the World Bank’s Inspection Panel (for IBRD and IDA operations) or Compliance and Accountability Ombudsman (CAO) (for the IFC and MIGA). These are promising developments.¹⁶⁰ However, these mechanisms remain internal to the operations of the international financial institutions. And human rights considerations, if relevant at all to the evaluation of the operations of the international financial institutions, are so only indirectly – not because of a recognition that they would constitute binding obligations on these institutions, but because they are integrated in their operational policies or in the terms of reference of the evaluation mechanisms which have been set up. A number of authors have rightly described these as important limitations to the potential effectiveness of such mechanisms.¹⁶¹

In other cases, international agencies have chosen to submit to existing monitoring mechanisms, although they were not originally a party to the intergovernmental agreements establishing these mechanisms. Thus, sect. 2 of Regulation 1999/1 adopted by the United Nations Interim Administration Mission in Kosovo (UNMIK) provides that in the discharge of its functions, UNMIK shall comply with international human rights standards.¹⁶² On 23 August 2004, the UNMIK and the Council of

Usama bin Laden, the Al-Qaida network and the Taliban, *OJ* 2008 L 322/25.

¹⁵⁸ This term refers to the institutions of the World Bank group, including not only the International Bank for Reconstruction and Development (IBRD) set up in 1944 at the Bretton Woods conference in New Hampshire, but also the International Development Association (IDA) (established in 1960), the International Finance Corporation (IFC) (established in 1956), the Multilateral Investment Guarantee Agency (MIGA) (established in 1985), and the International Centre for the Settlement of Investment Disputes (ICSID) (established in 1966).

¹⁵⁹ The units are independent in the sense that they are not part of the administrative hierarchy of the institutions concerned, and they report directly back to the Board of Executive Directors of of IBRD/IDA, IFC and MIGA. The independency of these evaluations has been improved by the merger in November 2005, under the authority of the Director-General, Evaluation (DGE), of all independent evaluation work performed in these institutions.

¹⁶⁰ The literature is overwhelming. On the internal evaluation units, see P. G. Grasso, S. S. Wasty, R. V. Weaving, *World Bank Operations Evaluation Department - The First 30 Years*, The International Bank for Reconstruction and Development / The World Bank (2003). More generally on the human rights dimension of the activities of the World Bank and the IMF, see in particular, L. Boisson de Chazournes, ‘The Bretton Woods Institutions and Human Rights: Converging Tendencies’, in W. Benedek, K. De Feyter, and F. Marrella (eds), *Economic Globalization and Human Rights* (Cambridge, Cambridge University Press 2007) pp. 210-242; D. Bradlow, ‘The World Bank, the IMF and Human Rights’, 6 *Transnational Law and Contemporary Problems* 63 (1996); R. Dañino, ‘The Legal Aspects of the World Bank’s Work on Human Rights’, in P. Alston and M. Robinson (eds), *Human Rights and Development. Towards Mutual Reinforcement* (Oxford, Oxford Univ. Press, 2005) p. 509 ; M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford and Portland, Oregon, Hart Publishing 2003); S. Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (London, Cavendish 2001). On the International Monetary Fund in particular, see D. Bradlow, ‘Operational Policies and Procedures and an Ombudsman’, in B. Carin and A. Woods (eds.), *Accountability of the International Monetary Fund* 89 (Ottawa, etc, Ashgate and the International Development Research Centre 2005).

¹⁶¹ D.L. Clark, ‘The World Bank and Human Rights: The Need for Greater Accountability’, 15 *Harvard Human Rights Journal* (2002).

¹⁶² This provision states that ‘In exercising their functions, all persons undertaking public duties or holding public office in

Europe concluded an Agreement whereby UNMIK accepted not only to comply with the substantive provisions of the Council of Europe Framework Convention for the Protection of National Minorities, but also to be bound by the provisions on the monitoring of the implementation of the FCNM by UNMIK in Kosovo.¹⁶³ A similar agreement was concluded between the UNMIK and the Council of Europe on technical arrangements related to the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, allowing the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), by means of visits, to examine the treatment of persons deprived of their liberty in Kosovo with a view to ensure their protection and to prevent risks of torture or ill-treatment. While emphasising ‘that the present Agreement does not make UNMIK a Party to the Convention and that it is without prejudice to the future status of Kosovo to be determined in accordance with Security Council resolution 1244 (1999)’, the agreement provides that UNMIK shall permit visits by the CPT to any place in Kosovo where persons are deprived of their liberty by an authority of UNMIK. In 2006, an exchange of letters was concluded between the Secretaries General of the Council of Europe and the North Atlantic Treaty Organization (NATO), allowing the CPT to exercise its monitoring functions also as regards detention facilities managed by the NATO troops under K-FOR. As a result of the 2004 Agreement and the 2006 exchange of letters, a delegation of the CPT made its first visit to Kosovo from 21 to 29 March 2007.

By far the most developed mechanism of self-regulation – so sophisticated, in fact, that we tend to forget its voluntary nature – is that developed within the European Union since the late 1960s, when the European Court of Justice delivered its first judgments including fundamental rights among the general principles of law it ensures respect.¹⁶⁴ Much has been achieved since those leading cases, of course. Since 1992, the case-law of the European Court of Justice has been confirmed in the Treaty on the European Union.¹⁶⁵ Since 2000, it has been codified in a Charter of Fundamental Rights,¹⁶⁶ the legally binding character of which has been affirmed in the Reform Treaty signed in Lisbon on 13

Kosovo shall observe internationally recognized human rights standards and shall not discriminate against any person on any ground such as sex, race, color, language religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or other status’.

¹⁶³ On this Agreement see R. Hofmann, ‘Protecting Minority Rights in Kosovo’, in K. Dicke et al. (eds), *Weltinnenrecht, Liber amicorum Jost Delbrück*, (Berlin, Duncker & Humblot 2005) p. 347. In accordance with the agreement, UNMIK submitted its Report on 2 June 2005 and, subsequent to a visit to Kosovo in October 2005, the Advisory Committee adopted an opinion on 25 November 2006. After this opinion had been introduced to the GR-H on 21 February 2006, UNMIK decided to make the opinion publicly accessible on 2 March 2006. On 21 June 2006, the Committee of Ministers adopted a Resolution on the basis of the opinion of the Advisory Committee.

¹⁶⁴ See above, n. 92. The development of general principles of law by the European Court of Justice has been based on Article 220 EC (ex-Article 164 of the EC Treaty).

¹⁶⁵ See Article 6 § 2 of the Treaty on the European Union.

¹⁶⁶ The Charter was solemnly proclaimed by the Presidents of the European Parliament, the Council and the Commission on 7 December 2000 (OJ C 364, 18.12.2000, p. 1). It has been proclaimed, in a revised form, on 13 December 2007, in order to be referred to by the Treaty of the European Union as amended by the Treaty of Lisbon as having the same legal force as the treaties (OJ C 303 of 14.12.2007, p. 1).

December 2007, and which should enter into force in 2009.¹⁶⁷ In addition, measures have been adopted to ensure a prevention of human rights violations within the EU law- and policy-making. In April 2005, the Commission adopted a Communication¹⁶⁸ by which it seeks to improve the compliance of its legislative proposals with the requirements of the Charter. On 15 June 2005, it has adopted a new set of guidelines for the preparation of impact assessments,¹⁶⁹ which now pay a much greater attention to the potential impact of different policy options on the rights, freedoms and principles listed in the EU Charter of Fundamental Rights.¹⁷⁰ Remarkable as they are, these developments nevertheless remain of a voluntary kind. They do not imply an acceptance by the European Communities – or, now, by the European Union – that they are bound to comply with the requirements of international human rights law.¹⁷¹ The inclusion of fundamental rights among the general principles of law was, rather, a means to reassure the national courts of the EU Member States that the supremacy of European Community law would not oblige these national courts to set aside human rights guarantees set out in the national constitutions.¹⁷² The search for legitimacy was predominant; not any sense of the European institutions that they were bound to act in conformity with human rights.

Apart from the obvious need for international organizations to build their legitimacy,¹⁷³ the extraordinary proliferation of self-regulatory mechanisms may be explained by two factors. First, such mechanisms may be seen as an alternative to the reliance on the responsibility of member States for the acts of international organizations. A distinct advantage of self-regulation is that, in contrast to the alternative of member State responsibility, this solution will not provide a pretext for the Member States of the organization to insist on better controlling decision-making within the organization, for instance by being allowed to veto certain decisions or refuse to cooperate in the process of implementation. Second, self-regulation may be preferred to subordination to an international regime

¹⁶⁷ See Article 6 § 1 of the Treaty of the European Union, as modified by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *OJ C* 306 of 17 December 2007.

¹⁶⁸ Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring, COM(2005) 172 final of 27.4.2005.

¹⁶⁹ SEC(2005)791, 15.6.2005.

¹⁷⁰ Indeed, a specific report was commissioned by the European Commission (DG Justice, Freedom and Security) to EPEC (European Policy Evaluation Consortium), in order to ensure the adaptation of the guidelines on impact assessment to human rights requirements: see EPEC, *The Consideration of Fundamental Rights in Impact Assessment. Final Report*, December 2004, 61 pages.

¹⁷¹ For an attempt to show the limitations resulting from this situation and to ground the human rights obligations of the European Union in international law, see T. Ahmed and I. de Jesús Butler, 'The European Union and Human Rights: an International Law Perspective', op. cit. n. 12. In part I of this article, I have expressed my doubts about the attempt to build a theory of 'succession' of the EU to its member States on the existing case-law of the European Court of Justice (see above, text corresponding to n. 10-27); and I have indicated the limitations resulting from taking as a departure point either customary international law, as Ahmed and Butler do, or – perhaps more plausibly – the general principles of law (see above, text corresponding to n. 46-67). However successful these efforts may prove to be in the future, for now at least, it is clear that the system of human rights protection established within the legal order of the European Union remains internal to the EU, which has not recognized that it was bound to comply with international human rights under general public international law.

¹⁷² See above, n. 93.

¹⁷³ See Thomas M. Franck, 'Legitimacy in the International System', 82 *American Journal of International Law* (1988) pp. 705-759; A. Buchanan & R. O. Keohane, 'The Legitimacy of Global Governance Institutions', 20 *Ethics and International Affairs* (2006) pp. 405-437.

or to submission to the jurisdiction of national courts – two avenues I briefly explore below – either because these latter solutions are much more threatening to the international organization – representing a more serious limitation to their freedom to choose how to exercise the powers they have been attributed – or because, when they do not represent such a threat, they are ineffective – facing obstacles such as the impossibility for international organizations to accede to treaties devised for the participation of States only or immunity of jurisdiction before national courts. In other words, self-regulation seems to ensure that the activity of the international organization will be perceived as legitimate and as operating in conformity with the shared values of human rights, without putting in jeopardy in any way its ability to perform the functions it has been set up for: with self-regulation, we would have, as it were, the best of two apparently irreconcilable worlds.

Of course, by their very definition, these self-regulatory mechanisms have not been imposed on the international organization ‘from above’ or from the outside: they result, instead, from a choice of the organization; and they remain internal to the organization. But we should not equate the voluntary character of such mechanisms with any inherent weakness they would present as per definition. As the example of the European Union shows, certain of these mechanisms, for instance when they include judicial procedures and a reference to external standards,¹⁷⁴ are extremely robust, and probably more effective in the protection of human rights they ensure than any available alternative.

There are also more positive reasons to think of self-regulation as the ideal mechanism through which the accountability of international organizations can be improved. The voluntary adoption by the organization of certain standards guiding its conduct or those of its officials allows it to choose standards sufficiently detailed, tailored to the specific context in which the organization operates, and whose definition can go significantly beyond the minimum obligations flowing, under general public international law, from its constitution, the agreements to which it is a party, customary international law or general principles of law. The mechanisms through which such standards are monitored, moreover, exhibit a diversity which can go far beyond the classical ‘normative-judicial’ approach consisting in defining standards and setting up a body, judicial or quasi-judicial, to ensure compliance: they can comprise, for instance, impact assessments, participatory mechanisms, inspection panels or ombudsinstitutions. Such mechanisms may demonstrate a shift away from a stockholders approach to

¹⁷⁴ It may be recalled that, within the EU, the fundamental rights which are considered to belong to the general principles of law which the European Court of Justice ensures respect for, are developed by the Court on the basis of the international human rights treaties the EU member States have ratified. The European Convention on Human Rights has been recognized a ‘special significance’ in this context : it is applied by the ECJ as if it were obligatory for the EU institutions, and it is read in accordance with the case-law of the European Court of Human Rights, despite the absence of any formal link between the legal order of the European Union and the system of the European Convention on Human Rights. See Case C-249/96, *Grant*, [1998] ECR I-621; Case C-185/95, *Baustahlgewebe*, [1998] ECR I-8417; Case C-274/99, *Connolly*, [2001] ECR I-1611, and Case C-71/02, *Karner*, [2004] ECR I-3025. For a further elaboration, see O. De Schutter, ‘L’influence de la Cour européenne des droits de l’homme sur la Cour de justice des Communautés européennes’, in G. Cohen-Jonathan & J.-Fr. Flauss (dir.), *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l’homme* (Bruxelles, Bruylant-Nemesis, 2005) p. 189-242. However, the European Court of Justice appears to be willing to seek inspiration, in developing the general principles of law it ensures respect for, only from the international human rights treaties binding on all the EU member States: for further developments see above, n. 34.

the legitimacy of international organizations – according to which the interests that matter are those, primarily or exclusively, of its member States – to a shareholders approach under which all interests potentially affected by the activities of the organization are considered relevant to the definition of its rule and policy-making. In that sense, because of their flexibility and their adaptability to new contexts, self-regulatory mechanisms introduced by international organizations may be better suited to accommodate the emergence of new interests in the international legal process, as represented by a variety of non-governmental organizations.¹⁷⁵ The more such mechanisms develop, the more their participatory dimension is emphasized, and the more international organizations will build their legitimacy on the non-governmental organizations and grassroots movements they interact with and consult.¹⁷⁶ This can be in addition to their main source of legitimacy, which stems from the mandate they have been given by the States to which they owe their existence. But it can also move them further away from this mandate, and become an alternative and competing source of legitimacy, as international organizations may be tempted to conspire with those new actors against narrowly defined governmental interests.¹⁷⁷

¹⁷⁵ On the emergence of international civil society and of NGOs as participants in the international legal process, see, eg, presented in alphabetical order: L. Boisson de Chazournes, ‘The World Bank Inspection Panel: About Public Participation and Dispute Settlement’, in T. Treves et al. (eds), *Civil Society, International Courts and Compliance Bodies* (The Hague, TMC Asser Press, 2005) pp. 187-203; H. Cullen & K. Morrow, ‘International civil society in international law: The growth of NGO participation’, 1 *Non-State Actors and International Law* (2001) pp. 7-39; M. Edwards, *Future Positive: International Cooperation in the 21st Century* (London Earthscan 1999); M. Edwards and S. Zadek, ‘Governing the Provision of Global Public Goods: The Role and Legitimacy of Nonstate Actors’, in I. Kaul, P. Conceição, K. Le Goulven, and R. U. Mendoza (eds), *Providing Global Public Goods. Managing Globalization* (New York and Oxford, UNDP and Oxford University Press 2003) pp. 200-224; R. Falk, *On Humane Governance: Toward a New Global Politics* (Cambridge, Polity 1995); M. Kamminga, ‘The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?’, in P. Alston (ed), *Non-State Actors and Human Rights* (Oxford, Oxford University Press 2005) pp. 93-112; M. Shaw, *Global Society and International Relations*, (Cambridge, Polity 1995).

¹⁷⁶ As noted by J. Alvarez: ‘The legitimacy of NGOs and [international organizations] are often intertwined. NGOs have arguably enhanced the political legitimacy of some [international organizations] by providing forms of accountability not otherwise available, but NGOs’ participation has also benefited some NGOs by enhancing their own international stature or legitimacy’ (J. E. Alvarez, *International Organizations as Law-Makers*, op. cit. n. 2, p. 612). See also on what Alvarez labels a ‘symbiotic relationship’ between NGOs and international organizations S. Charnovitz, ‘Two Centuries of Participation: NGOs and International Governance’, 18 *Michigan Journal of International Law* 183 (1997) pp. 274-275. Coicaud has noted that, although it can gain from interacting more systematically with non-State actors, the challenges faced by international organizations in order to improve their legitimacy and ‘address the weak sense of international community that exists’ are not to be underestimated. In the process, international organizations will have to ‘revisit their relations of cooperation with the actors that are both their partners and competitors, especially states, regional arrangements, private actors, non-governmental organizations, and individuals. [However,] improving the relations of collaboration with these actors is destined to be a complex task, particularly because each tends to have an agenda that does not necessarily coincide entirely with those of the others. [...] States [in particular] will have to become less protective of their sovereign powers: more willing, for instance, to share power with international organizations and non-governmental organizations, and more open to claims about individuals’ (J.-M. Coicaud, ‘International organizations, the evolution of international politics, and legitimacy’, in J.-M. Coicaud and V. Heiskanen (eds.), *The Legitimacy of International Organizations*, (Tokyo-New York-Paris, United Nations University Press 2001) p. 547).

¹⁷⁷ This development has been documented, for instance, as regards the World Bank: see J.A. Fox and C.D. Brown (eds), *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements*, (Cambridge, MIT Press 1998). It is particularly visible in the instrumentalization by the European Union of civil society organizations, and the shaping, by the EU, of a ‘European civil society’ whose agenda the EU institutions have actively determined: see O. De Schutter, ‘Europe in Search of Its Civil Society’, 8 *European Law Journal* (2002) pp. 198-217; and R. Sanchez Delgado, *Comment l’Europe construit la société civile* (Paris, Dalloz 2007). The debate on the participation of NGOs in dispute settlement within the WTO is equally illustrative of this emerging conflict between two competing legitimacies: see, eg, St. Charnovitz, ‘Opening the WTO to Non-Governmental Interests’, 24 *Fordham International Law Journal* (2001) pp. 173-216; and R. Howse, ‘Membership and its Privileges: the WTO, Civil Society, and the Amicus Brief Controversy’, 9 *European Law Journal* (2003) pp. 496-510.

3.2. ACCESSION TO INTERNATIONAL HUMAN RIGHTS TREATIES

International human rights treaties have traditionally been open to accession and ratification by States only. This may, however change rapidly in the years to come. Both the expansion of the competences transferred to international organizations by States and the voluntary acceptance by these organizations of certain human rights obligations to the extent that their activities may impact on human rights, make such a route at once more plausible and perhaps more desirable than a few years ago.

The recent practice of the European Union may be announcing future developments in this direction. The first steps towards the EU acceding to human rights treaties have been in the framework of the Council of Europe. In 1997, the Convention on Human Rights and Biomedicine was the first human rights instrument adopted within the framework of the Council of Europe providing for the accession of the European Community.¹⁷⁸ In 1999, the Committee of Ministers of the Council of Europe adopted a set of Amendments to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data,¹⁷⁹ in order to allow for the accession to the Convention of the European Communities. The Amendments also adapt the provisions of the Convention related to the voting rights of the Parties, in order to take account the possibility that the European Communities will exercise the voting rights of its member States in matters for which it has been transferred competences.¹⁸⁰ This development followed the adoption by the European Community of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data,¹⁸¹ which, it was considered, empowered the EC to conclude international agreements in the areas covered by the said directive. And the 2007 Treaty of Lisbon amending the EU Treaty now provides for the possibility of the EU acceding to the European Convention on Human Rights.¹⁸²

Can this be generalized? In 2003, the European Commission, representing the European Community, was authorized to negotiate the UN Convention on the Rights of Persons with Disabilities, alongside

¹⁷⁸ Convention for the protection of Human Rights and dignity of the human being with regard to the application of biology and medicine: Convention on Human Rights and Biomedicine (CETS No. 164, opened for signature in Oviedo, on 4 April 1997), Article 33(1). The European Community, however, has not signed the Convention.

¹⁷⁹ CETS No. 108, opened for signature on 28 January 1981 in Strasbourg.

¹⁸⁰ A new para. 3 is to be inserted in Article 20 of the Convention: 'Every Party has a right to vote. Each State which is a Party to the Convention shall have one vote. Concerning questions within their competence, the European Communities exercise their right to vote and cast a number of votes equal to the number of Member States that are Parties to the Convention and have transferred their competencies to the European Communities in the field concerned. In this case, those member States of the Communities do not vote, and the other member States may vote. The European Communities do not vote when a question which does not fall within their competence is concerned'.

¹⁸¹ *OJL* 281 of 23.11.1995 p. 31.

¹⁸² See Article 6 § 2 of the Treaty of the European Union, as modified by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, *op. cit.* n. 167.

the EU member States. This followed a request of the Commission,¹⁸³ which it justified by the adoption of a EC legislative instrument on the question of discrimination in work and employment.¹⁸⁴ The Convention was adopted after three years of discussions by the United Nations General Assembly on 13 December 2006, and opened for signature on 30 March 2007. As a result of the involvement of the European Community in the negotiations, the Convention contains a provision (Article 44) on 'Regional integration organizations', providing the conditions under which such organizations may accede to this new instrument.¹⁸⁵ The Convention defines a 'regional integration organization' as 'an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention'. Upon acceding to the Convention, such organizations 'shall declare, [...] the extent of their competence with respect to matters governed by this Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence'.¹⁸⁶ The exercise of voting rights in the framework of the Convention is regulated as under the Amendments to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.¹⁸⁷

Were it not for the stipulations of human rights treaties, which traditionally are open to accession only of States, these precedents could be imitated in other areas in which the European Union has taken legislative action, thereby exercising competences it has been attributed by its member States. Of course, in the absence of a general power of the Community or the Union in the field of fundamental rights,¹⁸⁸ the limits imposed on the exercise of the international powers of the Community or the Union are a serious obstacle to their accession to international instruments for the protection of human rights. However, even under the present definition of the external powers of the Union, the accession to a number of international instruments in the field of human rights protection may be envisaged.¹⁸⁹

¹⁸³ Communication of the Commission to the Council and the European Parliament, 'Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities', COM(2003) 16 final of 24 January 2003.

¹⁸⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2.12.2000, p. 16.

¹⁸⁵ See also Article 12 of the Optional Protocol, providing the Committee on the Rights of Persons with Disabilities, the expert body set up under the Convention, with the competence to receive individual communications.

¹⁸⁶ Article 44(1) of the Convention.

¹⁸⁷ According to Article 44(4) of the Convention: 'Regional integration organizations, in matters within their competence, may exercise their right to vote in the Conference of States Parties, with a number of votes equal to the number of their member States that are Parties to this Convention. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa'.

¹⁸⁸ See on this the opinion delivered on 28 March 1996 by the European Court of Justice: Opinion 2/94, *Accession of the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, [1996] ECR I-1759, para. 20. The Court stated in that opinion that the Community institutions do not have at their disposal a 'general power to enact rules on human rights or to conclude international conventions in this field', although it did not question that respect for human rights constituted a 'condition of lawfulness of Community acts': see paras. 27 and 34 of the opinion. On this opinion, see, inter alia, O. De Schutter and Y. Lejeune, 'L'adhésion de la Communauté européenne à la Convention européenne des droits de l'homme. A propos de l'avis 2/94 de la Cour de justice des Communautés européennes', *Cahiers de droit européen* (1996) p. 555; G. Gaja, 'Opinion 2/94', 33 *Common Market Law Review* 973 (1996).

¹⁸⁹ *Report on the situation of fundamental rights in the European Union in 2003*, prepared for the EU Network of Independent Experts on Fundamental Rights, January 2004, pp. 19-20. Report available on http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm# (last visited on February, 2009). For the sake of transparency, it should be disclosed that I was the main author of this report.

Just as the achievements of the European Community in the field of data protection have been deemed sufficient to envisage the accession of the Community to the convention concluded on this question in the framework of the Council of Europe, similarly the *acquis* of EC Law in the field of equal treatment between women and men and in the field of non-discrimination on grounds of race or ethnic origin would appear sufficient to identify a power of the Community to accede to the United Nations Conventions on the Elimination of All Forms of Discrimination against Women (CEDAW)¹⁹⁰ and on the Elimination of All Forms of Racial Discrimination (CERD).¹⁹¹ It has also been argued that the EU should accede to the 1996 Revised European Social Charter, adopted within the Council of Europe as a complement, in the field of economic and social rights, to the 1950 European Convention on Human Rights¹⁹²; or to the Geneva Convention on the status of refugees of 28 July 1951.¹⁹³

Indeed, the time perhaps has come to question the classical approach to the question of the competence of international organizations to accede to international agreements, when the concerned agreements concern the promotion and protection of human rights. It is well established that the competence of international organizations is a limited one: they may only act under the condition that, and insofar as, they have been attributed the power to do so by the member States to which they owe their existence.¹⁹⁴ We may ask however, which implications follow from the accession of international organizations to human rights treaties ? By acceding to such instruments, the Parties undertake to respect certain minimal standards for the benefit of the persons under their jurisdiction, which implies in the first place that they will not adopt any measures which derogate from these standards. Insofar as the undertaking is purely negative (formulated as an obligation to abstain from), it is irrelevant whether or not the Party has the competence to take measures which implement the given standard. It is only where the undertaking is also to adopt certain measures – to fulfil positive obligations (to act) – that the question of competences may play a role.

If we agree to take this distinction between negative and positive obligations as a departure point, two views may be defended as to the impact, on the exercise by the international organization of its competences, of its accession to an international human rights treaty. Both views acknowledge that, by

¹⁹⁰ 1249 UNTS 20378, adopted by UN Gen. Ass. Res. 34/180 of 18 December 1979. All the 27 Member States of the EU have ratified this instrument.

¹⁹¹ 660 UNTS 9464, adopted by UN Gen. Ass. Res. 2106 A(XX) of 21 December 1965, and opened for signature at New York on 7 March 1966. All the 27 Member States of the EU have ratified this instrument.

¹⁹² The Revised European Social Charter of 3 May 1996 (ETS, n° 163) improves upon the original European Social Charter of 18 October 1961, by extending the list of rights protected. On the question of the accession of the European Union to the Council of Europe Social Charter, see O. De Schutter, 'Anchoring the European Union to the European Social Charter : The Case for Accession', in G. de Búrca and B. de Witte (eds), *Social Rights in Europe* (Oxford, Oxford Univ. Press, 2005) pp. 111-152; and, for a more technical discussion, O. De Schutter, *L'adhésion de l'Union européenne à la Charte sociale européenne*, EUI Working Paper LAW No. 2004/11, 42 pages.

¹⁹³ 149 UNTS 2545.

¹⁹⁴ In its advisory opinion on *Legality of the use by a State of nuclear weapons in armed conflict*, the International Court of Justice stated that: '[...] international organizations [...] do not, unlike States, possess a general competence. International organizations are governed by the 'principle of specialty', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them' (*I.C.J. Reports 1996*, p. 66 at p. 78 (para. 25)).

agreeing to be bound by an international agreement for the promotion and protection of human rights, an international organization – however limited its competences in the subject-matter covered by the said treaty – would be committing itself to comply with the prescriptions of the agreement insofar as it remains within its attributed competences. Under a first view, this would imply two sets of obligations: first, in exercising its competences, the international organization would be duty-bound to respect the rights stipulated in the concerned instrument; second, it would undertake to exercise the competences it has been attributed to the extent required in order to protect and fulfil those rights, insofar as required by that instrument. Restated, whereas the organization may be obliged to adopt certain measures, to the extent that human rights treaties impose certain positive obligations, it would only have to do so to the extent that this does not lead the organization to go beyond the principle of specialty.

This view was clearly put forward in the current discussions on the accession of the European Union to the European Convention on Human Rights.¹⁹⁵ When it examined this question during the ‘European Convention’ which prepared the ground for the Inter-governmental conference of 2003-2004, the Working Group established in order to study the twin questions of the incorporation of the EU Charter of Fundamental Rights in the new Treaty and of the accession of the Union to the European Convention on Human Rights noted:

The Group agrees on the central importance of the fact that accession by the Union to the ECHR [...] will in no way modify the allocation of competences between the Union and the Member States. According to the Group's common understanding, the legal ‘scope’ of the Union's accession to the ECHR would be limited to issues in respect of which the Union has competence; it would thus not lead to any extension of the Union's competences, let alone to the establishment of a general competence of the Union on fundamental rights. Accordingly, ‘positive’ obligations of the Union to take action to comply with the ECHR would arise only to the extent to which competences of the Union permitting such action exist under the Treaty.¹⁹⁶

Thus, according to this view, while accession to an international human rights agreement would not result in a transfer of supplementary powers to the acceding international organization, it might affect the exercise of any powers it has been attributed, to the extent that positive obligations to protect and fulfil human rights are imposed under the said treaty. It has been put forward in legal doctrine, in particular, that this should be the consequence of the EU taking seriously its commitment to international human rights.¹⁹⁷ However, another view may be defended, according to which, because

¹⁹⁵ See further O. De Schutter, ‘L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme comme élément du débat sur l'avenir de l'Union’, in M. Dony et E. Bribosia (eds.), *L'avenir du système juridictionnel de l'Union européenne* (Bruxelles, éd. de l'ULB 2002) pp. 205-256.

¹⁹⁶ European Convention, Final report of Working Group II, doc. CONV 354/02 (22 October 2002), p. 13 (footnote omitted).

¹⁹⁷ See O. De Schutter, ‘The Implementation of Fundamental Rights through the Open Method of Coordination’, in O. De Schutter and S. Deakin (eds.), *Social Rights and Market Forces. Is the open coordination of employment and social policies*

of the constraints imposed by the principle of specialty (also expressed, in the context of the EU, as the principle of conferral), their accession to international human rights treaties should be seen as imposing only negative obligations on the acceding international organizations: not only should it not lead to the transfer of supplementary powers to the international organization, but in addition it should not influence the purposes for which the organization should exercise the powers it has been attributed. According to this alternative view, the principle of specialty not only implies that the international organization may not exercise powers which it has not been attributed, but also that it should only use such powers for the fulfilment of the aims for which they have been attributed – so that adding the objective of protecting and fulfilling human rights to the aims of the organization, would be bringing about a fundamental change in its mandate, and disrupting the division of competences between the organization and its member States.¹⁹⁸

Each of these views takes a different position on the implications, for the principle of specialty of international organizations, of imposing that such organizations comply with human rights as defined in international human rights instruments and as expounded by the monitoring bodies set up under those instruments. What both these views have in common, however, is that, under either of these approaches, accession of an international organization to an international agreement in the field of human rights and attribution of competences to an international organization are two entirely separable questions. Since, in order to accede to a human rights treaty, an international organization does not need to have competences in the ‘domain covered’ by the said treaty – insofar as the treaty merely imposes on the organization that it exercises its competences, whatever these may be, in accordance with its requirements – accession to such a treaty may be envisaged for any organization whatsoever, whichever the competences it has been attributed. And since any ‘positive’ obligations flowing from the treaty will be imposed on the international organization only insofar as it has received the competences required to comply with such obligations, such accession should not, in principle, affect the constraints imposed on the organization by the principle of specialty.

A distinct but related question is that which the European Court of Justice refers to as the principle of ‘autonomy’ of the international organization. In the specific context of the EU, this principle is derived

the future of Social Europe? (Bruxelles, Bruylant 2005) pp. 279-343, at pp. 301-334 (arguing, at p. 308, that ‘a positive obligation [should be imposed on the EU to legislate in order to implement human rights] where, in the absence of action at the level of the Union, we may witness a ‘race to the bottom’ by Member States tempted to diminish the level of protection of fundamental rights within their jurisdiction’); and T. Ahmed and I. de Jesús Butler, ‘The European Union and Human Rights: an International Law Perspective’, op. cit. n. 12, at p. 800 (arguing that ‘in those areas where the EC and EU have competence, not only are their institutions under an obligation to refrain from actively violating human rights, but that they are also under the obligation to protect and fulfil human rights in those areas’). For a discussion of the thesis put forward in the first of these two contributions, see M. Lindfelt, *Fundamental Rights in the European Union – Towards Higher Law of the Land? A Study of the Status of Fundamental Rights in a Broader Constitutional Setting* (Åbo, Åbo Akademi University Press 2007) pp. 306-314.

¹⁹⁸ See A. von Bogdandy, ‘The European Union as a human rights organization? Human rights and the core of the European Union’, 37 *C.M.L.Rev.* (2000) pp. 1307-1338 (arguing, against proposals that the EU should develop a proactive fundamental rights policy, that this would have a powerful centralizing effect, and that such a prospect ‘might upset the constitutional balance within the Union, infringe the subsidiarity principle and encroach on the guarantee of constitutional autonomy as part of national identity’ (p. 1317)).

from the rule according to which the European Court of Justice ensures observance of the law in the interpretation and application of Union law¹⁹⁹ as well as from the undertaking of the Member States not to submit a disagreement on the interpretation or application of the EU Treaties to any other mode of settlement than those provided for by the EU Treaties.²⁰⁰ The European Court of Justice saw in those provisions the expression of a general principle, according to which that Court itself must remain the ultimate interpreter of the law of the Union, and more particularly of the rules in the EU Treaties establishing the division of competences between the Union and its Member States. The principle of autonomy of the Union's legal order consequently rules out that the Court of Justice can be bound by the interpretation which another court of law may give of Union law. Situated according to Opinion 1/91 of 14 December 1991 'at the foundations of the Community', this principle thus requires that questions of interpretation and application of Union law cannot be settled according to procedures outside the European Union, but only according to the rules of settlement which the Union itself has instituted.²⁰¹

For our purposes, the principle of autonomy thus described is relevant to the extent that it has sometimes been asked whether it would be compatible with this principle to allow a jurisdiction other than the European Court of Justice to make authoritative decisions about the division of competences between the EU and its member States, in the process of adjudicating on the international responsibility of the EU in the framework of international agreements to which it is a party.²⁰² It should be noted, however, that even in the context of EU law, the said principle does not exclude all forms of international commitment of the European Union that are placed under the control of an international court outside the European Union's legal order: as long as an external jurisdiction does not authoritatively interpret EU law, leaving this to be decided by the European Court of Justice itself, it may pass judgment on the question whether or not the EU has complied with its international obligations.²⁰³ In addition, mechanisms are available which would allow the determination of the respective competences of the EU member States and the European Union to be made within the legal order of the EU, under the supervision of the European Court of Justice, even in situations where a jurisdiction external to the legal order of the EU – such as the European Court of Human Rights, in the event of the accession of the EU to the European Convention on Human Rights – would be allowed to decide that the EU and/or its member States are in violation of their international obligations. Essentially, such a mechanism would consist in identifying a joint responsibility of both the EU and its

¹⁹⁹ Article 220 EC (former article 164 of the EC Treaty).

²⁰⁰ Article 292 EC (former article 219 of the EC Treaty).

²⁰¹ See Opinion 1/91 of 14 December 1991, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, [1991] ECR I-6079 ('First EEA opinion'); Opinion 1/92 of 10 April 1992, [1992] ECR I-2821 ('Second EEA opinion').

²⁰² Indeed, this question was central to the debate which resulted in requesting an opinion from the European Court of Justice about the accession of the European Community to the European Convention on Human Rights. The Court delivered its opinion in 1996 (op. cit. n. 188), but without providing an answer to that question.

²⁰³ Opinion 1/91, op. cit. n. 201, para. 40 ('The Community's competence in the area of international relations and its authority to enter into international agreements necessarily entails the possibility of submitting to the decisions of a court of

member States, and it would be left for the EU and its member States themselves to decide – in accordance with the EU treaties – which entity should take action in order to put an end to the violation.²⁰⁴

We may ask, finally, whether the principle of autonomy – despite the apparent specificities of the EU legal order and the role of the European Court of Justice – is not a mere platitude, and the product of a simple misunderstanding about the task of the international adjudicator. Where an international organization accedes to an international treaty and submits to a monitoring mechanism established under that treaty, it is unavoidable that this mechanism will have to ‘interpret’ the measures adopted by that organization, in order to decide whether the said measures are compatible with its international obligations. Exceptionally, it may even have to ‘interpret’, for similar reasons, the agreement through which the organization is established, for instance in order to decide whether the organization’s agents have acted *ultra vires* in certain cases.²⁰⁵ But such ‘interpretations’ have no pretence to being authoritative, i.e., to impose any particular normative reading of these instruments: for the international adjudicator, the measures adopted by the international organization and the treaty establishing that organization are mere ‘facts’; they are not the ‘law’ which the adjudicator takes as the basis of her legal reasoning. The circumstances which led the European Court of Justice to identify a ‘principle of autonomy’ at the basis of the EU legal order were highly specific:²⁰⁶ we should avoid extrapolating from the situation it was then presented with what is, upon closer examination, a rather artificial – if not totally imaginary – obstacle to the accession of international organizations to international agreements, probably based on a misunderstanding about the status of the ‘interpretation’ under such agreements of the measures adopted by the international organization.

In sum, while there is still no example at yet of an international organization having acceded to an international human rights treaty, it is clearly in this direction that the European Union is moving. The example of the EU may be inspiring other regional integration organizations, or even other international organizations, to follow suit. If we take into account the specific nature of the obligations imposed under human rights treaties, the question of whether such organizations possess the required competence to accede to such treaties may be easier to answer than is traditionally thought. Nor would

law that has been set up or designated by virtue of such agreements for the interpretation and application of their provisions’).

²⁰⁴ On this question, see O. De Schutter, ‘L’adhésion de l’Union européenne à la Convention européenne des droits de l’homme comme élément du débat sur l’avenir de l’Union’, op. cit. n. 195. Article 44(1) of the UN Convention on the rights of persons with disabilities also complies with the principle of autonomy, since it is for the regional integration organization itself (acting in accordance with the internal rules of the organization and its constitutive treaty) to declare which are the areas for which it has been attributed competences in the fields covered by the treaty.

²⁰⁵ On the question of the attribution of *ultra vires* conduct to international organizations, see Second report on responsibility of international organizations, by G. Gaja, Special Rapporteur to the International Law Commission, A/CN.4/541, 2 April 2004, paras. 23-27.

²⁰⁶ A separate court, but in which certain judges of the European Court of Justice were to be sitting, was to interpret within the Agreement establishing the European Economic Area provisions worded exactly like provisions from EC law: the result was that the interpretation of such provisions in this setting would inevitably have an impact on the interpretation of EC law by the European Court of Justice itself.

this be incompatible with the principle of specialty under which international organizations operate, since, in accordance with their specific status among the subjects of international law, international organizations would only be required to take action in order to comply with any positive obligations imposed upon them to the extent that they have been attributed the competence to do so. Finally, we should not fear that the interpretation, by human rights bodies, of any measures adopted by the international organization or of its constitutive treaty, may take the member States by surprise – for example, by imputing to the international organization a failure to act, whereas it has no competence to adopt the measure required: regrettable as it is, such an erroneous reading of the ‘facts’ by the human rights body concerned should not affect the existing division of competences between the organization and its member States.

3.3. THE ROLE OF NATIONAL COURTS

Finally, where self-regulation has failed, and whether or not there exist remedies at international level against human rights violations by international organizations, one possible option is to seek to file claims against such organizations before national courts. After all, if international organizations are bound to respect customary international law and the general principles of law – including internationally recognized human rights, as we have seen²⁰⁷ – could not national courts impose on them that they comply with those norms? Doesn’t international human rights law begin at the level of the national authorities?

The main obstacle this avenue will be facing resides in the immunity of jurisdiction generally recognized to international organizations before domestic courts.²⁰⁸ The importance of this argument has been confirmed by August Reinisch in his empirical study of the practice of national courts when facing suits against international organizations.²⁰⁹ Yet, this obstacle is not necessarily insuperable. Certain international organizations have renounced benefiting from such immunity in their constitutive instruments. This is the case, in particular, for two member organizations of the World Bank Group

²⁰⁷ See above, part I, section 2 of this paper.

²⁰⁸ The literature on the subject is rapidly expanding. The most influential writings, listed by chronological order, are J.-F. Lalive, ‘L’immunité de juridiction des Etats et des organisations internationales’, *Recueil des cours de l’Académie de droit international*, vol. 84 (1953-III) pp. 205-396; A. S. Muller, *International Organizations and Their Host States: Aspects of Their Legal Relationship* (The Hague-London-Boston, Kluwer Law International 1995), esp. chap. 5 on immunity of jurisdiction; M. Singer, ‘Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns’, 36 *Virginia Journal of International Law* (1995) pp. 53-163; E. Gaillard and I. Pingel-Lenuzza, ‘International Organizations and Immunity from Jurisdiction: to Restrict or to Bypass’, 51 *I.C.L.Q.* 1-15 (2002).

²⁰⁹ Whether it is based on domestic law, on treaty law, or on customary international law – although it is debatable whether there exists in fact such a customary norm, and whether therefore immunity of jurisdiction should be recognized to the international organization in the absence of any specification in the agreement with the host State (see the position of the Belgian Court of Cassation: Cass., 12 March 2001 (*Ligue des Etats arabes v. T.*), *Revue critique de jurisprudence belge*, 2002, p. 377, casenote J. Verhoeven) –, this argument appears to be the ‘avoidance technique’ most frequently resorted to by national courts for declining jurisdiction in claims filed against international organizations. See A. Reinisch, *International Organizations before National Courts* (Cambridge, Cambridge University Press 2000) p. 127 and ff. The other avoidance techniques documented by Reinisch are the lack of recognition of the legal personality of international organizations; the refusal to attribute a particular act to the organization, in particular because it has been adopted *ultra vires*; doctrines of act of

(the International Bank for Reconstruction and Development (IBRD) and the International Development Agency (IDA)), which provide for the possibility of legal action being brought against the institution ‘only in a court of competent jurisdiction in the territories of a member’ in which the Bank has offices.²¹⁰ Although the resulting waiver of immunity has sometimes been interpreted very restrictively in order to ensure that it will remain compatible with the fulfilment by the IBRD of its functions, a suit based on alleged violations of human rights universally recognized should not be treated as having a disruptive effect on its activities such as to justify upholding the immunity rule.²¹¹ National courts have also considered that immunity of jurisdiction should only be granted when it is expressly invoked by the defendant international organization – that, in other terms, the waiver could be implicit.²¹²

Even beyond the rather exceptional case where, explicitly or tacitly, the international organization concerned waives its right to immunity of jurisdiction, it should be asked whether the blanket invocation of its immunity by the international organization may be reconciled with the requirements of the right of access to a court, as recognized in international human rights law.²¹³ As we have seen,²¹⁴ the European Court of Human Rights has adopted the view that the application by national courts of the doctrine on immunity of jurisdiction of an international organization does not constitute a violation of Article 6 § 1 of the European Convention on Human Rights,²¹⁵ to the extent that ‘the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention’.²¹⁶ The Court considered that ‘bearing in mind the legitimate aim of immunities of international organizations [...], the test of proportionality cannot be applied in such a way as to compel an international organization to submit itself to national litigation in relation to employment

state, political questions, or other doctrines of non-justiciability; lack of jurisdiction of the forum court; absence of case or controversy; or abuse of right by the plaintiff.

²¹⁰ Article VII, section 3 of the Articles of Agreement of the IBRD; and Article VIII, section 3 of the IDA Agreement. In contrast, the International Monetary Fund claims full immunity from ‘all forms of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract’ (Article IX, section 3 of the IMF Agreement).

²¹¹ See *Mendaro v. World Bank* 717 F.2d 610, 614-15 (D.C. Cir. 1983), where the US Court of Appeal for the District Court of Columbia Circuit held that the justification for granting immunity to international organizations was to enable them to pursue their functions more effectively, in particular, to operate freely from unilateral control by a member state over their activities within its territory. This led the Court to offer a very restrictive interpretation of the waiver of immunity contained in the Agreement establishing the IBRD in the context of a sexual harassment suit based on Title VII of the 1964 Civil Rights Act against the IBRD by a former employee. The Court of Appeals observed that ‘such a waiver would expose the Bank to disruptive interference with its employment practices by requiring the Bank to adopt the local employment policies of each of its member countries, which would imply devastating administrative costs’. See the comment by Monroe Leigh, *American Journal of International Law*, Vol. 78, No. 1 (Jan., 1984), pp. 221-223.

²¹² See, eg, the position of the Brussels Court of Appeals : Bruxelles (9ème ch.), 19 November 1996 (*Eurocontrol v. PSRC*), *Pas.*, II, p. 119.

²¹³ See M. Singer, ‘Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns’, 36 *Virginia Journal of International Law* (1995) pp. 53-165 (arguing, at pp. 91-95, that the international responsibility of a member State of the international organization could be engaged for granting immunity to the international organization in the absence of an adequate alternative remedy). See also K. Wellens, *Remedies against international organizations* (Cambridge; Cambridge University Press 2002) at p. 214.

²¹⁴ See above, text corresponding to n. 95-96.

²¹⁵ Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court (see the *Goldor v. the United Kingdom* judgment of 21 February 1975, Series A no. 18, pp. 13-18, §§ 28-36).

²¹⁶ Eur. Ct. HR (GC), *Beer and Regan v. Germany* (Appl. N° 28934/95) judgment of 18 February 1999, para. 58; Eur. Ct. HR (GC), *Waite and Kennedy v. Germany* (Appl. N° 26083/94) judgment of 18 February 1999, para. 95.

conditions prescribed under national labour law. To read Article 6 § 1 of the Convention and its guarantee of access to court as necessarily requiring the application of national legislation in such matters would [...] thwart the proper functioning of international organizations and run counter to the current trend towards extending and strengthening international cooperation'.²¹⁷

This reasoning, while perfectly defensible for a specialized human rights jurisdiction whose role it is to apply a human rights treaty, cannot be simply reproduced in other fora. The European Court of Human Rights is established in order to ensure the observance of the engagements undertaken by the Parties in the European Convention on Human Rights.²¹⁸ Any other international undertakings of the States parties to the Convention, including those – such as agreements providing for immunities – which are potentially conflicting with the requirements of the Convention – such as its requirement that a right of access to a court be guaranteed for the determination of civil rights and obligations – cannot bind the European Court of Human Rights. Their status is similar to that of the internal law of the States parties: far from being bound by such competing international agreements, the Court is to evaluate their compatibility with the European Convention on Human Rights, for instance, where such agreements are invoked in order to justify restrictions to the rights and freedoms guaranteed in the Convention, in order to decide whether such restrictions respect the principle of proportionality. In this respect, non-specialized international tribunals or national courts are in a markedly different position: in principle, the different international agreements concluded by a State all have the same normative weight, since they are not hierarchically ordered, and the problem then becomes one of reconciling conflicting international obligations with one another.

Therefore, the reasoning adopted by the European Court of Human Rights in cases where States or international organizations were recognized a jurisdictional immunity before the national courts of the States parties only can inspire solutions before other courts if we posit that human rights treaties, to the extent that they guarantee a right of access to a court, should be seen as in some way hierarchically superior to other international agreements concluded by the State concerned, or to other sources of international law providing for such immunity of jurisdiction. Again, we would need to ground the assertion of a primacy of human rights treaties on Article 103 of the UN Charter or on the specific position of human rights norms recognized as *jus cogens* which, due to this specific status, should be allowed to override any other rule which does not have the same status, including rules on immunity of jurisdiction.²¹⁹

²¹⁷ Eur. Ct. HR (GC), *Beer and Regan v. Germany*, op. cit. n. 95, at para. 62.

²¹⁸ See Article 19 of the European Convention on Human Rights.

²¹⁹ See above, n. 149, the joint dissenting opinion filed by six members of the European Court of Human Rights to the judgment delivered on 21 November 2001 by the Grand Chamber of the Court in the case of *Al-Adsani v. the United Kingdom* (Appl. No. 35763/97). See also para. 28 of the dissenting opinion of Ms Van den Wyngaert, judge *ad hoc*, to the judgment of 14 February 2002 delivered by the International Court of Justice in the Case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, I.C.J. Reports 2002, p. 3. While there are both dissenting opinions, it is notable that the opinions of the majority which they oppose did not take a position on the question of whether the rules regarding immunity (of foreign States, in the case of *Al-Adsani*; of Foreign Affairs Ministers, in the case concerning

The potential, but also the weaknesses, of these arguments have been explored above,²²⁰ and we need not revisit them here. It should be noted however that, while it may narrow the range of situations where jurisdictional immunity will be denied, a reference of universally recognized human rights – as would be required in any case in order to justify asserting the primacy of human rights obligations over claims to immunity of jurisdiction by the international organization, on the basis of Article 103 of the UN Charter or of the *jus cogens* status of human rights norms – presents one significant advantage, from a policy point of view. It is well known that the main argument in favor of recognizing jurisdictional immunities to international organizations is that such immunities allow them to function properly, without having to take into account, in each of the countries in which they operate, the locally applicable legislation, which – for example in their staff policies – would otherwise create important operational difficulties.²²¹ But human rights claims filed against international organizations, again, are specific in this respect. Precisely because they are universally recognized, human rights can be imposed on international organizations wherever they operate. The removal of immunities in human rights claims would not create the disruptive effects which, in contrast, the imposition on international organizations of the *lex fori* might cause. This is one more reason for allowing claims against international organizations to proceed, when such claims allege that the defendant organization has violated human rights: where this is indeed the argument invoked by the plaintiff, it would seem difficult for the organization to allege that it cannot reconcile compliance with human rights with the smooth conduct of its operations.

3.4. THE LOGIC OF SLIDING SCALES EXPANDED

In the previous sections of this later analysis, I have reviewed briefly three mechanisms through which international organizations could be made accountable for human rights violations they commit or for which they share responsibility. These mechanisms are self-regulation – the voluntary integration, within the organization’s internal decision-making processes, of a concern for human rights; accession to international human rights treaties; and supervision by national courts. Far from being mutually exclusive, these mechanisms may be, instead, complementary. Until now, self-regulation has constituted the preferred and most frequently met mechanism of accountability. But, while we should not underrate the potential effectiveness of this mechanism, this tendency has been developing essentially by default: it is because of the obstacles, both technical and political, to the accession of international organizations to international human rights treaties or to such organizations submitting to

the *Arrest Warrant of 11 April 2000*) may be invoked as an obstacle to the application of rules imposing obligations which have the nature of *jus cogens* norms. This silence may be explained by the fact that, in both cases, the majority saw the conflict not between a) a *jus cogens* norm on the one hand and b) immunity on the other hand, but as between a) the right of access to a court in order to seek reparation from a violation of *jus cogens* (*Al-Adsani*) or the exercise of universal jurisdiction in order to ensure prosecution for such violation (the *Arrest Warrant* case) on the one hand, and b) immunity on the other.

²²⁰ See above, n. 145-149.

the jurisdiction of national courts, that self-regulation has been the rule.

The logic of sliding scales referred to above can be further expanded, in order to take into account the existence of these mechanisms, or the lack thereof. In part II of this paper, we examined whether the member States of an international organization could be considered internationally responsible in situations where that organization violates human rights. We identified as one potential problem in constructing a satisfactory regime of international responsibility, the adoption of a segmented approach to State responsibility – one which considers separately the role of the State in setting up the organization, its role in the decision-making process of the organization, and finally its role in contributing to the implementation of any decisions adopted within the organization. Instead, it was then suggested, a holistic approach might be preferred, which would follow the logic of sliding scales. According to this logic, the role of the State at any of these junctures should be evaluated by taking into account its role at the other junctures: for instance, the more a State retains influence on the decision-making process within the international organization, or the more it may obstruct implementation of the decisions of the organization, the easier it will be to justify the delegation of extensive powers to the international organization, although such a transfer of powers may result in the adoption by the international organization of measures which infringe upon human rights.

By the same logic, the standards used for evaluating the responsibility of the member States of international organizations for the acts of the latter should take into account whether or not accountability mechanisms have been set up ensuring that the organization will comply with any human rights standards equivalent to those imposed on the member States. This results in a reverse principle of proportionality: the more the international organization is subject to monitoring mechanisms, whether internal or external, the more it would be acceptable for States to transfer large competences to the organization and to renounce controlling the organization from within or blocking the implementation of any decisions adopted within the organization. Such a reverse proportionality constitutes the underlying philosophy of the ‘equivalent protection’ doctrine put forward by the European Court of Human Rights in the *Bosphorus Airways* case.²²² The more robust the protection of human rights in the activities of the organization, in other terms, the more we should accept that, for the sake of international cooperation, the member States take the risk of transferring powers to the organization without preserving the ability to influence how such powers will be exercised. From this point of view, self-regulation, the accession of the international organization to international human rights treaties, and the submission to the jurisdiction of national courts, are of course not necessarily equivalent: each mechanism, and any of the many variations which exist in each category, presents distinct strengths and weaknesses, and we should be sceptical of any attempt to offer too broad generalizations in this regard. The main point, however, is a simple one: before concluding whether a

²²¹ See the argument of the United States Court of Appeal in *Mendaro v. World Bank*, op. cit. n. 211.

²²² See above, text corresponding to n. 87-91.

State has 'circumvented' its international obligations by transferring powers to an international organization, we should ask, not only which influence it has retained on the decision-making process of the organization or in the implementation of its decisions, but also whether the organization itself is subject to certain forms of accountability, how effective these are, and whether they may be seen as an adequate substitute for the responsibility of the member States themselves.

4. CONCLUSION

International law is still in a state of flux, as regards the division of responsibilities between the international organization and its member States where the acts of the former, apart from potentially engaging the responsibility of the organization itself, are alleged to also potentially engage the responsibility of the latter. States have divested themselves of a number of sovereign powers. They have transferred these powers to international organizations which, insofar as they are autonomous from the member States and are not merely an instrument of inter-State cooperation without a will of their own, are recognized as an international legal personality distinct from that of their member States. Therefore, international organizations are potentially internationally responsible in situations, and for acts, for which their member States cannot be held responsible. But – with the notable exception of the European Union – these international organizations have only recently become aware of their human rights responsibilities. They have sought to take such responsibilities into account by setting up various mechanisms of self-regulation, on a voluntary basis. Only rarely have they agreed to submit to the jurisdiction of national courts. And only one of them – the European Union, again – has sought to formally accede to human rights conventions, allowing for an external supervision of their activities.

A regime of international responsibility of States and international organizations which takes into account the interrelationship between both responsibilities should define the scope of the member States' responsibility by evaluating whether, and through which mechanisms, the international organization to which they have delegated certain powers seeks to ensure that it exercises these powers in compliance with human rights. Insisting on the responsibility of the member States is entirely justified until such mechanisms are set up which ensure that the international organization itself will be accountable for any human rights violations it commits. While the accession of the international organization to the same human rights instruments already binding on its member States may be the most effective of such mechanisms, both because the substantive standards will be identical to those imposed on the member States and because, in general, such accession will place the international organization under some form of external supervision, this is by no means the only possibility. As illustrated in the case-law of the European Court of Human Rights, an 'equivalent' protection of human rights may be achieved by self-regulation, if it is sufficiently robust institutionally and if the normative standards are at least comparable to those imposed on the member States of the

organization. The logic of sliding scales proposed in this paper suggests that we tailor the obligations imposed on the member States of the international organization – in particular their obligation not to ‘circumvent’ their international obligations by establishing such organizations or transferring them powers – to the effectiveness of any such mechanisms which ensure (more or less adequately) the accountability of international organizations.

Although it is still in flux, the general direction of the relevant international legal practice is clear. In order to ensure that the development of inter-State cooperation through the setting up of international organizations with a distinct legal personality will not lead the member States of international organizations to evade their international obligations, we tend to insist on a prohibition to thus ‘circumvent’ such obligations. The risk is not only that this will impose further obstacles on international cooperation (although, arguably, for entirely legitimate reasons). As illustrated by the proposal of Dan Sarooshi,²²³ it is also that the member States could invoke their potential international responsibility for the internationally wrongful acts of the organization in order to reassert their control over the organization, thus putting in jeopardy the independence of the organization, however crucial such independence may be for the satisfactory fulfillment of the organization’s aims. After all, it is positively due to the independence of international organizations vis-à-vis their member States, and not the negation of such independence, that we as a result think of international organizations as essential actors in today’s interdependent world.

But the alternative – insisting on the setting up of mechanisms ensuring the direct accountability of the international organizations – also is fraught with dangers. By insisting on the human rights responsibilities of international organizations, are we not asking them in effect to betray the mandate for which they were originally established, and which should, in principle, guide the exercise by these organizations of the competences they have been attributed ? This is not an imaginary concern. The natural tendency has always been to interpret extensively the constituting charters of international organizations, thus expanding the organizational powers and scope of operations of many such organizations.²²⁴ The concern is illustrated by the extensive debates on the compatibility with the mandate of the World Bank and the International Monetary Fund of the inclusion of human rights considerations in their operations.²²⁵ Nor is the concern limited to the international financial

²²³ See above, text corresponding to n. 5-6.

²²⁴ See on this chapter 2 of José E. Alvarez, *International Organizations as Law-Makers* (Oxford, Oxford University Press 2005) pp. 65-108.

²²⁵ See L. Boisson de Chazournes, ‘The Bretton Woods Institutions and Human Rights: Converging Tendencies’, op. cit. at n. 160, pp. 212-223; P. Klein, ‘Les institutions financières internationales et les droits de la personne’, *Revue belge de droit international* (1999) pp. 97-114 (both examining the implications, for the ability of the Bretton Woods institutions to take human rights into account, of the prohibition imposed on them to make decisions on the basis of non-economic considerations). Article IV, section 10 of the Articles of Agreement of the International Bank for Reconstruction and Development states, under the heading ‘Political Activity Prohibited’: ‘The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article 1’. While the Articles of Agreement of the IMF do not

institutions, whose Articles of Agreement, it has been considered until recently, may be read to prohibit the inclusion of non-economic considerations in their decision-making. After the European Union was called upon to mainstream human rights in its activities and to develop a more 'proactive' policy in this area,²²⁶ it has been argued that this was not in conformity with the 'core mandate' of the Union.²²⁷ With the exception of the United Nations, the Council of Europe, or other organizations whose mandates already refer explicitly to the promotion of human rights, it may be a thin line between insisting on compliance with human rights and requesting that the aims of the organization be redefined so that it, too, transforms itself into a 'human rights organization' – bound to exercise its competences in order to contribute to the protection and promotion of human rights.

There is no simple or immediate way out of this dilemma. However, in discussing the mechanisms through which the human rights accountability of international organizations could be improved, this paper has emphasized the need to distinguish between the negative obligations (to abstain from violations) and the positive obligations (to protect and fulfil human rights) which are traditionally imposed on the parties to international human rights treaties.²²⁸ Whereas, in order to be fulfilled, positive obligations require that the addressee possess the required competences to do so, negative obligations merely impose limits on how existing competences may be exercised. The implication is that, by requiring from an international organization that it complies with human rights in the course of its activities, we are not asking it to expand its powers beyond those which it has been attributed by its member States. We are not even necessarily asking that it exercise the powers it has been attributed with a view to ensuring the protection and promotion of human rights. We ask, rather, than when it takes action, and insofar as it takes action, it should ensure that it will not negatively impact upon human rights. In that sense, the danger of 'creeping competences' usually associated with the imposition of human rights responsibilities on international organizations should not be exaggerated: while such a danger cannot be ignored, neither should it be considered an unavoidable consequence.

The logic of sliding scales proposed in this article conveys a simple message to States setting up international organizations: the more the organization itself complies with human rights, and establishes mechanisms, whether internal or external, relying either on international monitoring bodies or on national courts, in order to ensure such compliance, the less there will be reasons to suspect that, by transferring powers to the organization, the member States have somewhat 'circumvented' their

include a similar clause, the requirement to take only economic considerations into account has been seen as also applicable to the Fund. See also the other sources mentioned above, n. 160.

²²⁶ See P. Alston and J. H. H. Weiler, 'An 'ever closer union' in need of a human rights policy', in P. Alston (ed), *The EU and Human Rights* (Oxford, Oxford University Press 1999) p. 3. See also O. De Schutter, 'Mainstreaming Human Rights in the European Union', in Ph. Alston and O. De Schutter (eds.), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency* (Oxford, Hart Publ. 2005) pp. 37-72.

²²⁷ See A. von Bogdandy, 'The European Union as a human rights organization Human rights and the core of the European Union', op. cit. n. 198 (arguing that 'The Union as an organization focused on progressive human rights policy would easily endanger the European constitutional set-up between the Union and the Member States without any real need for protecting human rights (...)') (p. 1337)).

²²⁸ See above, text corresponding to n. 194-198.

human rights obligations. In that sense, the approach to international responsibility advocated here seeks not simply to be more realistic about the twin dangers of threatening the independence of international organizations and risking that they transform themselves, whether willfully or inadvertently, into 'human rights organizations': it also seeks to cut a path away from a vicious cycle, in which States seek to negate or undermine the independence of international organizations by arguing that they need to ensure that these organizations comply with human rights, while at the same time refusing that the international organizations establish mechanisms in order to improve such compliance, because of a fear that they would thereby betray their mandate.