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COLLECTIVE SECURITY AND THE ECONOMIC INTERVENTIONISM OF THE UN—THE NEED FOR A COHERENT AND INTEGRATED APPROACH

Laurence Boisson de Chazournes[★]

ABSTRACT

The scope of the collective security system established under the United Nations Charter has expanded significantly since the end of the cold war to cover new fields. An increasing linkage between maintenance of peace and economic reconstruction has lead the United Nations to play an unprecedented role within the economic realm, be it by the widening of the range of measures adopted by the Security Council under Chapter VII of the Charter with economic consequences or through the direct management of economies in post-conflict situations as part of a global strategy to restore peace in war-torn territories. This evolution has brought to light the limits of the existing UN collective security system as a framework to deal with economic issues. It is submitted that the ‘derogatory’ logic under Article 103 of the Charter and under WTO law through its exception clauses is no longer sufficient to review and assess the UN action in the economic sphere. The promotion and integration of a broader set of principles and rules of international economic law such as principles of fair competition, non-discrimination, or transparency, would help enhance the legitimacy of actions of the UN Security Council. Moreover, this article argues that taking into account international economic law would contribute to achieve UN goals in post conflict situations by paving the way for a stable and safe economic environment in a long-term perspective. The recently established Peacebuilding Commission may contribute to develop a coherent and integrated legal approach in this area.

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INTRODUCTION

The increasing interface between collective security, maintenance of peace and economic concerns was most recently acknowledged by the United Nations (UN) Member States at the 2005 World Summit of 14–16 September 2005, at which they endorsed the establishment of a Peacebuilding Commission. Stressing ‘the need for a coordinated, coherent and integrated approach to post-conflict peacebuilding and reconciliation with a view to achieving sustainable peace’, States have decided, among other measures, to create the Peacebuilding Commission, an intergovernmental advisory body, in order ‘to address the special needs of countries emerging from conflict towards recovery, reintegration and reconstruction and to assist them in laying the foundation for sustainable development’.¹ Jointly created by the Security Council and the General Assembly,² the Peacebuilding Commission represents an original prism to address the challenges raised by the relationship between collective security and economic reconstruction. The establishment of this new organ does not constitute the first sign of the UN interventionism within economic realms. However, so far this growing trend has never been dealt through a ‘coherent and integrated’³ legal approach.

Vested with the primary responsibility for the maintenance of international peace and security, the UN Security Council may adopt decisions that are binding on all Member States of the organization. By exercising its powers, the Security Council acts in the name of the Member States of the United Nations.⁴ The spectrum of measures that may be taken to confront ‘any threat to the peace, breach of the peace, or act of aggression’ as mentioned in Article 39 of the UN Charter, is very broad, reaching from a straightforward recourse to the use of force to non-military measures. In practice, the Security Council has been creative in its approach, both in terms of the substance of these measures and in the legal regime that frames the resort to their use.

Additionally, there has been a notable evolution in the use of the concept of threat to the peace with respect to situations that could potentially be brought under one of the headings listed in Article 39 of the Charter. Serious human rights violations, acts of terrorism, and changes of political regimes have met the qualification of Article 39 in recent years.

¹ 2005 World Summit Outcome, General Assembly, Resolution 60/1 (2005), A/RES/60/1, 24 October 2005, para 97, p. 24.

² See, for the Security Council, Resolution 1645 of 20 December 2005, and for the General Assembly, Resolution 60/180 of 30 December 2005.

³ See 2005 World Summit Outcome, above n 1, para 97.

⁴ Article 24(1) of the Charter of the United Nations specifies that: ‘In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.’

The conclusions of the meeting of the Security Council at the level of Heads of State and government, on 31 January 1992, went so far as to consider that '[t]he absence of war and military conflict amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security'.⁵ The Report of the High-level Panel created by the UN Secretary-General, which was released in December 2004, similarly addresses economic and social threats alongside the outbreak of conflict, acts of terrorism, and the proliferation of weapons of mass destruction.⁶ In practice, however, severe economic degradation has not yet in and of itself constituted a threat to peace in accordance with Chapter VII.⁷ The logic of maintaining international peace and security in its usual political, strategic, and sometimes humanitarian understandings thus continues to dominate the determination of situations as constituting threats to international peace and security.

This stands in stark contrast to the growing place that economic instruments and mechanisms occupy in the field of collective security. The increasingly interventionist role of the UN Security Council in the economic sphere exemplifies such trend. While it is true that the phenomenon is not entirely new, recent Security Council practice raises issues that deserve further enquiry. The Security Council has applied non-military measures comprising a number of actions of an economic character under Article 41⁸ to compel a 'troublemaking' State or, increasingly, non-State entities, in the sense of Article 39 of the Charter, to take particular steps to restore international peace and security. It has also recently participated in the restoration of peace through the adoption of resolutions dealing with the economic reconstruction of war-torn territories. The theatres of its operations are varied, spanning from a newly independent country to a region under international territorial administration, a State under military occupation or a State recovering from violent internal conflict. As has been

⁵ S/PV.3046, 31 January 1992, at 143.

⁶ *A more secure world: Our shared responsibility*, Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, A/59/565, 2 December 2004, available at www.un.org/secureworld/ (visited 28 November 2006).

⁷ On the links between security and economic development, see Ian Bannon and Paul Collier (eds), *Natural Resources and Violent Conflict: Options and Actions*, (Washington, DC: World Bank, 2003); *Breaking the Conflict Trap: Civil War and Development Policy*, (Washington, DC: World Bank/Oxford University Press, 2003). See Mats Berdal and David M. Malone (eds), *Greed and Grievance: Economic Agendas in Civil Wars*, A Project of the International Peace Academy, (USA/London: Lynne Rienner Publishers, 2000), and K. Ballentine and J. Sherman (eds), *The Political Economy of Armed Conflict: Beyond Greed and Grievance*, A Project of the International Peace Academy (USA/London: Lynne Rienner Publishers, 2003).

⁸ Article 41 states: 'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.'

commented elsewhere, in all of these situations, economic decisions play a significant role.

The emerging practice of including economic elements into collective security issues manifests itself in two ways: the resort to economic instruments in dealing with issues of collective security, and UN Security Council decisions entailing economic consequences.⁹ This growing practice calls for a fundamental change in current analyses of Security Council decision-making. The increasing interaction with the economic field raises difficult questions in terms of the body of principles and rules of international law that are applicable in the collective security context. In that respect, one may ask to what extent the traditional paradigm relying on the UN Charter is sufficient to address the issue of devising a normative framework to encompass that evolution. In particular, how relevant are the principles and rules of international economic law, including international trade law in these cases?

The two international legal bodies that represent, respectively, the collective security regime and the law of economic relations have almost never been considered in conjunction. Some elements of the international legal system reinforce this disconnect. On one hand, the UN Charter itself is often conceived through a derogatory angle with regard to its Article 103 that establishes the primacy of the Charter over other international treaties in the event of a conflict between Member States' obligations under the Charter and their obligations under any other international agreement. This special statute contributes to limit any attempts to think about a regulatory approach to UN Security Council action. On the other hand, collective security may be treated in exceptional terms such as under the GATT/WTO framework: WTO Member States are exempted from the principles and rules of international trade law when they are applying measures taken under Chapter VII of the UN Charter (see, for example, Article XXI c. of the GATT).¹⁰ This approach has been maintained even though the Security Council's scope of activities has gone well beyond traditional economic sanctions to include the adoption of reconstruction measures and transitional administration mandates.

Compliance with the UN Charter is not sufficient when dealing with economic issues. Recognizing the unsatisfactory nature of such a regime is topical. The question about a more elaborate normative framework integrating international economic law should, however, be asked and

⁹ Note the Economic Impact of Peacekeeping Project commissioned by the Peacekeeping Best Practices Section (PBPS) of the UN Department of Peacekeeping Operations (DPKO), in partnership with the Peace Dividend Trust, which seeks to measure the economic impact of peacekeeping operations, see Michael Carnahan, William Durch, Scott Gilmore, *Economic Impact of Peacekeeping*, Final Report, March 2006, available at, www.stimson.org/fopo/pdf/EIP_FINAL_Report_March2006doc.pdf (visited 28 November 2006).

¹⁰ See subsequently.

answered in a slightly different way than the efforts to apply human rights law and humanitarian law to the UN organs.¹¹ Whereas, the fundamental and humanitarian character of those latter norms lead to a discussion on how to establish their binding effect on UN organs, considering principles of economic law implies to go beyond that perspective. It is less an issue of demonstrating the compulsory nature of international economic law for UN Security Council than arguing that its actions in the economic field should be reconsidered based on a broader approach that takes account of principles and rules of international economic law.

Several reasons call for the applicability of principles of international economic law to UN measures. First of all such an integrated approach may contribute to enhance the legitimacy, stability, and predictability of Security Council decision-making. Since the promotion of the rule of law¹² at the national and international levels has been hailed as one of the key objectives of the United Nations,¹³ it would be incoherent to limit the legal framework to a derogatory logic when reviewing collective security measures of an economic nature. Although States provided a special regime in that matter, this article argues that Article 103 of the UN Charter as well as the exceptional regime under the WTO should not mean the exclusion of any rule of international economic law when considering collective security actions. For example, Article 103 comes into play only when there is a conflict between conventional norms, otherwise coherence and coordination among treaties should be favoured. If the UN and Members States are to uphold the rule of law and ensure respect for international norms, it implies to go beyond the adherence to the UN Charter by the promotion and integration of principles such as fair competition, non-discrimination or transparency. Taking into account international economic law would also

¹¹ For the latter, see, for example, August Reinisch, 'Developing human rights and humanitarian law accountability of the Security Council for the imposition of economic sanctions', 95 (4) *American Journal of International Law* 851 (2001), at 853–863

¹² The rule of law has two main dimensions. It is worth noting that it originates in domestic legal traditions and can be defined as 'the objective of a law-governed society, where governments act not only *by the law* but also *under the law* and respect the equal rights of their citizens', see Ernst-Ulrich Petersmann, 'How to promote international rule of law', 1 *JIEL* 25 (1998), at 26. At the international level, with the development of international norms, in particular treaties, the rule of law means ensuring the respect for international principles and norms to the benefit of States and, in some areas, non-state actors. This is the case with the WTO, for example, where the protection of 'individuals and the market-place' is 'one of the principal objects and purposes of the WTO'. See the Panel Report, *United States—Section 301–310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, para 7.86.

¹³ The Secretary-General and the General Assembly identified it as one of the major challenges of the new century. See for example, Kofi A. Annan, 'We the Peoples': The Role of The United Nations in the 21st Century, UN Doc. A/54/2000, available at www.un.org/millennium/sg/report/ (visited 28 November 2006). See also Hans Correll, 'A Challenge to the United Nations and the World: Developing the Rule of Law', 18 (2) *Temple International and Comparative Law Journal* 391 (2004), at 391

enhance stability within the countries or areas where the UN Security Council measures are to have an impact. Post-conflict environment and reconstruction projects would gain from the consideration of economic principles by linking the short-term and emergency aspects of UN action to a long-term prospect of strengthening the economic system at stake. Finally, UN Security Council decisions in the economic realm require more than a collective security paradigm due to the very nature of the measures at stake.

Although important and the focus of the present analysis, it should be stressed that the rule of law is not the sole means for addressing the legitimacy of the collective security regime. Moreover, this article does not assert that the application of international economic law principles constitute the unique remedy to deal with economic issues. Pondering general principles of economic law represents one component of the rule of law as well as one method to integrate economic concerns into the work of the UN Security Council. Guidance by financial institutions such as the World Bank may provide a complementary and appropriate tool to encompass issues raised in peculiar cases. This is particularly true as such rhetoric of relying on other norms outside the scope of the UN Charter seems to be undermined by the reluctance of the Security Council towards any regulatory approach.

Currently, there is no coherent legal framework to address the economic component of the collective security system. Such a framework is necessary not only in order to specifically identify the economic impact of specific measures,¹⁴ but also to assess the activities of the Security Council in the maintenance of international peace and security, particularly in light of principles and rules of international economic and trade law. The present contribution analyses Security Council actions within the economic field and distinguishes between 'traditional' economic dimensions of collective security and new forms of economic measures adopted under the collective security system. It seeks to review to what extent security and economic principles can coexist under the current system. This would allow collective security actions to be situated within a broader 'economic' framework and enhance respect for the international rule of law by the UN and by all States, be they developed countries or developing countries, strong or weak, big, or small.¹⁵

¹⁴ In the *Agenda for Peace*, the Secretary-General recommends, with regard to the operation of Art. 50 of the UN Charter (analysed subsequently) and third States affected by the application of economic sanctions, 'that the Security Council devise a set of measures involving the financial institutions and other components of the UN system that can be put in place to insulate States from such difficulties. Such measures would be a matter of equity and a means of encouraging States to cooperate with decisions of the Council'. Doc. A/47/277-S/24111, 17 June 1992.

¹⁵ See Secretary-General's address to the General Assembly, 21 September 2004, 59th Session of the General Assembly, New York, available at <http://www.un.org/apps/sg/sgststats.asp?nid=1088> (visited 28 November 2006).

It is also submitted that taking into account international economic law would contribute to achieve UN goals in post conflict situations by paving the way for a stable and safe economic environment in a long-term perspective. The 'derogatory' logic under both UN Charter and WTO law is thus no longer satisfactory in a situation where there are going to be long years of UN tutelage. In the following, this contribution will seek principally to raise questions and attempt to give a first outline of some answers; as yet UN practice in respect of the questions raised here is too uncertain to go much further than that.

I. THE 'TRADITIONAL' UNITED NATIONS ECONOMIC INTERVENTIONISM: A 'SANCTION-BASED' APPROACH

Measures of an economic nature adopted in application of Article 41 of the Charter of the United Nations are among the most frequently used in the realm of collective security.¹⁶ However, the application of these measures has often created negative side effects for the populations of States directly targeted by the sanctions and by third States. Requests for corrective measures have relied mainly on better compliance with human rights and humanitarian law as well as with specific provisions of the UN Charter.

A. Sanctions under Article 41 of the Charter of the United Nations and their side effects

Within the framework of its principal responsibility to maintain international peace and security, the UN Security Council has had recourse to a wide range of measures since the early 1990s. Measures of an economic nature have had a particularly significant role. Article 41 of the Charter provides a non-exhaustive list of measures, such as 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication . . .'.¹⁷ The Security Council has in many instances adopted these types of measures, as well as others such as the freezing of State and private assets.¹⁸

¹⁶ See Mohamed Benouna, 'Les sanctions économiques des Nations Unies', *Collected Courses*, The Hague Academy of International Law, vol. 300 (2002), at 14–77.

¹⁷ See on this point, Vera Gowlland-Debbas, 'Sanctions Regimes under Article 41 of the UN Charter', in Vera Gowlland-Debbas (ed.), *National Implementation of United Nations—A Comparative Study* (Geneva/Leiden/Boston: IUHEI – Nijhoff, 2004), 3–31.

¹⁸ On Afghanistan, see Security Council Resolutions 1267 of 15 October 1999 and 1333 of 19 December 2000 adopting sanctions against the Taliban. See also on Angola, Security Council Resolutions 864 of 15 September 1993, 1127 of 28 August 1997 and 1173 of 12 June 1998 prescribed a number of sanctions against UNITA. For an account of the practice of the Security Council in this area, see Nico Schrijver, 'The use of economic sanctions by the UN Security Council: an international law perspective', in Harry H. G. Post (ed.), *International Economic Law and Armed Conflict* (Dordrecht/Boston: Martinus Nijhoff, 1994), 123–161.

Sierra Leone and Liberia offer interesting illustrations of the use of varied economic sanctions. Security Council Resolution 1132 (adopted on 8 October 1997) imposed an oil and arms embargo, as well as restrictions on the travel of members of the military junta of Sierra Leone. On 5 July 2000, the Council adopted Resolution 1306 requesting all States to take necessary measures to prohibit the direct or indirect import of all rough diamonds from Sierra Leone to their territory, and also requesting that the Government of Sierra Leone ensure that an effective Certificate of Origin regime for trade in diamonds be in operation in Sierra Leone. On 7 March 2001, the Security Council unanimously adopted Resolution 1343, by which it imposed sanctions on Liberia, including an arms embargo and the adoption by all States of necessary measures to prevent the direct or indirect import of all rough diamonds. The Security Council specifically called 'upon the Government of Liberia to take urgent steps, including through the establishment of transparent and internationally verifiable audit regimes, to ensure that revenue derived by the Government of Liberia from the Liberia Shipping Registry and the Liberian timber industry is used for legitimate social, humanitarian and development purposes'.¹⁹

The substance and implementation of these measures have rarely been considered in light of principles and rules of international economic law, in particular those that favour free trade and non-discrimination.²⁰ On the other hand, the issue of political, humanitarian and economic consequences—hereinafter referred to as side effects—of these measures has led to debates within the UN on the compatibility of these sanctions with rules of international human rights law and humanitarian law.

The 'side effects' issue had been raised early on with the adoption of sanctions against Southern Rhodesia, but it was with the imposition of sanctions against Iraq—over a thirteen-year period—that the issue became particularly controversial.²¹ Side effects obviously affect the target State (which is the very reason for the adoption of the measures) but not necessarily in the manner in which they are intended. The most harmful consequences generally fall on the civilian population, far more than on

¹⁹ See also Security Council Resolutions 864 of 15 September 1993 and 1173 of 12 June 1998.

²⁰ With regard to the growing recourse by the Security Council to measures having an economic impact, Harry Post wisely noted that 'such a series of wide-ranging, binding measures can no longer be considered limited or incidental economic curiosities (...). In terms of international economic law, it might even be said that in recent years a new 'international sanctions law' is emerging with its own instruments (...), its own organs and institutions (...)', Harry H. G. Post, 'Introduction', in Harry H. G. Post (ed.), *International Economic Law and Armed Conflict*, above n 18, at 1.

²¹ See for example, David Cortright and G. A. Lopez, 'Sanctions Against Iraq', in David Cortright and George A. Lopez (eds), *The Sanctions Decade: Assessing UN Strategies in the 1990's*, A Project of the International Peace Academy, (USA/London: Lynne Rienner Publishers, 2000), 37–61, as well as David Malone and James Cockayne, 'The UN Security Council: 10 Lessons from Iraq on Regulation and Accountability', 2 (2) *Journal of International Law and International Relations* 1 (2006), at 3

members of the government. Third States can also be affected, as a result of the growing interdependence of domestic economic systems. In Iraq and in Yugoslavia, sanctions led to the impoverishment of the middle class, higher crime and long-term economic damage, which contributed to growing insecurity and instability.²² Embargoes led to scarcity in available goods and, consequently, to an increase in prices in the domestic market. In Iraq, the price of basic commodities increased by around 1000% between 1990 and 1995. The consequences are well known: the impoverished suffer disproportionately and the economic independence of the middle class (a potential source of resistance to the regime) is shattered. The members of the regime and their allies who control the black market profit the most from the situation.²³ In Haïti, for instance, the army had an interest in the continuing imposition of sanctions, as it had seized control of the black market on goods prohibited by the embargo and generated considerable profits.²⁴

As for the effects of sanctions on third States, the losses and costs they suffer can be classified under three broad categories: those relating to commercial relations, those resulting from restrictions on financial flows, and other losses and costs caused by the suspension of diverse sectoral or specific relationships with the target country.²⁵ Among the costs and losses of a commercial character, one can identify export and import losses. Financial difficulties arising from the suspension of capital support are linked to non-repatriation of profits and other receipts; confiscation, freezing, and conversion of savings and assets; the suspension of loans and credits at subsidized rates, and losses and difficulties due to the interruption of debt servicing.²⁶

B. The limits of corrective measures under the collective security regime

The Charter of the United Nations had considered the problem of the effects of sanctions from the outset, but in extremely limited and ambiguous terms. Article 50 of the Charter specifies that a third State, that is, a State not targeted by sanctions, 'which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems'.

²² Margaret Doxey, 'United Sanctions: Lessons of Experience', in *2nd Interlaken Seminar on Targeting United Nations Financial Sanctions*, 29–31 March 1999, Swiss Federal Office for Foreign Economic Affairs, in cooperation with the UN Secretariat, 207–19.

²³ Strategic Planning Unit, Executive Office of the Secretary General, United Nations, New York, March 1999, 'UN Sanctions: How Effective? How Necessary?', *Ibid.* at 104.

²⁴ Elizabeth Gibbons, *Sanctions in Haïti: Human Rights and Democracy under Assault* (Center for Strategic and International Studies: Preager Press, 1999).

²⁵ This typology is based on the report of the UN Secretary-General regarding 'the special economic problems of States as a result of sanctions imposed under Chapter VII of the Charter of the United Nations' (A/48/573 – S/26705, 8 November 1993, at 23–27), cited by Djacoba Liva Tehindrazanarivelo, *Les sanctions des Nations Unies et leurs effets secondaires: assistance aux victimes et voies juridiques de prévention* (Paris: Presses universitaires de France, 2005), at 88.

²⁶ See especially Djacoba Tehindrazanarivelo, *Ibid.*

However, the Charter gives no definition of these 'special economic problems', and offers no guarantee of compensation. The question arises as to whether this provision provides a simple right of consultation for States or whether it establishes a principle of assistance.²⁷ As such, it has been asserted that 'consultation with the Security Council is not an end in itself. Article 50 aims to come to the aid of States that encounter difficulties due to the application of UN Sanctions, and the consultation with the Security Council was instituted to arrive at practical solutions'.²⁸ It was the sanctions imposed against Iraq that recorded the highest number of requests for assistance by those States that experienced serious economic difficulties as a result.

Article 50 could also be read in conjunction with Article 49 of the Charter,²⁹ thereby underlining the inadequacy of the system prescribed by Article 50. But Article 49 fulfils, as pointed out by Djacoba Tehindrazanarivelo, a 'distinct function' in so far as the assistance provided for is concerned with the aid to bring to 'States that experience difficulties in applying the measures decided by the Security Council on the domestic level'.³⁰ Moreover, Article 49 aims at assistance given by States on a bilateral or regional basis and uniquely between Member States.³¹ Article 50, for its part, provides for a consultative dialogue with the Security Council. In practice, the management of the consequences of sanctions quickly exceeded the framework and scope of Article 50, a provision incapable of proposing an appropriate framework to resolve these issues.

Finally, economic sanctions are certainly a favourite collective security tool, but they have serious shortcomings in an increasingly interdependent economic environment. Difficulties related to the indirect effect of economic sanctions have sometimes led affected third States to dismiss the Council's prescriptions due to the inadequacy of compensation mechanisms. Sanctions often impose

²⁷ On this issue and in general on the regime of Art. 50 and its application by the UN, *Ibid*, 70–136.

²⁸ *Ibid*, at 79, (Author's trans.).

²⁹ Article 49 states that 'The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.'

³⁰ Djacoba Tehindrazanarivelo, above n 25, at 84, (Author's trans.).

³¹ Djacoba Tehindrazanarivelo observes in this regard that 'the mutual assistance of Art. 49 occurs in general under a form of interstate collaboration in the application of sanctions' (trans.). This author takes the example of the European Union which helped certain States in the Balkan region to better apply and coordinate the sanctions imposed against the former Yugoslavia. From October 1992, the European Union and the Conference on Security and Cooperation in Europe (CSCE, now OSCE) had sent assistance missions for the application of sanctions in seven neighbouring States of the Federal Republic of Yugoslavia. These missions aimed to counsel national authorities so that they would be better able to prevent violations of the sanctions against Yugoslavia, and therefore did not have a strictly economic nature. *Ibid*.

very high economic costs on economic partners of the target State. Appeals have often been made to have these costs equitably redistributed, but they have rarely been heard.³² The weaknesses in the provision of assistance to disadvantaged States have often been perceived by these States as unfair. In cases where assistance is non-existent or inadequate, the disadvantaged third State may disregard the sanctions altogether.³³ This attitude seems reinforced when sanction policies are not revised through a comprehensive approach that includes a consideration of specific international economic relations beyond limited collective security concerns.

The manner in which the economic consequences of sanctions on neighbouring States are dealt with is indicative of this state of affairs. Sanctions committees cannot do more than take note of grievances and requests of neighbouring States and call upon the concerned international organizations to act. For example, the negative consequences on trade and labour migration resulting from the sanctions against Iraq and Yugoslavia led the Secretary-General and the General Assembly to react, but their responses were not followed to any practical effect.³⁴ Despite the attempt to ease the situation through Security Council Resolution 986 'Oil for Food',³⁵ which gave Iraq the possibility to sell a specified quantity of oil in order to purchase food and medicine, the outcomes of these policies remain open to criticism. While aid to Egypt, Jordan, and Turkey at the time of the Iraqi crisis occurred on a bilateral basis with the USA, there was still large-scale oil smuggling taking place through and to these countries.³⁶ In the case of the Yugoslav crisis, the OSCE and the European Union (EU) intervened to provide support to third States that were indirectly impacted by the sanctions.³⁷

³² See on this point, above n 23, at 105.

³³ Ibid. Examples include the extension of restrictions on flights against Libya, which led Member States of the OAU to cease observing those restrictions (*Decision of the OAU summit in Burkina Faso, June 1998, Report in the Guardian Weekly, 12 July 1998*) or the United States' decision to import chrome from Rhodesia in violation of sanctions imposed between 1971 and 1977, Margaret Doxey, above n 22.

³⁴ 'Implementation of provisions of the Charter related to assistance to third States affected by the application of sanctions', Report of the Secretary-General, 27 August 1998, A/53/312.

³⁵ Resolution 986, 14 April 1995. This resolution was followed by a series of other resolutions related to this regime regarding its renewal: Resolution 1111 of 4 June 1997, Resolution 1143 of 12 November 1997, Resolution 1153 of 20 February 1998, Resolution 1472 of 28 March 2003. Some of them consisted of adjustments to the 'Oil for Food' programme. Resolution 1483 of 22 May 2003 put an end to the sanctions regime against Iraq.

³⁶ See Mohamed Bennouna, above n 16, at 47.

³⁷ The OSCE, in coordination with the EU, established Assistance Missions for the application of sanctions. These missions were tasked with helping neighbouring States of the Federal Republic of Yugoslavia to implement sanctions. See, spec. *OSCE Report of the Copenhagen Round Table on United Nations Sanctions in the Case of the Former Yugoslavia*, Copenhagen: 24–28 June 1996, 24 September 1996, published as UN Document S/776/1996, available at www.globalpolicy.org (visited 28 November 2006), as well as the *Annual Report on OSCE Activities*, 30 November 1996, available at www.osce.org (visited 28 November 2006).

Corrective measures were discussed in diplomatic and political fora, such as the Security Council, with the purpose of alleviating the effects of sanctions on civilian populations.³⁸ It was recognized that Article 103 of the Charter³⁹ could not be interpreted so as to prevent the United Nations from addressing serious humanitarian concerns through the adoption of necessary adjustments. However, such adjustments were confined to humanitarian measures understood in a restrictive manner, essentially covering food aid, health, or education. The concept of targeted sanctions⁴⁰—that is, restricted to specific persons and to specific fields—was progressively implemented in order to minimize the suffering of the civilian populations. In particular, financial sanctions were increasingly used not least because they appeared to be more effective than trade sanctions. Such sanctions also seemed to limit costs for neighbouring third States. While narrowly targeted financial sanctions (i.e. freezing the assets of political and military leaders held outside the country) cause little collateral damage, they are nevertheless inconvenient in that they are difficult to apply and not sufficiently damaging to the targeted individuals if these persons are able to otherwise appropriate financial resources.⁴¹ When targeting individuals or firms, sanctions may also raise new issues in terms of rights of individuals or corporations. This is particularly true in relation to decisions by the UN Sanctions Committees to list or delist natural and corporate persons targeted by sanctions. There is growing concern about respect for due process of law in the absence of effective remedy for individuals or entities wrongly listed to challenge such decisions.⁴²

³⁸ For an account of these discussions, see, in particular, *Les Nations Unies et les sanctions: quelle efficacité?* Colloquium of 10 and 11 December 1999, Huitièmes rencontres internationales d'Aix-en-provence, (Paris: Pedone, 2000); Linos-Alexandre Sicilianos, Bilan de recherches de la section de langue française in *Les sanctions économiques en droit international*, Centre d'étude et de recherche de droit international et de relations internationales de l'Académie de droit international de La Haye (The Hague/Boston/London: Martinus Nijhoff Publishers 2002), 13–127, as well as the report of Marc Bossuyt, *The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights*, Sub-Commission on the Promotion and Protection of Human Rights Fifty-second session, UN Doc E/CN.4/Sub.2/2000/33, June 21 2000.

³⁹ Article 103 reads as follows: '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'.

⁴⁰ See Linos-Alexandre Sicilianos, above n 38, at 106 ff.

⁴¹ Kimberly Ann Elliott, 'Analysing the Effects of Targeted Financial Sanctions', in *2nd Interlaken Seminar on Targeting United Nations Financial Sanctions*, above n 22, at 189. See also the case of Afghanistan, Jaleh Dashti-Gibson and Richard W. Conroy, 'Taming Terrorism: Sanctions Against Libya, Sudan, and Afghanistan', in David Cortright and George A. Lopez (eds), above n 21, 127–130.

⁴² On this question of black-listing and issues of due process, see Vera Gowlland-Debbas, above n 17–18; Alec Van Vaerenbergh, *Due Process of Law in the Work of UN Security Council Sanctions Committees*, Master Thesis, GHS, Geneva, October 2006. Several proposals have been made to address those issues and improve the existing proceedings. See, e.g. *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, White Paper prepared by the Watson Institute Targeted Sanctions Project, Brown University, Watson Institute for International Studies, 30 March 2006.

Another problem arises from the difficulties related to the internal application and implementation of sanctions.⁴³ At the time of the adoption of Resolution 661 (1990), which imposed sanctions against Iraq, implementing legislations adopted by States varied widely and applied differently in diverse sectors of the economy. The effect of this ‘patchwork’ on markets was chaotic, in particular for financial markets since bankers struggled to figure out the applicable rules in each individual case. Resolution 661 required States to check the activities of their nationals or the activities taking place in their territories, meaning that the effects and the legality of a given transaction had to be carefully reviewed in light of relevant national laws: the laws of the State of which the person was a national; those of the State of residence; and those of the States of persons or institutions implicated in the transaction (bank, agent, brokers, insurers, intermediaries, etc.). The diversity of potentially applicable national laws enormously complicated the task of the international banking community.⁴⁴

Economic considerations were incrementally integrated in collective security decision-making but only in an incidental or marginal fashion. To date, there have been no clear solutions proposed in the short or medium term to assess the impact of measures adopted within the collective security system in economic and regulatory terms. In particular, no principle or rule of economic law has been forged to prevent harmful effects on third parties, be they States or non-State Parties.

II. THE GROWING LINKAGE BETWEEN MAINTENANCE OF PEACE AND ECONOMIC RECONSTRUCTION: THE NEW ROLE OF THE UNITED NATIONS IN THE ECONOMIC SPHERE

Sanctions imposed against one State are not the only collective security measures of an economic character. The recent extension of the scope and understanding of what contribute to the maintenance of peace, such as sustaining reconstruction of post-conflict societies led the United Nations to adopt new types of economic measures that fall under the purview of

⁴³ There are two methods by which a State can implement SC sanctions—the adoption of legislation providing for compliance and and implementation of the decisions of the SC or case by case action. In the latter case, the government reacts in an *ad hoc* manner each time there is a SC decision requesting the imposition of sanctions. This is the approach chosen by a majority of States. See Motohide Yoshikawa, ‘Implementation of Sanctions Imposed by the United Nations Security Council—Japan’s Experience’, in *Report on the Expert Seminar on Targeting UN Financial Sanction*, 17–19 March 1998 (Interlaken I), Swiss Federal Office for Foreign Economic Affairs, in cooperation with the United Nation Secretariat, 105–110. See also, Vera Gowlland-Debbas, ‘Implementing sanctions resolutions in domestic law’, in Vera Gowlland-Debbas (ed.), above n 17, 33–78.

⁴⁴ Jeremy P. Carver, ‘Making Financial Sanctions Work: Preconditions for Successful Implementation of Sanctions by the Implementing State’, in *Report on the Expert Seminar on Targeting UN Financial Sanctions*, above n 43, at 90..

Chapter VII.⁴⁵ Assessing and discussing such evolution calls for a new framework of action encompassing broader elements than the mere Charter of the United Nations. This trend stemming from a linkage between collective security and economic matters may be described through three different cases. It is worth noting that it first affected the traditional UN peacekeeping operations. However, the international administration of territories ruled by the United Nations such as the UN mission in Kosovo constitutes a breakthrough in terms of economic interventionism. Finally the peculiar situation of Iraq made the Security Council adopt decisions with unprecedented reach.

A. The evolution of peacekeeping operations: the case of Liberia and Sierra Leone

Although marginally involved in economic activities, the UN missions in Liberia and Sierra Leone evolved in such a way that the United Nations played or will play an increasing role in economic matters: not only did several international institutions participate in reconstruction efforts and continue to do so, but the first meeting of the UN Peacebuilding Commission established at the end of 2005 dedicated to Sierra Leone leaves no doubt about the will to link maintenance of peace with economic development and stabilization strategies concerning this country. Liberia may also benefit from this new approach in the near future.

The UN missions in Liberia and Sierra Leone can be characterized as traditional peacekeeping missions: they are based on an agreement between the United Nations and the authorities in place, with a security-based mandate, including measures such as the monitoring of a cease-fire. The mandates of these missions nevertheless encompass reconstruction activities in post-conflict situations, allowing thereby the United Nations and the international community to become involved in economic reconstruction after an armed conflict.

The United Nations has carried out two missions in Liberia. The United Nations Observer Mission in Liberia (UNOMIL) was created by Resolution 866 (1993) with a traditional peacekeeping mandate⁴⁶ '(a) to receive and investigate all reports on alleged incidents of violations of the cease-fire

⁴⁵ This study does not aim to be exhaustive. Another example of economic action taken in the context of Chapter VII is the creation of the UN Compensation Commission by the Security Council, see Merritt B. Fox, 'Imposing Liability for Losses from Aggressive War: An Economic Analysis of the UNCC', 13 (1) *European Journal of International Law* 201 (2002) at 201–221

⁴⁶ The resolution makes no reference to the chapter of the UN Charter upon which the mission is based. The Security Council recalls the Peace Agreement signed by the three Liberian parties in Cotonou on 25 July 1993 [that] calls on the United Nations and the Military Observer Group (ECOMOG) of the Economic Community of West African States (ECOWAS) to assist in the implementation of the Agreement. This can be interpreted as consent given by the State for the deployment of a peacekeeping mission.

agreement and, if the violation cannot be corrected, to report its findings to the Violations Committee established pursuant to the Peace Agreement and to the Secretary-General; (b) to monitor compliance with other elements of the Peace Agreement, including at points on Liberia's borders with Sierra Leone and other neighbouring countries'. In November 1997, following the completion of UNOMIL's mandate on 30 September of the same year, the United Nations established a post-conflict peacebuilding support office. The United Nations Peace-Building Support Office in Liberia (UNOL), headed by a Representative of the Secretary-General, was mandated to strengthen and harmonize UN peace-building efforts, help promote reconciliation and respect for human rights and help mobilize international support for reconstruction and recovery.⁴⁷

Although the peace-building process was largely jeopardized by the outbreak of a new conflict between governmental forces and rebel groups, the Comprehensive Peace Agreement reached between Liberia's Government, rebel groups, political parties, and civil society leaders in Accra, Ghana on 18 August 2003, and the Liberian ceasefire agreement, signed in Accra on 17 June 2003, put an end to these hostilities. The parties to the agreements asked the United Nations to send a mission with a Chapter VII mandate to assist the Government in the implementation of the agreements. The UN Security Council adopted Resolution 1509 in September 2003 creating the United Nations Mission in Liberia (UNMIL). The UNMIL's mandate includes, among other tasks, 'to observe and monitor the implementation of the cease-fire agreement and investigate violations of the cease-fire; to observe and monitor disengagement and cantonment of military forces of all the parties and to develop, in cooperation with (...) relevant international financial institutions, international development organizations, and donor nations, an action plan for the overall implementation of a disarmament, demobilization, reintegration, and repatriation (DDRR) programme for all armed parties'. Resolution 1509 also asks UNMIL 'to assist the transitional government in restoring proper administration of natural resources'.⁴⁸ The Security Council called on 'the international community to consider how it might help future economic development in Liberia aimed at achieving long-term stability in Liberia and improving the welfare of its people'. An international Conference on Liberia's reconstruction took place in February 2004, gathering together governments, international financial institutions, the United Nations and specialized agencies. These reconstruction activities illustrate the growing focus placed on economic activities. In the large number of resolutions

⁴⁷ See www.un.org/peace/africa/pdf/Liberia.pdf (visited 28 November 2006).

⁴⁸ Note also that the Security Council Resolution 1521 of 22 December 2003 provides that UNMIL will assist in responsible resource management.

adopted so far, no reference is made to the applicable legal economic framework.

The United Nations Mission in Sierra Leone (UNAMSIL) was created in 1999 by Security Council Resolution 1270 following the Lomé Peace Agreement concluded in July 1999. The UNAMSIL's mandate requires cooperation 'with the Government of Sierra Leone and the other parties to the Peace Agreement in the implementation of the Agreement and to assist the Government of Sierra Leone in the implementation of the disarmament, demobilization and reintegration plan'. The UNAMSIL's mandate was extended in 2001 by Resolution 1346 without making explicit reference to economic activities. In Resolution 1537 of 30 March 2004 the Security Council decided to continue with the reduction of UNAMSIL's tasks initiated in Resolutions 1436 (2002) and 1492 (2003). Resolution 1562 of 17 September 2004 extended the mandate of the UN Mission until 30 June 2005 and clarified its tasks, which are mostly limited to security matters.

Considering such logic, it is of paramount importance to stress that the new Peacebuilding Commission insisted on the economic dimension of the action carried out to uphold peace in Sierra Leone. The Commission is entitled to address the situation of particular countries to 'marshal resources at the disposal of the international community to advise and propose integrated strategies for post-conflict recovery, focusing attention on reconstruction, institution-building and sustainable development, in countries emerging from conflict'.⁴⁹ In its first ever country-specific meeting, the Commission has decided to choose Sierra Leone for support from the newly established Peacebuilding Fund.⁵⁰

In both cases, one should exclude reference to the law of armed conflicts in these situations since the war had ceased. However, other branches of international law, such as international human rights and international economic law, are relevant, even though the extent of their application is yet to be defined. It is worth noting that Sierra Leone has been a member of WTO since 1995, but it is not clear whether this has ever been taken into consideration in assessing the existing legal framework in Sierra Leone and in reforming it through post-conflict activities.

Liberia and Sierra Leone witness an increasing involvement of the United Nations in economic realms after peace has been restored, using economic reconstruction as a tool to make sure that hostilities would not break out again. Carrying out such action within the narrow framework of the collective security system cannot be satisfactory in terms of efficiency. Grounding the reconstruction of Sierra Leone on economic legal pillars

⁴⁹ See, www.un.org/peace/peacebuilding (visited 28 November 2006).

⁵⁰ See, Launch of the Peacebuilding Fund, 11 October 2006, General Assembly, PBC/4, at www.un.org/News/Press/docs//2006/pbc4.doc.htm (visited 28 November 2006).

would contribute to strengthen the autonomous and sustainable character of the economy when the United Nations are gone. By resorting to the principles of transparency and non-discrimination, the United Nations would ensure that individuals, private companies, and local entities rely on such principles, rendering the transition towards the UN disengagement and the integration with the international economic order easier. This would also have consequences for countries and foreign entities.

B. Crossing the 'economic' Rubicon: the international administration of territories by the United Nations

In recent years, the UN Security Council has been adopting increasingly broad and complex peace mission mandates, going well beyond the simple maintenance or re-establishment of peace. In particular, the UN has assumed tasks of political and economic reconstruction, now incorporated under the lofty concept of peacebuilding.⁵¹ Such programmes and measures were implemented within the framework of transitional territorial administrations such as in East Timor and Kosovo,⁵² adopted under Chapter VII of the United Nations Charter. The expanding scope of peace operations has been based on a new interpretation of the concept of threat to peace, as well as on a range of measures that may be undertaken in order to fulfil the United Nations mission to maintain international peace and security.

These innovations inevitably led the United Nations to intervene in economic fields heretofore unexplored in terms of collective security. This has been particularly true in the case of Kosovo, where the mission is explicitly mandated to support economic reconstruction.⁵³ As such, Security Council Resolution 1244, which created an interim administration in Kosovo,⁵⁴ makes several references to the economic dimension of the mission. Thus, the resolution states that one of the main tasks of the international civilian presence is 'supporting the reconstruction of key infrastructure and other economic reconstruction'.⁵⁵ It also 'encourages all Member States and international organizations to contribute to economic and social reconstruction as well as to the safe return of refugees and

⁵¹ See on this question, Yves Daudet, 'L'action des Nations Unies en matière d'administration territoriale', *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. VI, 2002, 459–542.

⁵² For an extensive analysis, see Richard Caplan, *International Governance of War-Torn Territories—Rule and Reconstruction* (Oxford: Oxford University Press, 2005).

⁵³ The UN transitional administration in East Timor is another significant case in which the United Nations was involved in economic reconstruction. Although different, there are common elements between the Kosovo and East Timor experiences with regard to *inter alia* taxation or customs issues (see, for example, Regulation No. 2000/18, UNTAET/REG/2000/18, 30 June 2000, on a 'Taxation System for East Timor'). On the UN transitional administration in East Timor, see Stewart Eldon, 'East Timor', in David M. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century*, A Project of the International Peace Academy, (USA/London: Lynne Rienner Publishers, 2004), 551–66.

⁵⁴ United Nations Interim Administration Mission in Kosovo [hereinafter, UNMIK].

⁵⁵ Resolution 1244, 10 June 1999, para 11(g).

displaced persons, and emphasizes in this context the importance of convening an international donors' conference, (...) at the earliest possible date'.⁵⁶

As a result, UNMIK has become involved in the creation of a viable economy and the installation of an overall programme of economic stabilization. This has been achieved through the adoption, by the Special Representative of the Secretary-General (SRSG) by virtue of the powers conferred upon him by Resolution 1244, of a series of regulations, including Regulation No. 1999/1 of 25 July 1999, which establishes the powers of the interim administration in Kosovo. A council responsible for economic policy has been created alongside the adoption of a legal framework through a regulation adopted by the SRSG. Regulation No. 1999/16 creates a Central Fiscal Authority of Kosovo that is responsible, under the guardianship of the SRSG, for the general administration of the budget of Kosovo.⁵⁷ In fact, some of these measures call into question the monetary, financial, and economic unity of the Federal Republic of Yugoslavia (FRY).⁵⁸ The responsibility to develop and lead economic reconstruction activities in Kosovo fell to the European Union in cooperation with the World Bank and other organizations, namely the implementation of the Stability Pact for South Eastern Europe, with considerable international support, to promote democracy, economic prosperity, stability, and regional cooperation.⁵⁹

The institutional framework of economic reconstruction relies on the active cooperation of international organizations competent in the economic field. As with the territorial administration and reconstruction activities led by the Security Council, the legal framework is based on the Charter of the United Nations, on relevant resolutions of the Security Council providing for the development and adoption of legal instruments such as the regulations adopted by the international authorities in whom this power was vested, and on applicable local law.⁶⁰ In terms of relevant principles and norms of

⁵⁶ Resolution 1244, 10 June 1999, para 13.

⁵⁷ One can also cite other examples of actions taken in the framework of territorial administration that concern the economic field: Regulation No. 1999/9 on the Importation, Transport, Distribution, and Sale of Petroleum Products in Kosovo, as well as Regulation No. 1999/20 on the Banking and Payments Authority of Kosovo, adopted by the Special Representative of the Secretary-General 'For the purpose of strengthening the economy in Kosovo by providing for efficient payments and sound banking systems by establishing the Banking and Payments Authority of Kosovo'.

⁵⁸ Regulation No. 1999/4 on the Currency Permitted to be used in Kosovo. This regulation authorizes the free use of currency parallel to the Yugoslav Dinar in the payment and banking services sector, making the German Mark, and since 2000 the euro, the official currency of Kosovo. See Ruxandra Bordea, *La Mission intérimaire d'administration des Nations Unies au Kosovo*, LLM Thesis, University Paris I, September 2000, at 47.

⁵⁹ See the Petersberg Principles on the political solution to the Kosovo crisis, Statement by the Chairman on the conclusion of the meeting of the G-8 Foreign Ministers held at the Petersberg Centre on 6 May 1999, statement annexed to Resolution 1244.

⁶⁰ See Yves Daudet, above n 51, at 527 ff.

international law, explicit mention of principles of international human rights is generally made in Security Council resolutions or in the instruments adopted by the authorities responsible for territorial administration and reconstruction activities.⁶¹ However, no mention is made of principles and rules of international economic law that are relevant to the economic components of these missions, as is made apparent from the mandate given by the UN Secretary-General to the UN Office of Legal Affairs (OLA), which was tasked with the vetting of UN regulations in East-Timor and Kosovo.⁶² The then Under-Secretary-General for Legal Affairs later observed that it 'became quite an extensive activity. Not that we questioned the substantive solutions in customs, taxation, banking or whatever the subject matter was. Our task was to review the regulations from a constitutional viewpoint. That is: were they in conformity with the Charter, the pertinent Security Council resolutions, international human rights standards, etc.?'⁶³

Human rights law may certainly be applicable with regard to some economic activities. The most significant example is the right to private property, which undoubtedly provides for legal guarantees and offers some indirect protection against abuses. Another example is the principle of non-discrimination, although its understanding under human rights law⁶⁴ does not fully cover trade and investments activities.⁶⁵ Briefly put, international human rights law does not provide full legal guarantees, and might be ill-suited to deal with some economic activities and ensure, for example, that these are based on principles of transparency and fair competition.

Moreover, one may well ask whether UN law is the proper yardstick to review customs, taxation or banking regulations. Even though, it is true that the United Nations set up rules to be applied to the UN personnel with regard to certain aspects such as procurement,⁶⁶ a wider approach promoting

⁶¹ For the case of Kosovo, see, Resolution 1244, para. 11 (j) as well as Regulation No. 1999/1, s 2 and Regulation No. 2000/38 that created the Ombudsman institution. Considering those instruments, the UN Human Rights Committee expressively stated that UNMIK is bound by human rights obligations. See Concluding Observations of the Human Rights Committee—Kosovo (Serbia), CCPR/C/UNK/CO/1. 14 August 2006, para 4, p. 2.

⁶² See *Report of the Secretary-General on the work of the Organization*, U.N. GAOR, 55th Sess., Supp. No 1, UN Doc. A/55/1 (2000), para 325, p. 43, available at www.un.org/documents/sg/report00/a551e.pdf (visited 28 November 2006).

⁶³ See, Hans Correll, above n 13, at 397.

⁶⁴ On the different aspects of non-discrimination in human rights law, see Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (Oxford: Oxford University Press, 2005), 265–267.

⁶⁵ On issues of discrimination and the right of a State to participate in international economic relations in the context of the process of liberalization of economic intercourse, see Andrzej Calus, 'The Right of a State to International Intercourse', 7 *Polish Yearbook of International Law* 209 (1975).

⁶⁶ See, for example, *The Financial Regulations and Rules of the United Nations*, Secretary-General's bulletin, ST/SGB/2003/7, 9 May 2003; or *United Nations Procurement Manual*, Department of Management, Office of central Support Services, Procurement Service, August 2006, available at www.un.org/Depts/ptd/pdf/pm_31august2006_english.pdf (visited 28 November 2006).

and integrating general principles of international economic law would be needed.

One might argue that organizations that are competent in the area of economic reconstruction will advocate for the application of general principles of economic law that they have helped develop through their own practice. However, affirming as a matter of principle the importance of the international rule of law for questions related to international trade, government procurement,⁶⁷ or competition in the field of economic reconstruction still seems paramount. The procedures followed in the context of economic reconstruction would indeed benefit from explicit reference to clear legal criteria. Key standards such as openness and equity that are linked to the application of well-established principles of free competition and transparency, in WTO law for example, would help contribute to the reconstruction of stable domestic economies in the medium and long-term facilitating the transition of the newly recovered economies from a system backed by UN efforts to a sustainable system interacting within the international economic order.⁶⁸

C. The situation of Iraq following the adoption of Security Council Resolution 1483

The case of Iraq following the adoption of Resolution 1483 by the Security Council, on 22 May 2003—albeit peculiar because of the regime of military occupation⁶⁹—deserves specific enquiry. The UN role in this context raises new questions with respect to the recourse to economic instruments, the international rule of law as well as issues of global legitimacy and coherence of the UN system in its relations with other actors, institutions and norms. In addition, economic issues, namely those relating to the exploitation of

⁶⁷ This aspect is important if we consider the implication of many non-governmental actors, both public and private, among them non-governmental organizations (NGOs), in the management of public affairs and services. See Carsten Stahn, *NGO's and International Peacekeeping—Issues, prospects and Lessons Learned*, 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 379 (2001), at 397.

⁶⁸ This need for greater reliance on economic law is particularly true if we take into consideration the fact that institutions such as UNMIK or KFOR enjoy immunity in local courts. See Ombudsperson Institution in Kosovo, *Special Report No 1 on the Compatibility with recognized international standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo* (18 August 2000), 26 April 2001.

⁶⁹ The UN involvement in the Occupied Territories through the UN Relief and Works Agency can be seen—though in a very limited way—as another example of transitional administration led by the United Nations in a context of occupation. Discussing the categorization of powers drawn by M. W. Doyle in the context of transitional administration [See Michael W. Doyle ‘War-Making and Peace-Making: The United Nations’ Post Cold War Record’, in Chester A. Crocker, Fen Osler Hampson, and Pamela Aall (eds), *Turbulent Peace: The Challenges of Managing International Conflict*, (Washington DC: United States Institute of Peace Press, 2001), at 529], Simon Chesterman uses the case of UNRWA in Occupied Territories to reflect on the powers of administrative authorities. See Simon Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (Oxford: Oxford University Press, 2004), at 56.

natural resources in the framework of collective security activities, had never before played such an important role.

Security Council Resolution 1483 primarily specified that the legal regime in force in Iraq at the time was that of military occupation as provided in The Hague and Geneva Conventions, and that the Coalition Provisional Authority (composed of the USA and the UK, hereinafter CPA) was the occupying power. This resolution also prescribed a role for the United Nations and other international organizations, but did not specify the law applicable to their activities. It was the balance of power in the international system at the time that led to the recognition that the primary responsibility for the political and economic reconstruction of Iraq was in the hands of the CPA. As such, the international community rubber-stamped a system that had been established and managed by the USA and Great Britain. The United Nations was involved in the process on the basis of a very narrow mandate, breaking away from practice developed in preceding years in the realm of political and economic reconstruction.⁷⁰

In the economic field, Resolution 1483 envisioned the role of the United Nations and the international community through a range of complex procedures, which only accorded them a right to be informed, while the decision-making power remained in the hands of the CPA. This remained true even though the United Nations had taken part for the first time in the setting up of a regime where economic considerations were predominant. With regard to the delicate question of the management and exploitation of natural resources, the CPA was granted jurisdiction over export sales of petroleum, petroleum products, and natural gas from Iraq. These prerogatives were to be exercised under certain conditions subject to oversight and audit procedures conducted by certain responsible international organizations. However, the nature and the duration of these procedures were not settled.

The resolution took note of the creation of the Development Fund for Iraq, notably supplied by left-over subsidies from the 'Oil for Food' programme and by revenues linked to the exportation of oil and gas. This fund was placed under the aegis of the Central Bank of Iraq and its use was within the competence of the CPA. It was specified that this fund must be 'used in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq'.⁷¹ The international community was granted a right of supervision through a monitoring and audit system. The International Advisory and Monitoring Board (IAMB), created in October 2003—involving, in particular, the

⁷⁰ See, on this point, Laurence Boisson de Chazournes, 'The United Nations on Shifting Sands: About the Rebuilding of Iraq', 5 (4) *International Law Forum* 254 (2003), at 257.

⁷¹ Resolution 1483 (2003), para 14.

United Nations, the World Bank, the IMF, and the Arab Fund for Economic and Social Development—had the responsibility to ensure that the funds from the sale of petroleum and natural gas were used in accordance with principles of transparency.⁷² In addition to this special regime for the export of petroleum and natural gas, the United Nations was given a coordinating role, in partnership with other international organizations, in ‘promoting economic reconstruction and the conditions for sustainable development’ and in ‘facilitating the reconstruction of key infrastructure’.⁷³

Despite the fact that Resolution 1483 set up the framework establishing the jurisdiction and powers of the CPA, it could not conceal the marginal role of the United Nations compared with the truly decisive prerogatives of the CPA in the economic domain. The Security Council resolution basically recognized in large part the system put into place by the Coalition. In exchange, it obtained the recognition of the application of the law of military occupation. However, that law is laconic, to say the least, with regard to the management of economic affairs in a military occupation. Its application in the field of oil exploitation was mostly limited up to now to questions related to the conflict in the Middle East.⁷⁴ Article 55 of The Hague Regulations concerning the Laws and

⁷² Resolution 1483 ‘*Underlines* that the Development Fund for Iraq shall be used in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq’s infrastructure, for the continued disarmament of Iraq, and for the costs of the Iraqi civilian administration, and for other purposes benefiting the people of Iraq’ (*loc. cit.*) and ‘*Decides* that all export sales of petroleum, petroleum products, and natural gas from Iraq following the date of the adoption of this resolution shall be made consistent with prevailing international market best practices...’ (Ibid, para 20). These objectives were also used to establish the framework of the International Advisory and Monitoring Board. The *Terms of Reference for the International Advisory and Monitoring Board* (IAMB) state that the purpose of the IAMB is ‘to promote the objectives set forth in Security Council resolution 1483 of ensuring that the Development Fund for Iraq is used in a transparent manner for the purposes set out in § 14 and that export sales of petroleum products and natural gas from Iraq are made consistent with prevailing international market best practices’. See www.iamb.info/pdf/torold.pdf (visited 28 November 2006).

⁷³ Resolution 1483 (2003), para 8 (e) and (d).

⁷⁴ On this issue, see especially Brice M. Clagett et O. Thomas Johnson, ‘May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez’, 72 *American Journal of International Law* 558 (1978), as well as Monroe Leigh, Department of State Legal Adviser, Memorandum of Law on Israel’s Right to Develop New Oil Fields in Sinai and the Gulf of Suez, 1 October 1976, in 16 *International Legal Materials* 733 (1977). See also the practice that arose in relation to the Japanese use of natural resources throughout South-East Asia during the Second World War. See for example, *N.V. De Bataafsche Petroleum Maatschappij & Ors. V. The War Damage Commission*, 22 *Malayan Law Journal* 155 (1956), Court of Appeal, Singapore, 13 April 1956, Whyatt, C. J., Mathew, C. J., and Whitton, J., reprinted in Marco Sassóli and Antoine Bouvier, *How Does Law Protect in War?—Cases and Teaching Materials on International Humanitarian Law in Contemporary Practice*, vol. II, (2nd edn, Geneva: ICRC, 2006), 1071–76.

Customs of War on Land annexed to the 1907 Convention (IV) respecting the Laws and Customs of War on Land⁷⁵ is not very explicit. How should the last sentence of the article relating to administration in conformity with the rules of usufruct be interpreted? How should the share of expenses that arises from the costs of the occupation and the share that goes beyond it be determined?⁷⁶ The restoration of an economic system is part of the responsibilities of an occupying power, but what principles should guide its activities? As for Article 43 of the same 1907 Regulation, it specifies that ‘the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country’. If the stabilization of an economy forms a part of the maintenance of public order and safety, questions arise as to the precise limits of this obligation. The problem is particularly acute with regard to the duration of legislative action on monetary and trade policy and on investments.

There is a need to reflect on this legal regime and the interpretation that must be made in light of the evolution of contemporary economic relations. The question of the negotiation and granting of investment contracts⁷⁷ must be examined as much in light of the laws of war as of the principle of permanent sovereignty over natural resources: the law of military occupation no doubt permits the negotiation of commercial contracts, but within what limits?⁷⁸ If this law allows for legal modifications, can it go as far as a complete liberalization of the investment regime?⁷⁹ The law applicable to the activities of international organizations in the economic domain should also catch our attention. Even though this is not specified, one can infer that that

⁷⁵ Article 55 of the Regulation annexed to the 1907 Hague Convention (IV) respecting the Law and Customs of War on Land states that ‘The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.’

⁷⁶ On this point, see R. Dobie Langenkamp and Rex J. Zedalis, ‘What Happens to the Iraqi Oil? Thoughts on Some Significant, Unexamined International Legal Questions Regarding Occupation of Oil Fields’, 14 (3) *European Journal of International Law* 417 (2003).

⁷⁷ The diversity of reconstruction contracts that the regime may establish and were used in Iraq is, as emphasized by Jean-Michel Jacquet, very complex. He identifies three categories of contracts: ‘Iraqi public contracts’, ‘Contracts concluded by the Coalition Provisional Authority with Iraqi or foreign private companies’ and ‘Contracts concluded by a United States public body’ (author’s trans.). On this issue, and on the issue of the law framing these different contracts, see Jean-Michel Jacquet, ‘Les contrats de reconstruction de l’Irak’, Communication to the French Section of the International Law Association, Meeting of 28 June 2004 (on file with the author).

⁷⁸ See the reflections of Philippe Sands regarding the Legal Opinion of the Attorney General of the United Kingdom, Lord Goldsmith, on the administration of Iraq, ‘l’exploitation des ressources naturelles en Irak’, in K. Bannelier, Th. Christakis, Olivier Corten, and Pierre Klein (dir.), *L’intervention en Irak et le droit international*, coll. Cahiers internationaux N° 19 (Paris: Editions A. Pedone, 2004), 319–324.

⁷⁹ See Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’, 16 (4) *European Journal of European Law* 661 (2005), at 679.

law goes beyond the confines of the law of occupation⁸⁰ since these institutions are vested with a significant role in the economic reconstruction of a State, or, in other circumstances, a part of a State territory, following a conflict, through a Security Council resolution adopted under Chapter VII of the Charter of the United Nations.

If the situation that prevailed in Iraq following the adoption of Resolution 1483 could be considered in light of the principles and rules of the law of military occupation, the question then would be whether Resolution 1546, adopted 8 June 2004, and the establishment of an interim government in Iraq, ended the military occupation. The issue of the applicable law is an important question. In Resolution 1546, the Security Council:

Notes that, upon dissolution of the Coalition Provisional Authority, the funds in the Development Fund for Iraq shall be disbursed solely at the direction of the Government of Iraq, and *decides* that the Development Fund for Iraq shall be utilized in a transparent and equitable manner and through the Iraqi budget including to satisfy outstanding obligations against the Development Fund for Iraq, that the arrangements for the depositing of proceeds from export sales of petroleum, petroleum products and natural gas established in paragraph 20 of resolution 1483 (2003) shall continue to apply, that the International Advisory and Monitoring Board shall continue its activities in monitoring the Development Fund for Iraq and shall include as an additional full voting member a duly qualified individual designated by the Government of Iraq and that appropriate arrangements shall be made for the continuation of deposits of the proceeds referred to in paragraph 21 of resolution 1483 (2003).⁸¹

Even if we were to consider the situation of Iraq as that of a State in which the law of military occupation cannot be applied *a priori*, one should note that once again, the Security Council made important economic decisions for Iraq. It imposed an obligation to respect the criteria of transparency and equity in the use of the Development Fund for Iraq and provided that the International Advisory and Monitoring Board would continue to exercise its oversight activities.⁸² The composition of the Monitoring Board was

⁸⁰ See Adam Roberts, 'Transformative Military Occupation: Applying The Laws of War and Human Rights', 100 *American Journal of International Law* 580 (2006), at 604. However, for some, these activities would also be governed by the international humanitarian law of occupation. In this vein, see Marco Sassöli, above n 79, 686–93.

⁸¹ Resolution 1546, 8 June 2004, para 24.

⁸² See, *Report of the International Advisory and Monitoring Board of the Development Fund for Iraq*, covering the period from the establishment of the DFI on May 22, 2003 until the dissolution of the CPA on June 28, 2004, p. 18, released on December 14, 2004, available at www.iamb.info/pdf/IAMBreport.pdf (visited 28 November 2006), the *Letter dated 6 January 2005 from the representative of the Secretary-General on the International Advisory and Monitoring Board addressed to the Secretary-General*, submitted to the Security Council by the Secretary-General on January 10 2005, S/2005/12, as well as the numerous reports from independent auditors carried out in relation to the monitoring task of the IAMB, available at www.iamb.info/dfiaudit.htm (visited 4 November 2005).

enlarged since it must now include 'a duly qualified individual designated by the Government of Iraq'.⁸³ The Security Council thus was creative in providing a method of international monitoring with respect to a 'fully sovereign and independent Interim Government of Iraq'.⁸⁴ The mandate of the IAMB was extended by the UN Security Council till 31 October 2006.⁸⁵ The Iraqi Government has subsequently decided to create a national oversight body to succeed the IAMB and ensure respect for transparency principle.⁸⁶ This example illustrates the positive impact the Security Council consideration for economic principles can have on a domestic system. It allows for the development of an economic framework.

The contours of the rules the Security Council refers to in Resolutions 1483 and 1546 should also be analysed. The two instruments refer to practices, criteria and standards that demonstrate the normative diversity of 'international law' in its binding and non-binding dimensions in the contemporary legal order.⁸⁷ Moreover, the emphasis placed on the conditions of transparency and equity demonstrates the emerging recognition of economic principles that are relevant to peace-building measures decided on by the Security Council. That issue should be also emphasized with respect to UN operations based on State consent that involve economic activities, as will be briefly shown subsequently.

III. MEETING THE CHALLENGE OF UN INVOLVEMENT IN ECONOMIC MATTERS: THE NEED FOR A COHERENT ECONOMIC AND LEGAL FRAMEWORK

Each of the situations examined earlier raises questions as to the applicable legal framework, which has been only tangentially addressed thus far. Some, however, highlight the increasing acknowledgement of the need to refer to economic regulatory framework. The United Nations, international institutions, and the other actors involved in reconstruction activities cannot act in a complete vacuum when it comes to economic intervention and assistance.

⁸³ Resolution 1546, para 24.

⁸⁴ Ibid, Preamble, para 1.

⁸⁵ Resolution 1637, 8 November 2005.

⁸⁶ See the letter and annexed documents concerning the council of Ministers of the Iraqi Republic which adopted the decision to create the *Committee of Financial Experts*, Republic of Iraq, General Secretariat of the council of Ministers, 22 October 2006. See, also, Letter from the UN Representative of Iraq to the United Nations to the Chairman of the IAMB, 31 October 2006, and Statement by the International Advisory and Monitoring Board on the Development Fund for Iraq, 6 November 2006, all those documents are available at www.iamb.info/dfiaudit.htm (visited 28 November 2006).

⁸⁷ See Laurence Boisson de Chazournes, 'Qu'est ce que la pratique en droit international?', in *La pratique et le droit international*, Colloque de Genève de la S.F.D.I. (Paris: Pedone, 2004) 43–46.

There is a clear need to identify the applicable rules and principles for the sake of legitimacy, stability, and predictability. The multiplication of international conferences on post-conflict reconstruction (Liberia, Afghanistan and Iraq) highlights this need. International organizations carry out reconstruction tasks based on a wide array of mandates. Bilateral aid is also important in this context. The following section will first review the principles of international law that may be applicable and proceed with an analysis of the relation between collective security and another specific legal regime, i.e. WTO law.

A. International economic law principles and maintenance of international peace and security: efficiency at stake

What is at stake is not so much to analyse the actions of the Security Council with a view to assessing the legality of a particular conduct, but to integrate Security Council decision-making into a larger framework encompassing economic law in order to establish the legitimacy and legality of Security Council decisions. What emerges from the analysis of current practice is that this integration occurs in an *ad hoc* manner, and benefits from grey areas and exceptional regimes granted by instruments of international economic law.

A question is whether the legal framework for the Security Council's economic actions should be limited to the Charter of the United Nations. Article 103 establishes the primacy of obligations arising from the Charter over other conventional obligations 'in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement'.⁸⁸ The International Court of Justice ruled that obligations resulting from Security Council decisions enjoy similar pre-eminence through an interpretation combining Article 103 with Article 25 of the Charter.⁸⁹ Certainly, the effect of this provision, which assures the primacy of the Charter in case of conflict, seems decisive with regard to treaty obligations. When it comes to *jus cogens*

⁸⁸ Article 103 reads as follows: '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.'

⁸⁹ See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, (Libyan Arab Jamahiriya v United Kingdom)*, Provisional Measures, Order of 14 April 1992, *I.C.J. Reports 1992*, para 39, p. 16. The International Court of Justice held that 'both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter' and that 'at the stage of proceedings (...) the Court 'considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention'.

norms, customary international law or general principles of law, however, the situation is different.⁹⁰

When there is no conflict between an obligation under the Charter and another conventional obligation, however, both should find application. This point should be borne in mind when addressing the relationship between, on the one hand, decisions taken in the context of Chapter VII, and WTO agreements and other economic agreements, on the other.

An issue is the identification of norms and principles that should find application in reconstruction activities and the appraisal of their status.⁹¹ Non-discrimination, one of the cornerstone principles of the WTO system,⁹² is obviously an essential regulatory principle for the (re)-building of an economic system. Yet, its status under international customary law is at present rather dubious.⁹³ The issue also deserves further consideration with respect to the standing of the principle of non-discrimination in its national treatment dimension.

If the principle of non-discrimination were applicable, specific provisions might, however, be considered to grant preference to local suppliers and contractors in order for them to help start up the local economy again and contribute to post-conflict reconstruction. There would be a need to define the adjustments, for example, in the context of procurement practices.⁹⁴

Fair competition⁹⁵ is gaining the status of a norm in its own right through procurement and bidding schemes put in place by the various actors involved

⁹⁰ Recent judicial decisions have dealt with the relationships between Art. 103 of the Charter and *jus cogens* norms, see, Judgments of the Court of first Instance of the European Communities, ECJ, 2005, Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation, v Council of the European Union and Commission of the European Communities* [2005], paras. 277 ff. and 343, and Case T-315/01, *Yassin Abdullah Kadi, v Council of the European Union and Commission of the European Communities* [2005], paras 226 ff and 288; available at <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en> (visited 28 November 2006). See also England and Wales High Court (Administrative Court), *Al-Jedda, R (on the application of) v Secretary of State for Defence*, EWHC 1809 (Admin), 12 August 2005, available at www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2005/1809.html&query=razzaq&method=all (visited 28 November 2006), paras 111–22.

⁹¹ A practical question arises as to whether discriminatory practices are compatible with the principles of the UN Charter on international peace and security, see Andrzej Calus, above n 65, 252–53.

⁹² See, for example, Andreas F. Lowenfeld, *International Economic Law* (Oxford: Oxford University Press, 2003), at 28.

⁹³ The question whether there is a customary norm of economic relations that prohibits ‘discriminatory’ action among nations is still controversial, see John H. Jackson, *The World Trading System—Law and Policy of International Economic Relations*, (2nd edn, Cambridge: MIT Press, 1997, at 27, Georg Schwarzenberger, ‘Equality and Discrimination in International Economic Law’, 25 Yearbook of World Affairs (1971), at 163.

⁹⁴ See below n 96.

⁹⁵ As to the concept of fair competition, see, Permanent Court of International Justice, *The Oscar Chinn Case*, Judgment of December 12th, 1934, Series A./B., 84–87.

in economic intervention and assessment.⁹⁶ In order to avoid discrepancies and loopholes in the application of these schemes, it might be important to promote their harmonization and to make sure that all institutions acting in the economic field apply and respect the same basic principles.

The principle of transparency is also gaining ground. The practice of the Security Council, for example in Resolutions 1483 and 1546 dealing with Iraq, has acknowledged the need to comply with this standard.⁹⁷ Publication requirements as well as oversight activities are facets of this emerging principle of international law.⁹⁸ Notification and advertising (allowing sufficient time for participation), pre-disclosure of relevant information, public bid opening, and accessibility of applicable laws and regulations are some of the critical facets of this principle. Numerous treaty provisions make explicit reference to transparency while international tribunals have used it to combine it with the principle of due process. Another relevant development is the Extractive Industries Transparency Initiative, a proposal from the UK government, which has gained increasing support from resource-rich developing countries. This initiative led to the adoption of guidelines in 2005, which will require signatory governments to publish all payments to them from oil and mining companies operating in their country, to subject all such revenues to an independent audit, and to consult with

⁹⁶ See the UN practice with the *Common Guidelines for Procurement by Organizations in the UN system* (available at www.iapso.org, visited 28 November 2006) or the World Bank system with the *Guidelines: Procurement under IBRD Loans and IDA Credits*, May 2004, available at www.worldbank.org (visited 28 November 2006). It is worth noting that the World Bank highlights the need to implement existing guidelines flexibly in post-conflict reconstruction or emergency situations to ensure an efficient response with streamlined procedures. See on this point, *Post-Conflict Reconstruction—The Role of the World Bank*, The World Bank, Washington, 1998, *Ibid*, at 11. It has been stated that some problems with and consequences of donor aid coordination come from ‘bureaucratic approval and procurement procedures [which] lead to delays in commitment and disbursements’, *Ibid*, at 51. Certain adjustments have thus been made, under the applicable guidelines in emergency situations. See *The World Bank Operational Policy on Emergency Recovery Assistance* (OP 8.50), August 1995, *Ibid*, at 67.

⁹⁷ See Resolution 1483 (2003) at para 20 and Resolution 1546 (2004) at para 24. See also, Security Council Resolution 1607 of 21 June 2005 (para 4) with respect to Liberia. Another example is the Security Council Resolution 1599 of 28 April 2005, in which the Security Council requested that ‘when implementing its mandate, UNOTIL [the United Nations Office in Timor-Leste, a one-year follow-on special political mission in Timor-Leste] emphasize proper transfer of skills and knowledge in order to build the capacity of the public institutions of Timor-Leste to deliver their services in accordance with international principles of rule of law, justice, human rights, democratic governance, transparency, accountability (...)’ (para 3).

⁹⁸ See *Financial Times*, 18 March 2005. One can also refer to the initiatives carried out by Transparency International. This non-governmental organization produced a series of risk assessments, action plans and anti-corruption tools for the construction sector, which would be used to lobby relevant organizations to take action to prevent bribery. Amongst the action plans is included an international initiative of minimum standards for public contracting, which are a blueprint for ensuring transparent public procurement. The standards call on public contracting authorities to ensure that contracts are subject to open, competitive bidding.

local non-governmental organizations about the monitoring of the industry. The International Finance Corporation, the World Bank's investment arm, has already decided not to proceed on any financing where the initiative's principles were not applied. As can be noted, various facets of the principle of transparency have made their way through practice. In spite of these developments, it is however, too early to conclude that transparency is regarded as a full-fledged principle of international economic law.⁹⁹

Both compliance with these various norms and their strengthening through the elaboration of more detailed rules would contribute to promoting the international rule of law. From a legal standpoint, the members of the Security Council are bound to uphold customary international norms as well as other sources of international law. Explicit reference to those norms would help enhance the legitimacy of the increasingly broad scope of collective security. A concrete initiative towards this end would be to develop a set of guidelines to promote awareness of and respect for them.

B. Going beyond the 'derogatory' logic under the WTO agreements

With respect to conventional norms and principles arising from treaty-based systems, international peace and security measures seem to benefit from a regime of full legal obedience. Thus, Article XXI (c) of the GATT (which became GATT 1994 with the creation of the WTO) permits a Member State to escape its obligations arising from the GATT if it conforms to its obligations under the Charter. The article provides, *inter alia*, that:

Nothing in this Agreement shall be construed
c) to prevent any contracting party from taking any action in pursuance of its obligations under that United Nations Charter for the maintenance of international peace and security.

The GATT agreement leaves, so to speak, Member States' complete leeway to apply collective security decisions, even if theoretically, the use of Article XXI could be challenged before WTO bodies. The same is true for Article XIV *bis* of the General Agreement on Trade in Services which reads as follows:

Nothing in this Agreement shall be construed:
c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

⁹⁹ Transparency appears to be a constitutive element of the rule of law. See, on this question, Todd Weiler, 'NAFTA Article 1105 and the Principles of International Economic Law', 42 (1) Columbia Journal of Transnational Law 35 (2003), 77–78.

The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.¹⁰⁰

Article 1 § 10 of the Agreement on Import Licensing Procedures specifies that 'With regard to security exceptions, the provisions of Article XXI of GATT 1994 apply'.

The legal regime of economic measures that a State adopts in accordance with the United Nations Charter differs from that of 'unilateral' measures adopted for the purposes of security—that is, measures adopted without a collective decision by a UN body in the realm of international peace and security. In the case of measures adopted without authorization or without a UN body providing or adopting a decision,¹⁰¹ an element of necessity must be established, which, as a result, seems to open the door to international oversight. Each State is allowed to determine what it considers necessary to adopt a measure in the framework of protection of its security interests, and, in the final analysis, to determine the scope of the exception, while, possibly, having to determine the well-foundedness of its measures in the framework of the WTO if a dispute resolution procedure begins. However, practice in terms of international oversight is scarce. A Panel was created under the GATT in the 'United States—Trade Measures affecting Nicaragua' case. The USA took the position that the legal terms of Article XXI (b) such as 'security interests' could not be the subject of examination or a decision by a Panel. The Panel did not have the opportunity to rule on this question of principle since the terms of its mandate prevented its review.¹⁰² This does mean that any judicial review is excluded.¹⁰³

In contrast to the measures just referred to, the condition of necessity is not required for measures adopted under the United Nations Charter with a view to maintain international peace and security. The only required element

¹⁰⁰ Likewise, Art. 73 of the Agreement on Trade-Related aspects of Intellectual Property Rights that relates to trade specifies: Nothing in this Agreement shall be construed: (c) to prevent a Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

¹⁰¹ For example, Art. XXI (b) of GATT 1994 provides that a Member State can take measures that it 'considers necessary for the protection of its essential security interests'.

¹⁰² See the Panel report, not adopted by the contracting parties, on the economic boycott imposed by the USA against Nicaragua, 13 October 1986, Doc.L/6053; 13 (45) International Trade Reporter (1986), 1368–69, para 5.2. On this issue, see Laurence Boisson de Chazournes, *Les contre-mesures dans les relations internationales économiques* (Paris: IUHEI/Pedone, 1992), 143–46.

¹⁰³ In a similar situation, the Arbitrators in the Ecuador Banana case hold that although Art. 22, § 3 (b) and (c) of the Dispute Settlement Understanding (DSU) refers to the expression "if that party considers that" with regard to the possibility to retaliate and therefore grants a certain margin of appreciation, there can be some judicial review regarding whether the Member had considered 'the necessary facts objectively'. See, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, Decision by the Arbitrators, 24 March 2000, WT/DS27/ARB/ECU, para 52.

that seems to prevail is that of a multilateral authorization given by a UN body.¹⁰⁴ This seems to be the correct interpretation, unless one would consider that a necessity requirement could be deduced from the spirit and the object of all the exception clauses, including the one referring to action pursuant to a resolution adopted by a UN body in the context of the maintenance of international peace and security. However, the quasi-non-existent preparatory works and practice in relation to these articles do not support this approach.

Another question that has not yet been elucidated is whether this exception only applies to Security Council decisions, or whether it also covers measures such as General Assembly recommendations on the maintenance of international peace and security. The issue came up in relation with the Kimberley Process, which provides for the funding of an international diamond certification programme.¹⁰⁵ In 2000, the UN General Assembly adopted Resolution 55/56, calling for the adoption of measures to deal with the problem of trade in diamonds during armed conflicts.¹⁰⁶ This resolution was part of the extension of the 1998 Security Council decision to impose sanctions according to which the only diamonds from Angola that could be imported were those that fulfilled the criteria of a monitoring system and that were accompanied by an official certificate of origin.¹⁰⁷ Subsequently, a Declaration adopted on 5 November 2002 by several countries and known as the Interlaken Declaration, specified that trade between the States participating in the Kimberley Process is restricted to certified non-conflict diamonds, and that trade between those States and the States not participating in the Kimberley Process is prohibited.¹⁰⁸ The Security Council then gave its support to the Kimberley Process scheme of certification through Resolution 1459, stating that it '*strongly supports* the Kimberley Process Certification Scheme, as well as the ongoing process to refine and implement the regime, adopted at the Interlaken Conference as a valuable contribution against trafficking in conflict diamonds and looks forward to its implementation and strongly encourages the participants to further resolve outstanding issues'.¹⁰⁹

¹⁰⁴ For example, consider a document from India that observes that 'while almost all of India's trading partners received most-favoured-nation treatment in the issue of import licences, import licences were not issued for imports from countries facing UN mandated sanctions, at present, Iraq, Fiji, Serbia and Montenegro', cited in *Analytical Index, Guide to GATT Law and Practice*, vol. I, 1995, at 605.

¹⁰⁵ On this process, see <http://www.kimberleyprocess.com> (visited 28 November 2006).

¹⁰⁶ See also UN General Assembly Resolution 56/263, 9 April 2002, A/RES/56/263, on the role of diamonds in fuelling conflict.

¹⁰⁷ Resolution 1173 of 12 June 1998, para 12 (b).

¹⁰⁸ See Interlaken Declaration of 5 November 2002 on the Kimberley Process Certification Scheme. The text of the Declaration is annexed to the WTO Council for Trade in Goods, Kimberley Process Certification Scheme for Rough Diamonds—Request for a Waiver, G/C/W/431, 12 November 2002.

¹⁰⁹ Resolution 1459 of 28 January 2003, para 1.

On 15 May 2003, WTO Members granted a waiver for certain import and export restrictions on conflict diamonds. The General Council decided that 'with respect to the measures taken by a Member listed in the Annex necessary to prohibit the export of rough diamonds to non-Participants in the Kimberley Process Certification Scheme consistent with the Kimberley Process Certification Scheme, paragraphs 1 of Article I; 1 of Article XI; and 1 of Article XIII of the GATT 1994 are waived as of 1 January 2003 until 31 December 2006'.¹¹⁰ The waiver does not cover the Kimberley Process certification scheme insofar as it concerns trade in conflict diamonds as between the participating States. Clearly, therefore, it was believed that a waiver was not necessary for this aspect of the scheme; however, one may wonder why it was necessary to have a waiver for the elements related to trade in conflict diamonds with non-participating States. One cannot exclude that the waiver in this respect was a somewhat facile 'safety first' approach to the problem, without exploring further whether the security exception would also cover this aspect of the scheme,¹¹¹ and in particular, whether the resolutions of the General Assembly would qualify as a multilateral authorization given by a UN body as provided for by Article XXI(c).

Another issue is the effects of sanctions adopted under Chapter VII of the UN Charter on third States. It should be noted that the potentially disruptive effect on international trade of an abusive recourse to Article XXI of the GATT/WTO was invoked with regard to unilateral economic measures adopted outside of the frame of the UN Charter. The GATT Council adopted a decision in 1982 relating to Article XXI in which it asked that the interests of third States that could be injured by such actions be taken into account.¹¹² This decision is in the spirit of Article 50 of the Charter and it can *a fortiori* be considered to apply to actions adopted in the framework of collective security. The legal scope of this declaration has yet to be specified for WTO agreements on services and intellectual property rights.

The Agreement on Government Procurement—a plurilateral agreement that binds a smaller number of States—also provides for an exception clause covering security aspects, albeit formulated in more restrictive terms than the

¹¹⁰ WTO Council for Trade in Goods, Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds: Communication, 24 February 2003. The waiver was adopted by the WTO General Council in May. See WTO General Council, Proposed Agenda, WT/GC/W/498, 13 May 13 2003, Item VI.

¹¹¹ More generally see, Joost Pauwelyn, 'WTO Compassion or Superiority Complex?: What to make of the WTO Waiver for "Conflict Diamonds"', 24 Michigan Journal of International Law 1177 (2003).

¹¹² GATT Council, *Decision Concerning Article XXI of the GATT*, 30 November 1982, I.B.D.D., Supplément, n 29, at 24–25. The GATT Council considered that 'in taking action in terms of the exceptions provided in Article XXI of the General Agreement, contracting parties should take into consideration the interests of third parties which may be affected', *Analytical Index*, above n 104, at 605.

aforementioned security exception provisions. It does not refer to the Charter of the United Nations and specifies the types of measures that can be taken.¹¹³ The relevance of such provision was invoked in the context of an American decision of December 2003 that limited competition in the framework of calls for tender relating to contracts for economic reconstruction in Iraq to only certain States. A memorandum titled 'Determination and Findings' justified that 'it is necessary for the protection of the essential security interests of the United States to limit competition'.¹¹⁴ The issue of the compatibility of such a measure in light of WTO rules was raised, specially with regard to the non-discrimination principle contained in Article III of the Agreement on Government Procurement.¹¹⁵ Can the exception of Article XXIII (1) of this agreement be invoked?¹¹⁶ The issue is obviously linked to the problem of the relationship between the WTO agreements, the UN Charter, and the law of military occupation. Could one consider that the United States, through the CPA—notwithstanding the issue of whether or not the CPA is an entity covered by the Agreement—was in a position to benefit from the exception clause of the Agreement on Government Procurement by arguing that the decisions are taken in the framework of a regime ratified by the Security Council in application of Chapter VII, and which, as a result, enjoy an exceptional status? Considering the restrictive

¹¹³ The Agreement on Government Procurement specifies in Art. XXIII that:

'1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.

2. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour.'

¹¹⁴ The Determination and Findings, 5 December 2003, available at http://www.washingtonpost.com/wp-srv/world/documents/iraqcontracts_dod20031205.pdf (visited 28 November 2006). Note that the USA eventually extended the call for tender to all States without the previous restrictions.

¹¹⁵ On this issue, see Geert Van Calster, 'WTO Law and Contracts for Rebuilding Iraq', 5 (4) *International Law Forum* 270 (2003).

¹¹⁶ It has been considered that the USA were bound by the Agreement on Government Procurement, *Ibid.*, at 272 ff. The issues of the legal profile of the CPA, as well as those relating to the specific undertakings of the United States in the context of the Agreement on Government Procurement have also caught attention. In that respect, the question whether the US discriminatory practice regarding reconstruction and relief contracts in Iraq falls at all within the scope of this agreement was discussed. For an interpretation questioning the relevance of WTO Government Procurement rules to address the US determination under the conditions of this instrument, especially with respect to which entities are covered, see Joost Pauwelyn, 'Iraqi Reconstruction Contracts and the WTO: "International Law? I'd Better Call My Lawyer"', *Jurist: Forum*, 19 December 2003, available at <http://www.jurist.law.pitt.edu/forum/forumnew133.php#2> (visited 28 November 2006).

wording of Article. XXIII (1), which is limited to ‘the protection of essential security interests’, it is rather dubious. Moreover, one may question to what extent the national security exception would have been able to cover all the reconstruction contracts envisaged by Washington.

The above developments demonstrate the need to clarify the scope of the rule of deference that exists in the GATT/WTO system towards the collective security system of the UN Charter in case of conflict between legal obligations. The application of principles and norms of international economic law to collective security measures dealing with economic reconstruction would contribute to peaceful stabilization, basing the reconstruction of societies on principles of sovereign equality, non-discrimination, and transparency. As an example, the notification requirement in international trade is an important pathway in favour of transparency.¹¹⁷

The admission of Iraq’s application for accession to the WTO by the General Council on 13 December 2004 (as well as for Afghanistan)¹¹⁸ may be seen as an encouraging development in this direction. This will require the adjustment of currently enacted rules to principles and norms of international trade law and will oblige public authorities and the economic actors present in Iraq to take account of these principles in their relations with other States and other actors involved in economic activities.

CONCLUSIONS

The Security Council’s work on international peace and security has become increasingly broad and varied, encompassing not only political, legal, and military, but also economic, measures. Economic issues have thus far been addressed only in relation to the impact of sanctions, and from a fairly restricted humanitarian perspective. What is still lagging is a rigorous legal analysis under international economic law of sanctions not only as direct contributors to the degradation of an economic system of the targeted State and of third States, but also of their long-term impact.

The emerging involvement of the Security Council in economic reconstruction activities also highlights the necessity to include references to principles of international economic law in analysing these new types of measures. Yet, the issue of applicable international norms and standards has gone unnoticed. Respect for the international rule of law in this area seems particularly crucial for strengthening both the legitimacy and legality of measures adopted under the current collective security system. Lastly, the law relating to economic activities in the context of military occupation as defined in international humanitarian law is underdeveloped. Whether the

¹¹⁷ See for example Art. X of the General Agreement on Tariffs and Trade.

¹¹⁸ WTO News, ‘Accession working parties established for Afghanistan, Iraq’, (visited 28 November 2006) 13 December 2004, see www.wto.org.

laws of occupation effectively restrain the activities of international organizations in times of war is even less clear.

Several principles such as non-discrimination, equity, and transparency are particularly relevant in the context of post-conflict activities.¹¹⁹ While non-discrimination has not yet been specifically mentioned in Security Council decisions, there have, in contrast, already been references to equity and transparency, contributing thus to the strengthening of these principles. They should be viewed as important regulatory principles in the context of collective security activities dealing with post-conflict contexts. The Peacebuilding Commission recent meetings and decisions illustrate the importance of gathering together relevant actors to advise on and propose comprehensive strategies for peacebuilding and post-conflict recovery. The elaboration of specific guidelines for peace-building practitioners could be one approach towards promoting respect for these principles while strengthening their content through practice.

While the application of GATT/WTO law is expressly excluded when it prevents contracting parties from taking an action in pursuance of their obligations under the UN Charter for the maintenance of international peace and security, one should question whether this logic of deference should not be supplanted by an approach based on coordination and integration that would favour the application of principles and rules of international economic law in peacebuilding and post-conflict recovery contexts. When there is no conflict between GATT/WTO requirements and those arising in the context of UN collective security decisions, the logic of deference instilled by security clauses should be reassessed. The adoption by WTO members of a decision under Article IX, paragraph 2 of the Agreement establishing the WTO, could be envisaged so as to lay down a new interpretation of the security exceptions.

The Security Council has so far shown great reluctance to adopt regulatory frameworks. Yet, its increasingly broad mandate on peace and security demands that the current *ad hoc* approach be improved to ensure greater predictability and stability. As was noted by the Secretary-General at the opening of the 59th Session of the General Assembly, while vested with enforcement capacity, the Security Council has not always been perceived as using its powers fairly or effectively. If Member States are serious about promoting and enhancing the legitimacy and continued relevance of the United Nations in its primary collective security function, further efforts should be made to uphold the international rule of law. This would also respond to the mounting demands for accountability of all actors involved in

¹¹⁹ It should be noted that the issue of transparency in government procurement was identified as a topic for negotiations by the WTO Ministerial Declaration adopted at Doha on 14 November 2001, see para 26 of the Declaration, WT/MIN(01)/DEC/1, available at www.wto.org (visited 28 November 2006).

peace-building operations, be they states, non-states entities or international organizations. Principles and rules constitute important parameters of accountability because they are defined through law-based processes and thus agreeable to all concerned actors. While respect for the international rule of law is obviously not the sole answer for enhancing the legitimacy of the Security Council's enforcement activities, it is an essential part of the ongoing transformation of the international system for the maintenance of international peace and security. In this context, international economic law should play a growing role.