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TAKING THE INTERNATIONAL RULE OF LAW SERIOUSLY: ECONOMIC INSTRUMENTS AND COLLECTIVE SECURITY

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Executive Summary

- The scope of the collective security system established under the United Nations (UN) Charter has expanded significantly since the end of the cold war. Aside from the increasingly broad understanding of the concept of "threat to international peace," there has also been a related widening of the range of measures that may be adopted by the Security Council under Chapter VII of the Charter.
- Measures of an economic nature adopted in application of Article 41 of the Charter are among the most frequently used in the realm of collective security. 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. Economic considerations have been 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 formulated to prevent harmful effects on third parties, be they states or non-state entities.
- In recent years, the UN Security Council has also adopted an increasing number of economic reconstruction measures aimed at contributing to the restoration of peace in war-torn territories. These measures have brought to light the limitations of the existing UN collective security system to deal with economic issues that concern international peace and security. As it stands, Security Council actions are mainly reviewed in accordance with the UN Charter, and with human rights and humanitarian law principles.
- The growing convergence between collective security measures and economic measures suggests that a broader set of principles and rules of international law are applicable to collective security decisions. The increasing interdependence of security and economic concerns was most recently acknowledged by the UN member states at the 2005 World Summit of 14–16 September, at which they endorsed the establishment of a Peacebuilding Commission. Yet much uncertainty remains as to the international legal principles applicable to economic measures adopted in the collective security context. The question posed is whether and how principles and rules of international economic law, including international trade law, find material application in these contexts.
- This paper argues that respect for the international rule of law should not be based solely on adherence to the UN Charter when reviewing collective security measures of an economic nature. The promotion and integration of principles such as fair competition, non-discrimination and transparency would help enhance the legitimacy of the UN Security Council. While upholding the rule of law at national and international levels has been hailed as a key UN objective, such rhetoric is undermined by the reluctance of the Security Council to adopt regulatory mechanisms.

Economic reconstruction and collective security: an emerging practice

- Recent peace operations mandated by the Security Council have often included specific measures on economic reconstruction. For example, Resolution 1244 (1999) establishing the UN Mission in Kosovo (UNMIK) makes specific reference to these objectives, and several UNMIK regulations have addressed questions of economic governance, such as the creation of a

council on economic policy and of a Central Fiscal Authority. However, there is no mention of applicable principles of international economic law in Security Council decisions, while references are now commonly made to relevant principles of international human rights and humanitarian law

- International financial and economic development institutions rely on economic principles and rules in their activities. Specific mention of the applicability of these principles and rules to questions of government procurement, competition in the field of reconstruction and international trade would help clarify the legal criteria under which these institutions operate. Key issues such as openness and equity, which find application through well-established principles of fair competition and transparency, would help contribute to the reconstruction of stable domestic economies in the medium and long term.
- These questions became particularly significant in the Security Council's handling of the Iraq situation after the adoption of Resolution 1483 (2003), which stated that the legal regime of military occupation applied in Iraq, and that the occupying power was to be exercised by the Provisional Authority. While the Provisional Authority granted itself wide prerogatives subject to vague international oversight, the role of the UN was limited to the right to be informed of economic policies. The apparent marginalization of existing principles of international economic law was particularly regrettable in light of the fact that the international legal regime of military occupation remains laconic on questions related to the management of economic affairs. Crucial economic activities, such as the negotiation of investment contracts, are not envisaged under international humanitarian law.
- Thus, while there is still much controversy regarding the regulatory role of the Security

Council in the economic realm, recent Iraq resolutions point to the emergence of practice, standards and criteria on economic activities that deserve greater scrutiny. In particular, such issues should be incorporated into the discussions on the mandate and status of the Peacebuilding Commission. It is also important to emphasize that this emerging practice is not only relevant to cases of military occupation, but also in "traditional" peacekeeping missions, such as in the cases of Sierra Leone and Liberia.

Linking collective security and the international economic order

- Article 103 of the UN Charter 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. When there is no conflict, coherence and coordination among treaties should be favored. In addition, customary principles of international economic law should also be considered, including in the context of collective security decision-making. Principles of transparency, fair competition, and non-discrimination are fundamental norms that should underpin measures of economic reconstruction. The principle of fair competition has gained stronger normative status through procurement processes while the principle of transparency is receiving increased recognition, as reflected in publication requirements and oversight activities. While fundamental within the World Trade Organization (WTO) system, the standing of non-discrimination as a principle of international customary law is still uncertain.
- The disconnect between collective security and the international economic order is also apparent in the rule of deference that exists under current WTO law. Under the present system, international peace

and security measures benefit from a regime of full legal obedience. In other words, member states may evade their obligations arising from the 1994 General Agreement on Tariffs and Trade (GATT) if this would "prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security." Similar provisions can be found under other multilateral trade agreements, where, unlike unilateral measures adopted by States for security reasons, no condition of necessity is required, thereby limiting the possibility of international ruling on the justifiability of the decision.

- What is not yet clear is whether this exception exclusively applies to Security Council decisions or whether it extends to measures adopted by the General Assembly in the pursuance of its collective security mandate. The latter seems to be correct, based on recent WTO practice. The question arose in connection with decisions by the General Assembly

and the Security Council to support the Kimberley Process regulating the trade of rough diamonds, which led the WTO General Council to waive the application of several articles of GATT 1994.

- Of special concern is the applicability of the Agreement on Government Procurement, a plurilateral agreement that binds a smaller number of states and also includes an exception clause covering security aspects without referring to the UN Charter. This provision was invoked by the United States (US) government in order to limit the competition for economic reconstruction contracts in Iraq to certain states only. Doubts remain as to whether the US, through the Provisional Authority, was in a position to benefit from the exception clause of the Agreement on Government Procurement by arguing that the decisions were taken in the framework of a regime ratified by the Security Council in application of Chapter VII and, as a result, enjoy an exceptional status.

I. Introduction

The establishment of the collective security regime in 1945, as provided under the United Nations Charter, constituted a major turning point in the management of international crises. Member states renounced the unilateral use of armed force except for the purposes of self-defense. The compensation for this prohibition is an institutional system that vests decision-making power on international peace and security in a political body that has limited membership and can adopt decisions that are binding on all member states of the organization.¹ The Security Council acts on behalf of the member states of the United Nations in carrying out its principal responsibility of maintaining international peace and security.² 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 measures³ and in the legal regime that frames the resort to their use.⁴

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 qualifications of Article 39 in recent years. 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 "The 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 violent 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 Thus, in determining what situations constitute threats to international peace and security, the usual political, strategic, and sometimes humanitarian considerations continue to dominate.

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

¹ Note that the execution of military measures by the Security Council was foreseen under Article 42, although in practice such measures have not been used. See, P. Daillier, "Article 42," in *La Charte des Nations Unies – Commentaire article par article*, J-P Cot and A. Pellet, dir., 3rd ed. (Paris: Economica, 2005): 1243–1260.

² Article 24(1) of the UN Charter 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."

³ Consider, for example, the creation of international criminal tribunals.

⁴ In that respect, one can refer to the evolution of measures involving the use of armed force under Chapter VII of the UN Charter. The language of Chapter VII has been interpreted to allow the Security Council to authorize military actions against a state when it deems this "necessary to maintain or restore international peace and security."

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.

⁷ On the links between security and economic development, see I. Bannon and P. Collier, eds., *Natural Resources and Violent Conflict: Options and Actions* (World Bank, 2003); *Breaking the Conflict Trap: Civil War and Development Policy* (World Bank/Oxford University Press, 2003); M. Berdal and D. Malone, eds., *Greed and Grievance: Economic Agendas in Civil Wars* (Boulder, Colo.: Lynne Rienner Publishers, 2000); and K. Ballentine and J. Sherman, eds., *The Political Economy of Armed Conflict: Beyond Greed and Grievance* (Boulder, Colo.: Lynne Rienner Publishers, 2003).

economic sphere exemplifies this 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 theaters 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 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 "creative" 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 principles and rules of international law that are applicable in the collective security context. In particular, how relevant are principles and rules of international economic law, including international trade law, in these cases?

The two international bodies that represent the collective security regime and the law of economic relations, respectively, have almost never been considered in conjunction. Some elements of the international legal system reinforce this disconnect. Collective security may be conceived 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, Art. 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.

This paper argues that Security Council actions in the economic field should be reconsidered based on a broader approach that takes account of principles and rules of international economic law, with a view to enhancing the legitimacy, stability and predictability of Security Council decision-making. Compliance with the UN Charter is not sufficient when dealing with economic issues. The promotion and integration of principles such as non-discrimination – in both its international and national treatment dimensions – and transparency would contribute to strengthening the legitimacy of the UN Security Council. This is particularly relevant since the promotion of the rule of law at the national and international levels has been hailed as one of the key objectives of the United Nations.¹¹ 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 legiti-

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."

⁹ Note the ongoing project commissioned by the Best Practices Unit of the UN Department of Peacekeeping Operations, in partnership with the Peace Dividend Trust, which seeks to measure the economic impact of peacekeeping operations. See: www.peacedividendtrust.org/EIP.htm.

¹⁰ See below.

¹¹ 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," *Journal of International Economic Law* 1 (1998): 26. With

macy of the collective security regime.

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 identify the economic impact of specific measures,¹² 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 analyzes Security Council actions within the economic field and distinguishes between "traditional" economic dimensions of collective security and new forms of economic measures. 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.¹³

II. "Traditional" Economic Dimensions of Collective Security

Measures of an economic nature adopted in applica-

tion of Article 41 of the Charter of the United Nations are among the most frequently used in the collective security realm.¹⁴ However, the application of these measures has often had 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.¹⁵

A. Measures adopted in application of Article 41 of the UN Charter and their side effects

Within the peace and security framework, the United Nations 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."¹⁶ The Security Council has in many instances adopted such measures, as well as others such as the freezing of state and private assets.¹⁷

Sierra Leone and Liberia offer interesting illustrations

the development of international norms, in particular international treaties, the rule of law means ensuring 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. 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/. See also Hans Correll, "A Challenge to the United Nations and the World: Developing the Rule of Law," *Temple International and Comparative Law Journal* 18:2 (2004): 391–402.

¹² In the *Agenda for Peace*, the Secretary-General recommends, with regard to the operation of Article 50 of the United Nations Charter (analyzed below) 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 United Nations 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.

¹³ 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/sgstats.asp?nid=1088>.

¹⁴ See Mohamed Bennouna, "Les sanctions économiques des Nations Unies," *Collected Courses* 300 (2002): 14–77.

¹⁵ See for example, M. Bossuyt, "The adverse consequences of economic sanctions on the enjoyment of human rights," UN Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2000/33, 21 June 2000, or more generally, D. Cortright and G. Lopez, "Reforming Sanctions," in *The UN Security Council: From the Cold War to the 21st Century*, D. Malone, ed. (Boulder, Colo.: Lynne Rienner Publishers, 2004): 167–179.

¹⁶ On this point, see Vera Gowlland-Debbas, "Sanctions Regimes under Article 41 of the UN Charter," in *National Implementation of United Nations: A Comparative Study*, Vera Gowlland-Debbas, ed. (Geneva: IUHEI–Nijhoff, 2004): 3–31.

¹⁷ On Afghanistan, see Security Council resolutions 1267 of 15 October 1999 and 1333 of 19 December 2000 adopting sanctions against

of the use of varied economic sanctions by the 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."¹⁸

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 favor free trade and non-discrimination.¹⁹ On the other hand, the issue of political, humanitarian

and economic consequences — hereafter 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.²⁰ 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 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 a long-term economic downturn, which contributed to growing insecurity and instability.²¹ 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 1,000% 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 Taliban. On Angola, see Security Council resolutions 864 of 15 September 1993, 1127 of 28 August 1997 and 1173 of 12 June 1998, which 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 *International Economic Law and Armed Conflict*, Harry H. G. Post, ed. (Dordrecht & Boston: M. Nijhoff, 1994): 123–161.

¹⁸ See also Security Council Resolutions 864 of 15 September 1993 and 1173 of 12 June 1998.

¹⁹ 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." Post, "Introduction," in *International Economic Law and Armed Conflict*, p. 1.

²⁰ See for example, D. Cortright and G. Lopez, "Sanctions Against Iraq," in *Sanctions Decade*, pp. 37–61.

²¹ 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 United Nations Secretariat, March 1999): 207–219.

the situation.²² In Haiti, 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.²³

As for the effects of sanctions on third states, the losses 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.²⁴ Among the commercial costs and losses are 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.²⁵

B. Corrective economic measures

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." 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.²⁶ 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 United Nations Sanctions, and the consultation with the Security Council was instituted to arrive at practical solutions."²⁷ 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,²⁸ thereby underlining the inadequacy of the system prescribed by Article 50. But Article 49 fulfills, as pointed out by Djacoba Tehindrazanarivelo, a "distinct function" insofar as the assistance provided for is aid to "States that experience difficulties in applying the measures decided by the Security Council at the domestic level."²⁹ Moreover, Article 49 aims at assistance given by states on a bilateral or regional basis, and exclusively between member states.³⁰ Article 50, for its part, provides for a consultative dialogue with the

²² Strategic Planning Unit, Executive Office of the UN Secretary-General, "UN Sanctions: How Effective? How Necessary?" in *2nd Interlaken Seminar*, p. 104.

²³ Elizabeth Gibbons, *Sanctions in Haiti: Human Rights and Democracy under Assault* (Center for Strategic and International Studies/Preager Press, 1999).

²⁴ 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 of 8 November 1993, pp. 23–27), cited by Djacoba Liva Tehindrazanarivelo, *Les sanctions des Nations Unies et leurs effets secondaires: assistance aux victimes et voies juridiques de prevention* (Paris: Presses universitaires de France, 2005): 88.

²⁵ See especially Tehindrazanarivelo, *Les sanctions des Nations Unies*.

²⁶ *Ibid.*, pp. 70–136, on this issue and in general on the regime of Article 50 and its application by the UN.

²⁷ *Ibid.*, p. 79 (author's translation).

²⁸ Article 49 states, "The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council."

²⁹ Tehindrazanarivelo, *Les sanctions des Nations Unies*, p. 84 (author's translation).

³⁰ *Ibid.* Tehindrazanarivelo observes in this regard that "the mutual assistance of Article 49 occurs in general under a form of interstate

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.

Economic sanctions are certainly a favorite 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 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.³¹ 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.³² This attitude seems reinforced when sanction policies are not revised through a comprehensive approach that considers specific international economic relations beyond limited collective security concerns.

The manner in which the economic consequences of sanctions on neighboring states are dealt with is indicative of this state of affairs. Sanctions committees cannot do more than take note of grievances and requests of neighboring states and call upon the concerned international organizations to act. For example, the negative consequences on trade and labor 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.³³ Despite the attempt to ease the situation through Security Council Resolution 986, "Oil for Food,"³⁴ which gave Iraq the opportunity to sell a specified quantity of oil in order to purchase food and medicine, the outcomes of these policies were criticized. While aid to Egypt, Jordan, and Turkey occurred on a bilateral basis with the United States at the time of the Iraqi crisis, there was still large-scale oil smuggling taking place through and to these countries.³⁵ In the case of the Yugoslav crisis, the Organization for Security and Co-operation in Europe (OSCE) and the European Union (EU) intervened to provide support to third states that were indirectly impacted by the sanctions.³⁶

Corrective measures were discussed in diplomatic

collaboration in the application of sanctions" (author's translation). 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 Co-operation in Europe (CSCE, now OSCE) had sent assistance missions for the application of sanctions in seven neighboring states of the FRY. 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.

³¹ See on this point, Strategic Planning Unit, Executive Office of the UN Secretary-General, "UN Sanctions: How Effective? How Necessary?" p. 105.

³² *Ibid.* Examples include the extension of flight restrictions against Libya, which led member states of the Organization of African Unity (OAU) to cease observing those restrictions ("Decision of the OAU Summit in Burkina Faso," *Guardian Weekly*, 12 July 1998), and the US decision to import chrome from Rhodesia in violation of sanctions imposed between 1971–1977 (Doxey, "United Nations").

³³ "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.

³⁴ 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, and Resolution 1472 of 28 March 2003. Some of them consisted of adjustments to the "Oil for Food" program. Resolution 1483 of 22 May 2003 put an end to the sanctions regime against Iraq.

³⁵ See Bennouna, "Les sanctions économiques des Nations Unies," p. 47.

³⁶ The OSCE, in coordination with the EU, established Assistance Missions for the application of sanctions. These missions were tasked with helping neighboring states of the Federal Republic of Yugoslavia to implement sanctions. See *OSCE Report of the Copenhagen Round Table on United Nations Sanctions in the Case of the Former Yugoslavia* (1996), published as UN Document S/776/1996 and available at www.globalpolicy.org. See also *Annual Report on OSCE Activities* (1996), available at www.osce.org.

and political fora, such as the Security Council, with the purpose of alleviating the effects of sanctions on civilian populations.³⁷ It was recognized that Article 103 of the Charter³⁸ could not be interpreted so as to prevent the UN 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 sanctions³⁹ – that is, sanctions restricted 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 neighboring 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.⁴⁰ When targeting individuals or firms, sanctions may also raise due process issues relating to the right to a hearing.⁴¹

Another problem arises from the difficulties related to the internal application and implementation of sanctions.⁴² 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 because 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

³⁷ 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): 246. See also 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 (La Haye/Boston/Londres: Martinus Nijhoff Publishers, 2002): 13–127; and the report of M. Bossuyt, "The adverse consequences of economic sanctions on the enjoyment of human rights."

³⁸ 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."

³⁹ See Sicilianos, "Bilan de recherches de la section de langue française," p. 106 ff.

⁴⁰ Kimberly Ann Elliott, "Analysing the Effects of Targeted Financial Sanctions," in *2nd Interlaken Seminar*, p. 189. See also the case of Afghanistan, Jaleh Dashti-Gibson and Richard W. Conroy, "Taming Terrorism: Sanctions Against Libya, Sudan, and Afghanistan," in *Sanctions Decade*, pp. 127–130.

⁴¹ Human Rights Watch (HRW), "U.N.: Sanctions Rules Must Protect Due Process" (New York: Human Rights Watch, 2002), available at www.hrw.org. Kenneth Roth, from HRW, notes that "in applying the measures foreseen by resolutions 1267, 1333, and 1390 to individual citizens, the Council should ensure that the basic due-process rights of these individuals are guaranteed, in particular the right to equality before the law, the right to be informed of the reasons for the sanction or restriction imposed, the right to prepare a defense, the right to be heard, the right to challenge evidence, and the right to obtain a review." On this question of black-listing and issues of due process, see also Gowlland-Debbas, "Sanctions Regimes under Article 41 of the UN Charter," pp. 17–18.

⁴² There are two methods by which a state can implement Security Council sanctions: the adoption of legislation providing for compliance and implementation of Security Council decisions, or case-by-case action. In the latter case, the government reacts *ad hoc* each time there is a Security Council 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," p. 1 and following. See also Gowlland-Debbas, "Implementing sanctions resolutions in domestic law," in *National Implementation of United Nations – A Comparative Study*, pp. 33–78.

complicated the task of the international banking community.⁴³

Economic considerations were incrementally integrated into 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 formulated to prevent harmful effects on third parties, be they states or non-state entities.

III. Recent Developments in Collective Security and the Role of Economic Instruments

Recent events have led to the adoption of new types of economic measures that fall under the purview of Chapter VII.⁴⁴ The following section will focus on instruments related to the reconstruction of war-torn territories, which led the Council to adopt decisions with unprecedented reach.

A. Measures of economic reconstruction

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.⁴⁵ Such programs and measures were implemented within the framework of transitional territorial administrations such as in East Timor and Kosovo, 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 fulfill the UN's mission to maintain international peace and security.

These innovations inevitably led the UN 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.⁴⁶ As such, Security Council Resolution 1244, which created an interim administration in Kosovo,⁴⁷ makes several references to the economic dimension of the mission. 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."⁴⁸ 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 displaced persons, and emphasizes in this context the importance of convening an international donors' conference...at the earliest possible date."⁴⁹

⁴³ Jeremy P. Carver, "Making Financial Sanctions Work: Preconditions for Successful Implementation of Sanctions by the Implementing State," p. 4.

⁴⁴ 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," *EJIL* 13:1 (2002): 201–222.

⁴⁵ On this question, see Yves Daudet "L'action des Nations Unies en matière d'administration territoriale," in *Cursos Euromediterráneos Banca de Derecho Internacional VI* (2002): 459–542.

⁴⁶ The UN transitional administration in East Timor is another significant case in which the UN 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 *The UN Security Council*, pp. 551–566.

⁴⁷ United Nations Interim Administration Mission in Kosovo (hereinafter, UNMIK).

⁴⁸ Resolution 1244, 10 June 1999, para. 11(g).

⁴⁹ *Ibid.*, para. 13.

As a result, UNMIK has become involved in the creation of a viable economy and the installation of an overall program 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. 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.⁵⁰ Some of these measures affect the monetary, financial and economic unity of the Federal Republic of Yugoslavia (FRY).⁵¹ 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, with considerable international support, of the Stability Pact for South Eastern Europe to promote democracy, economic prosperity, stability and regional cooperation.⁵²

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.⁵³ In terms of relevant principles and norms of 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.

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.⁵⁴ 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.?"⁵⁵

Granted, human rights law may 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

⁵⁰ 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."

⁵¹ 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, p. 47.

⁵² 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*, Petersberg Centre, 6 May 1999, statement annexed to Resolution 1244.

⁵³ See Daudet, "L'action des Nations Unies en matière d'administration territoriale," p. 527 and following.

⁵⁴ See *Report of the Secretary-General on the work of the Organization*, UN GAOR, 55th Sess., Supp. No. 1, UN Doc. A/55/1 (2000), p. 43, para. 325, available at www.un.org/documents/sg/report00/a551e.pdf.

⁵⁵ See Correll, "A Challenge to the United Nations and the World," p. 397.

some indirect protection against abuses. Another example is the principle of non-discrimination, although its understanding under human rights law⁵⁶ does not fully cover trade and investments activities.⁵⁷ In fact, 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.

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,⁵⁸ 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 issues such as openness and equity that find application through well-established principles of free competition and transparency, would help contribute to the reconstruction of stable domestic economies in the medium and long term.⁵⁹

B. 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 — although peculiar because of the military occupation regime⁶⁰ — deserves specific inquiry. The UN role in this context raises new questions with respect to the recourse to economic instruments, the international rule of law, and issues of global legitimacy and the 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 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 Provisional Authority 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

⁵⁶ 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.

⁵⁷ On issues of discrimination and the right of a state to participate in international economic relations in the process of economic liberalization, see Andrzej Calus, "The Right of a State to International Intercourse," *Polish Yearbook of International Law*, Vol. VII (1975): 209–253.

⁵⁸ This aspect is important if we consider the implication of many non-governmental actors, both public and private, among them non-governmental organizations (NGOs), working in the management of public affairs and services, See Carsten Stahn, *NGOs and International Peacekeeping – Issues, Prospects and Lessons Learned*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 61 (2001): 397.

⁵⁹ 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.

⁶⁰ The UN's involvement in the Occupied Territories through the UN Relief and Works Agency (UNRWA) can be seen — though in a very limited way — as another example of transitional administration led by the UN in a context of occupation. Discussing the categorization of powers drawn by Michael Doyle in the context of transitional administration, Simon Chesterman uses the case of UNRWA in the Occupied Territories to reflect on the powers of administrative authorities. See M. Doyle, "War-Making and Peace-Making: The United Nations' Post Cold War Record," in *Turbulent Peace: The Challenges of Managing International Conflict*, Chester A. Crocker, Fen Osler Hampson, and Pamela Aall, eds. (Washington D.C.: United States Institute of Peace Press, 2001): 529; and Simon Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (Oxford: Oxford University Press, 2004): 56.

the political and economic reconstruction of Iraq was in the hands of the Provisional Authority. As such, the international community rubber-stamped a system that had been established and managed by the United States (US) and the United Kingdom (UK). The UN 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.⁶¹

In the economic field, Resolution 1483 envisioned the role of the UN and the international community through a range of complex procedures that accorded them only the right to be informed, while the decision-making power remained in the hands of the Provisional Authority. This remained true even though the UN had taken part for the first time in the setting up of a regime in which economic considerations were predominant. With regard to the delicate question of the management and exploitation of natural resources, the Provisional Authority 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 specific 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 leftover subsidies from the "Oil for Food" program, 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 Provisional Authority. It was specified that the 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."⁶² The international community was granted a right of supervision through a monitoring and audit system. The International Advisory and Monitoring Board, created in October 2003 — involving, in particular, the UN, the World Bank, the International Monetary Fund (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.⁶³ In addition to this special regime for the export of petroleum and natural gas, the UN 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."⁶⁴

Despite the fact that Resolution 1483 set up the framework establishing the jurisdiction and powers of the Coalition Provisional Authority, it could not conceal the marginal role of the UN 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

⁶¹ See, on this point, Laurence Boisson de Chazournes, "The United Nations on Shifting Sands: About the Rebuilding of Iraq," *International Law Forum* 5:4 (2003): 254–261.

⁶² Resolution 1483 (2003), para. 14.

⁶³ *Ibid.* 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," 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. See www.iamb.info/tor.htm.

⁶⁴ Resolution 1483 (2003), para. 8(e) and (d).

exploitation was mostly limited up to now to questions related to the conflict in the Middle East.⁶⁵ Article 55 of the Hague Regulations concerning the Laws and Customs of War on Land, annexed to the 1907 Convention (IV) respecting the Laws and Customs of War on Land,⁶⁶ 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 arise from the costs of the occupation and the share from costs beyond it be determined?⁶⁷ 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 1907 Regulations, 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.

This legal regime needs to be reflected on and interpreted in light of the evolution of contemporary economic relations. The negotiation and granting of investment contracts⁶⁸ must be examined as much in terms 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?⁶⁹ If this law allows for legal modifications, can it go as far as a complete liberalization of the investment regime?⁷⁰ 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 this law goes beyond the confines of the law of occupation because these institutions are vested, through a Security Council resolution adopted under Chapter VII of the UN Charter, with a significant role in the economic reconstruction of a state, or, in other circumstances, a part of a state territory, following a conflict.⁷¹

⁶⁵ On this issue, see especially Brice M. Clagett and O. Thomas Johnson, "May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez," *AJIL* 72 (1978): 558–585, as well as Department of State legal adviser Monroe Leigh, "Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez, 1 October 1976," *International Legal Materials*, vol. XVI (1972): 733–753. Consider also the practice which arose in relation to the Japanese use of natural resources throughout southeast Asia during the Second World War. See for example, C. J. Whyatt, C. J. Mathew, and J. Whitton, "*N.V. De Bataafsche Petroleum Maatschappij & Ors. v. The War Damage Commission*," in *Malayan Law Journal* 22:155 (1956), reprinted in Marco Sassóli and Antoine A. Bouvier, *How Does Law Protect in War? Cases and Teaching Materials on International Humanitarian Law in Contemporary Practice* (Geneva: ICRC, 1999): 706–712.

⁶⁶ 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."

⁶⁷ 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," *EJIL* 14:3 (2003): 417–435.

⁶⁸ 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 translation). On this issue, and on the issue of the law framing these different contracts, see Jacquet, "Les contrats de reconstruction de l'Irak," Communication to the French Section of the International Law Association, meeting of 28 June 2004.

⁶⁹ See the reflections of Philippe Sands regarding the legal opinion of the UK Attorney General, Lord Goldsmith, on the administration of Iraq, "l'exploitation des ressources naturelles en Irak," in *L'intervention en Irak et le droit international*, K. Bannelier, Th. Christakis, O. Corten et P. Klein, dir., coll. Cahiers internationaux N° 19, (Paris: Editions A. Pedone, 2004): 319–324.

⁷⁰ See Marco Sassóli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers," *EJIL* 16:4 (2005): 679.

⁷¹ However, for some, these activities would also be governed by the international humanitarian law of occupation. In this vein, see *ibid.*, pp. 686–693.

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 now would be whether Resolution 1546 of 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).⁷²

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 and provided that the International Advisory and Monitoring Board would continue to exercise its oversight activities.⁷³ The composition of the Monitoring Board was enlarged since it must now include "a duly qualified individual designated by the Government of Iraq."⁷⁴ 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."⁷⁵

The contours of the rules the Security Council refers to in Resolutions 1483 and 1546 should also be analyzed. 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.⁷⁶ Moreover, the emphasis placed on the conditions of transparency and equity demonstrates the emerging recognition of economic principles that are relevant to peacebuilding measures decided by the Security Council. This issue should also be emphasized with respect to UN operations based on State consent that involve economic activities, as will be briefly shown below.

C. Other United Nations operations: Liberia and Sierra Leone

Although marginally involved in economic activities,

⁷² Resolution 1546, 8 June 2004, para. 24.

⁷³ See *Report of the International Advisory and Monitoring Board of the Development Fund for Iraq* (December 2004), covering the period from the establishment of the DFI on 22 May 2003 until the dissolution of the CPA on 28 June 2004, available at www.iamb.info/pdf/IAMBreport.pdf. Also see *Letter dated 6 January 2005 from the Representative of the Secretary-General on the International Advisory and Monitoring Board addressed to the Secretary-General*, 10 January 2005, S/2005/12, as well as the numerous independent auditors' reports on the monitoring task of the IAMB, available at www.iamb.info/dfiaudit.htm.

⁷⁴ Resolution 1546, para. 24.

⁷⁵ *Ibid*, preamble, para. 1.

⁷⁶ See 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.

the United Nations missions in Liberia and Sierra Leone are worth analyzing as several international institutions were involved in economic reconstruction matters. There is, however, no explicit reference to the applicable legal economic framework in the large number of resolutions that were adopted on both countries.

The United Nations missions in Liberia and Sierra Leone can be characterized as traditional peacekeeping missions: they are based on an agreement between the UN and the authorities in place and have a security-based mandate, including such measures as the monitoring of a cease-fire. The mandates of these missions nevertheless encompass reconstruction activities in post-conflict situations, thereby allowing the UN 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 mandate:⁷⁷ "(a) to receive and investigate all reports on alleged incidents of violations of the cease-fire 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 neighboring 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 United Nations peacebuilding efforts, help promote reconciliation and respect for human rights and help mobilize international support for reconstruction and recovery.⁷⁸

Although the peacebuilding 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 the hostilities. To assist the government in the implementation of the agreements, the United Nations sent a mission with a Chapter VII mandate. The UN Security Council adopted Resolution 1509 in September 2003, creating the United Nations Mission in Liberia (UNMIL). 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) program for all armed parties." Resolution 1509 also asks UNMIL "to assist the transitional government in restoring proper administration of natural resources."⁷⁹ The Security Council called on "the international community to consider how it might

⁷⁷ 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.

⁷⁸ See www.un.org/peace/africa/pdf/Liberia.pdf.

⁷⁹ Note also that the Security Council Resolution 1521 of 22 December 2003 provides that UNMIL will assist in responsible resource management.

help future economic development in Liberia aimed at achieving long-term stability in Liberia and improving the welfare of its people." The 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. However, no mention was made of the applicable law.

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. 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." This 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.

In both cases, one should exclude reference to the law of armed conflicts since the war has ended. 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.

IV. Integration of Security Council Decision-making into the International Economic Order

Each of the situations examined above raises questions as to the applicable legal framework, which has been only tangentially addressed thus far. The UN, international institutions, and other actors involved in reconstruction activities cannot act in a complete vacuum when it comes to economic intervention and assistance. There is a clear need to identify applicable rules and principles for the sake of legitimacy, stability and predictability. The multiplication of international conferences on post-conflict reconstruction (Liberia, Afghanistan, Iraq) highlights this need. 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. Measures on the maintenance of international peace and security and general international law: a necessary assessment

This section seeks to clarify the status of principles and norms of international law, setting aside their standing as treaty-based principles and norms. The purpose is not so much to analyze the actions of the Security Council solely with the aim of 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 gray areas and exceptional regimes granted by instruments of international economic law.

Another question is whether the legal framework of the Security Council's economic actions boils down 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."⁸⁰ 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.⁸¹ 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* norms, customary international law or general principles of law, however, the situation is different.⁸²

When there is no conflict between an obligation under the Charter and another conventional obligation, however, both should be applicable. This point should be kept in mind when addressing the relation-

ship between decisions taken in the context of Chapter VII, on the one hand, and WTO agreements and other economic agreements, on the other.

Principles of transparency, fair competition and non-discrimination are important norms that should find application in reconstruction activities.⁸³ Non-discrimination, one of the cornerstone principles of the WTO system,⁸⁴ 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.⁸⁵ 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 be considered to grant preference to local suppliers and contractors in order for them to help start up the local economy and contribute to post-conflict reconstruction. These adjustments would need to be defined, for example, in the context of procurement practices.⁸⁶

Fair competition⁸⁷ is gaining the status of a norm in its own right through procurement and bidding

⁸⁰ 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."

⁸¹ 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, p. 16, § 39. 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."

⁸² Recent judicial decisions have dealt with the relationships between Article 103 of the Charter and *jus cogens* norms. See Judgements of the Court of First Instance of the European Communities, 21 September 2005, *Ahmed Ali Yusuf and Al Barakaat International Foundation, v. Council of the European Union and Commission of the European Communities*, Case T-306/01, Paras. 277 ff. and 343, and *Yassin Abdullah Kadi, v. Council of the European Union and Commission of the European Communities*, Case T-315/01, Paras. 226 ff and 288; available at <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>. 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, paras. 111–122, available at www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2005/1809.html&query=razzaq&method=all.

⁸³ A practical question arises as to whether discriminatory practices are compatible with the principles of the UN Charter on international peace and security. See Calus, "The Right of a State to International Interchange," pp. 252–253.

⁸⁴ See, for example, Andreas F. Lowenfeld, *International Economic Law* (Oxford: Oxford University Press, 2003): 28.

⁸⁵ 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 ed. (Cambridge, Mass.: MIT Press, 1997): 27; and Georg Schwarzenberger, "Equality and Discrimination in International Economic Law," *Yearbook of World Affairs*, vol. 25 (1971): 163.

⁸⁶ See footnote 90.

⁸⁷ As to the concept of fair competition, see Permanent Court of International Justice, *The Oscar Chinn Case*, Judgment of December 12,

processes put in place by the various actors involved in economic intervention and assessment.⁸⁸ 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.⁸⁹ Publication requirements as well as oversight activities are facets of this emerging principle of international law.⁹⁰ 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 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. In spite of these developments, however, it is too early to conclude that transparency is regarded as an autonomous principle of international economic law.⁹¹

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 and

1934, Series A./B., pp. 84–87.

⁸⁸ See the UN practice with the *Common Guidelines for Procurement by Organizations in the UN System*, available at www.iapso.org, or the World Bank system with *Guidelines: Procurement under IBRD Loans and IDA Credits*, May 2004, available at www.worldbank.org. 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. On this point, see *Post-Conflict Reconstruction: The Role of the World Bank* (Washington, D.C.: World Bank, 1998): 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.*, p. 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.*, p. 67.

⁸⁹ 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 SC 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).

⁹⁰ 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. Included in the action plans is an international initiative for minimum standards for public contracting, a blueprint for ensuring transparent public procurement. The standards call on public contracting authorities to ensure that contracts are subject to open, competitive bidding.

⁹¹ 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," *Columbia Journal of Transnational Law* 42(2003): 77–78.

compliance by peace mission personnel.

B. Measures on the maintenance of international peace and security and WTO agreements: beyond deference?

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 World Trade Organization) permits a member state to escape its obligations arising from the GATT if it conforms to its obligations under the Charter. The article provides that:

Nothing in this Agreement shall be construed:

- a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

- i) relating to fissionable materials or the materials from which they are derived;
- ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
- iii) taken in time of war or other emergency in international relations; or

- 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.*⁹²

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 XVI bis of the General Agreement on Trade in Services which reads as follows:

Nothing in this Agreement shall be construed:

- a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
- b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:

- i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;
- ii) relating to fissionable and fusionable materials or the materials from which they are derived;
- iii) taken in time of war or other emergency in international relations; or

- 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.*

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.⁹³

Article 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

⁹² Emphasis added.

⁹³ Emphasis added. Likewise, Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights that relates to trade specifies:

"Nothing in this Agreement shall be construed:

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 United Nations body providing or adopting a decision,⁹⁴ a condition of necessity must be fulfilled, which, as a result, seems to open the door to international oversight. Each state is allowed to determine the necessity of a measure in terms of protection of its security interests, and, in the final analysis, to determine the scope of the exception. The state may possibly have to determine how well-founded its measures are, within 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 United States 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.⁹⁵

In contrast to the measures just referred to, the condition of necessity is not required for measures adopted under the UN Charter with a view to maintaining international peace and security. The only required element that seems to prevail is that of a

multilateral authorization given by a UN body.⁹⁶ 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 answered 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 to the Kimberley Process, which provides for the funding of an international diamond certification program.⁹⁷ 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.⁹⁸ 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.⁹⁹

- a) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- b) to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests;
 - i) relating to fissionable materials or the materials from which they are derived;
 - ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - iii) taken in time of war or other emergency in international relations; or
- 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 [emphasis added].

⁹⁴ For example, Article 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."

⁹⁵ See the Panel report, not adopted by the contracting parties, on the economic boycott imposed by the United States against Nicaragua, 13 October 1986, doc.L/6053, *ITR* 13:45 (1986): 1368–1369, § 5.2. On this issue, see Boisson de Chazournes, *Les contre-mesures dans les relations internationales économiques* (Paris: IUHEI/Pedone, 1992): 143–146.

⁹⁶ 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): 605.

⁹⁷ On this process, see <http://www.kimberleyprocess.com>.

⁹⁸ See also UN General Assembly Resolution 56/263, 9 April 2002, A/RES/56/263, on the role of diamonds in fueling conflict.

⁹⁹ Resolution 1173 of 12 June 1998, para. 12(b).

Subsequently, a declaration adopted on 5 November 2002 by several countries and known as the Interlaken Declaration, specified that trade between states participating in the Kimberley Process is restricted to certified non-conflict diamonds and that trade between those states and non-participatory states is prohibited.¹⁰⁰ 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."¹⁰¹

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."¹⁰² The waiver does not cover the Kimberley Process certification scheme insofar as it concerns trade in conflict diamonds 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,¹⁰³ 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 effect on third states of sanctions adopted under Chapter VII of the UN Charter. 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 on Article XXI, in which it asked that the interests of third states that could be injured by such actions be taken into account.¹⁰⁴ 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 one formulated in more restrictive terms than the above-mentioned security exception provisions. It specifies the types of

¹⁰⁰ 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.

¹⁰¹ Resolution 1459 of 28 January 2003, para. 1.

¹⁰² 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 2003, Item VI.

¹⁰³ More generally, see Joost Pauwelyn, "WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for 'Conflict Diamonds'," *Michigan Journal of International Law* 24 (summer 2003): 1177–1207.

¹⁰⁴ GATT Council, *Decision Concerning Article XXI of the GATT*, 30 November 1982, *I.B.D.D., Supplément* 29: 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." See *Analytical Index, Guide to GATT Law and Practice*, p. 605.

measures that can be taken and does not refer to the Charter of the United Nations.¹⁰⁵ The provision was recently invoked in an US decision of December 2003 that limited competition for economic reconstruction contracts in Iraq to certain states only. 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."¹⁰⁶ The issue of the compatibility of such a measure in light of WTO rules was raised.¹⁰⁷ Can the exception of Art. XXIII 1) of the Agreement on Government Procurement be invoked?¹⁰⁸ 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 Provisional Authority, 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?

The above developments demonstrate the need to reconsider the rule of deference that exists under the GATT/WTO system towards the collective security system of the United Nations Charter in case of conflict between legal obligations. Principles of international economic law should apply to collective

security measures dealing with economic reconstruction. Respect for these principles would contribute to peaceful stabilization, while basing the economic development of these societies on principles of sovereign equality, non-discrimination and transparency. Indeed, the notification requirement in international trade is an important pathway in favor of transparency.¹⁰⁹

The admission of Iraq's application for accession to the WTO by the General Council on 13 December 2004¹¹⁰ (and of Afghanistan in April 2003) may be an encouraging development in this direction. This will require current rules' adjustment 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.

V. Conclusions and Recommendations

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

¹⁰⁵ The Agreement on Government Procurement specifies in Article 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 labor."

¹⁰⁶ The Determination and Findings, 5 December 2003, available at http://www.washingtonpost.com/wp-srv/world/documents/iraqcontracts_dod20031205.pdf. Note that the United States eventually extended the call for tender to all states without the restrictions.

¹⁰⁷ On this issue, see Geert Van Calster, "WTO Law and Contracts for Rebuilding Iraq," *International Law Forum* 5:4 (2003): 270–275.

¹⁰⁸ In the case, it is considered that the US was bound by the Agreement on Government Procurement: see Van Calster, "WTO Law and Contracts for Rebuilding Iraq," p. 272 and following. The issues of the legal profile of the Provisional Authority, 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.

¹⁰⁹ See, for example, Art. X of the General Agreement on Tariffs and Trade.

¹¹⁰ See *Le Temps*, 13 December 2004.

rigorous legal analysis, under international economic law, of the impact of sanctions — both in directly contributing to the degradation of the economic systems of the targeted state and of third states, and in the long-term.

The emerging involvement of the Security Council in economic reconstruction has also highlighted the necessity to include references to principles of international economic law in analyzing these new types of measures and in assessing their validity. 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.

The law relating to economic activities in the context of military occupation, as defined in international humanitarian law, is underdeveloped. Whether the 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.¹¹¹ While non-discrimination has not been specifically mentioned in Security Council decisions, there have already been references to equity and transparency, thus contributing to the strengthening of these principles. It is hoped that the Peacebuilding Commission, an intergovernmental advisory body which should gather together relevant actors to advise on and propose comprehensive strategies for peacebuilding and post-conflict recovery, will address these questions.¹¹² The elaboration of specific guidelines for peacebuilding 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 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 enable principles and rules of international economic law to apply 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.

Greater consideration for these principles would entail significant changes in the Security Council's operations. The Council has so far shown great reluctance to adopt regulatory frameworks. Nonetheless, 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.

¹¹¹ 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 § 26 of the Declaration, WT/MIN(01)/DEC/1, available at www.wto.org.

¹¹² See, concerning the Peacebuilding Commission, *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, 21 March 2005, A/59/2005, §§ 114–119.

This would also respond to the mounting demands for accountability of all actors involved in peacebuilding operations, be they states, non-state entities or international organizations. Principles and rules constitute important parameters of accountability because they are defined through law-based processes and thus are 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.

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