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## Collaborating with the United Nations: Does Flexibility Imply Informality?

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### Abstract

Collecting information has always been both a necessity and a challenge for the United Nations. The timely and accurate knowledge of relevant facts is undoubtedly a necessary prerequisite when exercising its functions. However, given the lack of autonomous sources of information, the United Nations is more often than not reliant upon States to acquire information before they take any action. Recent practice in this respect is marked by informality and opacity. These traits come into sharp focus particularly in the context of investigations led by United Nations. What this article will attempt to show is that flexibility, or at least good-functioning, does not necessarily imply informality. By taking similar examples of exchanges of information at the international, European and domestic levels, it will be argued that a formal legal basis stressing a limited number of conditions for the exchange of information has already been established and thus may be possible in the context of the United Nations.

### Keywords

international organizations, investigations, exchange of information, international institutional law

### 1. Introduction

Collecting information has always been both a necessity and a challenge for the United Nations. The timely and accurate knowledge of relevant facts is undoubtedly a prerequisite to exercise its functions. However, given the lack of autonomous sources of information, the UN is more often than not reliant upon States to acquire information before they take any action. Recent practice in this respect is marked by informality and opacity. These traits are brought into sharp focus particularly in the context of investigations led

by United Nations. Once the United Nations is mandated to investigate a given event or situation, the first and necessary step is indeed to collaborate with those who have the relevant information, which is generally States.

Frequently, the United Nations actually requests information from the administrations of States. However, as these exchanges of information have generally taken the form of informal channels, the procedure is rarely transparent. In isolated cases, the collaborating State makes its collaboration public, but these are the exception rather than the rule. This occurred, for example, when Switzerland did so in the context of inquiries on the Oil-for-Food Programme. In order to investigate allegations of fraud and corruption on the part of United Nations officials, personnel, and agents, as well as contractors in the United Nations Oil-for-Food Programme, former UN Secretary-General Kofi Annan appointed, in April 2004, an Independent Inquiry Committee (hereinafter the Volcker Commission) specially devoted to this matter.<sup>1</sup> Following this, the United Nations Security Council unanimously adopted Resolution 1538 (2004), which endorsed the inquiry and called for full cooperation in the investigation by all United Nations officials and personnel, the Coalition Provisional Authority, Iraq, and all other Member States, including their national regulatory authorities. Immediately as its mission began, the Volcker Commission requested assistance from a number of States, among them Switzerland and its State Secretariat for Economic Affairs (SECO), and the Swiss Federal Council authorised SECO to cooperate with the Volcker Commission on 22 December 2004.<sup>2</sup> Subsequently, approximately 170 federal files including numerous banking documents were communicated by the Swiss Federal Banking Commission (CFB) to the Volcker Commission, and interviews with 30 different representatives of banks and merchants in oil and other enterprises took place in Switzerland under the supervision of SECO.<sup>3</sup>

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<sup>1</sup>) The Committee was chaired by Paul A. Volcker, former Chairman of the Board of Governors of the United States Federal Reserve. The other members were Richard J. Goldstone, Justice of the Constitutional Court of South Africa from 1994 to 2003 and Visiting Professor of Law at Harvard Law School, and Mark Pieth, Professor of Criminal Law and Criminology at the University of Basel. See <[www.iic-offp.org/members.htm](http://www.iic-offp.org/members.htm)>.

<sup>2</sup>) Three requests for assistance were made by the IIC. The first was made on 21 October 2004, while the second and third were made on 22 November 2004. See <[www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=fr&msg-id=9500](http://www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=fr&msg-id=9500)>.

<sup>3</sup>) See <[www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=fr&msg-id=9635](http://www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=fr&msg-id=9635)>.

This case raises many questions. What is the legal basis for this cooperation? Is there an obligation for the State to furnish the requested documents? What are the consequences of a State refusing such a request? Under what conditions does the exchange of information have to be made? What happens when the United Nations itself is requested to give information they obtained from one State to another State? It is noteworthy that in the same context of the investigations on the Oil-for-Food Programme, at least six Congressional panels, the Treasury Department, the United States Attorney for the Southern District of New York, and the Manhattan District Attorney, were also investigating allegations of corruption and mismanagement.<sup>4</sup> During a meeting organized in Washington on 13 July 2004, officials and diplomats representing the United States stated that Paul A. Volcker had rejected requests from members of Congress for access to review documents and to interview United Nations officials being scrutinized by the Volker Commission.<sup>5</sup>

Although this practice of cooperation is a recurring reality for the United Nations, and can be a crucial means to fulfil its functions, its legal framework remains unclear and controversial. The exchange of information in this way relies more on political arrangements between the United Nations and the States concerned than on legal obligation. For practical reasons, the determination of applicable rules may not be a priority for the United Nations and States, as long as no particular problems arise, and as long as exchanges of information can take place through informal and political processes. However, it is likewise true that the lack of a clear legal framework could hamper the requesting authority in fulfilling its objectives when the institution giving the information is reluctant to furnish confidential or sensitive documents in the absence of legal guarantees.

Regardless, acting outside of any formal legal framework does not bode well for the United Nations as it strives for transparency and legitimacy.<sup>6</sup> One can argue that the type of relationship described above necessarily implies a degree of flexibility, and thus of informality. What this article will attempt to show is that flexibility, or at least good-functioning, does

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<sup>4</sup>) See Judith Miller, "U.N. and Congress in Dispute over Iraq Oil-for-Food Inquiries", *The New York Times*, 28 July 2004.

<sup>5</sup>) *Ibid.*

<sup>6</sup>) See, e.g., Laurence Boisson de Chazournes, "Mainstreaming International Law within the United Nations", 1 *International Organizations Law Review* (2007), pp.165–168.

not necessarily imply informality. Taking similar examples of exchanges of information at the international, European, and domestic levels, it will be argued that a formal legal basis stressing a limited number of conditions for the exchange of information has already been established and thus may be possible in the context of the United Nations.

The structure of this article is as follows. First, it will define in more detail the collaboration between the United Nations and States (Section 2). Secondly, the question of the legal basis of the exchange of information between the United Nations and States will be addressed (3). Next, the exchange of information at the international level also takes place between entities other than international organizations and States. The study of these relationships may indicate possible ways to strengthen the legal framework for the aforementioned exchanges (4). Furthermore, the European (5), and the domestic levels (6), may also provide enlightening insights into the matter. Lastly, we will suggest some conditions gathered that, in the author's view, should be applied to the exchange of information between international organizations and States (7).

## **2. Terminological Remarks**

The collaboration between States and the United Nations can take many forms. The particular form that will be studied in this paper is the exchange of information. The latter occurs when one of the United Nations bodies requests information from a State in order to fulfil one of the objectives of the requesting authority. The term information is broadly understood here. It can cover, for example, the exchange of banking or fiscal documents, access to databases, or interviewing witnesses. As already mentioned, United Nations activities that give rise to this type of collaboration usually occurs during the course of investigations.

The notion of an 'investigation' has been defined as covering "any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security".<sup>7</sup> The sole provision of the UN Charter that

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<sup>7)</sup> General Assembly, *Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security*, A/RES/46/59, 9 December 1991, para. 2, <[www.un.org/documents/ga/res/46/a46r059.htm](http://www.un.org/documents/ga/res/46/a46r059.htm)>.

assigns investigatory powers to a United Nations organ is Article 34. This empowers the Security Council to investigate “any dispute, or any situation which might lead to international friction or give rise to dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security”. However, the Security Council is not the only organ of the United Nations that is authorized to make investigations. According to the implied powers theory, other UN organs, such as the General Assembly and the Secretary-General, can conduct investigations.<sup>8</sup> Similarly, the Security Council is empowered to acquire information by other means of investigations and for purposes other than those mentioned in Article 34.<sup>9</sup>

In practice, only two decisions of the Security Council in which it ordered an investigation referring expressly to Article 34 have been taken.<sup>10</sup> More frequently, the Security Council has decided to investigate outside of the framework of Article 34, using its implied powers as a mandate to do so.<sup>11</sup> Recent practice has confirmed the tendency of the Security Council to collect information by more informal means to avoid the restrictive scope of Article 34. Using Article 28 of its Provisional Rules of Procedure, the Security Council has established specific bodies to conduct investigations.<sup>12</sup> These bodies have had different names over time, such as “sub-committee”,<sup>13</sup> “special mission”,<sup>14</sup> or “commission of investigation”.<sup>15</sup> In these cases, it was foreseen that the investigatory organs should benefit from the full cooperation of States. In the *Corfu Channel* case, for example, the Security Council “empowered the sub-committee to request further information as it deem[ed] necessary from the parties to the dispute, and the representatives

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<sup>8</sup>) Theodor Schweisfurth, “Article 34”, in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary* (Oxford University Press, New York, 1995), p. 515.

<sup>9</sup>) *Ibid.*

<sup>10</sup>) In 1946 and 1948 in the *Greek Frontier Incidents Questions* case and the *India-Pakistan Question* case respectively.

<sup>11</sup>) In the *Corfu Channel Incidents* case in 1947, for example.

<sup>12</sup>) “The Security Council may appoint a commission or committee or a rapporteur for a specified question.”

<sup>13</sup>) Security Council Resolution 19, S/RES/19, 13 February 1947.

<sup>14</sup>) Security Council Resolution 289, S/RES/289, 23 November 1970.

<sup>15</sup>) Security Council Resolution 571, S/RES/571, 20 September 1985.

of the United Kingdom and Albania [were] requested to give every assistance to the sub-committee in its work”.<sup>16</sup> In situations requiring urgent action, the Security Council has also requested the Secretary General to appoint a mission of investigation in accordance with the powers of that office.<sup>17</sup> This shows a clear tendency on the part of the Security Council to delegate its investigative powers.<sup>18</sup>

These practices have prompted the need to redefine the notion of investigation in the context of the United Nations. Regarding the definition adopted in Article 34, the purpose of the investigation – the maintenance of international peace and security – seems to be the primary criterion. This real purpose of Article 34 was presumably one of the reasons that the Security Council has avoided reference to it as a mandate for investigations in recent times.<sup>19</sup> Instead of a strict focus on the originally intended *end* of the provision, however, it may be more appropriate to shift attention to the *means* of investigation used by the United Nations (that is, the actual exchange of information). Investigation in the United Nations today implies the use by the Security Council, or another organ of the United Nations, of a fact-finding procedure – through an exchange of information – mandated by their implied powers of investigation. Consequently, it is this aspect of procedure that will form the centrepiece of the present study.

### **3. Legal Basis for the Exchange of Information between the UN and States**

Even if the implied powers theory can justify the right of UN organs to investigate, it nevertheless leaves another important question unanswered: do States have an obligation to respond positively to the request for information? In this section, the potential legal sources of this obligation will be studied methodically, starting with a State’s membership in the United Nations (Section 3.1), followed by Chapter VII of the UN Charter (3.2), and then other relevant dispositions of the UN Charter, such as Article 25 (3.3), will be considered. Lastly, this study will analyze the questions raised

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<sup>16)</sup> *Supra* note 13.

<sup>17)</sup> Security Council Resolution 780, S/RES/780, 6 October 1992 or, more recently, Security Council Resolution 1564, S/RES/1564, 18 September 2004.

<sup>18)</sup> Sofène Bouiffror, “Article 34”, in Jean-Pierre Cot *et al.* (eds.), *La Charte des Nations Unies: Commentaire article par article* (Economica, Paris, 3rd edition, 2005), p. 1070.

<sup>19)</sup> Schweisfurth, *supra* note 8, p. 518.

by the delegation of investigation powers from the Security Council to the Secretary-General (3.4).

### 3.1. *An Obligation to Cooperate Stemming From Membership?*

The first argument for the existence of an obligation to cooperate on the international plane may originate simply by virtue of being a member of an organization. In this respect, both the State and the organization will inherently have an obligation to cooperate with one another given that each has freely entered into a reciprocal relationship of sorts. This argument was explicitly used by the International Court of Justice in its Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*. According to the Court, “the very fact of Egypt’s membership of the Organization entails certain mutual obligations of cooperation and good faith incumbent upon Egypt and upon the Organization”.<sup>20</sup> The Court clearly states here that a duty to cooperate applies not only between the international organization and the host State, but also in respect of all Member States.<sup>21</sup>

An obligation to cooperate may be strengthened by the existence of good faith in a given relationship. Good faith can operate not only to ensure that the activities of international organizations are conducted effectively, but it can also help to prompt cooperation by ensuring that all means available to cooperate are used.<sup>22</sup> Logically, it may be said that a member of a given international organization who voluntarily refuses to cooperate where it has

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<sup>20)</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 20 December 1980, International Court of Justice, Advisory Opinion, ICJ Reports 1980, p.93, para. 43. As Roberto Ago pointed out in his separate opinion: “Paragraph 43 of the Advisory Opinion very properly emphasizes that the legal relations between an international organization and the host State constitute a special régime. The paragraphs which follow it treat at length of the obligations to consult, negotiate and cooperate which this special régime implies, defining them in correct though cautious terms. At the same time they draw attention to the solid foundation for these obligations which already exists in the principles of general international law concerning the subject of international organizations, as well as what may be called the common principles emerging from the whole body of conventional instruments concluded between States and international organizations”. Separate Opinion of Judge Ago, ICJ Reports 1980, p. 158.

<sup>21)</sup> In this respect, see Charles A. Wintermeyer, “ICJ Advisory Opinion: 1951 WHO-Egypt Treaty”, 10 *Denver Journal of International Law & Policy* (1980–1981), p. 565.

<sup>22)</sup> See *infra*, Section 7.3.



the ability to do so, is not acting in good faith. This link between the obligation to cooperate and an obligation of good faith was also highlighted by the Commission on Darfur when it considered that “both the Government of Sudan and the rebels (were) under a *bona fide* obligation to cooperate with it in the discharge of its various functions”.<sup>23</sup>

Is this sufficient to conclude with certainty that such an obligation exists? At this juncture, it is necessary to distinguish the two sides of the aforementioned obligation, which are an obligation to cooperate and an obligation to do so in good faith. These obligations are manifestly interdependent. However, the existence of an independent obligation to act in good faith in this context is open to doubt. Indeed, there is probably only an obligation to abide by already existing substantial rules in good faith.<sup>24</sup> This interpretation has been adopted by the Court itself eight years after the *WHO-Egypt* Advisory Opinion.<sup>25</sup> The weakness of any obligation to act in good faith may be thus derived from the uncertainties concerning the normative status of the obligation to cooperate. This is fundamentally problematic for the abovementioned argument.

All considered, the existence of an obligation to cooperate which stems from membership in an international organization is doubtful, or at least, controversial. In any case, if we admit that a customary rule is emerging, its operational features remain unclear and many questions are left unanswered. What is the concrete meaning of this obligation? Does the obligation apply to *ultra vires* activities of international organizations? Furthermore, the existence of such an obligation must be analyzed by taking into account the specific character of membership. While sovereign States submit themselves voluntarily to international organizations by becoming members, they nevertheless retain control over both themselves and their institutions.<sup>26</sup>

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<sup>23</sup>) *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, S/2005/60*, p. 14, para. 27, <[www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf)>.

<sup>24</sup>) Jean Combacau, “La question du transfert du bureau régional de l’OMS devant la Cour internationale de Justice (Avis consultatif du 20 décembre 1980)”, *Annuaire français de droit international* (1980), pp. 243–244.

<sup>25</sup>) “The principle of good faith is ... not in itself a source of obligation where none would otherwise exist.” *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 20 December 1988, International Court of Justice, Jurisdiction and Admissibility, ICJ Reports 1988, p. 105, para. 94.

<sup>26</sup>) Daniel Vignes, “La participation aux organisations internationales”, in René-Jean Dupuy

Where the UN faces a situation in which a State refuses to cooperate, it may have to resort to a more coercive measure to extract information. One option is for it to premise its request on a less controversial and more solid foundation, such as its mandatory Chapter VII powers.

### 3.2. *An Obligation to Cooperate under Chapter VII of the UN Charter?*

Regarding fact-finding committees, cooperation has been premised on Chapter VII in two occasions: when States were requested to cooperate with the Commission on Darfur, and also when the commission was established to investigate the assassination of former Lebanese Prime Minister Rafik Hariri. The legal basis for the Commission on Darfur was Article 41 of the UN Charter, used here for the first time to authorize the creation of a fact-finding committee.<sup>27</sup> In its Report, released on 25 January 2005, the Commission noted that both the Government of Sudan and the rebel groups had willingly accepted to cooperate with the Commission, notably by providing it with free access to all sources of information, including documentary material and physical evidence.<sup>28</sup>

Originally, the Commission on the assassination of former Lebanese Prime Minister Rafik Hariri was not based on Chapter VII of the UN Charter.<sup>29</sup> On 13 June 2005, a Memorandum of Understanding, which

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(ed.), *Manuel sur les organisations internationales* (Martinus Nijhoff Publishers, Dordrecht, 1998), p. 61.

<sup>27</sup>) Security Council Resolution 1564 (2004). The SC, “Determining that the situation in Sudan constitutes a threat to international peace and security and to stability in the region, Acting under Chapter VII of the United Nations Charter”, (para. 12) “Requests that the Secretary-General rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable, calls on all parties to cooperate fully with such a commission, and further requests the Secretary-General, in conjunction with the Office of the High Commissioner for Human Rights, to take appropriate steps to increase the number of human rights monitors deployed to Darfur”.

<sup>28</sup>) *Supra* note 23.

<sup>29</sup>) Security Council Resolution 1595, S/RES/1595, 7 April 2005, para 3. The SC “decides that, to ensure the Commission’s effectiveness in the discharge of its duties, the Commission shall ... Enjoy the full cooperation of the Lebanese authorities, including full access to all documentary, testimonial and physical information and evidence in their possession that the Commission deems relevant to the inquiry [and] Have the authority to collect any additional

defined the modalities of the cooperation, was signed by the Commission and the Lebanese Government respectively.<sup>30</sup> In this agreement it was decided that the Lebanese Government,

shall guarantee that the Commission is free from interference in the conduct of its investigation, and is provided with all necessary assistance to fulfil its mandate, including ... [p]rovision of all documentary, testimonial and physical information and evidence in possession of the Lebanese authorities on the case as soon as possible, but no later than three days after the signature of this MOU. Any additional documentary, testimonial or physical information and evidence that may be collected by the Lebanese authorities after the signature of this MOU, shall also be provided to the Commission as soon as possible, but no later than three days from the date they were collected.<sup>31</sup>

In the first report released on 20 October 2005, the Commission emphasised the lack of cooperation of the Government of the Syrian Arab Republic, which had impeded the investigation.<sup>32</sup> Following this report, the Security Council adopted Resolution 1636, which was based on its Chapter VII powers, resolving that all States shall cooperate with the Commission.<sup>33</sup>

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information and evidence, both documentary and physical, pertaining to this terrorist act, as well as to interview all officials and other persons in Lebanon, that the Commission deems relevant to the inquiry". However, in the meantime, the SC at para. 7 "Calls on all States and all parties to cooperate fully with the Commission, and in particular to provide it with any relevant information they may possess pertaining to the above-mentioned terrorist act".

<sup>30)</sup> See <[www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Lebanon%20S2005393.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Lebanon%20S2005393.pdf)>.

<sup>31)</sup> *Ibid.*

<sup>32)</sup> *First Report of the International Independent Investigation Commission established pursuant to Security Council Resolution 1595, S/2005/662, 20 October 2005, p. 19, <[www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Lebanon%20S2005662.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Lebanon%20S2005662.pdf)>.*

<sup>33)</sup> Security Council Resolution 1636, S/RES/1636. The SC, "Acting under Chapter VII of the Charter of the United Nations", (para. 3) "Decides as a step to assist in the investigation of this crime and without prejudice to the ultimate judicial determination of the guilt or innocence of any individual; (a) that all individuals designated by the Commission or the Government of Lebanon as suspected of involvement in the planning, sponsoring, organizing or perpetrating of this terrorist act, upon notification of such designation to and agreement of the Committee established in subparagraph (b) below, shall be subject to the following measures: ... All States shall: cooperate fully in accordance with applicable law with any international investigations related to the assets or financial transactions of such individuals, entities or persons acting on their behalf, including through sharing of financial information".

This Resolution was especially adopted to enhance the collaboration of Syria with the inquiry, which was accused of not cooperating or even trying to undermine the work of the Commission. It was noted in the second report, released after Resolution 1636, that the Commission's efforts to gain the cooperation of the Syrian authorities "have recently begun to bear fruit after delays which had an impact on the Commission's ability to effectively carry out its work".<sup>34</sup>

In short, it seems that the use of Chapter VII powers by the Security Council is a means to induce the cooperation of States. As the General Assembly Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security provides: "States *should cooperate* with United Nations fact-finding missions and give them, within the limits of their capabilities, the full and prompt assistance necessary for the exercise of their functions and the fulfilment of their mandate".<sup>35</sup> It must be noted here that the use of Chapter VII of the Charter should not be interpreted as requiring States to cooperate, but only as a way of enhancing their cooperation. In the end, the final decision to cooperate or not will be made by States. In the absence of their cooperation, committees will not risk a direct confrontation with the uncooperative State. They will simply refer the matter to the Security Council when a State does not agree to furnish documents. Where the State still fails to take heed, their refusal to act in accordance with its obligations will be noted.<sup>36</sup>

Finally, it appears that Chapter VII, albeit useful to induce States to cooperate, cannot be the panacea in every case. It can serve as a legal basis, but only in certain limited cases. In this way, investigations are often required for situations other than those that qualify as a threat to the peace, breaches

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<sup>34</sup>) Letter dated 12 December 2005 from the Secretary-General addressed to the President of the Security Council, S/2005/775, 12 December 2005, p. 1. See <[www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Lebanon%20S2005775.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Lebanon%20S2005775.pdf)>.

<sup>35</sup>) General Assembly, *Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security*, *supra* note 7, para. 22.

<sup>36</sup>) Before the Darfur and Lebanon Committees, the Security Council has called States to cooperate with Committees, but it was not based on Chapter VII at that time. For example, in its Resolution 1053 (1996), S/RES/1053, the Security Council (para. 8) "expresses concern at the lack of response by certain States to the Commission's inquiries, and calls upon those States that have not yet done so to cooperate fully with the Commission in its inquiries and to investigate fully reports of their officials and nationals suspected of violating the relevant Council resolutions".

of the peace, or as an act of aggression, which is the criterion for decisions taken under Chapter VII. This would be the case, for example, in respect of investigations concerning frauds committed by United Nations or State agents.

### 3.3. *An Obligation to Cooperate under Other Provisions of the UN Charter?*

Other provisions of the UN Charter may be a source of an obligation for States to assist international organizations in their investigations. A cursory examination of Article 2(5) suggests that this provision contains a general obligation for Member States to give assistance to the organization.<sup>37</sup> However, as the obligation under this provision applies to “actions” and the last part of the sentence in the provision refers to “enforcement action”, it is clear that “only enforcement measures taken by the Security Council according to Chapter VII can be envisaged”.<sup>38</sup>

Another argument may be that States have an obligation to assist the United Nations each time the Security Council makes a request to that effect, by virtue of Article 25 of the UN Charter.<sup>39</sup> According to this reasoning, Article 25 could be a means to oblige States to give assistance when the Security Council so decides, even if its decision in this respect is not based on Chapter VII. This obligation to “accept and carry out” the decision to investigate could also be interpreted as giving a binding effect to the request based on Article 34 of the UN Charter.<sup>40</sup> According to the International Court of Justice in its Advisory Opinion on Namibia, before determining if a resolution of the Security Council has binding force, “the language used by the Security Council should be carefully analysed”.<sup>41</sup> The importance of

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<sup>37</sup>) Article 2(5) of the UN Charter: “All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action”.

<sup>38</sup>) Jochen A. Frowein, “Article 2(5)”, in Simma, *The Charter of the United Nations: A Commentary*, *supra* note 8, pp. 129–131.

<sup>39</sup>) Article 25 of the UN Charter: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”.

<sup>40</sup>) Schweisfurth, *supra* note 8, p. 525.

<sup>41</sup>) *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, 21 June 1971, International Court of Justice, Advisory Opinion, ICJ Reports 1971, p. 53, para. 114.

the language used by the Security Council may be seen, for example, when it ‘decides’ to request the implementation of economic sanctions, rather than simply to emphasise the political will of the Council. This tends to occur where it is attempting to strengthen the legal obligation at stake.<sup>42</sup> In contrast, the Security Council may hesitate to phrase an obligation in terms of a ‘decision’, when it feels that this obligation will not be implemented immediately or when it believes it is more important to highlight its political will rather than the legal obligation to the addressee of the resolution.<sup>43</sup> In practice, it appears that the Security Council tends rather to ‘call upon’ States to cooperate fully than to ‘decide’ that States must cooperate.

Chapter VII and Article 25 of the UN Charter can sometimes provide a legal basis at the international level, but not one that is permanent and that will work in every case. An obligation probably to cooperate when the Security Council decides that a State has to cooperate, or when its request is based on Chapter VII. However, this becomes problematic in the case of investigations led by other organs of the United Nations. These investigations have become more relevant given the recent tendency of the Security Council to delegate investigation powers to the Secretary-General.

#### 3.4. *Questions Raised by the Appointment of Inquiry Committees by the Secretary-General in the Absence of Further Endorsement by the Security Council*

Three recent appointments of Inquiry Committees by the UN Secretary-General have raised interesting questions concerning the obligation to cooperate with the United Nations. These are, namely: the United Nations Headquarters Board of Inquiry into certain incidents in the Gaza Strip between 27 December 2008 and 19 January 2009, established on February 2009;<sup>44</sup> the Commission on the assassination of the former Prime Minister of Pakistan Mohtarma Benazir Bhutto on July 2009;<sup>45</sup> and the Guinea

<sup>42</sup>) Eric Suy and Nicolas Angelet, “Article 25”, in Cot *et al.*, *supra* note 19, p. 915.

<sup>43</sup>) *Ibid.*

<sup>44</sup>) *Letter dated 4 May 2009 from the Secretary-General addressed to the President of the Security Council*, A/63/855-S/2009/250, 15 May 2009, see <[www.daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/338/94/PDF/N0933894.pdf?OpenElement](http://www.daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/338/94/PDF/N0933894.pdf?OpenElement)>.

<sup>45</sup>) See the statement of the Spokesperson for UN Secretary-General Ban Ki-Moon issued on 19 June 2009, “Three-Person Commission of Inquiry into Assassination of Former Pakistani

Commission of Inquiry to Investigate Events of 28 September on October 2009.<sup>46</sup> These three commissions were presumably created on the basis of Article 7(2) of the UN Charter, and therefore have the status of subsidiary organs of the Secretariat. This procedure is not new. It had previously been used to establish, for example, the Volcker Commission in April 2004. However, the inquiry in the case of the Volcker Commission was subsequently endorsed by the Security Council, partly resolving questions regarding the force of the obligation to cooperate incumbent upon States. The inquiries on incidents in the Gaza Strip between 27 December 2008 and 19 January 2009, on the assassination of Benazir Bhutto and on the events of 28 September in Guinea are not, at least at the present time, endorsed by the Security Council. It would be controversial, therefore, to identify an obligation for a State to furnish information in these cases. Given that the United Nations Headquarters Board of Inquiry was established in a specific context and for a different purpose, that is to investigate the damages suffered by United Nations personnel and buildings, it will be examined separately from the two other examples to be presently considered.

The Commission on the assassination of Benazir Bhutto and the Commission of Inquiry for Guinea were established following requests addressed respectively by Pakistan and Guinea to the UN Secretary-General. According to the letter from the Secretary-General to the President of the Security Council concerning the Commission on the assassination of Benazir Bhutto,

[t]he international commission would enjoy the full cooperation of the Pakistani authorities and be accorded the privileges, immunities and facilities necessary for the independent conduct of the inquiry including, in particular, unhindered access to all relevant sources of information. The International Commission may request cooperation of a third State in the collection of materials or information relevant to the case. I count on the full cooperation of Member States with such request.<sup>47</sup>

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Prime Minister Benazir Bhutto to Begin Six-Month Mandate 1 July 2009”, <[www.un.org/News/Press/docs/2009/sgsm12328.doc.htm](http://www.un.org/News/Press/docs/2009/sgsm12328.doc.htm)>.

<sup>46</sup> See the statement of the Spokesperson for UN Secretary-General Ban Ki-Moon issued on 30 October 2009, “Secretary-General Announces Members of Guinea Commission of Inquiry to Investigate Events of 28 September”, <[www.un.org/News/Press/docs/2009/sgsm12581.doc.htm](http://www.un.org/News/Press/docs/2009/sgsm12581.doc.htm)>.

<sup>47</sup> *Letter dated 2 February 2009 from the Secretary-General to the President of the Security Council*, S/2009/67, 3 February 2009, <[www.daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/226/66/PDF/N0922666.pdf?OpenElement](http://www.daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/226/66/PDF/N0922666.pdf?OpenElement)>.

The terms of reference of the Commission were annexed to the letter. Its Article 2 states that “the Commission shall enjoy the full cooperation of the Government of Pakistan”, whereas Article 3 foresees requests for cooperation by third States.<sup>48</sup> The terms of reference of the Commission of Inquiry for Guinea contain *mutatis mutandis* similar provisions, respectively in Articles 3 and 4.<sup>49</sup> The ‘softness’ of these recent practices may be explained by the fact that the establishment of each commission was expressly requested by the State concerned. The government of Guinea has, moreover, indicated in writing its willingness to cooperate with and facilitate the work of the Commission.<sup>50</sup>

The Commission on the assassination of Benazir Bhutto has recently encountered the limits of its cooperation with Pakistani authorities as its written request to interrogate military officials, including the Chief of Army Staff Ashaq Parvez Kayani, former ISI Chief Lt. Gen. Nadeem Taj and former Military Intelligence Chief Lt. Gen. Naddem Ejaz Mian, was rejected by the Government of Pakistan.<sup>51</sup> Following the extension of its mandate by three more months, the Commission released its report on 15 April 2010.<sup>52</sup> This report revealed not only a lack of cooperation but also “efforts of certain high-ranking government officials to obstruct access to Pakistani military and intelligence sources”.<sup>53</sup>

The Report of the Commission of Inquiry for Guinea was released on 18 December 2009.<sup>54</sup> It has been noted that

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<sup>48</sup>) *Ibid.*

<sup>49</sup>) *Letter dated 28 October 2009 from the Secretary-General addressed to the President of the Security Council*, S/2009/556, 28 October 2009, <[www.daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/581/27/PDF/N0958127.pdf?OpenElement](http://www.daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/581/27/PDF/N0958127.pdf?OpenElement)>.

<sup>50</sup>) *Ibid.*

<sup>51</sup>) See “Limited Mandate Hinders UN Probe into Bhutto’s Killing”, 31 December 2009, <[www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/18-limited-mandate-hinders-un-probe-into-bhuttos-killing-am-03](http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/18-limited-mandate-hinders-un-probe-into-bhuttos-killing-am-03)>.

<sup>52</sup>) See “La commission d’enquête sur l’assassinat de Bhutto a achevé sa dernière visite”, 26 February 2010, <[www.un.org/apps/newsFr/storyF.asp?NewsID=21328&Cr=bhutto&Cr1=>](http://www.un.org/apps/newsFr/storyF.asp?NewsID=21328&Cr=bhutto&Cr1=>).

<sup>53</sup>) *Report of the United Nations Commission of Inquiry into the Facts and Circumstances of the Assassination of Former Pakistani Prime Minister Mohtarma Benazir Bhutto*, 15 April 2010, p. 4, para. 6, <[www.un.org/News/dh/infocus/Pakistan/UN\\_Bhutto\\_Report\\_15April2010.pdf](http://www.un.org/News/dh/infocus/Pakistan/UN_Bhutto_Report_15April2010.pdf)>.

<sup>54</sup>) *Letter dated 18 December 2009 addressed to the President of the Security Council by the Secretary-General*, S/2009/693, 18 December 2009, <[www.daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/662/59/PDF/N0966259.pdf?OpenElement](http://www.daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/662/59/PDF/N0966259.pdf?OpenElement)>.



all of the Commission's meetings with the authorities proceeded smoothly and with full cooperation of the authorities, except for a number of requests that were denied or ignored. Lieutenant Toumba, for example, denied the Commission's request to meet with individuals under his command who had been identified as such or who were alleged to have actively participated in the events of 28 September at the Stadium. The Minister of Defence did not reply to the Commission's request to visit the Kundara and Kassa camps and, despite several oral requests to the Director-General of the National Police, a copy of the report prepared by the technical and scientific police experts present at the stadium and at the Bellevue police station was never provided.<sup>55</sup>

The United Nations Headquarters Board of Inquiry was established to investigate a number of incidents which occurred during the course of the conflict in the Gaza Strip and southern Israel in which United Nations personnel, premises and operations were affected. Its context and purpose are clearly different from the two other examples already mentioned. Regarding the Pakistan and Guinea requests, the inquiry committees were acting, following what was in effect a, 'delegation of competence' given by the requesting State. Committees give technical support but also, above all, provide a guarantee of independence and legitimacy to the inquiry. This is significant given that the investigations concern events in which current or former governmental authorities were or were supposed to be involved.

It must be noted that the report made public by the Board was not the full report but rather a summary. It is noteworthy that a high level of confidentiality has been adopted during this inquiry. Indeed, the Secretary-General noted that "the Board's report is an internal document and is not for public release. It contains significant amounts of information that was shared with the Board in strict confidence. It also contains a significant body of information, the disclosure of which could prejudice the security or proper conduct of the Organization's operations or activities".<sup>56</sup> Such confidentiality may well have enhanced the cooperation of Israel and may

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<sup>55</sup> *Report of the International Commission of Inquiry Mandated to Establish the Facts and Circumstances of the Events of 28 September 2009 in Guinea*, annexed to the Letter dated 18 December 2009 addressed to the President of the Security Council by the Secretary-General, S/2009/693, 18 December 2009, pp. 8–9, para. 20.

<sup>56</sup> *Letter dated 4 May 2009 from the Secretary-General addressed to the President of the Security Council*, S/2009/250, 15 May 2009.

explain why no explicit reference was made in the summary of any lack of cooperation by Israel. Latter parts of this study will be devoted to the potential of strengthening confidentiality in all exchanges of information.<sup>57</sup> However, we must remain aware of the fact that given the internal nature of the inquiry, to make public a lack of cooperation on the part of Israel would have been of limited utility.

Overall, it appears that the exchange of information between the United Nations and States can function without any problems. However, the proper functioning of those exchanges relies more on diplomatic arrangements than on legal guarantees. The consequences of a refusal to cooperate with a Committee are thus outside of its realm of control. If an obligation to cooperate could be identified in some cases, (that is within the framework of Chapter VII powers), uncertainties still remain about the enforcement of this obligation. Is it really plausible, for example, that a State's refusal to respond to a request for information be qualified as a threat to the peace?<sup>58</sup>

It seems necessary to formalize these relationships. It should be taken into account, of course, that these exchanges are of a specific nature and inevitably encroach upon a State's sovereignty. The establishment of an obligation in this domain could therefore be challenging. Nevertheless, the study of other types of exchanges of information at the international level may be useful to identify possible means and the methodology to meet this challenge.

#### **4. Lessons that Can be Learned from Other Information Sharing Channels at the International Level**

There are other mechanisms which allow for the exchange of information at the international level. The study of these mechanisms may help in identifying how the relationships between the UN and States can be formalized. The present study will now turn to examine both the exchange of information in the context of criminal procedures (Section 4.1), and also between international organizations (4.2).

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<sup>57</sup>) See *infra* Section 7.

<sup>58</sup>) In this respect, see Ernest L. Kerley, "The Powers of Investigation of the United Nations Security Council", 55 *American Journal of International Law* (1961), p. 903.

#### 4.1. *Exchange of Information in the Context of Criminal Procedures*

The exchange of information in the context of criminal procedure covers all proceedings for international cooperation in the enforcement of criminal law.<sup>59</sup> This form of cooperation has the advantage of permitting implementation of important coercive measures and of providing more elaborate means of inquiry. It includes *inter alia*, extradition, the transfer of criminal proceedings, and execution of foreign criminal judgments.<sup>60</sup> Cooperation in criminal matters at the international level is formalized first in bilateral treaties concluded between States. In order to increase this type of cooperation, a model treaty on mutual criminal assistance was adopted by the United Nations General Assembly in Resolution 45/117 (1990).<sup>61</sup> In this Resolution, the General Assembly explicitly recognized “the importance of a model treaty ... as an effective way of dealing with the complex aspects and serious consequences of crime, especially in its new forms and dimensions”.<sup>62</sup> Some time before this initiative, the European Convention on Mutual Assistance in Criminal Matters, adopted on 20 April 1959 by the Council of Europe, was in place to enhance criminal cooperation in a multilateral way within Europe.<sup>63</sup>

Cooperation in criminal matters also takes place between States and international courts and tribunals. According to Articles 29 and 28 of their respective Statutes, all Member States of the United Nations have an obligation to cooperate with the International Criminal Tribunal for the

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<sup>59</sup>) Beat Frey, *International Mutual Assistance in Criminal Matters: Guideline*, Federal Office for Police Matters – Section for International Mutual Assistance (Bern, 1998), p. 3.

<sup>60</sup>) *Ibid.*

<sup>61</sup>) See the amended version of the model treaty (by General Assembly Resolution 53/112) at <[www.unodc.org/pdf/model\\_treaty\\_mutual\\_assistance\\_criminal\\_matters.pdf](http://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf)>.

<sup>62</sup>) <[www.daccessdds.un.org/doc/RESOLUTION/GEN/NR0/565/06/IMG/NR056506.pdf?OpenElement](http://www.daccessdds.un.org/doc/RESOLUTION/GEN/NR0/565/06/IMG/NR056506.pdf?OpenElement)>.

<sup>63</sup>) European Convention on Mutual Assistance in Criminal Matters, <[www.conventions.coe.int/Treaty/en/Treaties/Html/030.htm](http://www.conventions.coe.int/Treaty/en/Treaties/Html/030.htm)>.

former Yugoslavia<sup>64</sup> and the International Criminal Tribunal for Rwanda.<sup>65</sup> Under Articles 86 to 102 of the Statute of Rome establishing the International Criminal Court, States Parties have an obligation to furnish assistance to the Court as well. However, the regime of those obligations will not be the same, since the obligation to cooperate with ICTY and ICTR is provided by Security Council resolutions, whereas the obligation to cooperate with the ICC is treaty-based. Only States that are parties to the Statute will in principle be under an international obligation to cooperate with the Court,<sup>66</sup> whereas with the *ad hoc* Tribunals established on the basis of Chapter VII of the UN Charter, all Member States of the UN are under an obligation to cooperate with the Tribunals.<sup>67</sup>

We can also note that both the ICTY<sup>68</sup> and ICC<sup>69</sup> can collaborate with States when they are leading investigations or trials for crimes which fall their respective jurisdictions. Agreements allowing for the exchange of

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<sup>64</sup>) Article 29 of the Statute of ICTY provides: “1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (a) the identification and location of persons; (b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons; (e) the surrender or the transfer of the accused to the International Tribunal”, <[www.icty.org/x/file/Legal%20Library/Statute/statute\\_septo8\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_septo8_en.pdf)>.

<sup>65</sup>) Article 28 of the Statute of ICTR, which is formulated *mutatis mutandis* identically as Article 29 cited above.

<sup>66</sup>) Article 87(5) of the Rome Statute envisages cooperation between the Court and a State non-Party only on a voluntary basis. However, some might say that such an obligation to cooperate with the Court may exist by virtue of other sources of international law, such as the United Nations Charter (under Article 25 or Chapter VII of the UN Charter, as was the case for Sudan in Resolution 1593 (2005) of the Security Council) or customary international law in respect of violations of *ius cogens* norms. See Faustin Z. Ntoubandi, “Towards Ending Impunity in Darfur: The ICC Arrest Warrant of 27 April 2007”, 1 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2009), pp. 144–151.

<sup>67</sup>) See Annalisa Ciampi, “The Obligation to Cooperate”, in Antonio Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, Oxford, 2002), Vol. II, pp. 1607–1638.

<sup>68</sup>) Article 11*bis* of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, <[www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_Rev42\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev42_en.pdf)>.

<sup>69</sup>) Article 93(10) of the Rome Statute.

information in criminal matters were also concluded between the ICC and the United Nations,<sup>70</sup> the European Union,<sup>71</sup> Interpol,<sup>72</sup> and the Asian-African Legal Consultative Organization.<sup>73</sup>

#### 4.2. *Exchange of Information between International Organizations*

Mechanisms allowing for the exchange of information have also been established between international organizations. Regarding the United Nations system, cooperation agreements were first concluded with regional organizations. Examples include the agreements made between the United Nations and the Organization of the Islamic Conference,<sup>74</sup> the Organization of African Unity,<sup>75</sup> and between UNESCO and the Association of Southeast Asian Nations.<sup>76</sup> Agreements of cooperation were also concluded between

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<sup>70</sup>) Article 5 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, <[www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/o/ICCASP3Res1\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/o/ICCASP3Res1_English.pdf)>.

<sup>71</sup>) Article 7 of the Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, <[www.icc-cpi.int/NR/rdonlyres/6EB8oCC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/6EB8oCC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106_English.pdf)>.

<sup>72</sup>) Article 2 of the Co-operation Agreement between the Office of the Prosecutor of the International Criminal Court and the International Criminal Police Organization – Interpol, <[www.interpol.int/Public/ICPO/LegalMaterials/cooperation/agreements/ICC2005.asp](http://www.interpol.int/Public/ICPO/LegalMaterials/cooperation/agreements/ICC2005.asp)>.

<sup>73</sup>) Article 3 of the Memorandum of Understanding between the International Criminal Court and the Asian-African Legal Consultative Organization, <[www.icc-cpi.int/menus/icc/legal%2otexts%2oand%2ootools/official%2ojournal/memorandum%2oof%2ounderstanding%2obetween%2othe%2ointernational%2ocriminal%2ocourt%2oand%2othe%2oasian-african%2olegal%2ocon](http://www.icc-cpi.int/menus/icc/legal%2otexts%2oand%2ootools/official%2ojournal/memorandum%2oof%2ounderstanding%2obetween%2othe%2ointernational%2ocriminal%2ocourt%2oand%2othe%2oasian-african%2olegal%2ocon)>.

<sup>74</sup>) General Assembly Resolution 49/15, A/RES/49/15, 25 November 1994.

<sup>75</sup>) General Assembly Resolution 49/64, A/RES/49/64, 23 January 1995.

<sup>76</sup>) See the full text of the agreement, especially Article IV, which provides “ASEAN and UNESCO shall arrange to the fullest extent possible and so far as is practicable for the exchange of information and documents on matters of common interest. This will include, where appropriate, the exchange of information and documents relating to specific projects, programmes or activities with a view to better complementary action and more effective co-ordination between the two organizations”, <[www.aseansec.org/7922.htm](http://www.aseansec.org/7922.htm)>.

the United Nations and specialized agencies, such as the World Tourism Organization,<sup>77</sup> and the World Intellectual Property Organization.<sup>78</sup>

Another significant example of these specific types of cooperation between international organizations are the agreements concluded with the International Criminal Police Organization (hereinafter Interpol).<sup>79</sup> A great number of agreements on cooperation have been concluded between Interpol and other international organizations, such as the United Nations,<sup>80</sup> the International Atomic Energy Agency,<sup>81</sup> and the International Maritime Organization.<sup>82</sup>

As this brief exploration demonstrates, cooperation in the context of criminal procedures and cooperation between international organizations is rooted in agreements in an international context and on the basis of need. The cooperation is thus premised on a ‘consensual’ source and not on an

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<sup>77)</sup> Resolution of the Economic and Social Council 2003/2, 23 December 2003. Article 8 of the Agreement provides that “[s]ubject to such arrangements as may be necessary for the safeguarding of confidential material, full and prompt exchange of appropriate information and documents shall be made between the United Nations and the World Tourism Organization”.

<sup>78)</sup> Assistance is envisaged in Article 6(a) which provides “[s]ubject to such arrangements as may be necessary for the safeguarding of confidential material, full and prompt exchange of appropriate information and documents shall be made between the United Nations and the Organization”. See <[www.wipo.int/treaties/en/agreement/pdf/un\\_wipo\\_agreement.pdf](http://www.wipo.int/treaties/en/agreement/pdf/un_wipo_agreement.pdf)>.

<sup>79)</sup> See, e.g., Bettina Schöndorf-Haubold, “The Administration of Information in International Administrative Law – The Example of Interpol”, 9 *German Law Journal* (2008), pp. 1719–1752.

<sup>80)</sup> Assistance is foreseen at Article 3 of the Agreement, which states that “[t]he United Nations and Interpol shall make every effort to achieve the best use of available information related to the issues of common interest. To that end, and subject to necessary limitations and their internal regulations concerning the safeguarding of confidential or semi-confidential material and information, they shall arrange for the exchange of information and documents of common interest”: <[www.interpol.int/Public/ICPO/LegalMaterials/cooperation/agreements/UN1997.asp](http://www.interpol.int/Public/ICPO/LegalMaterials/cooperation/agreements/UN1997.asp)>.

<sup>81)</sup> Assistance is foreseen at Article 2, which provides “(1) The Parties shall exchange information on developments in their activities, which are the subject of this co-operation agreement, and projects that are of mutual interest with a view to promoting co-ordination and co-operation”: <[www.interpol.int/Public/ICPO/LegalMaterials/cooperation/agreements/InternationalAtomicEnergyAgency200604.asp](http://www.interpol.int/Public/ICPO/LegalMaterials/cooperation/agreements/InternationalAtomicEnergyAgency200604.asp)>.

<sup>82)</sup> Agreement of Co-operation between the International Maritime Organization and the International Criminal Police Organization – Interpol (2005), <[www.interpol.int/Public/ICPO/LegalMaterials/cooperation/agreements/InternationalMaritimeOrganization.pdf](http://www.interpol.int/Public/ICPO/LegalMaterials/cooperation/agreements/InternationalMaritimeOrganization.pdf)>.

authoritative one, in contrast to that imposed by Chapter VII of the UN Charter.<sup>83</sup> An obligation to cooperate under sensitive circumstances is more likely to succeed if based on consensus. Furthermore, it must be noted that almost all of these treaties have a bilateral character. Indeed, it is self-evident that a consensus may be more easily reached between two actors than in the context of multilateral negotiations. As a result, it seems that if an obligation to cooperate between the UN and States must be achieved, it should take the form of consensual and bilateral instruments.

This proposition may be a cause for concern where the conclusion of a significant number of agreements is required. However, information-sharing channels at the international level show that the diversity of such agreements do not necessarily require a complex legal regime. Although the wording in these agreements occasionally changes, the conditions underpinning the exchange of information remain more or less the same from one agreement to another.

## **5. Exchange of Information at the European Level**

The European Union provides numerous examples of mechanisms assisting the exchange of information between Member States and European institutions. Most of these exchanges take place between Member States and the European Commission. These forms of assistance stem from the various activities of the Commission, particularly those that endeavour to protect the European Union's financial interests. For example, according to Regulation 2185/96, the Commission has the competence to carry out on-the-spot checks and inspections within Member States in order to protect the Communities against fraud and other irregularities.<sup>84</sup> On the other hand, requests for information emanating from Member States in respect of the Commission can be made. In that case, assistance may take

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<sup>83</sup>) On the distinction between consensual and authoritative sources of cooperation, *see, e.g.*, Muriel Ubéda-Saillard, *La coopération des Etats avec les juridictions pénales internationales*, Thesis, Université Paris Ouest Nanterre La Défense, December 2009, pp.25–31.

<sup>84</sup>) Council Regulation 2185/96 of 11 November 1996. *See especially* Article 7, which states: “Commission inspectors shall have access, under the same conditions as national administrative inspectors and in compliance with national legislation, to all the information and documentation on the operations concerned which are required for the proper conduct of the on-the-spot checks and inspections”.

the form of access to reports drawn up by the Commission officials, such as inspectors' reports.<sup>85</sup>

Such 'vertical' assistance may also be provided by European entities other than the Commission.<sup>86</sup> The European Anti-Fraud Office (OLAF), established in 1999, is responsible for ensuring the collection and analysis of information in relation to the fight against fraud.<sup>87</sup> Member States are under a "duty to inform the Office",<sup>88</sup> and the Office may at any time forward to the competent authorities of the Member States concerned information obtained in the course of its investigations.<sup>89</sup> Requests for information may also be made to Member States by the European Police Office (Europol), which is responsible for facilitating the exchange of information between Member States, as well as obtaining, collating, and analysing information and intelligence on crimes that fall under its competence.<sup>90</sup> The establishment of

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<sup>85</sup> See, e.g., *Zwartveld*, European Court of Justice, Order of 13 July 1990, C-2/88, *Rec. 1990*, p. I-3367. In this case, a Dutch judicial authority (the rechter-commissaris at the Arrondissementsrechtbank Groningen) requested the Commission to provide reports drawn up between 1983 and 1987 by Commission officials who carried out inspections in the Netherlands with regard to sea fisheries concerning the port of Lauwersoog.

<sup>86</sup> Christine Kaddous, "La coopération administrative dans l'Union européenne", in François Bellanger and Thierry Tanquerel (eds.), *L'entraide administrative* (Schulthess, 2005), p. 61.

<sup>87</sup> See Article 2(b) of the Commission Decision of 28 April 1999 establishing the European Anti-Fraud Office (OLAF), <[www.eur-lex.europa.eu/pri/en/oj/dat/1999/l\\_136/l\\_13619990531en00200022.pdf](http://www.eur-lex.europa.eu/pri/en/oj/dat/1999/l_136/l_13619990531en00200022.pdf)>.

<sup>88</sup> Article 7(2) and (3) of the Regulation 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF): "(2) The institutions, bodies, offices and agencies and, in so far as national law allows, the Member States shall, at the request of the Office or on their own initiative, forward any document or information they hold which relates to a current internal investigation. Member States shall forward the documents and information relating to external investigations in accordance with the relevant provisions. (3) The institutions, bodies, offices and agencies, and, in so far as national law allows, the Member States shall also send the Office any other document or information considered pertinent which they hold relating to the fight against fraud, corruption and any other illegal activity affecting the Communities' financial interests", <[www.eur-lex.europa.eu/pri/en/oj/dat/1999/l\\_136/l\\_13619990531en00010007.pdf](http://www.eur-lex.europa.eu/pri/en/oj/dat/1999/l_136/l_13619990531en00010007.pdf)>.

<sup>89</sup> Article 10 of the Regulation 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF).

<sup>90</sup> Article 3 of the Convention Based on Article K.3 of the Treaty on European Union, on the Establishment of a European Police Office (Europol Convention), <[www.europol.europa.eu/index.asp?page=legalconv#TITLE%20I](http://www.europol.europa.eu/index.asp?page=legalconv#TITLE%20I)>.



a legal framework for this type of cooperation began taking place in 1992 upon the inception of the Maastricht Treaty, and has been progressively strengthened. Mechanisms for the exchange of information can be found in three different domains, namely immigration policies, customs cooperation and the fight against fraud.

Regarding visas, asylum, or immigration, Article 66 of the Amsterdam Treaty provided that “the European Council shall take measures to ensure cooperation between the relevant departments of the administrations of the Member States ... as well as between those departments and the Commission”.<sup>91</sup> This treaty has provided a basis for decisions of the European Council, like the decision of 13 June 2002 that adopted an action programme for administrative cooperation in the fields of external borders, visas, asylum, and immigration (ARGO programme).<sup>92</sup> The scope of this legal basis has been extended in the Lisbon Treaty under Article 74.<sup>93</sup> This article is found under the General Provisions of Title V on the Area of Freedom, Security, and Justice, which includes not only immigration policies, but also judicial cooperation in civil and criminal matters as well as police cooperation.

Article 135 of the Amsterdam Treaty also provided a legal basis for decisions in respect of customs cooperation.<sup>94</sup> This Article has been reproduced *in extenso* in Article III-152 of the Constitution for Europe, and in Article 33 of the Lisbon Treaty. Such vertical cooperation was established through mechanisms of assistance between the administrative authorities of the

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<sup>91</sup> See <[www.eur-lex.europa.eu/en/treaties/dat/11997E/htm/11997E.html#0173010078](http://www.eur-lex.europa.eu/en/treaties/dat/11997E/htm/11997E.html#0173010078)>.

<sup>92</sup> See European Council Decision 2002/463/EC, 13 June 2002, <[www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:161:0011:0015:EN:PDF](http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:161:0011:0015:EN:PDF)>.

<sup>93</sup> Article 74 of the Consolidated Version of the Treaty on the Functioning of the European Union: “The Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission. It shall act on a Commission proposal, subject to article 76, and after consulting the European Parliament”.

<sup>94</sup> Article 135 of the EC Treaty: “Within the scope of application of this Treaty, the Council ... shall take measures in order to strengthen customs cooperation between Member States and between the latter and the Commission. These measures shall not concern the application of national criminal law or the national administration of justice”, <[www.eur-lex.europa.eu/en/treaties/dat/11997E/htm/11997E.html#0173010078](http://www.eur-lex.europa.eu/en/treaties/dat/11997E/htm/11997E.html#0173010078)>.

Member States and the Commission to ensure the correct application of the law on customs and agricultural matters.<sup>95</sup>

Regarding the fight against fraud, the exchange of information between Member States and the Commission may be based on Article 280(3) of the Amsterdam Treaty, which is reproduced *mutatis mutandis* at Article 325(3) of the Lisbon Treaty.<sup>96</sup> This legal basis was notably used for the adoption of the ‘Hercule’ Programmes I (2004–2006)<sup>97</sup> and II (2007–2013),<sup>98</sup> which promoted activities in the field of the protection of the Community’s financial interests by “enhancing transnational and multidisciplinary cooperation between member States’ authorities, the Commission and OLAF”.<sup>99</sup>

It is pertinent to note that whereas the aforementioned instruments were concluded in specific areas, a provision in the Lisbon Treaty envisages cooperation within the Union as a mechanism potentially applicable to all cases regarding the implementation of Union law.<sup>100</sup>

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<sup>95</sup> See the Council Regulation 515/97 of 13 March 1997, especially Title III on relations with the Commission and Title V on the Customs Information System, <[www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997R0515:EN:HTML](http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997R0515:EN:HTML)>.

<sup>96</sup> Article 280(3) of the Amsterdam Treaty: “Without prejudice to other provisions of this Treaty, the Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities”.

<sup>97</sup> Decision 804/2004 of the European Parliament and of the Council of 24 April 2004, <[www.ec.europa.eu/anti\\_fraud/programmes/hercule/archives/en.pdf](http://www.ec.europa.eu/anti_fraud/programmes/hercule/archives/en.pdf)>.

<sup>98</sup> Decision 878/2007 of the European Parliament and of the Council of 23 July 2007, <[www.ec.europa.eu/anti\\_fraud/programmes/hercule/en.pdf](http://www.ec.europa.eu/anti_fraud/programmes/hercule/en.pdf)>.

<sup>99</sup> Article 1(2a) of the Hercule Programme II.

<sup>100</sup> Article 197(2) (on Title XXIV on Administrative Cooperation) of the Consolidated Version of the Treaty on the Functioning of the European Union: “The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States”.

## 6. International Law and Domestic Analogies: The Concept of Administrative Assistance

The concept of administrative assistance is conceptually rooted at the domestic level. It is (classically) defined as “assistance given on the request of an authority or another government agency to the requesting authority ... in order to enable or to facilitate the execution of (its) functions”.<sup>101</sup> In short, it refers to cooperation between domestic administrative authorities. Originally, mutual assistance mechanisms were developed between authorities within the same State. Obligations to give assistance could often be found at the constitutional level, especially in federal States. Article 35 of the Fundamental Law of Germany provides, for example, that “all federal and Land authorities shall render legal and administrative assistance to one another”.<sup>102</sup> If there is no provision in the State’s constitution, assistance is rendered on the basis of laws or agreements.<sup>103</sup>

Assistance mechanisms at the international level were, and continue to be, established between State authorities through specific treaties. These treaties can address the issue of assistance in general, both administrative and criminal, such as in the treaty signed on 31 May 1988 between the Federal Republic of Germany and Austria.<sup>104</sup> Additionally they can focus on one specific matter, like the treaty on administrative assistance in customs matters signed on 21 March 1975 between France and Senegal.<sup>105</sup> The legal framework of inter-State assistance rests on a vast web of specific bilateral agreements.

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<sup>101</sup>) Edwin Loebenstein, “International Mutual Assistance in Administrative Matters”, *Österreichische Zeitschrift für öffentliches Recht*, Supplementum 2 (Springer-Verlag, Wien-New York, 1972), p. 11.

<sup>102</sup>) Comparable provisions can be found in Article 22 of the Constitution of the Republic of Austria, which states as well that “all authorities of the Federation, the States, and the Counties are bound within the framework of their legal sphere of competence to render each other mutual assistance”. Article 44 of the Federal Constitution of the Swiss Confederation provides that “the Confederation and the Cantons shall support each other in the fulfillment of their duties and shall generally cooperate with each other. They owe each other a duty of consideration and support. They shall provide each other with administrative assistance and mutual judicial assistance”. See François Bellanger, ‘L’entraide administrative en Suisse’, in Bellanger and Tanquerel, *supra* note 86, pp. 9–28.

<sup>103</sup>) Loebenstein, *supra* note 101, p. 12.

<sup>104</sup>) <[www.untreaty.un.org/unts/60001\\_120000/30/26/00059300.pdf](http://www.untreaty.un.org/unts/60001_120000/30/26/00059300.pdf)>.

<sup>105</sup>) France and Senegal, Convention on Administrative Assistance in Customs Matters, 29 March 1974, <[www.untreaty.un.org/unts/1\\_60000/29/16/00056791.pdf](http://www.untreaty.un.org/unts/1_60000/29/16/00056791.pdf)>.

There is no general treaty that provides requirements which can be applied to all forms of assistance, and on any matter. Treaties remain a traditional mechanism for formally establishing assistance between two States.

It may be possible to “transplant” domestic concepts,<sup>106</sup> such as assistance in administrative matters, to the international level. In one case concerning Switzerland, a mechanism to exchange information with international organizations inspired by the existing inter-State mechanisms has been adopted.<sup>107</sup> This is the Federal Law on the Application of International Sanctions or *loi sur les embargos (LEmb)*, which provides in Article 7 that competent federal authorities may cooperate and coordinate their inquiries with international organisations.<sup>108</sup> This law is not limited to collaboration with a sanction committee. It was also used by the Swiss Federal Council as the legal basis for the cooperation with the Volcker Commission.<sup>109</sup>

The advantage of this legal basis is that cooperation between Switzerland and an international organization can be based on this law or on a resolution adopted by an international organization. However, the determination of a legal basis for the cooperation at the domestic level obviously has the disadvantage of being limited to a single State. Even if a majority of States have a domestic legal basis for cooperation, it is likely that the conditions will differ from State to State. While a mass harmonisation exercise would be inherently problematic, it would be possible, and perhaps more fruitful,

<sup>106</sup> Nicolas Valticos, “Pluralité des ordres juridiques internationaux et unité du droit international”, in Jerzy Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century* (Kluwer Law, The Hague, 1996), p. 319.

<sup>107</sup> In Switzerland, the existence of a legal basis is one of the conditions for providing administrative assistance when the information that will be shared is deemed a secret protected by law. See JAAC 48/1984 n°28, p. 170 (OFJ, 17.02.1983).

<sup>108</sup> *Loi fédérale sur l'application de sanctions internationales (loi sur les embargos, LEmb)*, 22 March 2002, <[www.admin.ch/ch/f/rs/9/946.231.fr.pdf](http://www.admin.ch/ch/f/rs/9/946.231.fr.pdf)>. This law provides a permanent legal basis but Swiss policy is to implement sanctions decided by the Security Council on a case-by-case basis, with the adoption of specific ordinances. See, e.g., the *Ordonnance instituant des mesures à l'encontre de personnes et entités liées à Oussama ben Laden, au groupe «Al-Qaïda» ou aux Taliban* (RS 946.203), or more recently *Ordonnance instituant des mesures à l'encontre de la République populaire démocratique de Corée* (RS 946.231.127.6). For an overview of measures taken by Switzerland on that matter, see <[www.seco.admin.ch/themen/00513/00620/00622/index.html?lang=fr](http://www.seco.admin.ch/themen/00513/00620/00622/index.html?lang=fr)>.

<sup>109</sup> See *Rapport final de la Commission d'enquête indépendante concernant le programme « Pétrole contre nourriture » : soutien apporté par la Suisse à l'enquête*, <[www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=fr&msg-id=9635](http://www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=fr&msg-id=9635)>.

to focus on extracting a number of basic principles from existing practice within States.

## **7. A Proposal for a Basic Set of Conditions for the Exchange of Information between the UN and States**

The objective of this section is to describe the optimal conditions for the exchange of information that could be applied in the relationship between the UN and collaborating States. These conditions are derived from conditions that are applied at the domestic, the international, and the European levels, and from the practice that already exists between international organizations and States.

A leading criterion for the exchange of information, which is required both at the domestic and international level, is confidentiality (Section 7.1). We will examine the question of the potential application of the principles of speciality, proportionality (7.2), and good faith (7.3), in the relationship between States and international organizations. The question of reciprocity is more problematic. It appears that it should not be considered as a condition for the exchange of information (7.4).

### *7.1. Confidentiality*

Collaboration with international organizations often concerns the transfer of information that is protected at the domestic level. Therefore the United Nations must provide States with guarantees that this information will not be made public. Consequently, States request confidentiality. For example, the Swiss Federal Law on the application of international sanctions provides that the international organisation is bound by the *secret de fonction* or by the *devoir de discrétion équivalent*, and there must be a guarantee that the information will not be used to facilitate economic spying.

Provisions on confidentiality are found in the guidelines of the committees concerned. In the 'Investigations Guidelines' of the Independent Inquiry Committee into the United Nations Oil-for-Food Programme (hereinafter IIC),<sup>110</sup> it is stipulated that the Committee may determine that special measures to ensure confidentiality of sources or witnesses are required.

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<sup>110</sup>) See *The Independent Inquiry Committee into the United Nations Oil-For-Food Programme*, <[www.iic-offp.org/documents/Investigations%20Guidelines.pdf](http://www.iic-offp.org/documents/Investigations%20Guidelines.pdf)>.

This may include the use of a confidential source registry and designation, limits to the access of information about the identities of certain persons, and the use of normal file protection. If there has been any unauthorized disclosure of information by any IIC staff member, this disclosure “will be reported by the Executive Director to the IIC Chairman so that prompt corrective action can be taken, which may include the removal of the IIC staff member and notification to the affected person(s).”<sup>111</sup> Similar provisions can be found in the guidelines of sanction committees. Taking a recent example, the Guidelines of the Committee established pursuant to Resolution 1737 (Sanction against the Islamic Republic of Iran)<sup>112</sup> provides that “the information received by the Committee will be kept confidential if the provider so requests or if the Committee so decides”.<sup>113</sup>

Even if these guidelines “do not and are not intended to confer, impose or imply any duties, obligations or rights that are enforceable in any court of law or administrative proceedings”, the credibility of the committee will largely depend on how, in practice, it can guarantee confidentiality.<sup>114</sup> Self-imposing a strict obligation of confidentiality may also hamper the activity of such organs. This is especially true for sanction committees which, in the case of drawing up a list of individuals or entities, must deal with different claims that come from States, depending on how they cooperate. On the one hand, States in which the listed individuals and entities (or their assets) are believed to be located may request as much information as possible from the Committee about the individuals and entities listed, whereas on the other hand, it will be a matter of priority for States which have submitted

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<sup>111)</sup> *Ibid.*

<sup>112)</sup> See *Security Council Committee Established Pursuant to Resolution 1737 (2006): Guidelines of the Committee for the Conduct of Its Work*, <[www.un.org/sc/committees/1737/pdf/revisedguidelinesfinal.pdf](http://www.un.org/sc/committees/1737/pdf/revisedguidelinesfinal.pdf)>.

<sup>113)</sup> The same provision can be found in the Guidelines for the Committee 1718 (RDPK), <[www.un.org/sc/committees/1718/pdf/guidelines\\_20\\_jun\\_07.pdf](http://www.un.org/sc/committees/1718/pdf/guidelines_20_jun_07.pdf)>. In the guidelines of the Committee 751 (Somalia), <[www.un.org/sc/committees/751/comguide.shtml](http://www.un.org/sc/committees/751/comguide.shtml)>, it is provided that “[t]he Committee invites States to provide information relating to any violations or alleged violations by any party of the mandatory arms embargo established by the Security Council with respect to Somalia in paragraph 5 of resolution 733 (1992). The Committee is to make an initial appeal to all States to that effect, advising them to submit their information in communications addressed to the Chairman in writing, *under assurance of confidentiality*. The Committee may renew the appeal as occasion warrants” (emphasis added).

<sup>114)</sup> *Ibid.*

the names of the listed individuals/entities to receive assurances from the Committee that the information they have provided is kept confidential.<sup>115</sup>

In April 2003, investigative offices of several international organizations agreed on the need to harmonize their practices and endorse a set of uniform guidelines for investigations.<sup>116</sup> These guidelines state that investigators should endeavour to maintain both the confidentiality and, to the extent possible, the protection of witnesses. In short, confidentiality in the case of the exchange of information is guaranteed by a set of guidelines that are not binding on the UN committees. The imposition of an obligation of confidentiality, both on States and on international organizations, through a binding norm, could enhance the cooperation. Such norms could find a model in the provision regarding confidentiality made by the European Anti-Fraud Office (OLAF). According to Article 8 of Regulation 1073/1999, the Office and its employees are bound by an obligation of confidentiality but are able to communicate information to persons within the institutions of the European Communities or in the Member States if necessary.

### 7.2. *Proportionality and Speciality*

The principle of speciality means that the information that will be transferred from States to international organizations, and *vice versa*, will be used exclusively in order to act in conformity with the object of the request.<sup>117</sup> If the receiving authority wants or needs to use the information for the purpose of investigating or deciding on other infractions or facts, or to communicate such information to other entities, the consent of the sending authority must first be obtained. The application of the principle of speciality to the relationship between States and international organizations could be a guarantee that the information transferred will not be used for other purposes than those mentioned in the said request.

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<sup>115</sup> Machiki Kanetake, “Enhancing Community Accountability of the Security Council through Pluralistic Structure: The Case of the 1267 Committee”, 12 *Max Planck United Nations Yearbook* (2008), p. 118.

<sup>116</sup> Conference of International Investigators, *Uniform Guidelines for Investigations*, as endorsed by the 10th Conference of International Investigators held on 10–12 June 2009 at the Dead Sea in Jordan, <[www.un.org/Depts/oios/investigation\\_manual/ugi.pdf](http://www.un.org/Depts/oios/investigation_manual/ugi.pdf)>.

<sup>117</sup> Riccardo Sansonetti, *L'entraide administrative internationale dans la surveillance des marchés financiers: Standards internationaux et réception en droit suisse*, Etudes suisses de droit bancaire (Schutthess Polygraphischer Verlag, Zürich, 1998), p. 170.

According to the principle of proportionality, the requesting authority shall not go beyond, in its request for information, what is strictly necessary to achieve the objects of its mission or mandate.<sup>118</sup> The application of this principle would limit the requesting authority to request only those materials that are necessary in a given case, and prohibit it from pursuing other ends, such as other investigations, about which the sending authority is not informed.

### 7.3. *Good Faith*

The necessity to cooperate in good faith was outlined by the International Court of Justice and by the Committee on Darfur, as cited above.<sup>119</sup> At the European level, a similar requirement is found in Article 10 of the EC Treaty on the principle of loyal cooperation. However, as the addressees of this obligation are “member States”,<sup>120</sup> it was not clear if such an obligation also applied to European institutions as well. The European Court of Justice, in the *Zwartveld* case, made clear that the relationship between Member States and Community institutions is governed, according to Article 10 of the EC Treaty, by a principle of sincere cooperation.<sup>121</sup> According to the Court, “that principle not only requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law ... but also imposes on Member States and the Community institutions mutual duties of sincere cooperation”.<sup>122</sup> Following this decision, the Lisbon Treaty

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<sup>118</sup>) This condition is derived from the principle of proportionality that operates in Community Law (Article 5 of the EC Treaty provides that “any action by the Community shall not go beyond what is necessary to achieve the objects of the Treaty”). For further information, see Rob Widdershoven, “European Administrative Law”, in René Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States* (Intersentia, 2nd ed., 2007), p. 316, and the condition of proportionality that operates in Swiss Administrative Law in the case of a demand for assistance by another States, see Sansonetti, *supra* note 117, p.168.

<sup>119</sup>) See *supra* Section 3.1.

<sup>120</sup>) Article 10 of the European Community Treaty: “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty”.

<sup>121</sup>) *Zwartveld*, *supra* note 85, p. I-3367.

<sup>122</sup>) *Ibid.*, para. 17.



on the European Union has provided, in addition to the aforementioned provisions, that “pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties”.<sup>123</sup>

Two accepted forms of good faith may be distinguished. On a restrictive reading, good faith is seen as providing a “flexible basis with which to impose some basic obligations that enable the Organization to protect itself from acts that could undermine its functioning”.<sup>124</sup> From a broader perspective, the obligation to cooperate in good faith is derived directly from the “fundamental feature which is the accomplishment without any disturbance of certain functions that aims to fulfil a common purpose”.<sup>125</sup> Accordingly, good faith operates not only to protect the activities of international organizations, but also to enhance cooperation by ensuring that all available means are resorted to. The principle of good faith consequently entails not only a negative obligation, namely that the sending authority shall refrain from deliberately providing incorrect information which would jeopardize the fulfilment of the mission or mandate of the requesting authority, but also a positive obligation on the part of the sending States to cooperate by all available means with the requesting authority. In the context of the United Nations, the imposition of such an obligation to cooperate in good faith could undoubtedly enhance the cooperation of States and strengthen the investigation capacities of the organization.

#### 7.4. *The Question of Reciprocity*

The question of whether reciprocity can be viewed as a condition of the exchange of information is controversial. The Swiss Federal Law on the application of international sanctions stipulates that competent federal authorities can communicate information to international organizations and waive the condition of reciprocity, which is usually an automatic condition for the provision of documents to a foreign State. However, before the legislation was adopted, the Swiss Federal Tribunal clearly provided that

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<sup>123</sup>) Article 4(3) of the Consolidated Version of the Treaty on European Union.

<sup>124</sup>) Robert Kolb, *La bonne foi en droit international public: contribution à l'étude des principes généraux de droit* (PUF, 2000), p. 509 (author's translation).

<sup>125</sup>) *Ibid.* (author's translation).

reciprocity is not a condition for the granting of administrative assistance between States.<sup>126</sup>

If reciprocity is to be understood as a condition for the exchange of information, it would mean that States could have an automatic right to obtain information from international organizations on the sole condition that States have previously communicated information to them. This automatic right to information would create a conflict of norms with the international organization's duty of confidentiality *vis-à-vis* the information it has obtained from other States. The viability of this system may be threatened by such a requirement. It is perhaps for this reason that the Swiss Government has decided, in the context of the above-mentioned legislation, to renounce reciprocity in specific cases of cooperation with an international organization.

## 8. Conclusion

The analysis of the relationship between domestic administrations and international organizations was an issue that was examined in the early days of the United Nations. In a study plan made by UNESCO on 11 April 1949 and entitled 'Domestic Administrations in their Relations with International Organizations',<sup>127</sup> a proposal was made to study this relationship and to "encourage States to improve their own domestic mechanisms in order to be able to fulfil their obligations as members of international organizations".<sup>128</sup>

Recent events have once again brought this question to light. The main priority seems to be to establish clear legal bases for cooperation between States and the UN. The question of the formalization of the exchange of information between the United Nations and States can prompt several institutional responses. Such a legal basis should set out the conditions for its application. This legal basis could take different forms, like a multilateral treaty concluded under the auspices of the United Nations, a model bilateral

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<sup>126</sup>) Swiss Federal Supreme Court, 25 January 1999, 2A.345/1998, para. 3b. The Federal Supreme Court adopted a 'pragmatic' view stating that federal authorities may refuse in the future to communicate information to authorities which did not respond positively to their demands.

<sup>127</sup>) See UNESCO, *Plan d'une étude de coopération internationale l'administration nationale dans ses relations avec les organisations internationales*, UNESCO/SS/SIC/3, 11 April 1949, <[www.unesdoc.unesco.org/images/0015/001578/157857fb.pdf](http://www.unesdoc.unesco.org/images/0015/001578/157857fb.pdf)>.

<sup>128</sup>) *Ibid.*, para. 9 (author's translation).

treaty, or a set of uniform guidelines for international organizations. In the author's view, and according to the practices analyzed before, it seems that the best way to achieve this goal is a model bilateral treaty. Indeed, it seems more adequate to base the exchange of information on a consensual source that could be concluded on the basis of the need. It should be noted that such initiatives have already been taken by some international organizations such as Interpol. A model agreement has been compiled on the basis of numerous studies.<sup>129</sup>

Another type of relationship that must be taken into account is the relationship between international organizations on the one hand, and private individuals and entities concerned with the sharing of information on the other. It seems that it is necessary to provide for mechanisms that allow individuals and entities – whose bank details have been transmitted for example – to contest or control the use of this information. In the absence of this kind of procedure, international organizations may be confronted with problematic consequences, as was recently illustrated in the case of listed sanctions of the 1267 Committee and the *Kadi and Al Barakaat International Foundation* case before the European Court of Justice.<sup>130</sup>

Regarding the possibility for individuals and entities to contest a decision of a State to transmit information about them at the domestic level, two cases that came before the Swiss Federal Tribunal have shown the inherent problems of the absence of a clear legal framework in this area.<sup>131</sup> Two claims contesting the decision of the Swiss State Secretariat of Economic Affairs to transmit confidential information to the Inquiry Committee into the Oil-for-Food Programme were rejected by the Federal Tribunal, in which it clearly drew a distinction between treaty-based assistance and assistance accorded without any conventional basis. In the case of assistance based on a treaty, a claim made against the domestic legal basis of application will be admissible. It was made clear in the judgment that

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<sup>129</sup>) Chapter II of this agreement is devoted to the "Exchange of Information". See the full text of the Model Agreement at <[www.interpol.int/Public/ICPO/LegalMaterials/cooperation/Model.asp](http://www.interpol.int/Public/ICPO/LegalMaterials/cooperation/Model.asp)>.

<sup>130</sup>) *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council*, 3 September 2008, European Court of Justice, Grand Chamber, Joined Cases C-402/05 P and C-415/05 P.

<sup>131</sup>) Swiss Federal Supreme Court, 1st Chamber of Public Law, 6 October 2005, 1A.157/2005 and 1A.189/2005; Swiss Federal Supreme Court, 1st Chamber of Public Law, 10 October 2005, 1A.173/2005 and 1A.203/2005.

all transmission of information to foreign authorities will not be considered as an *acte de gouvernement*; in the majority of cases of assistance – in criminal or administrative matters – foreign relations are without a doubt involved, but decisions taken on that matter takes place within the framework of *pre-established conventional relations*, and has not the political character that justifies a subtraction to any judicial review.<sup>132</sup>

The assistance given to the Inquiry Committee has been consequently qualified as a political decision, exempt from judicial review. Respecting privacy and the right of individuals to challenge their State's decision to transmit information to another State or to international organizations constitute other fundamental issues that require further and more detailed consideration.

Transparency is also an issue that merits a more thorough examination in the context of the exchange of information between the UN and States. On initial consideration, confidentiality and transparency may appear contradictory. Indeed, if we acknowledge that the information shared must stay confidential, it seems nonsensical to insist that, simultaneously, the UN and the States be completely transparent in their actions. Contrarily, it is submitted that confidentiality and transparency are not contradictory but rather complementary. A balance might be achieved with, on the one hand, the effectiveness of the operation and, on the other, its legitimacy. In order to increase the legitimacy of their activities, international organizations have to establish mechanisms that enhance the transparency of their actions. It has become increasingly necessary to apply this principle in the relations between international organizations and States, but also between international organizations and individuals.<sup>133</sup> The viability and the legitimacy of UN investigations will depend in large part on the efforts to make more transparent these practices that should no longer stay in the shadows.

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<sup>132</sup> *Ibid.*, para. 3.1 (6 October 2005) and para. 3.3 (10 October 2005) (author's translation and emphasis).

<sup>133</sup> See, e.g., Benedict Kingsbury *et al.*, "The Emergence of Global Administrative Law", 68:3-4 *Law and Contemporary Problems* (2005), pp. 37–39; Benedict Kingsbury, "The Concept of 'Law' in Global Administrative Law", 20:1 *European Journal of International Law* (2009), pp. 48–50.