The Constitutional Dimension of the Charter of the United Nations Revisited

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1. The fiftieth anniversary of the United Nations has provided an opportunity to many authors to look back on the achievements of the United Nations as the world organisation *«par excellence»*.

Each and every aspect of the activities of the world organisation has been scrutinised; including, the assessment of the United Nations as a political process, and the comparison of its goals to the concrete evolution of the political relations between its member states during the first half century of its existence. The way in which the organisation has been able or unable to discharge its mandate, in particular, with regard to the maintenance of international peace and collective security, the contribution of the United Nations to the development of the international pro-

tection of human rights and to the rights of people are also issues which have been thoroughly discussed[1].

It is, then, with a high sense of modesty that the following remarks try to add to this chorus of commentaries and opinions by focusing on what is in the first instance *a purely legal question*, even if it is highly conditioned by political factors. This question is the following:

> *What is the current situation of the Charter, both as a legal instrument and as a compendium of legal rules, within the international legal system?*

2. In the foreword of a stimulating book gathering under his editorial responsibility a collection of studies devoted to *The United Nations at Age Fifty*, Tomuschat gave an answer to this question. He said:

> "It has become obvious in recent years that the Charter is nothing else than the constitution of the international community (...). Now that universality has almost been reached, it stands out as the paramount instrument of the international community, not to be compared to any other international agreement"[2].

This opinion reflects the views of many other writers. It suggests nevertheless some complementary observations in order to be plainly accepted. The main reason is the sharp contrast still existing between, on the one hand, the exigencies of normative and organic integration attached to the idea of constitution and, on the other hand, the persisting dissemination of power among competing and formally equal sovereign states, which still characterises the international society in spite of the importance now taken by the action of hundreds of international organizations.

3. As a matter of fact, to the question of whether the Charter is the constitution of the international community, many would probably be tempted to answer: Yes, of course! But, by the way, what was the question?

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1 Among other studies specially devoted to the anniversary of the United Nations, see O. Schachter, "United Nations Law", *AJIL* 88 (1994), 1 et seq.; "The United Nations at Fifty", with contributions of Sir R. Jennings, F.L. Kirgis, L.B. Sohn, *AJIL* 89 (1995), 493 et seq.; "The United Nations Jubilee Issue", *EJIL* 6 (1995), 317 et seq.; C. Tomuschat (ed.), *The United Nations at Age Fifty. A Legal Perspective*, 1995; P.M. Dupuy, "A propos d'un anniversaire", *RGDIP* 99 (1995), 777 et seq.

2 Tomuschat, see note 1, ix.

In other words, it is important to know what exactly is understood by the term «constitution». In particular, among other classifications, two meanings of the constitution may be understood.

– One is the constitution in the *material* or *substantial* sense of the term. Under this notion, what is pointed to is its substantial contents, and, in particular, its ideological and political ground, the basic principles which it sets out with a view to defining the fundamental rights of citizens, the general aims of the political institutions and, more generally, the legally binding conceptual framework of the concerned country. As envisaged from this perspective, a constitution is to be considered as a set of legal principles of paramount importance for every one of the subjects belonging to the social community ruled by it. It places all of them (including the different state's organs) in a subordinate position and implies a hierarchy of norms, on the top of which are the legal principles belonging to the said constitution.

– By contrast, the other perception, that of the constitution in the *organic* and *institutional* sense, points to the designation of public organs, the separation of powers and the different institutions which are endowed each with its own competencies.

As it stems clearly out of the context in which Tomuschat made the above cited statement, he had first in mind the *substantial* notion of constitution as opposed to the institutional one[3]. Nevertheless, constitutional experiences at the internal or municipal level clearly demonstrate that the substantial dimension of a constitution cannot be separated from its organic one, since the second is the institutional instrument necessary for the promotion of the first.

4. The present paper will simply try to bring some elements of response to the question of the function and position of the Charter within the international legal order by examining successively two main sets of problems:

– First, starting from the *substantial* constitutional dimension of the Charter, as Tomuschat did it, what conclusions stem from the comparison

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[3] In addition to the above cited observations, Tomuschat adds, still speaking of the Charter, "It may not be fully satisfactory as a world constitution, not having been conceived of for that function in 1945. But it is the only written text binding upon all states of this globe which sets forth firm determinations on the general issues which make up the hard core of any system of governance. The present-day world order rests entirely on the Charter", ibid. For a more complete development of the opinion of Tomuschat see his course given at the Hague Academy of International Law, "Obligations Arising For States Without or Against their Will", *RdC* 241 (1993), 199 et seq., (217).

between the principles laid down by the Charter and those which are most generally cited by authors as ranging among the rules of «jus cogens»?

– Second, continuing with the formal or *instrumental* constitutional dimension of the Charter, does it provide the international community with efficient mechanisms fitted to ensure that its substantial content will be implemented by every member state? This issue will be mainly examined in the light of recent practice, notably that of the ICJ and of the United Nations Security Council.

I. The Charter as the Substantial Constitution of the International Community: Basic Principles of the United Nations and «Jus Cogens»

1. An assimilation of the Charter to the substantial definition of a constitution raises several questions. In particular, does the Charter entail *all* the substantial principles of paramount importance for the international community?

– *If yes*: does it mean that there is not only a substantial convergence but also a clear identity between, on the one hand, the fundamental principles set forth in the Charter and, on the other hand, the peremptory norms of international law, the definition of which, under Article 53 of the Vienna Convention on the Law of Treaties, is precisely that it is a norm of general international law "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted ..."[4], a definition which stresses its fundamental feature?

– *If not*: how, then, to analyse those principles which, being established *outside* the Charter are, nevertheless, in substance, of a constitutional nature[5]? How to reconcile this dissemination of basic rules within and outside the Charter with the constitutional vision of the Charter, since, in theory, a constitution has precisely as its nature to put them all together within the same comprehensive body of norms[6]?

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4 *ILM* 8 (1969), at 698–699.

5 Because they entail essential obligations for the international community as a whole.

6 Tomuschat gives rather convincingly the following answer to that question: "Instead of being drawn up and put into force as a whole in one act, a constitution can also grow contingently, being moulded by the manifold political and historical forces at work within the community whose fundamental order it determines. The rules on government applicable in the United Kingdom constitute the prime example of a constitution whose relevant components cannot be found in a single document...",

2. If these obligations are not only set out by the provisions of the Charter but are also to be found outside, does it then mean that they are endowed with parallel but distinct legal regimes, whereas they apply to norms established within or outside the Charter?

More generally, the perception of the United Nations as the substantial constitution of the world community, at least if this expression is not only to be taken as a political metaphor but as a juridical reality does raise the problem of the overall relationship existing between the law of the United Nations and general customary international law including that part of it which belongs to «*jus cogens*».

From these different questions derive two sets of issues which shall be hereafter distinguished: *first*, how to identify the substantial norms able to be seen either alternatively or concurrently as United Nations law and as peremptory rules?; *second*, what are the questions raised, in terms of legal regime, by these dual norms?

A. Which Norms?

aa. Identification

3. The substantial and fundamental principles which the Charter of the United Nations lays down are mainly to be found in Articles 1 and 2[7] and are easy to list: The maintenance of peace and security (Article 1 para. 1), which goes together with the prohibition of the use of force laid down in Article 2 para. 4; the peaceful settlement of disputes (Arts. 1 para. 1, 2 para. 3 and 33); the principle of equal rights and self-determination of peoples (Article 1 para. 2); the principle of cooperation which extends to every field of international problems, in particular those concerned with "an economic, social, cultural, or humanitarian character" (Article 1 para. 3); the promotion of "respect for human rights and for fundamental free-

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cited from *RdC* 241 (1993), 217.

7 An analogy could be found here with the formal presentation of many municipal constitutions, in which the fundamental principles governing the community submitted to that constitution are also laid down in the Preamble or in the preliminary or first parts of the text. The usual structure of such constitutions has most probably served as a model for the drafters of the Charter. It may be suggested that this choice manifests their will, as well as that of every founding member of the Charter, to solemnly formulate the basic rules aimed at governing the community of "...The Peoples of the United Nations" in the name of which the Charter has been proclaimed, as established in the first sentence of the Preamble.

doms" without any form of discrimination (Article 1 para. 3); the respect of the "sovereign equality of all its Members"[8] (Article 2 para. 1).

It is no surprise to find again the same principles in A/RES/2625 (XXV) of 24 October 1970, the famous "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States ...", since it had precisely as its purpose to reiterate the major principles consecrated by the Charter in the context of peaceful coexistence between East and West[9].

4. The fact that there is a repetition of the same principles in the Charter and in the above mentioned Declaration has been particularly considered by the ICJ in one of its decisions, which is also important for the elucidation of some of the key rules of modern international law. In the Case Concerning Military and Paramilitary Activities in and against Nicaragua[10], the Court had, in particular, to evidence the customary character of the rule prohibiting the use of force[11], of the right of self-defence, of the principle of non intervention, together with the respect of some "elementary principles of humanitarian law". With regard to the prohibition of force repeated in Resolution 2625, the Court said:

> "The effect of consent to the text of such resolutions cannot be understood as merely that of a «reiteration or elucidation» of that treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves"[12].

As to the peremptory nature of the rule, the Court added:

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8 This last principle is surprising by its formulation which suggests that the member states of the United Nations are not bound by the same obligation with regard to non-member states, a conclusion which it is of course impossible to draw.

9 It is true that, in the Declaration an additional emphasis is put on the principle of non-intervention (principle 3). Nevertheless, it is directly grounded on the other basic principles enunciated by the Charter, in particular the prohibition of the use of force and the sovereign equality of states. See G. Abi-Saab, "La reformulation des principes de la Charte et la transformation des structures juridiques de la communauté internationale", in: *Le Droit International au Service de la Paix, de la Justice et de Développement, Mélanges Michel Virally*, 1991, 1 et seq.

10 ICJ Reports 1986, 14 et seq.

11 The Court observed at the same time that a convergence of opinions (including that of the two litigating states) attributed to the same rule the value of a peremptory norm of general international law.

12 ICJ Reports 1986, 14 (100), para. 188.

> "A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law"[13].

Moreover, as demonstrated again in the cautious wording adopted by the Court in its most recent Advisory Opinion, concerning the Legality of the Threat or Use of Nuclear Weapons (8 July 1996) there is an intimate relationship between the basic rules grounded in the Charter and those principles of customary international law which serve for the interpretation of these rules[14].

bb. Relationship Between Norms

5. Nevertheless, no other case than the above mentioned between Nicaragua and the United States demonstrates more clearly the rather complex trilateral relationship existing between the «constitutional rules» laid down in the Charter (a), some of the most important rules of customary contemporary international law (b), and a number of them which, at the same time, are to be identified as belonging to the category of peremptory norms (c).

From the views expressed by the Court in this judgment, it seems in particular possible to draw at least the three following conclusions:

a) *A rule stated by the Charter may be, at the same time, a customary principle.* A reality which the Court had already acknowledged in the North Sea Continental Shelf Case[15]. It is with regard to the prohibition of force that the Court stresses in particular that "even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence"[16]. The Court considered that the affirmation of the

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13 Ibid. at para. 190. The Court, then, observes that the ILC "in the course of it's work on the codification of the law of treaties, expressed the view that the law of the charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of jus cogens".

14 *ILM* 35 (1996), 814 et seq. See in particular para. 41 et seq., which deals with the interpretation of Arts. 51 and 2 para. 4 of the Charter and reply C, adopted unanimously by the Court.

15 ICJ Reports 1969, 3 (39), para. 63.

prohibition of the use of force as a customary international rule had appeared *after* its statement in the Charter. Nevertheless, from a more general point of view, on the basis of the same judgment, it is clear that:

b) *A rule stated by the Charter may have been already existing as a customary rule of international law before its enunciation in the Charter.* Such is explicitly the case of the right of self-defence[17], but the same could quite evidently be said, in particular, of the sovereign equality of states. This observation does not undermine the potential «constitutional» character of the Charter. Quite the contrary, it demonstrates that its founders had as their goal to reiterate and summarise in the same solemn and fundamental text the basic principles which had already served as the cornerstones of interstate relations while, at the same time, they wanted to add to these principles some new ones, aimed at reinforcing and enhancing them. This gathering of old and new rules, then, far from mitigating the «constitutional» value of the Charter, makes it even stronger.

c) *A customary rule may be eventually peremptory without being explicitly enunciated in the Charter.* According to the Nicaragua Case (see above under I.A.aa.4), this seems to be the situation prevailing with regard to the rule of non-intervention in internal affairs of sovereign states, as it was analysed in this judgment as well as in an earlier one, in which the Court had already stated:

> "Between independent States, respect for territorial sovereignty is an essential foundation of international relations"[18].

16 ICJ Reports 1986, 14 (95), para. 178.

17 Ibid. at page 102, para. 193: "...with regard to the existence of this right, [the Court] notes that in the language of Article 51 of the United Nations Charter, the inherent right (or «droit naturel») which any State possesses in the event of an armed attack, covers both collective and individual self-defence. Thus, the Charter itself testifies to the existence of the right of collective self-defence in customary international law". The Court says nothing about the eventual belonging of the right of self-defence to jus cogens, an issue which, generally, is not much considered by the authors. Nevertheless, the ICJ insists on the "inherent" character of that right, an affirmation which suggests that this right could not be derogated by way of treaty.

18 Corfu Channel Case (United Kingdom/Albania), ICJ Reports 1949, 4 (35), cited in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua, ICJ Reports 1986, 14 (106), para. 202.

In the Nicaragua Case, the Court carefully recorded some of the most striking evidence of the *«opinio juris»* according to which the principle of non-intervention belongs to general international law. In doing so, it relied in particular on some important resolutions or "declarations" adopted by the General Assembly, among which Resolution 2625, already mentioned[19], remains, by far, the most significant. The Court did not venture into the explicit qualification of the rule as a peremptory one. Nevertheless, it insisted on its paramount importance for the promotion of peaceful international relations. The mere fact that the rule of non-intervention "is not, as such, spelt out in the Charter"[20] did not constitute an obstacle for the designation of the principle as a crucial one, since it is directly derived from the equal sovereignty of states, which, as already seen, is both a customary *and* a United Nations principle. Furthermore, the conclusion of the Court as to the customary nature of the rule of non-intervention was backed by its reference to international states practice, even if the ICJ did so mainly by special reference to the behaviour and declarations of the United States[21] as the defendant of the litigation.

6. Generally speaking, the Court had proceeded in the same way, some years before, in the so-called Hostage Case (United States Diplomatic and Consular Staff in Teheran, ICJ Reports 1980, 3 et seq.), to stress "the extreme importance of the rule of law which it [was] called upon to apply" in that case. (It was the obligation of states to respect in every circumstance the diplomatic and consular immunities attached to the representatives of foreign countries). On the basis of such an emphatic wording, it may be suggested that, if a normative category of peremptory norms does really exist in positive international law, a fact which is still obstinately denied by some authors[22], then it is to be supposed that the latter obligation

19 Ibid. The other important declaration mentioned by the Court is A/RES/ 2131 (XX) of 21 December 1965 the "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty"; the Court likewise cited regional instruments, adopted, in particular, in the inter-American context, with the participation of the United States, ibid., 107, para. 204 et seq.

20 Ibid. at page 106, para. 202.

21 Ibid. at page 108–9, para. 207 et seq.

22 See in particular J. Combacau, "Le droit international: bric-à-brac ou système?", *Arch. de Philos. du Droit* 31 (1986), 85 et seq.; P. Weil, "Le droit international en quête de son identité", *RdC* 237 (1992), 261 et seq. *contra*, P.M. Dupuy, *Droit international public,* 3rd edition, 1995, at 219–222, 264–265, 313–317. As for it, the French government maintains its persistent objection to the existence of «jus cogens», a reason why it has still not ratified the 1969 Vienna Convention on the Law of Treaties.

belongs to it. Here again, this obligation to respect diplomatic immunities is not mentioned as such in the Charter, but it may be easily connected with some of its basic principles, and, in particular, with the rule of the equal sovereignty of states.

The same conclusion could be drawn with regard to several other norms which are usually cited as belonging to jus cogens without being explicitly mentioned in the Charter. This is, for instance, the case in the domain of human rights, for the prohibition of slavery, genocide or apartheid or for all those rules which reflect what the Court called in 1949[23] and in 1986 some "elementary considerations of humanity", as they are laid down, in particular, with regard to humanitarian law, in Article 3 common to all four Geneva Conventions of 12 August 1949. An identical observation may likewise be made as to those principles formulated in the provisions of the same conventions the content of which would not be affected by their eventual denunciation. They reflect "the principles of the law of nations as they result from the usage established among civilised peoples, from the law of humanity and the dictates of the public conscience"[24].

An identical demonstration could be made if one started from a different but proximate basis, namely the different categories of «International Crimes» which are listed under Article 19 of Part One of the Draft Report of the ILC on the work of its 48th Session, Chapter III, State Responsibility of 16 July 1996 (Doc. A/CN4./L.528/Add.2). All of them, in particular those mentioned under sub-paragraph 3 lit.d do not reflect in the same way the basic or «constitutional» principles established in the Charter[25]. Their conceptual analysis demonstrates nevertheless a close

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23 Corfu Channel Case, ICJ Reports 1949, 4 (22).

24 Convention I, Art. 63; Convention II, Art. 62; Convention III, Art. 142; Convention IV, Art. 158, cited in ICJ Reports 1986, 14 (113-4), para. 218.

25 Article 19 para. 3 lists as examples of "international crimes and international delicts" (a) "a serious breach of an international obligation of essential importance for the maintenance of international peace and security...", (b) "a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples...", (c) "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being... ". As to these three sets of "international crimes", they quite evidently directly derive from the principles of the Charter. The same is not true for the fourth category which deals with (d), "safeguarding ... of the human environment", an obligation which, as such, is not explicitly laid down in the Charter. It is nevertheless not too difficult to attach it to several provisions of the Charter, in particular those stated by Article 1 para. 3.

connection with the principles of the Charter, some of which have been developed and extended by the United Nations bodies.

7. The first general conclusion to be drawn from the preceding observations is that, even if it is true that the Charter cannot pretend to list explicitly each and every existing peremptory norm of modern international law, it remains evident that all of them benefit from a substantial link with it. These norms can be said, at least, to derive from the logical implications of the generic rules established in the Charter[26]. *They need to be designated in a global way as "so essential for the protection of fundamental interests of the international community"*[27].

The provisions of the Charter remain the same whereas peremptory rules may change during the course of time, as proved by Articles 64 and 66 of the 1969 Vienna Convention on the Law of Treaties. Nevertheless, from a substantial point of view, it seems possible to pretend that the Charter constitutes the constitutional «Law of Nations» in the sense that it is the ethical and legal *matrix* for every rule able to be qualified as peremptory. This conclusion does not pretend to solve every legal problem created by it. On the contrary, it leaves open the questions raised under paragraph I.2 above.

B. Which Legal Regime?

8. This issue is a particularly rich and complex one, which may only be explored here. The striking point lies in the fact that the same rules, existing both outside and within the law of the United Nations[28] "retain a separate

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26 Some problems may be raised for some rules, the direct connection of which with the Charter is not as evident as for other ones. Nevertheless, this is the place where it should be remembered that United Nations Law is not only made up of the provisions of the Charter. It is also developed and interpreted by the whole corpus juris which has been produced by or under the auspices of the United Nations organs. See in particular, O. Schachter, "United Nations Law", *AJIL* 88 (1994), 7–9. The author notes rightly that one field now has a particular development in spite of the fact that the references to it in the Charter were rather slight: it is the domain of human rights (page 17). Nevertheless, the fact that the protection and promotion of fundamental human rights is mentioned in Arts. 1 and 55 suffice to place them under the general scope of the Charter. See generally T. Meron, *Human Rights and Humanitarian Law as Customary Law,* 1989.

27 This terminology is retaken from Article 19 para. 2 of the ILC draft of 1996.

28 «The law of United Nations» is to be understood as covering both those

existence"[29]. This may well create a duality of legal regimes, as to what concerns, in particular, the consequences of their respective violation[30].

aa. Article 103

9. There is one provision in the Charter which deals (not on the ground of international responsibility but on that of primary obligations) with the relationship between the obligations of its members deriving from the Charter and those deriving from other instruments. It is Article 103, which reads as follows:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

The «constitutional» feature of this provision has been often underlined by commentators. Bernhardt writes in particular[31]:

> "The Charter has become the constitution of the international community and third states must, in their relations and otherwise, respect the obligations arising under the Charter for UN members"[32].

10. Nevertheless, now that participation in the United Nations has become almost universal, this «constitutional» dimension of Article 103 still remains, since it manifests the priority of the Charter over any other commitments which may also be concluded between member states. It is especially remarkable that Article 103 applies not only to obligations laid down in the Charter but also to the *decisions* taken in conformity with it by the competent organs, as illustrated, among many others, by S/RES/

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rules which are in the Charter itself and their development by the United Nations principal organs, as, in particular, the General Assembly and the Security Council.

29 ICJ Reports 1986, 14 (95), para. 178.

30 See M. Lachs, "The Law in and of the United Nations (some reflections on the principle of self-determination)", *IJIL* 1 (1960), 429 et seq.

31 R. Bernhardt, "On Article 103", 1117 et seq., in: B. Simma (ed.), *The Charter of the United Nations. A Commentary*, 1994; Th. Flory, "Article 103", in: J.P. Cot, A. Pellet (eds.), *La Charte des Nations Unies*, 2nd edition, 1991, 1381.

32 Id. 1123; J. Combacau, *Le pouvoir de sanction de l'O.N.U.*, 1974, 286 et seq.

670 (1990) of 25 September 1990[33]. Such is also the case for S/RES/748 (1992) of 31 March 1992, as it was stated by the ICJ in its Order in response to the request for provisional measures filed by Libya against the United States and the United Kingdom, in the Lockerbie Case[34].

11. The establishment of such a normative hierarchy in derogation to the common law of treaties[35] does create a situation which, in some respect, seems similar to the one existing at the municipal level between the constitution and ordinary legislation. However, the similarity should not be exaggerated and Article 103 raises quite a number of problems.

In particular, it says nothing about the relationship between the obligations of the United Nations and those which are rooted in general i.e. *customary* international law[36]. A logical explanation may be given to this silence, which does not necessarily weaken the «constitutional» interpretation of Article 103 in the spirit of the founding fathers, since, with regard to general international law existing at that time, it was probably obvious that this new Charter was designed to serve as a comprehensive updating of previously established customs (see above under I.A.bb.5b). As to the *future* customary rules, in the mind of the same drafters, these rules would never be substantially incompatible with the norms established in the Charter, for ideological more than for legal reasons. If this interpretation is the correct one, then it reinforces the idea that the Charter was aimed at

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33 See E. Roucounas, "Engagements parallèles et contradictoires", *RdC* 206 (1987), 13 (66–70).

34 ICJ Reports 1992, 3 (15), para. 39. The Court said that "*prima facie*", "this obligation extends to the decision contained in resolution 748 (1992); and (...) in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention". See in particular T. Franck, "The Power of Appreciation: Who is the Ultimate Guardian of UN Legality?", *AJIL* 86 (1992), 519 et seq.

35 Article 103 establishes a clear derogation to the rule «lex posterior derogat lex priori».

36 Contrary to a proposal made during the San Francisco Conference, according to which the latter should be superseded by the former: see Combacau, see note 32, 282. It should be noted that one of the highly controversial issues raised by the Order of the Court in the Lockerbie Case is that it does not even consider the fact that the rule «aut dedere, aut judicare», embodied in the Montreal Convention (over which Resolution 748 prevails on the basis of Charter Article 103) is most probably at the same time a customary rule. On the customary nature of this principle, see in particular, J.A. Carrillo Salcedo, "The Legal Aspects of International Terrorism", in: *Centre for Studies and Research in International Law and International Relations*, 1988, 39 et seq.

becoming and remaining the direct expression of the true «spirit» of modern international law, against which no rule of general international law should ever prevail[37].

12. Here again, however, the existence of Article 103 does not necessarily make easier the definition and articulation of the different legal regimes eventually overlapping each other: let us imagine a treaty concluded between two member countries of the United Nations which results in the violation by its parties of their common obligation to safeguard the rights of a people to its self-determination and its permanent sovereignty over its natural resources (an hypothesis of which the circumstances having given rise to a recent case prove that it is not purely academic)[38].

Not only would such a situation give rise to the question of the coordination of the international responsibility of both states for their dual violations, a) of their «constitutional» or statutory obligation as members of the United Nations; b) of their obligation under general international law to respect the same rights. It would likewise raise another issue, namely the fate of the bilateral treaty at the origin of the wrongfulness.

As an agreement giving rise to a conflict between, on the one hand, the obligations of its state parties on the basis of *pacta sunt servanda* and, on the other hand, their obligations as members of the United Nations, the latter would prevail over the former in application of Article 103 and the treaty could not be carried out.

Now, as a treaty in contradiction with what is most generally seen as a peremptory norm of international law (the obligation to respect the rights of people) this treaty would be void *ad initio*[39], which is something legally

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37 See M. Virally, *L'Organisation mondiale,* 1972, 160 et seq.

38 See under I.B.bb.14: the so called East Timor Case, the occasion of which was given by a treaty concluded between Australia and Indonesia to explore and exploit the oil resources on the continental shelf situated between East Timor and Australia. It should be noted that, in this case, Portugal, as explained hereafter did not want to invoke the nullity of the Australian-Indonesian treaty, since its claim focused, as that of Nauru had successfully done a few years before for another matter, on the specific responsibility of Australia, (in spite of the fact that Australia was not the sole Trustee exercising its authority over Nauru but shared this quality with the United Kingdom and New Zealand). The conduct of Indonesia was not considered in the claim. For Portugal, it constituted a mere fact (of which, furthermore) the illegality had been already declared by the competent political organs of the United Nations (Security Council and General Assembly) at the time of their creation.

39 At least, if both parties were parties to the 1969 Vienna Convention on the Law of Treaties (without discussing here the question whether jus cogens could be invoked outside the framework of this convention).

completely different. It may be assumed that the end result would be roughly the same, but this example demonstrates again that the basic principles laid down in Articles 1 and 2 of the Charter as «constitutional» rules of the international community and the same norms existing in general international law retain a separate identity, as rightly pointed out by the Court in the above mentioned Nicaragua Case. Legally speaking, they are not merged one with the other, each one staying with its own legal regime (see above under I.A.bb.5a). We then come to the conclusion that the substantially «constitutional» dimension of the Charter gives rise to some important unresolved questions. It is, at the same time, *irrefutable* and *uncompleted.*

bb. The Charter and the International «Crime» of a State

13. This paradoxical reality has been one of the reasons why, in particular, the ILC has met so many difficulties in assessing what could be the consequences of the commission of an international «crime»[40].

As a matter of fact, the breach of a United Nations obligation by one of the member states may give rise to institutional reactions, i.e. to reactions by the competent organs to condemn but also to sanction the responsible state. Both the Security Council (Arts. 41 and 42) and the General Assembly (Arts. 5 and 6) are able to do so. However, all these reactions do not cover the same field. Articles 5, 41 and 42 are explicitly connected with the threat to the peace, breach of the peace or an act of aggression. Inasmuch as the wording of the Charter is to be read as it is formulated, this then leaves out cases in which the breached obligation does not directly concern peace and collective security[41].

In any event, any institutional reaction by the competent organs of the United Nations does not prejudice the implementation of the international responsibility of the wrongful state on the ground of the secondary rules existing in general international law and governing state responsibility.

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[40] See in particular J. Weiler et al. (ed.), *International Crimes of States. A Critical Analysis of the ILC's Draft Article 19 on State Responsibility,* 1989; with a general bibliography; Sh. Rosenne (ed.), *The International Law Commission's Draft Articles on State Responsibility*, 1991, particularly page 179–207.

[41] The scope of Article 6 is larger, since it covers in general the persistent violation of "the Principles contained in the present Charter". But, as the absence of its practise has clearly shown during the first fifty years of the organization, its use is politically extremely difficult and presents the great disadvantage of placing the concerned state out of any action by the United Nations after it has been expelled from the organization.

Even more, it is often forgotten that, in the true spirit of the Charter, sanctions decided by the Security Council on the basis of Chapter VII are not to be taken as a form of international responsibility but merely as an action of international policy, undertaken with a view limited to the re-establishment of peace[42]. This is a further argument for evidencing that the implementation of institutional reactions is not meant to replace the implementation of state responsibility rules and mechanisms under general international law. However, as shown by the complexity of the work of the ILC on this issue, the question is even more critical for those United Nations principles the violation of which constitutes an international crime, as it amounts to a breach of a peremptory norm[43].

14. An illustration of this can be found in the recent East Timor Case brought to the ICJ by Portugal against Australia[44]. The requesting state asked the Court to declare responsible the defendant state for having ignored both the respective quality of Portugal as the *administering power* of East Timor and of the People of East Timor as a *non-self-governing territory* in the sense of Article 73 of the Charter. Portugal thus claimed that Australia was responsible for having ignored the rights of the People of Timor (to self-determination, together with its permanent sovereignty over its natural resources) in negotiating and concluding an agreement on exploration and shared exploitation of the continental shelf with the illegally occupying country, namely Indonesia. Indonesia, indeed, had invaded by force the territory of East Timor in December 1975. As such, it had been at that time condemned by the Security Council through resolutions S/RES/384 (1975) of 22 December 1975 and S/RES/389 (1976) of 22 April 1976 and by the General Assembly, which reiterated later its condemnation and maintained the qualification of Portugal as the administering Country in conformity with Article 73.

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42 See for instance R. Higgins, "International Law and the Avoidance, Containment and Resolution of Disputes", *RdC* 230 (1991), 19 (220); P.M. Dupuy, "The Institutionalization of International Crimes of State", in: Weiler, see note 40, 170–176; id., "Le fait générateur de la responsabilité internationale des Etats", *RdC* 188 (1984), 21 (55).

43 The present author does not share the view of the authors who say that the violation of a peremptory norm should not necessarily be constitutive of a «crime of state». See Dupuy, note 42: "Le fait générateur..." and id., "Observations sur le crime international de l'Etat", *RGDIP* 84 (1980), 449 et seq.

44 ICJ Reports 1995, 90 et seq.; see I. Scobbie, "Self-Determination Undetermined: The Case of East Timor", *LJIL* 9 (1996), 185 et seq.; C. Esposito, "El asunto Timor Oriental ante la Corte Internacional de Justicia", *Anu.Der.Internac.* 12 (1996), 617 et seq.

The interesting fact is that Portugal based its request *on two grounds*: first, on *the law of the United Nations* (especially, the obligation of every member state to respect the principle of equal rights and self-determination of peoples and their duty to cooperate in good faith with the Organisation); second, Portugal invoked, together with the latter ground, the same principle of equal rights and self-determination as exists, most probably with the quality of a peremptory norm, *in general customary international law*[45].

Quite unfortunately, the Court did not take up this opportunity for clarifying the relationship existing between the legal international responsibilities incurred by a state having acted, both, in breach of its «constitutional» obligations as a member of the United Nations and, at the same time, in violation of the same rule as comprised within general customary international law[46]. The international community is thus left with this question largely unsolved.

15. If one turns to general international law, the last version of Part Two of the ILC Draft of July 1996, fills this gap only partially, since it does not establish a complete regime of state responsibility for international crime. What it does, without differentiating between responsibility for the violation of law and the responsibility for crime, is to insist on the obligations of all states. So far, the Commission has chosen, perhaps wisely, to reject the rather unrealistic but highly interesting proposals made in the seventh report by its former Special Rapporteur, Gaetano Arangio-Ruiz[47]. Instead

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45 East Timor Case, ICJ Reports 1995, 90 (93/94) para. 10. The author of the present paper was Counsel for the Government of Portugal, acting in defence of the rights of the People of East Timor.

46 The Court decided that it had no jurisdiction on the case because, in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that state's consent, contrary of the arguments of Portugal that the illegality of Indonesia's conduct had already been established by the Security Council and the General Assembly in 1975 and, repeatedly, during the following years and that Australia's responsibility staid on its own, as it had violated *by its own conduct* its obligations as a member of the United Nations and as a member of the international community. For the eventual contradiction between the so called «Monetary Gold Principle» in the Nauru Case and in the East Timor Case, see in particular E. Jouannet, "Le principe de l'or monétaire, à propos de l'arrêt du 30 juin 1995 dans l'affaire du Timor oriental", *RGDIP* 100 (1996), 673 et seq.

47 G.Arangio-Ruiz, seventh Report on State Responsibility, Doc. A/CN. 4/469 of 9 May 1995, particularly paras.70–119. See Report of the ILC on the work of it's 47th Session, 2 May – 21 July 1995, GAOR 50th Sess. Suppl. No. 10, (A/50/10), particularly paras. 304–319.

of a complex system in which either the Security Council or the General Assembly would ask the ICJ to qualify an illicit act as a crime, leaving it to the Court to enable the member states to take counter-measures against the "criminal" state, the ILC decided to come back to its earlier drafts, established on the basis of Riphagen's reports. Its draft Article 53 adopted on first reading merely indicates what are the duties of the other states (apart from the wrongful one) with regard to the situation created by the committing of the crime and to the "criminal" state itself[48]. This is certainly a very useful provision. But it is not enough for defining in a positive and more concrete way which authority will qualify a wrongful act as being a «crime», and what will be the *specific* consequences of the creation of such an illicit act for the wrongdoer.

16. The current situation as to the legal regime of *«essential obligations»* (as defined above I.A.aa.3-4; bb.5–7) existing at the same time *within* and *outside* the Charter is then equivocal. There is still some ambiguity as to the legal consequences of their violation. Such an unsatisfactory situation is reflected in the very cautious but vague opening articles of Part Two of the 1996 ILC Draft. In particular, Article 37 reserves the case of a special regime of state responsibility for an act having been "determined by other rules of international law relating specifically to that act"[49]. Article 39 carefully says that "The legal consequences of an internationally wrongful act of a State set out in the provisions of this Part are subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of peace and security"[50].

Now, if one wants to avoid the spreading of unilateral reactions to the committing of an alleged «crime» by one state, as its practice proved, under other names, to be effective during the early eighties from the Western countries in reaction to the invasion of Afghanistan by the former Soviet Union or the Argentine invasion of the Falkland Islands[51], the logical outcome of this substantial link unifying all these «essential obligations» under the Charter as a constitution leads to one conclusion: *The regime of state responsibility for crimes should logically be institutionalised within the framework of the United Nations*[52].

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48 Obligations "not to recognize as lawful the situation created by the crime" and not to assist the state "which has committed the crime" as well as to "cooperate with other States", Doc. A/CN. 4/L. 528/Add. 2, Article 53.

49 Doc. A/CN. 4/L. 528/Add. 2, page 15.

50 Ibid. page 16.

51 See P.M. Dupuy, "Observations sur la pratique récente des sanctions de l'illicite", *RGDIP* 87 (1983), 505 et seq.

52 For the same conclusion, see P. Picone, "Valori fondamentali della Comu-

Nevertheless, the difficulty is to establish such an institutional regime without creating any major destabilisation in the actual distribution of political and juridical powers allocated by the Charter to the main organs, in particular the Security Council, the General Assembly and the ICJ. This conclusion points to the fact that the substantial dimension of the Charter as a constitution is necessarily not to be kept apart from its organic or institutional one.

II. The UN Charter as the Institutional Constitution of the International Community

1. Contention that the United Nations Charter could be considered as the constitution of the international community in the organic or institutional sense would mean that, in complement to its constitutional nature as a set of substantial rules and principles aimed at governing the behaviour of each and every member of the same community, the Charter should be able to provide them with the competent organs to set forth effectively these rules and principles in interstate relations.

Furthermore, the constitutional scheme suggests that these organs should be endowed with enough legal (and political) authority to enable them to be obeyed by the member states. The fact that the Organisation is "based on the principle of the sovereign equality of all its Members" is not necessarily an obstacle to the application of that scheme. It implies only that each of its members be placed on the same equal footing with regard to the legal competencies of the United Nations bodies. Incidentally, the same members have conferred on the Security Council "primary responsibility for the maintenance of international peace and security..."[53], and agreed "to accept and carry out the decisions of the Security Council in accordance with the present Charter"[54]. Nevertheless, as everyone knows, during most of the first forty-five years of its existence, the Security Council was unable to discharge its mandate, since it was paralysed by the veto inasmuch as it dealt (or would have dealt) with an issue giving rise to a conflict of political interest between two or more of its permanent members.

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nità internazionale e Nazioni Unite", *Comunità Internaz.* 50 (1995), 439 et seq.

53 Article 24 of the Charter.

54 Article 25 of the Charter.

2. However that may be, since the beginning of what is usually (and, it is suggested, rather improperly) called the post cold war era[55], the Security Council has proved able to act in a new way. It took a great number of decisions, dealing with many cases in which it considered that a "threat to the peace" actually existed which would justify the use of its special authority based on Chapter VII of the Charter. The discipline respected almost unanimously by the members as to the sanctions decided by the Security Council against Iraq effectively gave the unprecedented image of a world community placed under the centralised authority of the organ primarily responsible for the maintenance of collective security, a vision which would, at the first glance, fit within the perspective according to which the Security Council acts as the world executive, at least as far as peace and security are concerned.

Nevertheless, this new era is already composed of, at least, two differentiated periods. From August 1990 (Gulf Crisis) to December 1992 (Somalia Crisis[56]), the Security Council through the exercise of its newly recovered authority, did not evoke any real criticism from the large majority of the member states. By contrast, from mid-1993 onwards, the outcome of the Somalia Crisis, together with the increasing difficulties met by UNPROFOR in Bosnia and, above all, the questionable decisions taken by the Security Council with regard to Libya in connection with the Lockerbie Case, raised new questions. They pointed, in some situations, to the legality, in others, to the efficiency, of several Security Council's decisions. It was all the more the case for some of those decisions which appeared to be directly inspired by the political will of a sub-group among the permanent members of the Security Council, if not even, by one of them. This explains why the *«legitimacy»* of the Security Council's action (a notion which is familiar to constitutional lawyers) is such a frequently raised issue. It is, then, necessary to review these two successive periods.

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55 If, really, the «cold war» ended only in 1990, what, then, about more than twenty-five years of «peaceful coexistence», a period which began with the real end of the «cold war period», i.e. the end of the Cuba crisis in October 1962, thanks to the determination of J.F. Kennedy? The question is not a purely semantic one, since this very period of «peaceful coexistence» was, by far, the most fruitful one in terms of contribution by the United Nations (mainly the General Assembly) to the development of modern international law. Cf. Dupuy, see note 1.

56 S/RES/794 (1992) of 3 December 1992.

A. The Security Council as the «Executive» of the International Community

3. The different steps taken by the Security Council during the «Gulf Crisis» with regard to Iraq's characterised aggression against Kuwait and its aftermath have been often analysed in a most conclusive way by several authors to whom it is sufficient, here, to refer[57]. For testing the «constitutional» approach, it is necessary to focus, first, on the main features of the Security Council's actions, and, second, on their inherent legal significance.

4. As for the features of the actions undertaken by the Security Council during the first period contemplated above, they can be characterised in three ways: from August 1990 until at least December 1992, these actions were: a) *diversified*, as they were aimed at varied goals, some of which, in particular in S/RES/687 (1991) of 3 April 1991[58], are hardly reconcilable with a strict interpretation of the Security Council's power within Chapter VII; b) *authoritative*, at least for a good part of them, which consisted in decisions, some of which established sanctions against the targeted state; c) *accepted* by the great majority of member states.

The conjunction of these three characteristics is striking. Since it demonstrates the high level of legitimacy achieved by the Security Council during this period. It is, in particular, impressive to ascertain that the obligation in all instances including those for the implementation of sanctions, produced some economic prejudice, to implement the sanctions decided by the Security Council against Iraq under the authority of the Sanctions Committee ,which was composed of the same member states as the Security Council itself[59].

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[57] See in particular Colloque du CEDIN, "Les aspects juridiques de la crise et de la guerre du Golfe, aspects de droit international public et de droit international privé", 1991; J. Verhoeven, "Etats alliés ou Nations Unies?: l'ONU face au conflit entre l'Irak et le Koweït", *AFDI* 36 (1990), 415 et seq.; O. Schachter, "United Nations Law in the Gulf Conflict", *AJIL* 85 (1991), 452 et seq.; P.M. Dupuy, "Après la guerre du Golfe...", *RGDIP* 95 (1991), 621 et seq.; Symposium: The Gulf War and its Aftermath, *EJIL* 2 (1991), 85 et seq.; Agora, "The Gulf Crisis in International and Foreign Relations Law", *AJIL* 85 (1991), 63 et seq.

[58] S/RES/687 was taken immediately after the conclusion of the armed action carried out by the allied forces against Iraq. See S. Sur, "La résolution 687 du 3 avril 1991 du Conseil de sécurité dans l'affaire du Golfe: Problèmes de rétablissement de la paix", *AFDI* 37 (1991), 25 et seq.

[59] See M. Koskenniemi, "Le Comité des sanctions créé par la résolution 661

In the same way, almost no state raised real concern as to the legality of some quasi-judicial determinations exercised by the Security Council, in particular with regard to declare «null» and «void» all Iraqi statements made since 2 August 1990[60]. The same proved to be true both for use by the Security Council of Chapter VII to impose a binding settlement of the boundary dispute between Iraq and Kuwait[61] and for creating the Compensation Commission, aimed at carrying out a very special and new legal regime of state liability on the burden of Iraq for the reparation of damage caused by its aggression against Kuwait[62].

5. During this initial period, everything seemed at least to happen as if almost every state had found it legally and politically justified to support the action of an organ acting in the name of the international community as a whole in defence of the interests and values regarded by the same community as being fundamental for the maintenance of its own integrity.

This seems to be the inherent legal significance of the manifold actions undertaken by the Security Council. In particular, the extended way in which this organ interpreted the "threat to the peace" set out in Article 39 may be understood as demonstrating its willingness to cover under it a bright spectrum: not only the situations creating a risk of armed conflict but also several cases in which it seemed that the threat did not concern peace but the respect of some "international obligation so essential for the protection of fundamental interests of the international community" that their breach "is recognised as a crime by that community as a whole" to speak with Article 19 para. 2 of ILC Draft 1996[63].

6. This inspiration seems, indeed, to have inspired in particular the content of S/RES/687 (1991) of 3 April 1991, humorously called by F. Kirgis "the mother of all resolutions"[64]. In particular, the situation in which Iraq was placed after the successful ending of the allies' armed action authorised by the Security Council made the United Nations act both in a quasi-legislative and in a quasi-judicial way. The parallel between the legal regime established in the institutional framework of the Compensa-

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(1990) du Conseil de sécurité", *AFDI* 37 (1991), 119 et seq.

60 S/RES/687 (1991) of 3 April 1991, para. 17.

61 S/RES/687, para. 2/3.

62 S/RES/692 (1991) of 20 May 1991 which followed the declaration of Iraq's international responsibility made in S/RES/687. See F. Kirgis, "Claims Settlement and the United Nations Legal Structure in The United Nations Compensation Commission", in: R. Lillich (ed.), *13th Sokol Colloqium*, 1995, 110-113.

63 See note 40.

64 F. Kirgis, "The Security Council's First Fifty Years", *AJIL* 89 (1995), page 524.

tion Commission and the first experience of a state responsibility for crime has been explicitly drawn by several authors[65]. It also inspired G. Arangio-Ruiz in his seventh Report to the ILC on State Responsibility[66].

As a matter of fact, for the very first time in the history of international relations, an individual state was and still is confronted, at the time of writing, by the rest of the international community, represented and organised within a subsidiary organ of the Security Council. This state is held liable for having breached, among others, the prohibition of aggression, the right to self-determination of peoples, the serious breach on a widespread scale of human rights (in particular, as regards the Kuwaiti, the Shiite and the Kurdish population) and the massive pollution of the atmosphere and of the sea (by the voluntary burning of Kuwaiti oil spills), all of these wrongful acts constituting an «international crime» under Draft Article 19 para. 3 adopted by the ILC.

7. At this stage, it is very tempting to place the Security Council's line of action in connection with the remarks made in the first part of this paper. There is a parallel to be drawn between, on the one hand, the substantial constitutional dimension of the Charter, as it federates the basic rules of the international community, and, on the other hand, the action of the Security Council in the early nineties, precisely aimed at defending the same rules, breached by an individual aggressor.

If one looks at the records of debates which preceded the adoption of S/RES/687 (1991) of 3 April 1991, 688 (1991) of 5 April 1991, and 705 (1991) of 15 August 1991, it does not seem exaggerated to say that, at least during that period following the victorious allied coordinated action against Iraq, *one was very close to the unification of the substantial and of the organic dimensions of the Charter under the recovered authority of a Security Council* recognised by an almost unanimous international community as its diligent executive.

The substantial connection established by the Council between the maintenance of peace and the performance of the other duties included in Arts. 1 and 2 of the Charter does not seem, by itself, to be in contradiction with the spirit of the Charter, which does contain such a relationship

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65 See in particular, G. Gaja, "Réflexions sur le rôle du Conseil de sécurité dans le nouvel ordre mondial", *RGDIP* 97 (1993), 298 et seq.; P.M. Dupuy, "Sécurité collective et organisation de la paix", *RGDIP* 97 (1993), 617 et seq.; P. Picone, "Interventi delle Nazioni Unite e obblighi *erga omnes*", in: P.Picone (ed.), *Interventi delle Nazioni Unite e diritto internazionale*, 1995, 517 et seq.; G. Christenson, "State Responsibility and the UN Compensation Commission: Compensating Victims of Crimes of State", in: Lillich, see note 62, 311 et seq.

66 Doc. A/CN. 4/469, of 9 May 1995 at para. 82.

between the prohibition of force and the promotion of the many ways of cooperation among its members to eradicate the diverse causes of war[67]. The innovation seems more to be found in the way in which the Security Council, originally backed by the rest of the member states, considered it necessary to be not only primarily responsible for international peace but also for respect universally due to the main principles set out by the Charter.

8. This purpose guided some of the following Security Council's demonstrations of expanded understandings of a "threat to the peace". Two directions, in particular, may be recorded here:

– One is the involvement of newly designed actions having as their goal humanitarian interventions in a *non*-international armed conflict: such was notably the case in Iraqi/Kurdistan (S/RES/688 (1991) of 5 April 1991), in Somalia (S/RES/794 (1992) of 3 December 1992), later, in Rwanda (S/RES/929 (1994) of 22 June 1994). Even if preceded by an action exercised by one or few member states acting under the mandate of the United Nations, these actions were later directly endorsed by a new type of United Nations forces. This led the Secretary-General, in his Agenda for Peace, to differentiate, at least, between "preventive diplomacy", "peacemaking" and "peace-keeping".

– The other direction likewise inspired by a pretension of the Council to act as the executive of the international Community is the creation, under the umbrella of Chapter VII of special war crime tribunals for judging the atrocities committed in former Yugoslavia and in Rwanda, as they appear clearly as massive breaches of those "elementary principles of humanity" mentioned above.

Nevertheless, the tremendous action of the Security Council on the basis of Chapter VII, together with the evolution of the political balance which had prevailed during this first period led to manifold criticism as to the perpetuation of such a broad concept of "threat to the peace"[68].

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67 See P.M. Dupuy, "Sécurité collective et organisation de la paix", *RGDIP* 97 (1993), 615 et seq.; id., "Sécurité collective et construction de la paix dans la pratique contemporaine du Conseil de sécurité", in: U. Beyerlin et al. (eds.), *Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt*, 1995, 41 et seq.

68 See for instance Ch. Dominicé, "Le Conseil de sécurité et l'accès aux pouvoirs qu'il reçoit du chapitre VII de la Charte des Nations Unies", Revue suisse de droit international et de droit comparé, 1995, 417 et seq.

B. A Constitutional Crisis of the UN?

9. The idea that the United Nations could be confronted with a «constitutional crisis» has been spread by several authors, such as, in particular, Reisman[69] or Bedjaoui[70]. These opinions were inspired by Libya's suit in the International Court of Justice against the United States and the United Kingdom[71]. The Court adopted in 1992 two decisions on a Libyan request for interim measures, one for the United States, the other for the United Kingdom[72]. These decisions point to one of the *technical* reasons explaining the contention of a «constitutional crisis» within the United Nations. These reasons go along with others, even more determinant, which are political.

aa. Technical Reasons for the Crisis

10. The technical reasons are all caused by the sudden rebirth of the Security Council's activity after the ending of the East-West confrontation. There are three main reasons here:

– The first one derives from the way in which the Security Council has extended the scope of its initiatives. As already mentioned, the generalised invocation of the notion of "threat to the peace" is one of the most frequent tools used by the Council to decide sanctions, to create organs, or to define some set of actions to be undertaken by the member states. This notion of "threat to the peace" is in itself rather ambiguous and no precise determination as to it stems from practice. Frowein rightly points to it as to "the

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69 M. Reisman, "The Constitutional Crisis in the United Nations", *AJIL* 87 (1993), 83 et seq. and under the same title, a contribution of the same author to *Le développement du rôle du Conseil de sécurité/The Development of the Role of the Security Council*, Académie de droit international de La Haye, Colloque/Workshop, The Hague, 21–23 July 1992, 1993, 399 et seq.

70 M. Bedjaoui, *Nouvel ordre mondial et contrôle de la légalité des actes du Conseil de sécurité*, 1994, 7 et seq. with supplementary documents. See also M. Arcari, "Le risoluzioni 731 e 748 e i poteri del Consiglio di Sicurezza in materia di mantenimento della pace", *Riv. Dir. Int.* 75 (1992), 932 et seq.; J.M. Sorel, "Les ordonnances de la CIJ du 14 avril 1992 dans l'affaire relative à des questions d'interprétation et d'application de la Convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie", *RGDIP* 97 (1993), 689 et seq.

71 Initiated on 3 March 1992.

72 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, ICJ Reports 1992, 3 et seq. (114).

broadest and most indistinct concept in Article 39"[73]. This implies that it is an inherent weakness of the Charter. Quite evidently on purpose, its drafters wanted to leave as much freedom as possible to such a highly political organ dominated by the «Big Five» when appreciating the necessity to intervene in a concrete situation[74].

In recent practice, the striking fact is that the Security Council did not deem it necessary to demonstrate or justify the effective existence of a threat to the *international* peace including in some situations in which it was not necessarily self-evident that such a threat did exist at the international scale. Such was, in particular, the case with regard to the situation prevailing in Somalia in December 1994, when S/RES/794 (1992) of 3 December 1992 was adopted. The humanitarian crisis left no doubt. But its cross-border effects were not discernible, at least at first view[75]. In the same way, S/RES/748 (1992) of 31 March 1992 does not demonstrate in which respect the alleged conduct of Libya in the Lockerbie context creates a real threat to the international peace. As said by a qualified American author, "mere allegations that a particular government supports terrorism do not make the case"[76]. Other examples of such a practice could easily be found in recent times[77].

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73 See in particular J.A. Frowein, "On Art. 39", 605 et seq., in: Simma, see note 31; G. Cohen-Jonathan, "Article 39", in: Cot, Pellet, see note 31, 645 et seq.

74 See B. Conforti, "Le pouvoir discrétionnaire du Conseil de sécurité en matière de constatation d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression", in: *Le développement...*, see note 69, 51 et seq.; J. Combacau, *Le pouvoir de sanction de l'O.N.U.*, 1974, 104–106; J. Arntz, *Der Begriff der Friedensbedrohung in Satzung und Praxis der Vereinten Nationen*, 1975, 24 et seq.; U. Beyerlin, "Sanctions", in: R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, Vol. 2, 1995, 1111 et seq.

75 See Kirgis, note 64, 513; R. Gordon, "United Nations Intervention in Internal Conflict: Iraq, Somalia and Beyond", *Mich. J. Int'l L.* 15 (1994), 519 et seq.

76 Kirgis, note 64, 516.

77 Another issue which may be noticed here is the proportionality one, as applied to the reaction decided by the Security Council in response to what it determines as being a "threat to the *international* peace". See M. Bothe, "Les limites des pouvoirs du Conseil de sécurité", in: *Le développement...* , see note 69, 76 et seq.; more generally, see Société française pour le droit international, Colloque de Rennes, *Le chapitre VII de la Charte des Nations Unies*, 1995, see in particular, J.M. Sorel, "L'élargissement de la notion de menace contre la paix", 3 et seq., et P. Daillier, "Elargissement et diversification de l'intervention des Nations Unies au

– The second technical reason to the alleged constitutional crisis of the United Nations is the absence of checks and balances in the Charter itself. The way in which the Charter apportions competences among the General Assembly and the Security Council, in particular as to the maintenance of peace leaves room for some concurring action, as demonstrated by the ICJ in its Advisory Opinion in the Certain Expenses Case[78]. However, there is no «constitutional» way in which one would be able to control the action of the other. The recent period (i.e. from 1990 onward) has revealed the contrast between an overactive Security Council and a rather discreet General Assembly, which seems far from the time when it used to be the cradle of many far reaching normative innovations, which gave rise to the controversial «soft law» issue. After 1990, the Security Council became the almost exclusive center of initiatives within the United Nations, and its activity, dominated by the «Big Five», is not balanced by the universal deliberating body.

– This absence of political control is all the more striking in that there is no more judicial control over the decisions taken by the Security Council. As said again by the ICJ in the above mentioned opinion, "each organ must, in the first place at least, determine its own jurisdiction"[79]. This appreciation stems from the position adopted by the Court in the two orders which it adopted after the request of interim measures requested by Libya in the Lockerbie Case. Refusing to make any statement of law as to the legality of S/RES/748 (1992) of 31 March 1992, adopted by the Security Council after the closure of the oral proceedings, the Court merely said that "both Libya and the United States, as members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter"[80]. This conclusion was backed by an interpretation of the legal impact of Charter Article 103.

11. It is striking that, in commenting on these two identical orders, the parallel with municipal constitutional law was commonly made by authors, Franck going so far as comparing the issue at stake with the famous *Marbury v. Madison* U.S. Supreme Court Case[81]. Indeed, reference made

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titre du chapitre VII", 121 et seq.; à comparer à P. Picone (ed.), *Interventi delle Nazioni Unite e diritto internazionale*, 1995.

78 ICJ Reports 1962, 151 (163): "The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security".

79 ICJ Reports 1962, 151 (168). See generally Bedjaoui, see note 70.

80 ICJ Reports 1992, 3 (5), para. 42.

81 T. Franck, "The «Powers of Appreciation»: Who is the Ultimate Guardian of UN Legality?", *AJIL* 86 (1992), 519 et seq.; compare with J.

by the Court to Article 103 reinforces this constitutional approach, since it stresses the hierarchical position of United Nations obligations. It makes the basic rules and principles contained in the Charter superior to every other and gives a special weight to the decisions taken by the competent United Nations organs. From this point of view, and without prejudice to the remarks made earlier with regard to it (see above under I.B. 8–13), Article 103, as seen by the ICJ, seems to consecrate the constitutional dimension of the Charter, both in the substantial and in the organic sense: United Nations obligations have priority over others and the Security Council has the power to make them respected, since its decisions are peremptory ones. Nevertheless, this reference made by the Court to Article 103 should not obscure the main purpose of the ICJ in this case: its first target was to avoid a delicate confrontation between the concurrent exercise of their respective competencies by two principal organs, the Security Council and the Court itself.

In reality, the Lockerbie Case, while giving a new impetus to the constitutional approach of the Charter, still demonstrates that two logics are at work within the Charter. The one is legal. It aims to develop in the future new procedures aimed at controlling the Security Council's actions so as to make it respectful of the rule of law. The other remains political. Contrary to the former, it suggests that the Security Council's permanent members (even if their number would be extended) will (and would) maintain as much as possible the *discretionary* character of any legal determinations made by the Security Council on the ground of Article 39.

One may then ask whether the current situation is correctly characterised if identified in terms of "constitutional crisis". Crisis suggests that a situation is the result of a dysfunction of organs or institutions designed for another function. This does not seem to be the case, at least as far as the respective situations of the Security Council and of the Court are concerned. According to the Charter, none of them holds a controlling power over the other. If there is a crisis, then, it seems much more to be found in the political mistrust manifested by the other members of the United Nations with regard to the Security Council's continued action after mid-1992.

bb. Legitimacy

12. Examining the current challenge to the *legitimacy* of the Security Council's use of its constitutional authority, Caron points to two main reasons: one is that "the Council is dominated by a few states". The other

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Alvarez, "Judging the Security Council", *AJIL* 90 (1996), 1 et seq.

is "that the veto held by the permanent members is unfair"[82]. One may easily share this view. Here again, nevertheless, it should not be forgotten that, from a legal and constitutional point of view, the paradox of the Charter, as it was voluntarily established in the text of the Charter was to combine the equality of every one of its members (Article 2 para. 1) with the organisation, at the same time, of a directorate composed of the «Big Five» as they were after World War II (Article 27). The privilege is legal but, as any privilege, it must be deserved. In other terms, *what creates a problem is the very way in which it was used* during the period beginning with S/RES/731 and 748 (1992), both of them directed towards Libya with a view to ordering it to disregard its rights as a state submitted to general international law[83] and its obligations as a party to the 1971 Montreal Convention[84].

13. The crisis of legitimacy lies then precisely *in the absence of loyal representation by these resolutions of the general opinion prevailing among the members of the international community*, contrary to what it used, more or less, to be during the previous period.

The Security Council suddenly ceased to appear as the world executive. Rightly or wrongly, for many member states, it began to appear as a tool for the promotion of the political interest of a sub-group within the group of permanent members[85]. Later lack of coherence in the Security Council's position with regard to the Bosnian crisis, together with the growing implication of NATO in this country or the evident implication of the United States in the Haitian crisis[86] contributed to reinforcing the idea of

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82 D. Caron, "The Legitimacy of the Collective Authority of the Security Council", *AJIL* 87 (1993), 552 et seq., (562). Interestingly, the legitimacy problematic is basically an American one? See in particular T. Franck, *The Power of Legitimacy Among Nations*, 1990; see commentary by J. Alvarez, "The Quest of Legitimacy: An Examination of the «The Power of Legitimacy Among Nations» by T. Franck", N.Y.U.J. Int'l L. & Pol. 24 (1991), 199 et seq.

83 As said above, the principle «aut dedere aut judicare» is most probably a general custom of international law.

84 Cf. Reisman, see note 69, "The Constitutional Crisis... ", 404–409.

85 This persistent perception is currently reinforced by the prominent position of the United States, within and outside the Security Council. See in particular Caron, see note 82, 562; for an illustration of American pressures already during the "Gulf Crisis" period, see B. Weston, "Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy", *AJIL* 85 (1991), 516 et seq.; Reisman, see note 69, "The Constitutional Crisis...", 83; A.F. Cooper, R.A. Higgott & K. Nossal, "Bound to Follow? Leadership and Fellowship in the Gulf Conflict", *Pol. Sci.* 106 (1991), 391 et seq.; Kirgis, see note 64, (526).

an organ aligned on the position imposed by a very limited group of states, if not always by one.

Such a crisis is of a political nature much more than a constitutional one, but it has juridical outcomes. It results in getting out of the way the image of a Security Council acting in defence of the *«essential obligations»* (see above under I.A.bb.7). If the Security Council is no longer the representative of the world community but rather that of a very small minority of powerful countries acting to some extent under pressure exercised by the only super-power, then the international community lacks its main tool for the promotion and defence of its main rules. The reconciliation between the substantial and the organic dimensions of the Charter as the World Constitution, foreseen during a brief period after the "Gulf War", vanishes again, even if one should be careful, in such matters, not to move from one vision to the other with the same lightness.

III. General Conclusion

1. In expressing the idea that the Charter of the United Nations is or has become "the constitution of the international community", one must always be conscious that such an expression entails for a part a metaphoric dimension.

The international legal order remains more characterized by the spreading of sovereignty than by the overall normative and organic subordination of states to an international public order embodied in the text of a Charter that would at the same time provide for a central authority aimed at enforcing the "constitutional" rules characterising that public order. What the ICJ said in 1949 remains true: the United Nations is not a "super-State"[87].

That being said, the assertion that the creation of the United Nations has introduced a radical change in the structure of international law, which was made by a series of authors including Friedman[88], Lachs[89], Schach-

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86 See M. Reisman, "Haiti and the Validity of International Action", *AJIL* 89 (1995), 82 et seq. Y. Daudet (ed.), *La crise d'Haïti (1991–1996)*, 1996; O. Corten, "La résolution 940 du Conseil de sécurité autorisant une intervention militaire en Haïti: L'émergence d'un principe de légitimité démocratique en droit international?" *EJIL* 6 (1995), 116 et seq.

87 ICJ Reports 1949, 174 (179).

88 W. Friedmann, *The Changing Structure of International Law*, 1964.

89 M. Lachs, "The Development and Trends of International Law in our Time", *RdC* 169 (1980), 9 et seq.

ter[90], Virally[91] or R.J. Dupuy[92] has likewise proved to be true over the last fifty years.

2. In particular, on the normative front, the development of United Nations law through the activity of its principal organs, notably the General Assembly (during the sixties and seventies), the Security Council (during the first half of the nineties) and, in some decisions, the ICJ[93] has enhanced the seven principles contained in Charter Arts. 1 and 2 as reiterated in A/RES/2625 (XXV) of 24 October 1970. This demonstrated the vocation of the Charter to serve as *the* text of reference. It does not entail each and every of the "essential obligations" binding on all members of the international community. Nevertheless, the Charter, together with its further normative developments set forth the most comprehensive among them. As such, it establishes a substantial and logical link between all of these "essential obligations".

Thanks to the intimacy of their connection with the Charter, these obligations are practically all connected to the overall universal obligation to promote *peaceful* international relations in conformity with Article 2 para. 4 which realizes the *ratio legis* of the basic principles laid down in the Charter. A striking demonstration of this dynamic of integration has been demonstrated, among other examples, by the way in which the Security Council was able to welcome into the scope of the Charter the defence of those rules of humanitarian law "which are beyond any doubt part of customary international law", as it was accurately noticed recently by the ICJ in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, of 8 July 1996[94].

3. More generally, and this brings us to the organic or institutional dimension, the way in which the Security Council has expanded the scope

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90 O. Schachter, "International Law in Theory and in Practice", *RdC* 178 (1982), 9 et seq.

91 M. Virally, "Panorama du droit international contemporain", *RdC* 183 (1983), 9 et seq.

92 R.J. Dupuy, "Communauté internationale et disparités de développement", *RdC* 165 (1979), 9 et seq.

93 See P.M. Dupuy, "Le juge et la règle générale", *RGDIP* 93(1989), 569 et seq.

94 *ILM* 35 (1996), 828 para. 81. The Advisory Opinion refers in this paragraph to the Report of the Secretary-General introducing the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. This Report was unanimously adopted by the Security Council with S/RES/827 (1993) of 25 May 1993.

of Chapter VII, in particular through an enlarged acceptance of the concept of "threat to the peace", gave during a short period (1990–1993) some consistency to the idea that, as the organ primary responsible for the maintenance of international peace, it would become the promoter and defender of the universal respect due to these *essential obligations*, as defined above (see above under I.2–7).

4. However, the quick, but effective loss of credibility of the Security Council after the conjunction of different factors among which some of its decisions having taken place from 1993 onward demonstrate that its capital, in terms of *legitimacy* remains rather fragile. Now, this is a crucial element for the support and enhancement of its role as the "World Executive". The condition for the promotion of an extended concept of "threat to the peace" enabling the Security Council to act as the defender of the international public order depends on its recognition as such by "the international community as a whole".

This Security Council's legitimacy is in particular dependant on the fitness of its permanent members (especially the most powerful among them) for the taking of initiatives and decisions that represent effectively the will of the international community and not the achievement of their own foreign policy. The idea of a "constitutional crisis" affecting the United Nations is then to be viewed with some caution. It is true that a better balance of power between the General Assembly and the Security Council or a real control of the legality of its actions could be thought of in theory and, eventually, in practice[95]. It is likewise true that a modification of the composition of the Council must be envisaged, in order to make it more representative of the actual distribution of power among nations. The procedural and political difficulties for a revision of the Charter should, however, not be underestimated.

5. Nevertheless, the promotion of the Charter as the effective and stable constitution of the international community constitutes a challenge of particular importance. There are many reasons for that, both political[96] and legal[97]. The Charter of the United Nations is at the same time a political

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95 See J. Alvarez, "Judging the Security Council", *AJIL* 90 (1996), 1 et seq. (38–39).

96 Behind the illusion of a world community reconciled by an apparent common belief in the virtues of free trade and democracy, the divorce of mentalities and immediate interests remains as huge as before the "end of the Cold War".

97 There is a real legal technical concern and an element of threat placed on the international legal order which makes this issue even more stringent. It consists in the dissemination of treaty based regimes establishing each for itself, their mechanisms of sanctions and settlement of disputes, as

project and a legal commitment for its member states as well as a binding treaty and programme of ambitious cooperation. It is at the same time the basic covenant of the international community and the world constitution, already realised and still to come.

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demonstrated in particular in human rights law, in environmental law, or in some branches of international economic law. The advantages of such "follow-up mechanisms" in terms of implementation and, even, of enforcement of treaty obligations is striking. Nevertheless, the way in which they could be worked out on the false assumption that each of them constitutes a *"self-contained regime"*, more or less autonomous and independent from the general framework of the international legal order creates a real danger of the legal fragmentation of this order. One of the means aimed at safeguarding its unity would consist in the effective promotion of the Charter as the substantial and organic constitution of the international community. See P.M. Dupuy, "The International Legal Order: Unity or Fragmentation?", forthcoming.