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TARGETED SANCTIONS IMPOSED BY THE UN SECURITY COUNCIL AND DUE PROCESS RIGHTS

A Study Commissioned by the UN Office of Legal Affairs and Follow-up Action by the United Nations

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INTRODUCTORY NOTE

In the World Summit Outcome Document (UN General Assembly Res. 60/1, para. 109) of 16 September 2005, the Heads of State and Government of the UN Member States "call[ed] upon the Security Council with the support of the Secretary-General to ensure that *fair and clear procedures* exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions".

Pursuant to this mandate, and in accordance with a decision of the Policy Committee of 27 September 2005 (see also the Report of the Secretary-General, "Implementation of decisions from the 2005 World Summit Outcome for action by the Secretary-General", UN Doc. A/60/430 of 25 October 2005, para. 20), the Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, Mr. Nicholas Michel, commissioned a study of the legal implications of the issue. A draft of the study was discussed in an expert seminar, convoked by the Legal Counsel, on 27 February 2006 at UN Headquarters. A final version of the study was submitted by its author on 20 March 2006, and made public by the Office of Legal Affairs in July 2006. It is verbatim reproduced below; only the bibliography (part E) and the texts of relevant provisions of universal and regional human rights treaties and constitutions of UN Member States (part F) were omitted.

In June 2006, the UN Secretary-General addressed a letter to the presidency of the Security Council. Annexed to the letter was a non-paper in which the Secretary-General set out his views concerning the listing and delisting of individuals and entities on sanctions lists. While the non-paper is confidential, the UN Legal Counsel disseminated its principal contents in his statement to the Security Council of 22 June 2006 (which, in relevant parts, is also reproduced below). Accordingly, the minimum standards required to ensure that the procedures for listing and delisting are fair and transparent would include four

basic elements, namely (1) the right of a person against whom measures have been taken to be informed, (2) the right of such a person to be heard, (3) the right to review by an effective review mechanism, and (4) a periodical review of targeted sanctions by the Security Council. The Secretary-General also indicated that those elements would apply *mutatis mutandis* in respect of "entities".

By and large, these views and recommendations of the Secretary-General follow the findings of the study (see part C, para. 12, and part D, sec. 12). The Secretary-General also adopted the notion of "minimum standards" to be observed by the Security Council. By clearly speaking of a "right to be informed", a "right to be heard … by the relevant decision-making body", and a "right to review", the Secretary-General endorsed the view expressed in the study that a person (and an "entity", respectively) against whom measures have been taken by the Council can rely on subjective rights vis-à-vis the United Nations that derive from the UN Charter. As regards the – crucial – right to review, the statement of the Secretary-General remains behind the conclusions of the study. While the latter speaks of a "right to an effective remedy before an impartial institution or body previously established", the Secretary-General introduces the more limited notion of a "right to review by an effective review mechanism", the impartiality of which is relegated to being a feature of the mechanism's effectiveness.

However, in the Presidential Statement of 22 June 2006 (UN Doc. S/PRST/2006/28, in relevant parts reproduced below), the Security Council confined itself to reiterating its commitment to "fair and clear procedures" for the listing and delisting of individuals and entities *in abstractu*. The Council did not specify the requirements of such procedures, as outlined in the study and the non-paper of the Secretary-General, and simply repeated the statement of the World Summit Outcome Document.

It is no secret that the United States and the United Kingdom, in particular, do not support changes to the present situation that would call into question the ultimate decision-making authority of the Security Council with respect to sanctions imposed against individuals and "entities". Both governments therefore reject the establishment of any form of independent review mechanism the decisions of which would be binding on the Security Council, and at least dislike the idea of a body or person with only recommendatory powers whose recommendations would compel the Council to explain and justify its decisions (see, e.g., the proposal of Denmark to establish "an independent review mechanism, in the form of an ombudsman, which could accept petitions directly from listed parties who claim they were unjustly included in the List and unable to get de-listed, … and make a recommendation for action to the Committee";

Fourth report of the Monitoring Team appointed pursuant to Security Council resolutions 1526 (2004) and 1617 (2005), UN Doc. S/2006/154 of 10 March 2006, para. 46).

Apart from further improvements of the sanctions committees' guidelines (see, in that respect, Security Council res. 1617 (2005), paras. 5, 6 and 18, and the Fourth report of the Monitoring Team, paras. 48-50), a relatively modest French proposal may have a chance of succeeding. France has proposed the creation within the Secretariat of a "focal point for receiving delisting and exemption requests directly from the individuals listed". "The creation of such a focal point, to be shared by all the sanctions committees, would allow the procedure to be more accessible, transparent and standardized and ensure that all requests are considered" (see statement of France in the Security Council meeting of 22 June 2006, UN Doc. S/PV.5474, p. 18).

For the time being, the following statement included in the discussion paper provided by the Danish presidency for the debate in the Security Council on 22 June 2006 (UN Doc. S/2006/367) accurately describes the situation: "The Security Council has repeatedly stated that, while combating acts of terrorism by all means, the fight against terrorism must take place within the established framework of international law, in particular human rights, refugee and humanitarian law. While there seems to be broad support for this principle, its more practical application is still under development."

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TARGETED SANCTIONS AND DUE PROCESS

THE RESPONSIBILITY OF THE UN SECURITY COUNCIL TO ENSURE THAT FAIR AND CLEAR PROCEDURES ARE MADE AVAILABLE TO INDIVIDUALS AND ENTITIES TARGETED WITH SANCTIONS UNDER CHAPTER VII OF THE UN CHARTER

STUDY COMMISSIONED BY THE UNITED NATIONS OFFICE OF LEGAL AFFAIRS – OFFICE OF THE LEGAL COUNSEL –

Final version (20 March 2006)

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A. DEFINITION OF THE STUDY'S SCOPE

In the World Summit Outcome Document (General Assembly Resolution 60/1, paragraph 109) of 16 September 2005, the Heads of State and Government of the Member States of the United Nations "call[ed] upon the Security Council with the support of the Secretary-General to ensure that *fair and clear procedures*

exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions".[1]

Pursuant to this mandate, and in accordance with a decision of the Policy Committee of 27 September 2005, the Office of Legal Affairs commissioned the present study of the legal implications of the issue.[2]

"Call[ing] upon the Security Council … to ensure that fair and clear procedures exist", the General Assembly did not express an opinion on the possible existence of a legal obligation of the Council to maintain or introduce such procedures. The General Assembly also abstained from defining the term "fair and clear procedures", especially with regard to the question whether under such procedures targeted individuals and entities must enjoy own procedural rights.

To clarify these issues from a legal point of view, the present study focuses on the following **question**: "Is the UN Security Council, by virtue of applicable rules of international law, in particular the United Nations Charter, obliged to ensure that rights of due process, or 'fair and clear procedures', are made available to individuals and entities directly targeted with sanctions under Chapter VII of the UN Charter?" Having answered this question in the affirmative,[3] an effort is made more precisely to identify those rights and the options available to the Security Council to secure them.

The study does not deal with the position of individuals and entities who suffer losses, damages or disadvantages because of comprehensive economic and trade sanctions imposed on a State or an organization, such as a party to a non-international conflict.[4] It also excludes the question of obligations of individual members of the Security Council arising, on the one hand, from their respective domestic and constitutional law and, on the other hand, from international treaty and customary human rights law.

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1 Emphasis added.

2 The author wishes to express his gratitude to the participants of the expert seminar on fair and clear procedures in sanctions regimes of the Security Council, convoked by the Legal Counsel of the UN, Mr. Nicholas Michel, which took place at UN Headquarters on 27 February 2006 to discuss a draft of the present study. He is grateful for valuable comments and criticism.

3 For the issue of differentiating between due process rights of individuals and "entities", see *infra*, part 12.

4 For a study addressing these questions, see Marc Bossuyt, 'The adverse consequences of economic sanctions on the enjoyment of human rights', Working paper, UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/ 2000/33 of 21 June 2000.

B. THE PROBLEM: THE LACK OF LEGAL PROCEDURES AVAILABLE TO INDIVIDUALS AND "ENTITIES" TARGETED WITH SANCTIONS UNDER CHAPTER VII OF THE UN CHARTER THROUGH WHICH THEY COULD CHALLENGE THE MEASURES TAKEN AGAINST THEM

There are currently ten sanctions regimes in place which have been imposed by the Security Council acting under Chapter VII of the UN Charter, the oldest, concerning Somalia, established in 1992, and the most recent established pursuant to Resolution 1591 concerning Sudan in March 2005.

Eight of the ten sanctions regimes have been established with the purpose, *inter alia*, of designating individuals and "entities" (as defined non-uniformly under the different regimes) as targets of sanctions. Usually, these sanctions encompass a travel ban, an assets freeze and an arms embargo. In five of the eight sanctions regimes, lists have been established with the names of designated individuals and entities.

Of the various sanctions regimes, the one established against individuals and entities belonging to, or associated with, Al-Qaida and/or the Taliban (Resolution 1267 of 15 October 1999 and following resolutions) has gained particular practical importance because of the relatively high number of individuals and entities listed.[5] This sanctions regime also differs from the others in that, after the Taliban were removed from power in Afghanistan, there is no particular link between the targeted individuals and entities and a specific country.

Targeted individuals and entities are not informed prior to their being listed, and accordingly do not have an opportunity to prevent their inclusion in a list by demonstrating that such an inclusion is unjustified under the terms of the respective Security Council resolution(s). There exist different de-listing procedures under the various sanctions regimes, but in no case are individuals or entities allowed directly to petition the respective Security Council committee for de-listing. Individuals or entities are not granted a hearing by the Council or a committee. The de-listing procedures presently being in force place great emphasis on the States particularly involved ("the original designating govern-

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[5] For an overview of the work and procedure of the 1267 Committee, see Eric Rosand, 'The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions', in *American Journal of International Law*, vol. 98 (2004), pp. 745-763, at pp. 747-753. The author rightly emphasized "the delicate balance that needs to be struck between having an expedited listing process to ensure that legitimate targets do not escape sanctions and putting minimum evidentiary standards and a transparent listing process into place to ensure that due process and other human rights standards are respected" (*ibidem*, p. 750).

ment" which proposed the listing, and "the petitioned government" to which a petition for de-listing was submitted by an individual or entity) resolving the matter by negotiation. Whether the respective committee, or the Security Council itself, grants a de-listing request is entirely within the committee's or the Council's discretion; no legal rules exist that would oblige the committee or the Council to grant a request if specific conditions are met.

At the same time, no effective opportunity is provided for a listed individual or entity to challenge a listing before a national court or tribunal, as UN Member States are obliged, in accordance with Article 103 of the UN Charter, to comply with resolutions made by the Security Council under Chapter VII of the UN Charter.[6] If, exceptionally, a domestic legal order allows an individual directly to take legal action against a Security Council resolution, the United Nations enjoys absolute immunity from every form of legal proceedings before national courts and authorities, as provided for in Article 105, paragraph 1, of the UN Charter, the General Convention on the Privileges and Immunities of the United Nations (General Assembly Resolution 1/22A of 13 February 1946) and other agreements.[7]

It has been argued by leading scholars of international law that the present situation amounts to a "denial of legal remedies" for the individuals and entities concerned, and is untenable under principles of international human rights law: "Everyone must be free to show that he or she has been unjustifiably placed

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[6] Thus, the EU Council and EC Commission in the *Yusuf* and *Kadi* cases correctly described the law as it stands, the Court of First Instance agreeing: "As their principal argument, the Council and the Commission, referring in particular to Articles 24(1), 25, 41, 48(2) and 103 of the Charter of the United Nations, submit, first, that the Community, like the Member States of the United Nations, is bound by international law to give effect, within its spheres of competence, to resolutions of the Security Council, especially those adopted under Chapter VII of the Charter of the United Nations; second, that the powers of the Community institutions in this area are limited and that they have no autonomous discretion in any form; third, that they cannot therefore alter the content of those resolutions or set up mechanisms capable of giving rise to any alteration in their content and, fourth, that any other international agreement or domestic rule of law liable to hinder such implementation must be disregarded." See Judgments of the Court of First Instance of 21 September 2005, Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the EU and Commission of the EC, para. 206, and Case T-315/01, Yassin Abdullah Kadi v Council of the EU and Commission of the EC, para. 153.

[7] See Michael Gerster & Dirk Rotenberg, Commentary on Art. 105 of the UN Charter, in Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 2nd ed., vol. II, Oxford: Oxford University Press, 2002, pp. 1314-1324, at p. 1318.

under suspicion and that therefore [for instance] the freezing of his or her assets has no valid foundation."[8]

C. SUMMARY OF FINDINGS

1. On the basis of constitutional and statutory rules and practices common to a great number of States of all regions of the world, and as guaranteed by universal and regional human rights instruments, rights of due process, or "fair trial rights", have been generally recognized in international law protecting individuals from arbitrary or unfair treatment by State organs. Generally recognized due process rights include the right of every person to be heard before an individual measure which would affect him or her adversely is taken, and the right of a person claiming a violation of his or her rights and freedoms by a State organ to an effective remedy before an impartial tribunal or authority. These rights can be considered as part of the corpus of customary international law, and are also protected by general principles of law in the meaning of Article 38, paragraph 1, lit. c, of the ICJ Statute.

2. The UN Security Council being a principal organ of the United Nations, a legal obligation of the Council to comply with standards of due process, or "fair and clear procedures", for the benefit of individuals and "entities" presupposes that the United Nations, as a subject of international law, is bound by respective rules of international law. In accordance with the established system of sources of international law, the United Nations could be obliged to observe such standards by virtue of international treaties (including the UN Charter as the constitution of the United Nations), customary international law, or general principles of law recognized by the members of the international community.

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[8] See Christian Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press, 2003, p. 90. See also Karel Wellens, *Remedies against international organisations*, Cambridge: Cambridge University Press, 2002, at p. 89: "[T]he lack of an appropriate remedial mechanism within the international organisation to carry out the legality test, let alone upon a private individual's request, leaves him or her without direct means of protection", and Gerster & Rotenberg, *supra* note 7, at p. 1318: "*As long as alternative means of legal recourse* (internal appeal procedures; arbitration) *are at the claimant's disposal*, neither Art. 10 of the Universal Declaration of Human Rights nor constitutional guarantees by States compel national courts to deny [the UN] immunity and to start legal proceedings against the UN" (emphasis added).

3. Since the United Nations is not a party to any universal or regional treaty for the protection of human rights, it is not directly bound by the respective treaty provisions guaranteeing rights of due process. The United Nations being an autonomous subject of international law, it does not follow from the fact alone that its Member States have ratified certain human rights instruments that an according obligation of the Organization has come into existence.

4. However, the emergence of "supranational" organizations of the type of the European Community has changed this traditional picture. The law of the European Community (European Union) has made both human rights treaty obligations of EC (EU) Member States as well as "constitutional traditions common to the Member States" sources of Community (Union) law from which direct obligations of the Community (Union) itself arise. There is good reason to expect that the law of other international organizations, including the United Nations, will be increasingly influenced by that development as they, too, begin to engage in "supranational" lawmaking with a direct effect on individuals.

5. At present, customary international law does not provide for sufficiently clear rules which would oblige international (intergovernmental) organizations to observe standards of due process vis-à-vis individuals. To the extent that rules of customary law exist with respect to such standards, they address obligations of States in the sphere of domestic law, and not obligations of international organizations. However, a trend can be perceived widening the scope of customary law in regard to due process to include direct "governmental" action of international organizations vis-à-vis individuals. To this development, the law of the European Community (European Union) has strongly contributed.

The due process rights of individuals recognized as general principles of law are also applicable to international organizations as subjects of international law when they exercise "governmental" authority over individuals.

6. The development of international human rights law, to which the work of the United Nations has decisively contributed, has given grounds for legitimate expectations that the UN itself, when its action has a direct impact on the rights and freedoms of an individual, observes standards of due process, or "fair and clear procedures", on which the person concerned can rely. This finding is in line with essential notions of the concept of international personality.

7. It was already anticipated by the drafters of the Universal Declaration of Human Rights that the respect for and observance of human rights and

fundamental freedoms called for by the Declaration would not only be demanded from States but also from other bodies and institutions exercising elements of governmental authority, including international organizations.

8. Notwithstanding the growing legal importance, for the United Nations, of human rights treaty law on the one hand and constitutional values and traditions common to UN Member States on the other hand (see *supra*, paras. 4 and 6), and the extension of rules of customary international law and general principles of law about due process to international organizations (see *supra*, para. 5), the principal source of human rights obligations of the United Nations is the UN Charter. All UN organs are bound to comply with the rules of the Charter as the constitution of the United Nations. Today, the Charter obliges the organs of the United Nations, when exercising the functions assigned to them, to respect human rights and fundamental freedoms of individuals to the greatest possible extent.

9. The human rights and fundamental freedoms which the organs of the United Nations are obliged to respect by virtue of the UN Charter include rights of due process, or "fair and clear procedures", which must be guaranteed whenever the Organization is taking action that adversely affects, or has the potential of adversely affecting, the rights and freedoms of individuals.

10. The exact scope and intensity of those Charter-based rights of due process of individuals whose rights and freedoms are directly affected by acts of the United Nations is not generally predefined. Dependent on the circumstances of a particular situation, appropriate standards must be determined, suited to that situation, paying due regard to the nature of the affected rights and freedoms and the extent to which action taken by the UN is likely adversely to affect those rights and freedoms. In the first place, such a determination of standards is a responsibility of the organ the action of which is directly affecting rights and freedoms of individuals.

11. When imposing sanctions on individuals in accordance with Chapter VII of the UN Charter, the Security Council must strive for discharging its principal duty to maintain or restore international peace and security while, at the same time, respecting the human rights and fundamental freedoms of targeted individuals to the greatest possible extent. There is a duty of the Council duly to balance the general and particular interests which are at stake. Every measure having a negative impact on human rights and freedoms of a particular

group or category of persons must be necessary and proportionate to the aim the measure is meant to achieve.

12. While the circumstances and modalities of particular sanctions regimes may require certain adjustments or exceptions, the rights of due process, or "fair and clear procedures", to be guaranteed by the Security Council in the case of sanctions imposed on individuals and "entities" under Chapter VII of the UN Charter should include the following elements:

(*a*) the right of a person or entity against whom measures have been taken to be informed about those measures by the Council, as soon as this is possible without thwarting their purpose;

(*b*) the right of such a person or entity to be heard by the Council, or a subsidiary body, within a reasonable time;

(*c*) the right of such a person or entity of being advised and represented in his or her dealings with the Council;

(*d*) the right of such a person or entity to an effective remedy against an individual measure before an impartial institution or body previously established.

D. COMMENTS AND EXPLANATIONS

1. On the basis of constitutional and statutory rules and practices common to a great number of States of all regions of the world, and as guaranteed by universal and regional human rights instruments, rights of due process, or "fair trial rights", have been generally recognized in international law protecting individuals from arbitrary or unfair treatment by State organs. Generally recognized due process rights include the right of every person to be heard before an individual measure which would affect him or her adversely is taken, and the right of a person claiming a violation of his or her rights and freedoms by a State organ to an effective remedy before an impartial tribunal or authority. These rights can be considered as part of the corpus of customary international law, and are also protected by general principles of law in the meaning of Article 38, paragraph 1, lit. c, of the ICJ Statute.

1.1 Principles of due process, or fair trial, are fundamental to the protection of human rights.[9] Such rights can only be protected and enforced if the citizen has recourse to courts, tribunals or other impartial institutions which enjoy a sufficient measure of independence from the governmental or administrative organs of a State, and which resolve disputes in accordance with fair procedures. The fairness of the legal process has a particular significance in criminal cases. It appears that it was in that context that principles of a fair trial were first developed, and both older constitutions of States and international human rights treaties focus on standards of fairness in criminal proceedings. However, due process rights must also be secured in other proceedings which deal with disputes between citizen and state, or in which civil rights and obligations of a person are determined. As two English human rights lawyers remarked, "the protection of procedural due process is not, in itself, sufficient to protect against human rights abuses but it is the foundation stone for 'substantive protection' against state power".[10]

1.2 One of the earliest and most well known provisions is to be found in the Fifth Amendment to the Constitution of the United States of America, adopted in 1791: "No person shall … be deprived of life, liberty, or property, without due process of law".[11] These procedural safeguards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary government action.[12] The Sixth Amendment to the US Constitution includes the provision that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial", and it elaborates the essential elements of such a trial.

1.3 In 1948, due process rights were for the first time universally recognized. Article 10 of the Universal Declaration of Human Rights provides: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". Article 11 of the Declaration elaborates on what

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[9] For this and the following, see Richard Clayton & Hugh Tomlinson, *The Law of Human Rights*, Oxford: Oxford University Press, 2000, at p. 550.

[10] See Clayton & Tomlinson, *ibidem*.

[11] For the full text of the Amendment, see *infra*, part F.IV.7.

[12] See Laurence H. Tribe, *American Constitutional Law*, 2nd ed., Mineola, NY: Foundation Press, 1988, at p. 664. See also John V. Orth, *Due Process of Law: A Brief History*, Lawrence, Kansas: University Press of Kansas, 2003.

is considered to be a fair trial in the case of criminal charges. In the perspective of common law, the article defines standards, on the one hand, for procedural due process and, on the other hand, for substantive due process.[13] According to Article 8 of the same Declaration, "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".[14]

In 1999, the UN General Assembly adopted the "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms" (Resolution 53/144 of 8 March 1999), in which it further elaborated on the "right to benefit from an effective remedy" (Article 9, paragraph 1, of the Declaration).[15]

1.4 The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR) then was the first international human rights instrument to set out in detail fair trial rights. The Convention, which today is binding on forty-six States, served as a model for the International Covenant on Civil and Political Rights (ICCPR) and the regional human rights treaties for the Americas and for Africa.[16] Article 6, paragraph 1, of the ECHR guarantees that "[i]n the determination of his *civil rights and obligations* or of any *criminal charge* against him, everyone is entitled to a *fair and public hearing* within a reasonable time by an *independent and impartial tribunal* established by law", whereas Article 14, paragraph 1 of the ICCPR pronounces that "[i]n the determination of any *criminal charge* against him, or of his *rights and obligations in a suit at law*, everyone shall be entitled to a *fair and public*

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[13] See Raimo Lahti, 'Article 11', in Gudmundur Alfredsson & Asbjørn Eide (eds.), *The Universal Declaration of Human Rights*, The Hague: Martinus Nijhoff, 1999, pp. 239-249, at 239.

[14] For commentaries on Arts. 8 and 10, see Erik Møse, 'Article 8', and Lauri Lehtimaja & Matti Pellonpää, 'Article 10', *ibidem*, pp. 187-207 and 223-237, respectively. For an analysis of the *travaux préparatoires* of the Declaration's fair trial provisions, see David Weissbrodt, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*, The Hague: Martinus Nijhoff, 2001, pp. 5-33.

[15] For the full text, see *infra*, part F.I.

[16] For texts of the relevant provisions, see *infra*, part F.II and III. See also Louise Doswald-Beck & Robert Kolb, *Judicial Process and Human Rights: UN, European, American and African systems*, Kehl: N.P. Engel, 2004, pp. 123-134.

hearing by a *competent, independent and impartial tribunal* established by law".[17]

The European Convention, the ICCPR and the other regional human rights treaties guarantee the following elements or aspects of due process rights and principles:

- general rights to procedural fairness, including a public hearing before an independent and impartial tribunal which gives a reasoned judgment (ECHR, Article 6, para. 1; see ICCPR, Article 14, para. 1; American Convention, Article 8, para. 1; African Charter, Article 7, para. 1);
- the presumption of innocence in criminal proceedings (ECHR, Article 6, para. 2; see ICCPR, Article 14, para. 2; American Convention, Article 8, para. 2; African Charter, Article 7, para. 1(b));
- specific rights for persons accused of criminal offences, including rights to be informed of the charge, to trial within a reasonable time, to legal assistance and to cross-examine witnesses (ECHR, Article 6, para. 3; see ICCPR, Article 14, para. 3; American Convention, Article 8, para. 2; African Charter, Article 7, para. 1), and the right to be free from retrospective criminal laws (ECHR, Article 7; see ICCPR, Article 15; American Convention, Article 9; African Charter, Article 7, para. 2).

In Article 5, paragraph 1, of the European Convention (right to liberty and security) it is guaranteed that "no one shall be deprived of his liberty save … in accordance with a procedure prescribed by law" (see ICCPR, Article 9; American Convention, Article 7; African Charter, Article 6). According to Article 2, paragraph 3(a), of the ICCPR, each State Party to the Covenant undertakes "to ensure that any person whose rights or freedoms as herein [in the Covenant] recognized are violated shall have an effective remedy".

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[17] Emphasis added. For the interpretation of Article 14 of the ICCPR by the Human Rights Committee, see Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, Oxford: Clarendon Press, 1994, pp. 395-458; and Alfred de Zayas, 'The United Nations and the Guarantees of a Fair Trial in the ICCPR and the Convention Against Torture', in David Weissbrodt & Rüdiger Wolfrum (eds.), *The Right to a Fair Trial*, Berlin: Springer, 1998, pp. 669-696. For an analysis of the *travaux préparatoires* of the ICCPR's fair trial provisions, see Weissbrodt, *supra* note 14, pp. 35-91. The Human Rights Committee is expected to finalize, in March 2006, the first reading of its new General Comment on Article 14, para. 1, which will replace its General Comment 13/21 of 1984 (UN Doc. A/39/40, pp. 143-147).

1.5 Additional legal process rights in criminal proceedings were agreed upon by the Member States of the Council of Europe in the Seventh Protocol to the European Convention, and have also been recognized by other instruments:

- the right of appeal in criminal matters (Seventh Protocol, Article 2; see ICCPR, Article 14, para. 5; American Convention, Article 8, para. 2(h));
- the right to compensation for wrongful conviction (Seventh Protocol, Article 3; see ICCPR, Article 14, para. 6; American Convention, Article 10);
- the right not to be tried or punished twice for the same offence (Seventh Protocol, Article 4; see ICCPR, Article 14, para. 7; American Convention, Article 8, para. 4).[18]

1.6 The right of access to the court in order to have disputes determined in accordance with the law is deeply rooted in the common law. In his famous "Commentaries on the Laws of England", Blackstone described the right in the following terms: "A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty and property, courts of justice must at all times be open to the subject and the law be duly administered therein."[19]

1.7 Further, the following general fair trial rights have been recognized in common law: the right to an independent and impartial tribunal; the right to a fair hearing; the right to a public hearing; the right to hearing within a reasonable time; the right to a reasoned judgment.[20] The principle *audi alteram partem* (hear the other side) is generally accepted as a principle of natural justice.[21] More specific fair trial rights apply in criminal cases, for instance the right to

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[18] For an in-depth analysis, see Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford: Oxford University Press, 2005.

[19] Quoted in: Clayton & Tomlinson, *supra* note 9, at p. 553.

[20] For details, see Clayton & Tomlinson, *supra* note 9, at p. 574 *et seq*.

[21] See *ibidem*, p. 552. For the recognition of the principle *Audiatur et Altera Pars* in the jurisprudence of international courts, see Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London: Stevens, 1953, pp. 290-298; and Peter Hamacher, *Die Maxime* audiatur et altera pars *im Völkerrecht*, Vienna: Springer, 1986.

legal advice, the right to silence and the privilege against self-incrimination, the presumption of innocence, and the right to jury trial.[22]

1.8 In continental Europe and civil law jurisdictions, rights of due process or fair trial are regarded as inherent in the idea of the rule of law (*Rechtsstaats-Idee*, *le concept de l'Etat de droit*). In particular, the right of access to a court (*Anspruch auf Justizgewährung*, *l'accès au juge*) and the right to be heard before a court (*Anspruch auf rechtliches Gehör*) are generally recognized.[23]

1.9 As it already appears from the foregoing remarks, and also from a careful comparison of the treaty law and constitutional law provisions reprinted in part F of the present study, expressions and definitions of due process rights in the individual international agreements and in national constitutions vary, and so do the interpretations given to those rights by national and international courts.[24] In particular, there are differences relating to the following issues:[25]

– The extent of the right of access to the courts;

– the types of dispute subject to fair trial rights;

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[22] For details, see Clayton & Tomlinson, *supra* note 9, at p. 589 *et seq*.

[23] For the perspective of French and German constitutional law, respectively, see Constance Grewe, 'L'accès au juge: Le droit processuel d'action', in Dominique d'Ambra et al. (eds.), *Procédure(s) et effectivité des droits: Actes du colloque des 31 mai et 1er juin 2002*, Brussels: Bruylant, 2003, pp. 29-42; and Eberhard Schmidt-Assmann, 'Der Rechtsstaat', in Josef Isensee & Paul Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. III, 3rd ed., Heidelberg: C. F. Müller, 2004, pp. 541-612, at p. 579 *et seq*. and 582 *et seq*. (administrative procedures).

[24] For summaries of case law regarding fair trial rights, see Doswald-Beck & Kolb, *supra* note 16, pp. 119-283. For country reports covering the Americas, Africa, Asia and Europe, see Weissbrodt & Wolfrum, *supra* note 17. See also Human Rights Committee, General Comment No. 13: 'Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)', 13 April 1984, para. 2: "In general, the reports of States parties fail to recognize that Article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine the rights and obligations in a suit at law. Laws and practices dealing with these matters vary widely from State to State. This diversity makes it all the more necessary for States parties to provide all relevant information and to explain in greater detail how the concepts of 'criminal charge' and 'rights and obligations in a suit at law' are interpreted in relation to their respective legal systems."

[25] See Clayton & Tomlinson, *supra* note 9, p. 552 *et seq*.

– the application of fair trial rights to administrative procedures;[26]

– the nature of the tribunal (its "independence" and "impartiality"); and

– legitimate restrictions of fair trial rights "in the wider interest".

1.10 It is not universally accepted that there exists a right to a *judicial* remedy against any administrative act of a State organ or agency. In many states, all or certain "acts of state (or government)" (*actes de gouvernement*, *Regierungsakte*) and legislative acts (acts of Parliament) are exempt from judicial review.[27] Accordingly, Article 2, paragraph 3(b), of the ICCPR speaks of "competent judicial, administrative or legislative authorities" or "any other competent authority provided for by the legal system of the State" that shall determine whether a person's rights or freedoms under the Covenant have been violated.[28] According to the case law of the Human Rights Committee, Article 14, paragraph 1, of the ICCPR does not appear to guarantee a right of judicial review of public law determinations by administrators or administrative tribunals, nor does it guarantee that any such review entails an evaluation of the merits of a decision.[29]

1.11 In view of these differences between regional and national standards of due process, the interpretation given to Article 2, paragraph 3, of the ICCPR by the Human Rights Committee is of particular significance. In its General

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[26] For discussion, see, e.g., Jerry L. Mashaw, *Due Process in the Administrative State*, New Haven, CT: Yale University Press, 1985 (about the United States of America); D. J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures*, Oxford: Clarendon Press, 1996 (about the United Kingdom); and Michele Albertini, *Der verfassungsmässige Anspruch auf rechtliches Gehör im Verwaltungsverfahren des modernen Staates*, Bern: Stämpfli Verlag, 2000 (about continental Europe and, in particular, Switzerland).

[27] See Dinah Shelton, *Remedies in International Human Rights Law*, Oxford: Oxford University Press, 1999, pp. 64-68, and Georg Ress, 'Judicial Protection of the Individual against Unlawful or Arbitrary Acts of the Executive', in Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, *Judicial Protection against the Executive*, vol. 3: Comparative Law – International Law (English edition), Cologne and Dobbs Ferry, NY: Carl Heymanns Verlag & Oceana Publications, 1971, pp. 47-76, at pp. 57-66 (limitations on judicial protection).

[28] However, in the same provision the States Parties to the Covenant have promised "to develop the possibilities of judicial remedy".

[29] See Sarah Joseph et al., *The International Covenant on Civil and Political Rights*, 2nd ed., Oxford: Oxford University Press, 2004, p. 394. *Cf.* McGoldrick, *supra* note 17, pp. 414-416.

Comment No. 31 about "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", adopted on 29 March 2004,[30] the Human Rights Committee explained, *inter alia*:

> "15. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. […] The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy."
>
> "19. The Committee further takes the view that the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations."
>
> "20. Even when the legal systems of States parties are formally endowed with the appropriate remedy, violations of Covenant rights still take place. This is presumably attributable to the failure of the remedies to function effectively in practice. Accordingly, States parties are requested to provide information on the obstacles to the effectiveness of existing remedies in their periodic reports."

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[30] UN doc. CCPR/C/21/Rev.1/Add.13.

1.12 Further, the elaboration of due process rights in the Charter of Fundamental Rights of the European Union (EU Charter) is of particular relevance to the effort of determining internationally agreed upon standards of due process. For this Charter takes account of, and reflects, the constitutional traditions common to the now twenty-five Member States of the EU,[31] as well as their obligations under the European Convention of Human Rights, as interpreted by the European Court of Human Rights on the one hand, and the Court of Justice of the European Communities on the other hand. Accordingly, the EU Charter also serves as an interpretation of the due process provisions of the European Convention of Human Rights as it was developed in the case law of the two courts.[32] It should also be noted that among the States which have accepted the EU Charter there are both common law and civil law countries, so that the Charter bridges the two traditions.

1.13 The EU Charter was solemnly proclaimed by the European Parliament, the Council and the Commission in December 2000, and was included in the Treaty establishing a Constitution for Europe of 2004. Since that Treaty has not yet entered into force, the EU Charter as such is not legally binding on EU Member States. However, the Charter has already been referred to by most EU institutions as a text of legal importance. In a decision of 2001, the Court of First Instance referred to Articles 41(1) and 47 of the Charter, laying down a person's right to have his or her affairs handled impartially, and to secure an effective remedy where rights are violated. The Court described those Charter rights as confirming existing "general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States".[33]

1.14 In Article 41 of the EU Charter, a "right to good administration" is proclaimed, and defined as follows:

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[31] For this notion, as used in Art. 6, para. 2, of the Treaty on European Union, see *infra*, part 4.

[32] See also Carol Harlow, 'Access to Justice as a Human Right: The European Convention and the European Union', in Philip Alston (ed.), *The European Union and Human Rights*, Oxford: Oxford University Press, 1999, pp. 187-213.

[33] Judgment of the Court of First Instance of 30 January 2001 (max.mobil Telekommunikation Service GmbH v Commission), Case T-54/99, paras. 48 (Art. 41(1)) and 57 (Art. 47).

> "1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
>
> 2. This right includes:
>
> (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
>
> (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
>
> (c) the obligation of the administration to give reasons for its decisions.
>
> […]"

As the Convention drafting the EU Charter noted, "Article 41 is based on the existence of a Community subject to the rule of law whose characteristics were developed in the case law [of the European Court of Justice] which enshrined, *inter alia*, the principle of good administration".[34]

1.15 According to Article 43, "[a]ny citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union".

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[34] See 'Draft Charter of Fundamental Rights of the European Union', Doc. CHARTE 4474/00 of 11 October 2000, p. 36. As regards the case law referred to by the Convention, see the Judgment of the Court of First Instance in the *Yusuf* case, *supra* note 6, para. 325: "[A]ccording to settled case-law, observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings at issue. That principle requires that any person on whom a penalty may be imposed must be placed in a position in which he can effectively make known his views on the evidence on the basis of which the sanction is imposed (see, to that effect, Case C-135/92 Fiskano v Commission [1994] ECR I-2885, paragraphs 39 and 40; Case C-32/95 P Commission v Lisrestal and Others [1996] ECR I-5373, paragraph 21, and Case C-462/98 P Mediocurso v Commission [2000] ECR I-7183, paragraph 36)."

1.16 In Article 47 of the EU Charter, a "right to an effective remedy and to a fair trial" is guaranteed in the following terms:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice."

Both the first and the second paragraph of Article 47 are based on the European Convention of Human Rights, namely its Articles 13 and 6, paragraph 1, respectively. However, in Community law the right to an effective remedy before a *court* was recognized. Further, in Community law the right to a fair hearing has not been confined to disputes relating to civil rights and obligations, or criminal court proceedings.[35]

1.17 Notwithstanding the mentioned differences in the definition of due process rights, it can be concluded that today international law provides for a universal minimum standard of due process which includes, *firstly*, the right of every person to be heard before an individual governmental or administrative measure which would affect him or her adversely is taken, and *secondly* the right of a person claiming a violation of his or her rights and freedoms by a State organ to an effective remedy before an impartial tribunal or authority. These rights are widely guaranteed in universal and regional human rights treaties. They can be considered as part of the corpus of customary international law, and are also protected by general principles of law in the meaning of Article 38, paragraph 1, lit. c, of the ICJ Statute.[36] Indeed, "[o]ne of the most important legal developments of the modern era – both nationally and internationally – has

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[35] See 'Draft Charter of Fundamental Rights of the European Union', Doc. CHARTE 4474/00 of 11 October 2000, p. 40 *et seq*.

[36] For general principles of law as a source of contemporary international law, see, generally, Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on

been the opening of avenues of complaint for private citizens against oppressive action by government agents and agencies and the affording of remedies when violations are found."[37]

2. The UN Security Council being a principal organ of the United Nations, a legal obligation of the Council to comply with standards of due process, or "fair and clear procedures", for the benefit of individuals and "entities" presupposes that the United Nations, as a subject of international law, is bound by respective rules of international law. In accordance with the established system of sources of international law, the United Nations could be obliged to observe such standards by virtue of international treaties (including the UN Charter as the constitution of the United Nations), customary international law, or general principles of law recognized by the members of the international community.

3. Since the United Nations is not a party to any universal or regional treaty for the protection of human rights, it is not directly bound by the respective treaty provisions guaranteeing rights of due process. The United Nations being an autonomous subject of international law, it does not follow from the fact alone that its Member States have ratified certain human rights instruments that an according obligation of the Organization has come into existence.

3.1 The United Nations, as an international organization and a subject of international law,[38] is not a party to any of the universal or regional treaties and conventions for the protection of human rights and fundamental freedoms. Accordingly, the UN is not directly bound by the respective provisions guaranteeing standards of due process. The treaties and conventions were drafted only with a view to the performance of States, not of other subjects of international law. For instance, in Article 2, paragraph 1 of the International Covenant on Civil and Political Rights (ICCPR) it is stated that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant […]". According to Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), "[t]he High

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the Eve of a New Century. General Course on Public International Law', in *Recueil des Cours*, vol. 281 (1999), pp. 9-438, at pp. 335-340.

[37] See Shelton, *supra* note 27, at p. 358.

[38] See ICJ, Advisory Opinion in the *Reparations for Injuries Case*, ICJ Reports 1949, p. 179.

Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".

3.2 The United Nations also could not become a party to the treaties and conventions in question because they are only open to accession by States (see, e.g., Article 48 ICCPR, Article 59 ECHR, Article 74 of the American Convention on Human Rights).

3.3 The reason for this restrictive approach of human rights treaties in defining the respective duty bearers is that traditionally States (i.e., their governmental, administrative, legislative and judicial organs) have been regarded as the main potential violators of human rights. "[The] 'international' protection of human rights denotes an ensemble of procedures and mechanisms which […] are primarily designed to protect human beings against their own state. Protection is generally needed at home. Human rights have been brought into being as a supplementary line of defence in case national systems should prove to be of no avail. Although the state is on the one hand reckoned with as the indispensable guarantor of human rights, historical experience has also made clear that the state […] may use the sovereign powers at its disposal to commit violations of human rights".[39]

3.4 As regards, in particular, the United Nations, it is certainly true that "until recently, the UN had never thought of itself as actually capable of violating human rights"[40]. Accordingly, the UN Charter requires the United Nations to "promot[e] and encourag[e] respect for human rights" (Article 1, para. 3), and to "assist" Member States "in the realization of human rights" (Article 13, para. 1b).

3.5 It does not follow from the fact alone that UN Member States, or even an overwhelming majority of Member States, have ratified certain human rights instruments that an according obligation of the Organization has come into existence.[41] The concept of international person, or subjects of international

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[39] See Tomuschat, *supra* note 8, at p. 84.

[40] See Frédéric Mégret & Florian Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', in *Human Rights Quarterly*, vol. 25 (2003), pp. 314-342, at p. 314.

[41] But see August Reinisch, 'Securing the Accountability of International Organizations', in *Global Governance*, vol. 7 (2001), pp. 131-149, at pp. 137 *et seq*., 141-143, arguing

law, is based on a distinction between particular subjects and their particular rights, duties or powers.[42] "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community."[43] The rights and duties of intergovernmental organizations, as autonomous subjects of international law, on the one hand, and of their Member States, on the other hand, must be distinguished.[44] In the advisory opinion it gave to the World Health Organization in 1996, the International Court of Justice held that it is the object of constituent instruments of international organizations "to create new subjects of law endowed with a certain autonomy".[45] In view of the United Nations, the Court had already stated in 1949 that "the Organization […] occupies a position in certain respects in detachment from its Members".[46] As the Court also ruled, "international organizations are subjects of international law and, as such, are bound by any obligations *incumbent upon them* under general rules of international law, under *their constitutions* or under international agreements to which *they are parties*".[47]

4. However, the emergence of "supranational" organizations of the type of the European Community has changed this traditional picture. The law of the European Community (European Union) has made both human rights treaty obligations of EC (EU) Member States as well as "constitutional traditions common to the Member States" sources of Community (Union) law from which direct obligations of the Community (Union) itself arise. There is good reason to expect that the law of other international organizations, including the United

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that the UN is bound "transitively" by international human rights standards as a result and to the extent that its members are bound ("functional treaty succession by international organizations to the position of their member states").

42 See Sir Robert Jennings & Sir Arthur Watts (eds.), *Oppenheim's International Law*, 9th ed., vol. I: Peace, Part 1, p. 119 *et seq*.; Henry G. Schermers & Niels M. Blokker, *International Institutional Law*, 3rd ed., The Hague: Martinus Nijhoff Publishers, 1995, p. 976 *et seq*.

43 ICJ, *Reparations for Injuries Case*, ICJ Reports 1949, p. 178.

44 See, in general, Niels Blokker, 'International Organizations and Their Members', in *International Organizations Law Review*, vol. 1 (2004), pp. 139-161, at p. 152 *et seq*.

45 ICJ, Advisory Opinion, ICJ Reports 1996, p. 75.

46 ICJ, *Reparations for Injuries Case*, ICJ Reports 1949, p. 179.

47 ICJ, Advisory Opinion on the *Interpretation of the WHO-Egypt Agreement*, ICJ Reports 1980, p. 73, at pp. 89-90 (emphasis added).

Nations, will be increasingly influenced by that development as they, too, begin to engage in "supranational" lawmaking with a direct effect on individuals.

4.1 As explained above, the legal spheres of individual member states of international organizations on the one hand, and of the organizations themselves on the other hand, must be distinguished as a matter of principle. Rights and duties of governments created on the basis of international treaties concluded by the respective states, or existing by virtue of their domestic (constitutional) law, are not per se binding on international organizations formed by the respective states.

4.2 However, in this respect the law of the European Community and European Union has produced a novel development of great consequence. By referring to that development we do not mean to equate the UN with the EC/EU, or to put an undue emphasis on the European experience. Rather, EU law is mentioned as an example of a development which in the future may also be of importance to other international organizations, including the United Nations – namely the development of a legal technique through which constitutional traditions and international obligations of member states are integrated into the legal order of the organization itself.

4.3 According to Article 6, para. 1 of the Treaty on European Union, the EU is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. Paragraph 2 of that provision additionally says that the Union shall respect "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and as they result from the constitutional traditions common to the Member States, as general principles of community law". By this provision, the terms of an international agreement concluded by EU Member States with the purpose of securing "to everyone in their jurisdiction" certain rights and freedoms (Article 1 of the European Convention for the Protection of Human Rights) were made binding on the EU itself. In addition, "fundamental rights … as they result from the constitutional traditions common to the Member States", i.e. rules belonging to the domestic legal order of Member States were transferred to the level of the EU in the form of general principles of community law.

4.4 With regard to the application of standards of due process by the EC/EU, this means that the standards determined both in the European Convention, as

developed by the jurisprudence of the European Court of Human Rights, and in the constitutional law of EU Member States must now be respected by the Union and Community in their whole range of activities, including the Union's common foreign and security policy as provided for in Articles 11 to 28 of the Treaty on European Union.

4.5 While at present only the EU has adopted formal rules recognizing these sources of treaty law and constitutional traditions, there is good reason to expect that the law of other international organizations, including the United Nations, will be increasingly influenced by that development as they, too, begin to engage in "supranational" lawmaking with a direct effect on individuals.

4.6 Article 6, para. 2 of the EU Treaty is an expression of the high degree of integration of EC/EU law and national law which is typical of the European Union, and as yet unparalleled in the law of other international organizations. Also, the recognition of common constitutional traditions as a source of EU law is based on the fact that the EU Member States share certain principles of legal and political order, namely "the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law" (Article 6, para. 1, of the Treaty on European Union). A similar degree of cohesion was already expressed by the states agreeing on the European Convention of Human Rights in 1950. In the Convention's preamble, they described themselves "as the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law". Article 4 of the Constitutive Act of the African Union of 2000 also mentions among the principles in accordance with which the African Union shall function "respect for democratic principles, human rights, the rule of law and good governance", the "promotion of social justice" and "respect for the sanctity of human life" (lit. m, n and o).

4.7 Although the Charter of the United Nations contains similar statements of values, in particular in the preamble and Article 1, for a long time the political divisions of the world prevented UN Member States from agreeing on their substance. However, since the antagonism of the former bloc systems was overcome, more and more such agreement could be found, as is apparent from many resolutions of the General Assembly in regard to human rights, democracy, the rule of law, and good governance. Thus, there is an increasingly broader basis for referring to the constitutional traditions and values common to the Member States of the United Nations as a source of UN law. Accordingly, such traditions

and values concerning due process rights, as identified above (see *supra*, part 1), are already to be taken into account by the organs of the United Nations as regards an exercise of functions vis-à-vis individuals. *Mutatis mutandis*, the same holds true of human rights treaty obligations common to a great majority of UN Member States. Following the wording of Article 6, paragraph 2, of the Treaty on European Union quoted above (4.3), it is therefore possible to say that the United Nations shall respect fundamental rights, as guaranteed by the universal human rights treaties, and as they result from the constitutional traditions common to the Member States, as general principles of UN law.

5. At present, customary international law does not provide for sufficiently clear rules which would oblige international (intergovernmental) organizations to observe standards of due process vis-à-vis individuals. To the extent that rules of customary law exist with respect to such standards, they address obligations of States in the sphere of domestic law, and not obligations of international organizations. However, a trend can be perceived widening the scope of customary law in regard to due process to include direct "governmental" action of international organizations vis-à-vis individuals. To this development, the law of the European Community (European Union) has strongly contributed.

The due process rights of individuals recognized as general principles of law are also applicable to international organizations as subjects of international law when they exercise "governmental" authority over individuals.

5.1 There exists today broad agreement to the effect that many of the rules enunciated in the Universal Declaration of Human Rights have crystallized as customary international law, in particular the right to life, the prohibition of torture, the protection of personal freedom, and the prohibition of discrimination on racial grounds.[48]

5.2 It has been argued that the respective customary obligations are also binding on international organizations, as subjects of international law, to the extent that the organizations engage in activities which are likely to affect the mentioned rights of individuals.[49]

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[48] See Tomuschat, *supra* note 8, at p. 35, with further references.

[49] See August Reinisch, 'Governance Without Accountability?', in *German Yearbook of International Law*, vol. 44 (2001), pp. 270-306, at p. 281 *et seq*., with further references.

5.3 However, as was mentioned before (see *supra*, part 3), international human rights law was primarily designed to protect human beings against their own state. In general, it was not considered necessary to secure protection against acts of "governmental" power with a direct impact on individuals issued by organs of international organizations, as there virtually were not any such acts. Accordingly, there was little room for a development of rules of customary international law about the obligation of international organizations to comply with standards of due process vis-à-vis individuals. The right to a fair and public hearing by an independent and impartial tribunal (Article 10 of the Universal Declaration) and other due process rights may today be a part of customary international law, as far as States are the addressees of those obligations.[50] But because of a lack of relevant practice and *opinio juris*, the same can presently not be said for international organizations in general, or the United Nations in particular.[51]

5.4 Nevertheless, a trend can be perceived widening the scope of customary international law to include direct "governmental" action of international organizations vis-à-vis individuals. To this development, the law of the European Community/European Union (EC/EU) has strongly contributed. As is well known, the European Community has been endowed with far-reaching powers over the whole breadth of the tasks it is mandated to perform.[52] According to Article 249 of the EC Treaty, the EC can make regulations, issue directives, and take decisions. All of these acts produce binding effects for their individual addressees. Consequently, a system of judicial protection against EC acts was established which is by and large equivalent to the protection offered in EC Member States at a national level, and in which established standards of due process are generally complied with. A person who is of the opinion that his or her rights have been breached by an act of Community power can either challenge that act directly by instituting proceedings before the Court of Justice of the European Communities (Article 230, para. 4 EC Treaty), or can contest national acts taken on the basis of European legislation before national tribunals

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[50] Certain due process rights, like the right to be heard, may also belong to *jus cogens*, i.e. rules from which no derogation is permitted, because they are "core rights directly related to human existence" (for this expression, see Tomuschat, *supra* note 8, at p. 35).

[51] See Reinisch, *supra* note 49, at pp. 282-286, with the conclusion that "[t]he problem of redress mechanisms in case of unlawful UN action remains an unsolved one".

[52] For this and the following, see Tomuschat, *supra* note 8, at p. 87.

which must then, under certain conditions, refer the case to the European Court of Justice.

5.5 Since the direct effect of Community law is still a unique feature unparalleled in the law of other international organizations, in particular universal organizations, it is currently not possible to deduce general rules of customary international law about judicial protection and due process from the law and practice of the European Union alone. But considering the degree to which the EC/EU has been a model for other regional international organizations, particularly in Latin America and in Africa, it is justifiable to say that EC/EU law can be regarded as a precedent which in the future will serve as a guide or pattern in analogous cases of direct "governmental" action taken by international organizations vis-à-vis individuals.

5.6 As explained in part 1 above, certain standards of due process are concurrently recognized in the domestic (constitutional) law of a great number of States of all regions of the world. To that extent, they have become rules of international law in the form of general principles of law in the meaning of Article 38, para. 1, lit. c, of the ICJ Statute. Although the standards in question describe obligations of Governments vis-à-vis their citizens (and foreigners under their jurisdiction) in the sphere of domestic law, the general principles of international law which have arisen on the basis of those widely recognized standards are also applicable to international organizations as subjects of international law when those organizations exercise "governmental" authority over individuals.[53] However, if the constituent treaty of an international organization provides for specific rules, these rules prevail in accordance with the concept of *lex specialis derogat legi generali*.[54] If possible, an effort must be made to

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[53] See Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers*, Oxford: Oxford University Press, 2005, at p. 16: "A domestic public or administrative law principle is arguably only applicable to the exercise by an international organization of governmental power where this principle can be identified as applying to the particular power within the domestic public and administrative law systems of a number of member States, since only then can it be considered as a general principle of law and thus a formal source of law applicable to international organizations". These conditions appear to be met in the case of certain due process rights of individuals. For the applicability of general principles of law in the law of international organizations, see generally Schermers & Blokker, *supra* note 42, at p. 984 *et seq*.

[54] See also Tomuschat, *supra* note 36, p. 335: "They [the general principles of law] provide a residual framework of general precepts for instances where treaty and custom are silent

interpret the rules of the constituent treaty in accordance with the substance of the respective general principles of international law.

6. The development of international human rights law, to which the work of the United Nations has decisively contributed, has given grounds for legitimate expectations that the UN itself, when its action has a direct impact on the rights and freedoms of an individual, observes standards of due process, or "fair and clear procedures", on which the person concerned can rely. This finding is in line with essential notions of the concept of international personality.

6.1 To a considerable extent, the present state of international human rights law is a result of the constant endeavors of the United Nations.[55] The preamble of the UN Charter declared the determination of the peoples of the United Nations "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women". In the preamble, human rights appear right after the prevention of war among the principal goals of the United Nations. Article 1, para. 3 of the Charter defines as one of the purposes of the United Nations "to achieve international co-operation … in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". According to Article 1, para. 4 of the Charter the UN shall be "a centre for harmonizing the actions of nations in the attainment of these common ends".[56] As Professor Hurst Hannum noted, "in perhaps no other area has the United Nations been so prolific or, some would argue, so successful as it has been in the adoption of new international norms for the protection of human rights".[57] Most recently, the UN General Assembly, when establishing the Human Rights Council, acknowledged "that

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on how to resolve a specific legal issue."

[55] Of the extensive literature, I only mention Philip Alston (ed.), *The United Nations and Human Rights*, Oxford: Clarendon Press, 1992; Tom J. Farer & Felice Gaer, 'The UN and Human Rights: At the End of the Beginning', in Adam Roberts & Benedict Kingsbury (eds.), *United Nations, Divided World: The UN's Roles in International Relations*, 2nd ed., Oxford: Clarendon Press, 1993, pp. 240-296; and Hurst Hannum, 'Human Rights', in Oscar Schachter & Christopher C. Joyner (eds.), *United Nations Legal Order*, vol. 1, Cambridge: Cambridge University Press, 1995, pp. 319-348.

[56] For further references of the Charter to human rights, see Arts. 13(1b), 55(c), 62(2) and 76(c).

[57] See Hannum, *supra* note 55, at p. 319.

peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being".[58]

6.2 As mentioned before, the founders of the United Nations did not expect the Organization to exercise power or authority in a way that rights and freedoms of individual persons would be directly affected. Accordingly, they did not find it necessary to make human rights directly binding on the Organization.

6.3 However, in the meantime "the screen which originally separated the United Nations from the man on the street disappeared",[59] at least to a certain extent. Increasingly, the UN is entrusted with tasks of global governance that go beyond its traditional purposes and functions.[60] A number of developments, in particular in the context of peacekeeping operations and the international administration of territories, have made it a possibility that violations of human rights and international humanitarian law occur that are attributable to the UN.[61] Accordingly, "the temporary exercise of governmental or quasi-governmental authority by an international organisation over private persons and enterprises within a particular territorial scope beyond district headquarters may […] give rise to claims that the acts performed by the organisation under that authority are illegal"[62].

6.4 In the case of Chapter VII sanctions targeting individuals, those sanctions do have a direct impact on the rights and freedoms of individuals.[63] It is true that it is the Member States which must take the necessary measures of implementation by first enacting respective rules in accordance with the

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[58] See General Assembly Res. 60/251 of 15 March 2006, preambular para. 6.

[59] Tomuschat, *supra* note 8, at p. 87.

[60] Reinisch, supra note 49, p. 270, speaks of "a global trend of shifting governance tasks from states (including their sub-entities) to non-state actors", i.e., private entities on the one hand, and inter- or supranational entities on the other hand.

[61] See, e.g., Mégret & Hoffmann, *supra* note 40, at p. 325 *et seq*.

[62] See Wellens, *supra* note 8, at p. 89.

[63] In the first place, existing sanctions regimes targeting individual persons affect the right to property, which is protected by regional human rights treaties and today possibly also by customary international law, the freedom of movement and the freedom of association. Sanctions may also affect the right to respect for family and private life and the right to seek and to enjoy in other countries asylum from persecution. Further, the right to reputation is affected which is a (civil) right in the meaning of Art. 14, para. 1, ICCPR and Art. 6, para. 1, of the European Convention of Human Rights.

requirements of their domestic law, and secondly enforcing these rules against the individuals and entities concerned. As a matter of principle, UN Security Council resolutions are not self-executing in the domestic legal order of Member States, and the United Nations does not have at its disposal own means and mechanisms of enforcement. However, Member States do not possess any discretionary rights, i.e. rights to decide or act according to their own judgment or choice, with regard to the implementation of sanctions determined by the Security Council under Chapter VII of the UN Charter.[64] Instead, they must comply with the terms of the Council resolutions as they stand. In particular, Member States have no authority to review the names of individuals and entities specified by the responsible committee of the Security Council, with the aim of ascertaining whether the persons and entities indeed fall under the categories defined by the respective Council resolution.

6.5 The respective obligations prevail over any arising from other international agreements or customary international law (Article 103 UN Charter), and in its relationship to the United Nations, a Member State may not invoke the provisions of its internal law, including its constitutional law, as justification for its failure to implement a binding resolution of the Security Council (see Article 27 of the Vienna Convention on the Law of Treaties of 1969).

6.6 It follows from the foregoing that Chapter VII sanctions targeting individuals have a direct impact on the rights and freedoms of the individuals and entities concerned, and that the United Nations cannot deny its respective responsibility.[65] In that situation, there is a legitimate expectation that the UN, through its organs, observes standards of due process, or "fair and clear procedures", on which the person concerned can rely.[66] If the UN rejected such standards as being of no importance or consequence for its own action vis-à-vis individuals, it violated the legal maxim of *venire contra factum proprium*[67]

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[64] See *supra*, note 6.

[65] See also Tomuschat, *supra* note 8, at p. 85.

[66] See also August Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions', in *American Journal of International Law*, vol. 95 (2001), pp. 851-872, at p. 869: "When the United Nations–the major promoter of human rights in the international arena–takes enforcement action, it can be legitimately held to show respect for human rights in an exemplary fashion."

[67] *Venire contra factum proprium (nemini licet / nulli conceditur / non valet)*: No one is allowed to act contrary to, or inconsistent with, one's own behaviour. See Detlef Liebs,

which is general principle of law as defined by Article 38, para. 1, lit. c of the ICJ Statute. The United Nations would contradict itself if, on the one hand, it constantly admonished its Member States to respect human rights and, on the other hand, it refused to respect the same rights when relevant to its own action. As another author wrote, "[i]t is self-evident that the Organization is obliged to pursue and try to realize its own purpose."[68]

6.7 This finding is also in line with essential notions of the concept of international personality. As the International Court of Justice ruled, "the rights *and duties* of an entity such as the [United Nations] Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[69] The application of the doctrine of implied powers in the law of international organizations must lead to a recognition of implied duties or obligations. In other words, if the recognized practice of an organization develops in a way that it exercises direct authority over individuals, a corresponding duty of that organization to observe standards of due process arises under international law.

7. It was already anticipated by the drafters of the Universal Declaration of Human Rights that the respect for and observance of human rights and fundamental freedoms called for by the Declaration would not only be demanded from States but also from other bodies and institutions exercising elements of governmental authority, including international organizations.

7.1 While addressing, in the first place, human rights obligations of States, the drafters of the Universal Declaration of Human Rights anticipated that in the future other bodies and institutions, including international organizations, would also exercise "elements of governmental authority"[70] so that the scope of

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Lateinische Rechtsregeln und Rechtssprichwörter, 3rd ed., Munich, 1983, p. 216. For the relationship between this rule and the concept of estoppel, see Robert Kolb, *La bonne foi en droit international public. Contribution à l'étude des principes généraux de droit*, Paris, 2000, p. 357 *et seq*.

[68] See Zenon Stavrinides, 'Human Rights Obligations under the United Nations Charter', in *International Journal of Human Rights*, vol. 3 (1999), p. 38 *et seq*., at p. 40. See also Mégret & Hoffmann, *supra* note 40, at 317 *et seq*.

[69] ICJ, *Reparations for Injuries Case*, ICJ Reports 1949, p. 180 (emphasis added).

[70] This expression is taken from the ILC Articles on Responsibility of States for Internationally Wrongful Acts (Annex to UN General Assembly Res. 56/83 of 12 December 2001), Arts. 5, 6, 7 and 9.

the Declaration should reach beyond the performance of States. The language of the Universal Declaration is indeed broad enough to cover also official acts of international organizations, such as the United Nations. For instance, the preamble of the Declaration states that "human rights should be protected by the rule of law", and that the General Assembly proclaims the Declaration "as a common standard of achievement for all peoples and all nations" to be kept in mind by "every individual and every organ of society". By "progressive measures, national and international", the "universal and effective recognition and observance" of human rights and freedoms shall be secured.

7.2 According to Article 2 of the Declaration, "everyone is entitled to all the rights and freedoms set forth in this Declaration", and "no distinction shall be made on the basis of the political, jurisdictional or international status of the country to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty". In Article 28 it is declared that "[e]veryone is entitled to a social *and international order* in which the rights and freedoms set forth in this Declaration can be fully realized".[71]

7.3 Further, the individual rights proclaimed in the Declaration are formulated in a way to make it clear that every body or institution exercising governmental authority vis-à-vis individuals, or elements thereof, shall be bound by them. Articles 3 and 6 of the Declaration, for instance, say that "[e]veryone has the right to life, liberty and the security of person" and "the right to recognition everywhere as a person before the law".

7.4 That reading of the Universal Declaration has been confirmed by many resolutions of the UN General Assembly, as well as the Vienna Declaration adopted by the World Conference on Human Rights in 1993.[72] The World Conference declared, *inter alia*, "that the promotion and protection of human rights is a matter of priority for the international community". It further expressed the view that "[t]he promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles", and that "the promotion and protection of all human rights is a legitimate concern of the international community" (paragraph 4). Paragraph 13 of the Vienna Declaration opens with the following statement:

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[71] Emphasis added.

[72] For relevant excerpts from the Vienna Declaration and Programme of Action of 1993, see *infra* part F.I.

"There is a need for States *and international organizations*, in cooperation with non-governmental organizations, *to create favourable conditions at the* national, regional and *international levels to ensure the full and effective enjoyment of human rights*."[73]

8. Notwithstanding the growing legal importance, for the United Nations, of human rights treaty law on the one hand and constitutional values and traditions common to UN Member States on the other hand (see supra, parts 4 and 6), and the extension of rules of customary international law and general principles of law about due process to international organizations (see supra, part 5), the principal source of human rights obligations of the United Nations is the UN Charter. All UN organs are bound to comply with the rules of the Charter as the constitution of the United Nations. Today, the Charter obliges the organs of the United Nations, when exercising the functions assigned to them, to respect human rights and fundamental freedoms of individuals to the greatest possible extent.

8.1 The United Nations is an organization based on the concept of the rule of law. The organs of the UN are bound to comply with the rules of the UN Charter, which is the constitution of the United Nations.[74]

8.2 In the preamble of the UN Charter, the peoples of the United Nations have declared their determination "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women". Article 1, paragraph 3 of the Charter defines as one of the purposes of the United Nations "to achieve international co-operation … in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". However, as explained above, the founders of the United Nations did not expect the Organization to exercise power or authority over individual persons in a way that their rights and freedoms would be directly affected. Accordingly, they did not find it

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[73] Emphasis added.

[74] For the concept of the UN Charter as a constitution, see Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community', in *Columbia Journal of Transnational Law*, vol. 36 (1998), pp. 529-619, and *Idem*, 'The Meaning of International Constitutional Law', in Ronald St. John Macdonald & Douglas M. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, Leiden: Martinus Nijhoff Publishers, 2005, pp. 837-851.

necessary to make human rights directly binding on the Organization, and to define such binding rules in the Charter.

8.3 But as a constitution, the UN Charter is a "living instrument".[75] Early after the San Francisco Conference, an eminent international lawyer, Professor J.L. Brierly of Oxford University, wrote about the Charter that "constitutions always have to be interpreted and applied, and in the process they are overlaid with precedents and conventions which change them after a time into something very different from what anyone, with only the original text before him, could possibly have foreseen".[76] More recently, the United Nations was called "an entire system which is in constant movement, not unlike a national constitution whose original texture will be unavoidably modified by thick layers of political practice and jurisprudence."[77] By way of example, one can mention as such changes caused by practice and new insight the Uniting for Peace resolution of 1950, the codification and development of Charter principles and rules by the General Assembly, the development of peacekeeping operations, and the expansion of the concept of international peace and security in the practice of the Security Council.

8.4 Following the adoption of the Charter, human rights, which at the international level in 1945 were still moral postulates and political principles only, have become legal obligations of States under international treaty and customary law. This is essentially due to the incessant work of the organs of the United Nations, in particular the General Assembly and the Commission on Human Rights. The Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of Genocide of 1948, the Convention on the Elimination of Racial Discrimination of 1965 and the two Human Rights Covenants of 1966 have become part of the constitutional foundation of the international community. In the preamble of the International Covenant on Civil and Political Rights, the States Parties to the Covenant declared, *inter alia*, that "in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable

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[75] For this notion, see Fassbender, The UN Charter, *supra* note 74, at 594 *et seq*.

[76] See J.L. Brierly, 'The Covenant and the Charter', in *British Year Book of International Law*, vol. 23 (1946), at p. 83.

[77] See Christian Tomuschat, 'Obligations Arising for States Without or Against Their Will', in *Recueil des Cours*, vol. 241 (1993), pp. 195-374, at p. 251 *et seq*.

rights of all members of the human family is the foundation of freedom, justice and peace in the world".

8.5 Another process has led the United Nations to exercise governmental or quasi-governmental authority over private persons and enterprises, in particular in the context of peacekeeping operations and the temporary administration of territories (see *supra*, part 6). Sanctions imposed by the Security Council on individuals in accordance with Chapter VII of the UN Charter have a direct impact on the rights and freedoms of individuals.

8.6 In consequence of this dual progress – the coming into existence of a firmly recognized body of human rights in international law, promoted by the United Nations, and the expansion of functions of the UN into new areas resulting in acts with a direct impact on the rights of individuals –, the mentioned references of the UN Charter to human rights have developed into rules embodying direct human rights obligations of the organs of the United Nations. Today, the Charter obliges the organs of the United Nations, when exercising the functions assigned to them, to respect human rights and fundamental freedoms of individuals to the greatest possible extent.[78] The United Nations cannot attain its purpose of achieving "international co-operation … in promoting and encouraging respect for human rights and fundamental freedoms for all" (Article 1, paragraph 3 of the UN Charter) if it disregards these rights when exercising jurisdiction over individuals.[79] In the absence of a specification of such rights and freedoms in the Charter itself, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights serve, first and foremost, as a relevant standard. This author agrees with Professor I. Brownlie who said: "Even if the political organs [of the UN] have a wide margin of appreciation in determining that they have competence by virtue of Chapter VI oder Chapter VII, and further, in making dispositions to maintain or restore international peace and security, it does not follow that the selection of the modalities of implementation is unconstrained by legality. Indeed when the rights of individuals are involved,

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[78] For discussion, with special emphasis on the Security Council, see Reinisch, *supra* note 66, at p. 853 *et seq*.

[79] See Walter Kälin, Comments on a draft of the present study, 27 February 2006 (on file with author).

the application of human rights standards is a legal necessity. Human rights now form part of the concept of the international public order".[80]

8.7 In the practice of the UN, the aforementioned principles have been expressly recognized in two important areas. With regard to UN peacekeeping operations, the UN Secretary-General in 1999 promulgated "fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control".[81] In East Timor and Kosovo, respectively, the UN Transitional Administration in East Timor (UNTAET) and the UN Interim Administration in Kosovo (UNMIK) proclaimed the "applicability" of human rights standards by stipulating that "[i]n exercising their functions, all persons undertaking public duties or holding public office [in the respective territories] shall observe internationally recognized human rights standards".[82]

9. The human rights and fundamental freedoms which the organs of the United Nations are obliged to respect by virtue of the UN Charter include rights of due process, or "fair and clear procedures", which must be guaranteed whenever the Organization is taking action that adversely affects, or has the potential of adversely affecting, the rights and freedoms of individuals.[83]

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[80] See Ian Brownlie, 'The Decisions of Political Organs of the United Nations and the Rule of Law', in R. St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya*, Dordrecht: Martinus Nijhoff, 1993, pp. 91-102, at p. 102.

[81] See 'Observance by United Nations forces of international humanitarian law', Secretary-General's Bulletin, UN doc. ST/SGB/1999/13 of 6 August 1999, reprinted in: *International Legal Materials*, vol. 38 (1999), p. 1656. *Cf.* Daphna Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage', in *American Journal of International Law*, vol. 94 (2000), pp. 406-412; and Wellens, *supra* note 8, at pp. 162-166. For an overview of the previous debate over the applicability of international humanitarian law to UN operations, see Daphna Shraga, 'The United Nations as an actor bound by international humanitarian law', in Luigi Condorelli et al. (eds.), *Les Nations Unies et le droit international humanitaire – The United Nations and International Humanitarian Law*, Paris: Editions Pedone, 1996, pp. 317-338.

[82] See UNTAET, Reg. No. 1999/1, 'On the Authority of the Transitional Administration in East Timor', Doc. UNTAET/REG/1999/1 of 27 November 1999; UNMIK, Reg. No. 1999/1, 'On the Authority of the Interim Administration in Kosovo', Doc. UNMIK/REG/1999/1 of 25 July 1999. *Cf.* Mégret & Hoffmann, *supra* note 40, at p. 333 *et seq.*

[83] See also the 1957 resolution of the Institut de droit international, demanding that for every decision of an international organ or organisation that affects private rights or interests, appropriate procedures should be provided in order to settle, by judicial or arbitral methods,

10. The exact scope and intensity of those Charter-based rights of due process of individuals whose rights and freedoms are directly affected by acts of the United Nations is not generally predefined. Dependent on the circumstances of a particular situation, appropriate standards must be determined, suited to that situation, paying due regard to the nature of the affected rights and freedoms and the extent to which action taken by the UN is likely adversely to affect those rights and freedoms. In the first place, such a determination of standards is a responsibility of the organ the action of which is directly affecting rights and freedoms of individuals.[84]

11. When imposing sanctions on individuals in accordance with Chapter VII of the UN Charter, the Security Council must strive for discharging its principal duty to maintain or restore international peace and security while, at the same time, respecting the human rights and fundamental freedoms of targeted individuals to the greatest possible extent.[85] There is a duty of the Council duly to balance the general and particular interests which are at stake. Every measure having a negative impact on human rights and freedoms of a

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any juridical differences that might arise from such a decision. See *Annuaire de l'Institut de droit international*, vol. 47(2) (1957), p. 488. For discussion, see Wellens, *supra* note 8, at p. 95.

[84] See also Wellens, *supra* note 8, at p. 170: "Given the proliferation of their activities and the ensuing variety of disputes involving international organisations as a respondent party, it would be unwise and unrealistic to attempt and to expect to accommodate adequately the diversity of claims by providing one single, comprehensive, all-encompassing remedial mechanism."

[85] See also the Judgment of the Court of First Instance in the *Yusuf* case, *supra* note 6, paras. 279 *et seq*.: "[T]he Charter of the United Nations itself presupposes the existence of mandatory principles of international law, in particular, the protection of the fundamental rights of the human person. In the preamble to the Charter, the peoples of the United Nations declared themselves determined to 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person'. In addition, it is apparent from Chapter I of the Charter, headed 'Purposes and Principles', that one of the purposes of the United Nations is to encourage respect for human rights and for fundamental freedoms. Those principles are binding on the Members of the United Nations as well as on its bodies. Thus, under Article 24(2) of the Charter of the United Nations, the Security Council, in discharging its duties under its primary responsibility for the maintenance of international peace and security, is to act 'in accordance with the Purposes and Principles of the United Nations'. The Security Council's powers of sanction in the exercise of that responsibility must therefore be wielded in compliance with international law, particularly with the purposes and principles of the United Nations."

particular group or category of persons must be necessary and proportionate to the aim the measure is meant to achieve.[86]

12. While the circumstances and modalities of particular sanctions regimes may require certain adjustments or exceptions, the rights of due process, or "fair and clear procedures", to be guaranteed by the Security Council in the case of sanctions imposed on individuals and "entities" under Chapter VII of the UN Charter should include the following elements:

(a) the right of a person or entity against whom measures have been taken to be informed about those measures by the Council, as soon as this is possible without thwarting their purpose;

(b) the right of such a person or entity to be heard by the Council, or a subsidiary body, within a reasonable time;

(c) the right of such a person or entity of being advised and represented in his or her dealings with the Council;

(d) the right of such a person or entity to an effective remedy against an individual measure before an impartial institution or body previously established.

12.1 The rights listed under (a) to (d) constitute the minimum standards of "fair and clear procedures" in a legal order committed to the idea of the rule of law (see also *supra*, part 1). This appears from a comparative analysis of the respective guarantees in international human rights treaties and national constitutional law (see *supra*, part 1). The legal obligation of the Security Council to guarantee these minimum standards directly results from the UN Charter (see *supra*, parts 8 and 9), in accordance with general principles of international law protecting due process rights of individuals (see *supra*, part 5).

12.2 An individual against whom measures have been taken by the Council should be given the right directly to deal with the Council or a responsible subsidiary body, either in person or through a representative. The present

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[86] For the principle of proportionality as a limit to the Security Council's discretion under Chapter VII of the UN Charter, see Nicolas Angelet, 'International Law Limits to the Security Council', in Vera Gowlland-Debbas (ed.), *United Nations Sanctions and International Law*, The Hague: Kluwer Law International, 2001, pp. 71-82, at pp. 72-74.

system, which only allows a person to approach the Council via a Government of a Member State, is inadequate. Since it relies on greatly differing national rules about diplomatic protection, it violates the right to equality before the law as guaranteed by Articles 2 and 7 of the Universal Declaration of Human Rights.

12.3 As is known, the consideration of individual communications by the Human Rights Committee and the other existing treaty bodies takes place on paper only. Parties are neither entitled to appear to present oral argument or evidence, nor are they invited to do so. The desirability of oral hearings has been raised by some commentators, suggesting that they would facilitate the determination of disputed issues of fact and save time in the overall process of consideration of a complaint. However, so far concerns about the time and resources that the use of oral hearings would involve have prevailed.[87] Whereas the applicable due process standards do not mandatorily require oral hearings by the Security Council or a subsidiary body, further reflection is needed about the possibility and merits of an introduction of such hearings.

12.4 The right of a person to an effective remedy relates to a measure taken by the Council only insofar as that measure individually affects the person in question. The right does not relate to the measure of the Council *in abstractu*. In other words, an individual person cannot contend that a resolution adopted by the Council as such is unlawful under the UN Charter.[88] A person can only allege that he or she does not belong to the group or category of persons targeted with certain sanctions as defined in the respective resolution because the necessary conditions are not met in the individual case. For instance, a person can claim that there has been a confusion of names to his or her disadvantage, or that he or she in fact never supported a terrorist group or organization in any way. A person must also be given the right to prove that certain conditions specified in a Council resolution are no longer met in the individual case.

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[87] See Andrew Byrnes, 'An Effective Complaints Procedure in the Context of International Human Rights Law', in Anne F. Bayefsky (ed.), *The UN Human Rights Treaty System in the 21st Century*, The Hague: Kluwer Law International, 2000, pp. 139-162, at 148 *et seq*.

[88] Judicial review of Security Council resolutions is a responsibility which could only be entrusted to the International Court of Justice. There is an extensive literature addressing this issue. See Bardo Fassbender, 'Quis judicabit? The Security Council, Its Powers and Its Legal Control' (Review Essay), in *European Journal of International Law*, vol. 11 (2000), pp. 219-232; John Dugard, 'Judicial Review of Sanctions', in *United Nations Sanctions and International Law*, *supra* note 86, pp. 83-91.

12.5 By way of analogy, the sanctions resolutions of the Security Council can be regarded as "legislative" acts[89] which in principle cannot be challenged by an individual, whereas the listing of an individual name by a Council committee constitutes an individual "administrative" measure which the person concerned is entitled to challenge for the reasons mentioned above. Only exceptionally, when a Council resolution itself specifies individual names, can a person concerned take action against the resolution insofar as it is an individual measure.

12.6 This understanding of a listing of an individual as a measure of an administrative character corresponds to the assumption that sanctions imposed on an individual person by the Security Council are not penalties imposed on account of a criminal offence committed by that person.[90] Instead, measures taken against an individual in accordance with Chapter VII of the UN Charter must have the same purpose and rationale as measures taken against a State, i.e. the purpose of influencing the person's attitude and conduct to the effect that international peace and security are maintained or restored. The Security Council was not intended to be a criminal court. As a political organ, it lacks all the necessary qualifications for a proper conduct of criminal proceedings. This was recognized by the Council itself when it established the Yugoslavia and Rwanda Tribunals. In other words, sanctions are not meant to penalize a person but to make him or her change his or her attitude and conduct. Accordingly, a person must be offered an opportunity of demonstrating to the Council such a change of attitude and conduct.

12.7 A contrary understanding of sanctions imposed by the Council on individuals, i.e. an understanding of sanctions as penalties, would have significant consequences for the standard of "fair and clear procedures" to be guaranteed by the Council under international law. For in that case the comparatively high standards relating to criminal offences and penalties would have to be applied.[91]

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[89] For the concept of the Council as a legislative body, see, e.g., Paul C. Szasz, 'The Security Council Starts Legislating', in *American Journal of International Law*, vol. 96 (2002), pp. 901-905.

[90] But see Iain Cameron, *The ECHR, Due Process and UN Security Council Counter-Terrorism Sanctions*, Report prepared for the Council of Europe, 6 February 2006, at p. 2: "The effects of blacklisting [a person] may be sufficiently serious to be the 'determination of a criminal charge', triggering the application of Article 6 [of the European Convention of Human Rights] in its entirety."

[91] For a detailed examination of fair trial guarantees in criminal proceedings, see Trechsel, *supra* note 18, parts 2 (p. 45 *et seq.*) and 3 (p. 153 *et seq.*). For an analysis of the extension

In particular, an individual targeted with sanctions would be entitled to a fair and public hearing by an independent and impartial court or tribunal previously established by law. Further, the right not to be tried or punished twice for the same criminal offence would have to be respected.

12.8 Under the different sanctions regimes presently being in force, different categories of individuals are targeted with sanctions. As set out above (see *supra*, part B), under Resolution 1267 individuals and entities are made the object of sanctions because of their being a member of, or associated with, Al-Qaida and/or the Taliban. In contrast, other sanctions regimes target individuals in their official capacity, in particular as political and military leaders of a state or members of a government. In the latter case (of "political" sanctions), the true addressee of the measures is the state in question, and the listed individuals are held responsible as agents of the state or government. In spite of this difference, the due process rights listed under (a) to (d) above should also be made available to these individuals. If the Security Council chooses to place sanctions not on a state as such, but on individually named persons, these individuals must be given an opportunity to demonstrate that the conditions determined in the relevant resolution are not, or no longer, met in the individual case, for instance because the respective person is no longer in office and therefore not capable of taking part in the decision-making of the government in question which the Council seeks to influence.

12.9 As regards the form and modalities of an effective remedy, the Security Council enjoys a considerable measure of discretion. Among the options available to the Council are the establishment of

- an independent international court or tribunal;
- an ombudsman office, as it exists in a number of States and in the European Union as an alternative remedial mechanism;[92]
- an inspection panel following the model of the World Bank Inspection Panel;[93]

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of the notion of fair trial to international criminal proceedings, and of the ensuing rights of persons during investigations and in trial proceedings, see Salvatore Zappalà, *Human Rights in International Criminal Proceedings*, Oxford: Oxford University Press, 2003, pp. 3 *et seq*., 29 *et seq*., and 83 *et seq*.

92 For details, see Wellens, *supra* note 8, at pp. 178-181.

93 For details, see Wellens, *supra* note 8, at pp. 181-190.

– a commission of inquiry;[94] or

– a committee of experts serving in their personal capacity, as it exists, for instance, in accordance with Article 28 of the International Covenant on Civil and Political Rights.[95]

12.10 As regards the criterion of effectiveness of a remedy, the following factors (identified on the basis of a comparative analysis of existing individual complaint mechanisms under universal human rights treaties) need to be taken into consideration:

– Accessibility of the procedure;

– speed and efficiency of consideration by the reviewing body;

– power of the reviewing body to request interim measures of protection;

– due process concerns (does each party have a fair opportunity to put forward its case and permit full consideration of disputed issues of fact and law so that credible and persuasive decisions result?);

– quality of decision-making (does the decision of the reviewing body clearly indicate the reasoning on which any finding is based, and indicate the appropriate remedy?);

– compliance with the decision; and

– follow-up (does the reviewing body have effective procedures to monitor whether its decision has been carried out?).[96]

12.11 For the criterion of impartiality of the reviewing body or mechanism, reference can be made to the "Basic Principles on the Independence of the

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[94] For details, see Wellens, *supra* note 8, at pp. 190-197.

[95] For respective options, see also the report by Professor Rudolf L. Bindschedler, 'To which extent and for which questions is it advisable to provide for the settlement of international legal disputes by other organs than permanent courts?', in Max Planck Institute for Comparative Public Law and International Law (ed.), *Judicial Settlement of International Disputes: An International Symposium*, Berlin: Springer Verlag, 1974, pp. 133-145. For an overview of existing judicial and quasi-judicial organs of international organizations, see Schermers & Blokker, *supra* note 42, at pp. 411-451.

[96] See Byrnes, *supra* note 87, at p. 143 *et seq.*, with a fuller discussion of the various factors on pp. 144-155.

Judiciary", adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan in 1985 and endorsed by UN General Assembly resolutions 40/32 and 40/146 of 29 November 1985 and 13 December 1985, respectively.[97] According to the second principle,

> "[t]he judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".

12.12 If the body or mechanism entrusted with an impartial review of measures imposed on an individual arrives at the conclusion that the measures in question are unlawful because the necessary conditions, as defined in the Security Council resolutions, are not met in the individual case, the name of the person must be immediately removed from the respective list, with the consequence that Member States must lift the restrictions imposed on the person. The body and mechanism can be empowered to make a final decision to that effect. Alternatively, it can be provided that this decision is to be made by the responsible sanctions committee, on a binding recommendation made by the review body or mechanism.

12.13 As a consequence of a determination that measures imposed on an individual were unlawful under the terms of a Security Council resolution, a right to reparation – in the form of compensation, rehabilitation, satisfaction, and/or guarantees of non-repetition[98] – may arise. The issue of a right to reparation[99] is, however, lying outside the purview of the present study because it is not encompassed by the notion of "due process" or "fair and clear procedures". The possible existence and content of such a right in the present context, and

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[97] See also Peter Rädler, 'Independence and Impartiality of Judges', in Weissbrodt & Wolfrum, *supra* note 17, pp. 727-746.

[98] See 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', UN Commission on Human Rights Res. 2005/35, UN Doc. E/CN.4/2005/L.10/Add.11 of 19 April 2005, paras. 18 to 23.

[99] For a detailed treatment of this issue in national and international law, see Shelton, *supra* note 27, chapters 3 and 7 to 10.

a corresponding obligation of the United Nations, require a careful examination.[100]

12.14 In the World Summit Outcome Document, the Security Council has been called upon "to ensure that fair and clear procedures exist for placing individuals *and entities* on sanctions lists and for removing them [...]".[101] The General Assembly thus did not distinguish between individual and "corporate" addressees of targeted sanctions. However, international human rights law generally affords only individual persons – not legal entities like commercial companies and enterprises, or organizations without legal personality – rights of due process or fair trial, and respective rules of national law are not uniform. Further, only "individuals who claim that any of their rights enumerated in the Covenant have been violated" have recourse to the complaint mechanism established by the (First) Optional Protocol to the ICCPR.[102] Nevertheless, considering the position adopted by the General Assembly, the practical importance of the issue, and the fact that otherwise individual members of entities would be without procedural protection if not listed additionally, it is appropriate that the due process rights outlined above be made available to "entities", as defined in the relevant Security Council resolutions. By necessity, every measure taken against an "entity" entails disadvantageous "collateral" effects on individuals, such as members and employees of entities and users of the services of entities.[103] In the case of such an equal treatment of individuals and entities as addressees of targeted sanctions, a number of practical questions need to be resolved, *inter alia* the question of who is entitled to represent an entity before the Security Council, a subsidiary body of the Council, and the impartial review body or mechanism.

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[100] *Inter alia*, the question of negligence needs to be examined. Does a right to reparation arise only if the Security Council has been negligent, or even grossly negligent, in discharging its responsibilities? Or is there a "liability without fault"? And how to deal with a contributory negligence on the part of the addressee of sanctions?

[101] Emphasis added.

[102] See Art. 2 of the First Optional Protocol.

[103] See Thomas J. Biersteker, Comments on a draft of the present study, February 2006 (on file with author).

Statement made by Mr. Nicolas Michel, Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, to the Security Council, 22 June 2006

> "I would like to thank you, Mr. President, for kindly giving me the floor in order to speak on behalf of the Secretary-General at this public debate devoted to the theme 'Strengthening international law: rule of law and maintenance of international peace and security'.
>
> […]
>
> As regards the third topic suggested for our consideration [in the discussion paper provided by the Danish presidency of the Council, UN Doc. S/2006/367 of 7 June 2006] – enhancing the efficiency and credibility of United Nations sanctions regimes – I wish to refer to the letter recently addressed by the Secretary-General to the presidency of the Security Council, which I would request to be distributed to all Council members. Largely on the basis of the outcome document of the 2005 world summit, the Secretary-General, in a non-paper annexed to his letter, sets out his views concerning the listing and delisting of individuals and entities on sanctions lists. According to the non-paper, the minimum standards required to ensure that the procedures are fair and transparent would include the following four basic elements. […]
>
> First, a person against whom measures have been taken by the Council has the right to be informed of those measures and to know the case against him or her as soon as and to the extent possible. The notification should include a statement of the case and information as to how requests for review and exemptions may be made. An adequate statement of the case requires the prior determination of clear criteria for listing.
>
> Secondly, such a person has the right to be heard, via submissions in writing, within a reasonable time by the relevant decision-making body. That right should include the ability to directly access the decision-making body, possibly through a focal point in the Secretariat, as well as the right to be assisted or represented by counsel. Time limits should be set for the consideration of the case.

> Thirdly, such a person has the right to review by an effective review mechanism. The effectiveness of that mechanism will depend on its impartiality, degree of independence and ability to provide an effective remedy, including the lifting of the measure and/or, under specific conditions to be determined, compensation.
>
> Fourthly, the Security Council should, possibly through its Committees, periodically review on its own initiative targeted individual sanctions, especially the freezing of assets, in order to mitigate the risk of violating the right to property and related human rights. The frequency of such review should be proportionate to the rights and interests involved.
>
> The non-paper indicates also that those elements would apply mutatis mutandis in respect of entities.
>
> […]"

Source: UN Security Council, 5474th meeting, 22 June 2006, UN Doc. S/PV.5474, p. 3 et seq.

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Statement by the President of the Security Council, 22 June 2006 (UN Doc. S/PRST/2006/28)

> "The Security Council reaffirms its commitment to the Charter of the United Nations and international law, which are indispensable foundations of a more peaceful, prosperous and just world. The Council underscores its conviction that international law plays a critical role in fostering stability and order in international relations and in providing a framework for cooperation among States in addressing common challenges, thus contributing to the maintenance of international peace and security.
>
> […]
>
> The Security Council considers sanctions an important tool in the maintenance and restoration of international peace and security. The Council resolves to ensure that sanctions are carefully targeted in

support of clear objectives and are implemented in ways that balance effectiveness against possible adverse consequences. The Council is committed to ensuring that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions. The Council reiterates its request to the 1267 Committee to continue its work on the Committee's guidelines, including on listing and delisting procedures, and on the implementation of its exemption procedures contained in resolution 1452 (2002) of 20 December 2002."