

# **Binding the United Nations to Customary (Human Rights) Law**

## **Abstract**

Whilst most legal scholarship focuses on the responsibility of the United Nations for human rights violations few studies have ascertained the legal basis of the primary rules leading to such responsibility. This article fills this gap by reviewing the theories used to bind the UN to customary human rights law: (1) the UN has inherited its Member States' obligations, (2) participation in the formation of customary human rights law implies being bound by it, (3) the UN is bound by international law because it has legal personality and (4) as the UN is embedded in international law it must comply with its norms. Such theories are further tested against the backdrop of international organisations' theories. The article draws the conclusion that (1) should be rejected, (2) is not yet legally sound and (3)-(4), despite their flaws, are more persuasive. Ultimately, recourse must be had to the general international law.

## **Keywords**

United Nations; Customary International Law; Human Rights Law

## **Introduction**

As Klabbers notes, “[t]he normative climate prevailing in the post-Second-World-War world held that [international] organizations could do no wrong”.<sup>1</sup> For years, it was, often naively, thought that whatever such international organisations<sup>2</sup> did was far removed from States' narrow-minded political interests and that, acting for the collective good, international organisations were a power for the good of the international community. In particular, it was a long held opinion “that ‘UN power’ is

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<sup>1</sup> Jan Klabbers, ‘Kadi Justice at the Security Council?’ (2007) 4 *International Organizations Law Review* 293, 296; See also Jan Klabbers, ‘The Emergence of Functionalism in International Institutional Law: Colonial Inspirations’ (2014) 25 *European Journal of International Law* 645, 646.

<sup>2</sup> An international organisation is defined as under Article 2(a) in the *Report: Responsibility of International Organizations*, Sixty-Third Session (26 April-3 June and 4 July-12 August 2011), UN Doc A/66/10 (2011) 73 and commentary 74-78 [1]-[15].

‘good’ power, as opposed to state power”<sup>3</sup> that is often perceived as limited to protecting certain categories of individuals and certain interests to the exclusion of others. Consequently no one ever questioned whether the United Nations (UN) was bound by international law and the idea of judicial review or any other form of oversight was firmly rejected.<sup>4</sup>

However, in the last three decades calls were made to hold the UN more accountable, in particular in relation to some of its activities that impacted negatively on individuals’ lives.<sup>5</sup> The reason for such a call is that accrued powers endowed by Member States to the UN have not been matched by the transmission of concomitant responsibilities despite the fact that the UN is capable of violating human rights in the framework of both its operational and normative activities<sup>6</sup> - a fact acknowledged by UN bodies.<sup>7</sup> In parallel, the International Law Commission (ILC) wrote the Draft Articles on the Responsibility of International Organizations which establish the responsibility of international organisations, including the UN, thereby recognising that international organisations are bound by international law.<sup>8</sup> However, curiously, whilst considerable academic literature is devoted to scrutinising the secondary rules relating to the responsibility of international organisations and thus the provisions of the Draft Articles on the Responsibility of International Organizations, much less has been written on the

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<sup>3</sup> Guglielmo Verdirame, ‘Compliance with Human Rights in UN Operations’ (2002) 2 *Human Rights Law Review* 265, 265.

<sup>4</sup> See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Rep 16, 33 [89].

<sup>5</sup> See Parliamentary Assembly of the Council of Europe, *Accountability of International Institutions for Human Rights Violations*, AS/Jur (2013) 17 (10 May 2013) 1-2 [3]; Kristina Daugirdas, ‘How and Why International Law Binds International Organisations’ (2016) 57 *Harvard International Law Journal* 325, 350.

<sup>6</sup> Guillaume Le Floch, ‘Responsibility for Human Rights Violations by International Organizations’ in Roberto Virzo and Ivan Ingravallo (eds), *Evolutions in the Law of International Organizations* (Brill, 2015) 381, 381; Parliamentary Assembly of the Council of Europe, above n 5, 2 [4].

<sup>7</sup> For example the sanctions imposed by way of Security Council resolutions upon Iraq have led to various human rights committees to declare that such sanctions may have violated the International Covenant on Economic, Social and Cultural Rights (Concluding Observations of the Committee on Economic, Social and Cultural Rights: Iraq, UN Doc E/C.12/1/Add.17 (12 December 1997) [8]) and the International Covenant on Civil and Political Rights (Concluding Observations of the Human Rights Committee: Iraq, UN Doc CCPR/C/79/Add.84 (19 November 1997) [4]) and the United Nations Economic and Social Council (*Bossuyt Report: The Adverse Consequences of Economic Sanctions*, UN Doc E/CN.4/Sub.2/2000/33 (21 June 2000)).

<sup>8</sup> *Report: Responsibility of International Organizations*, above n 2

primary rules, ie the law that is applicable to international organisations.<sup>9</sup> This might be due to the fact that a consensus seems to have emerged that, in the words of the International Law Association, “[t]here is no reason in principle why primary rules of international law should not apply to collective enterprises undertaken by states in the framework of IO-s”.<sup>10</sup> This still does not explain what is the legal device used to bind international organisations and more specifically the UN to international law.

After all, secondary rules of responsibility can only be applied once the precise basis of UN legal liability has been established. Thus the key question which this article seeks to answer is “what is the international legal source of the UN human rights law obligations?”. So far the only thorough and comprehensive investigation into the ways international organisations are bound by international law is Daugirdas’ excellent study<sup>11</sup> and there is only limited literature on the UN as an international organisation (rather than its bodies) and human rights law (rather than international law).

With this view, this article explores whether customary international law is a source of binding international human rights law for the UN as there seems to have been little discussion in academic literature of the actual justifications for binding the UN to customary in contrast to treaty human rights law.<sup>12</sup> The focus on treaties seem to be dictated by the order stipulated in the most commonly used list of sources of legal obligations in international law,<sup>13</sup> Article 38 of the Statute of the International Court of

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<sup>9</sup> Klabbers claims that “the discipline still lacks an adequate theory concerning the basis of obligation of international organizations”. Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press, 2<sup>nd</sup> ed, 2009) 284.

<sup>10</sup> Report of the Seventy-First Conference, Berlin, 16-21 August 2004, Final Report of the International Law Association Committee on Accountability of International Organizations, available at <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1058&StorageFileGuid=04c9caf1-2834-4490-9125-7d9ba3683246>, 18.

<sup>11</sup> Daugirdas, above n 5.

<sup>12</sup> For example de Schutter takes great care in analysing treaty obligations but barely investigates why international organisations are bound by customary law. Olivier de Schutter, *Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of International Responsibility*, Cellule de recherche interdisciplinaire en droits de l’homme, Working Paper 2010/4, available at <https://cridho.uclouvain.be/documents/Working.Papers/CRIDHO-WP-2010-4-ODESchutter-IO-HRD.pdf>

<sup>13</sup> Duncan B Hollis, ‘Why State Consent Still Matters – Non-State Actors, Treaties, and the Changing Sources of International Law’ (2005) 23 *Berkeley Journal of International Law* 1, 5. Jan Klabbers, ‘Constitutionalism and the Making of International Law. Fuller’s Procedural Natural Law’ (2008) 5 *No Foundations: Journal of Extreme Legal Positivism* 84, 84.

Justice (ICJ).<sup>14</sup> As most human rights treaties stipulate that only States can become parties,<sup>15</sup> it seems impossible to bind the UN by conventional means.<sup>16</sup> Thus, recourse must be had to other sources of international law relating to human rights law. Whilst the “domination of the field by treaty instruments [...] and by tribunals established to oversee their workings” has led to the view that “there exists a large measure of protection of human rights without any need for custom to play a role”,<sup>17</sup> such attitude towards customary international law fails to understand that this source might be one of the few available avenues to bind international organisations to human rights law. Generally, customary law is comprised of two components that must be conjunctly fulfilled: a pattern of practice or behaviour and the acceptance of such practice/behaviour as a legal obligation.<sup>18</sup> Accordingly, customary law may exist and apply independently of treaty law, even in cases where they cover congruent subject

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<sup>14</sup> ICJ Statute, 26 June 1945, 59 Star. 1055, TS No 993.

<sup>15</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 48(1); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), Article 26(1); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered 3 September 1981) 1249 UNTS 13 (CEDAW), Article 25; United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC), Article 48; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD) Article 17.

<sup>16</sup> Frédéric Mégret and Florian Hoffmann, ‘The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities’ (2003) 25 *Human Rights Quarterly* 314, 316; Niels Blokker, ‘International Organizations and Customary International Law’ (2017) 14 *International Organizations Law Review* 1, 2; Noëlle Quénivet, ‘Binding the United Nations to Human Rights Norms by Way of the Laws of Treaties’ (2010) 42 *George Washington International Law Review* 587; Parliamentary Assembly of the Council of Europe, above n 5, 3 [13].

<sup>17</sup> Hugh Thirlway, ‘Human Rights in Customary Law: An Attempt to Define some of the Issues’ (2015) 28 *Leiden Journal of International Law* 495, 497.

<sup>18</sup> See generally *Lotus* case (Merits) PCIJ Rep Series A No 10; Article 38 ICJ Statute, above n 14. For a discussion on the elements of customary international human rights law, see Omri Sender and Michael Wood, ‘The Emergence of Customary International Law: Between Theory and Practice’ in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on International Lawmaking* (Edward Elgar, 2016) 133-159; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press, 1989); Jordan Paust, ‘The Complex Nature, Sources and Evidences of Customary Human Rights’ (1995) 25 *Georgia Journal of International and Comparative Law* 147, 148. This article does not investigate whether the formation of customary international human rights law is different from that of customary international law more generally (as mentioned in Michael Wood, *First Report on Formation and Evidence of Customary International Law*, UN Doc A/CN.4/663 (17 May 2013) 7-8 [19]; Michael Wood, *Second Report on Formation and Evidence of Customary International Law*, UN Doc A/CN.4/672 (22 May 2014) 11-12 [28]). To this effect, see Oscar Schachter, *International Law in Theory and Practice* (Springer, 1991), Chapter XV and especially discussion in Thirlway, above n 17, 495-506.

matters and prescribe the same rules.<sup>19</sup> Additionally, the ICJ has admitted that human rights, as internationally guaranteed in treaties, have entered into the realm of customary international law norms.<sup>20</sup> Therefore, although the UN cannot at the moment be bound by treaty rules, it might be by customary law in respect of human rights norms.

This article seeks to fill a gap by offering a comprehensive review and analysis of the various legal avenues and approaches that have been used to elicit support for the view that customary law and, more specifically, customary human rights law is applicable to international organisations<sup>21</sup> such as the UN: (1) the theory that the UN has inherited the human rights obligations of its member States, (2) the theory that participation in the formation of customary human rights law necessarily implies being bound by it, (3) the theory that as the UN has legal personality it is bound by all international law norms and (4) the theory that as the UN is embedded in international law it must comply with all its norms. Whilst two of the methods are commonly mentioned and used in legal literature and case-law ((3) and (4)), another one, albeit often used in relation to treaties, will be tested in relation to customary law (1) and another one is entirely novel in its approach (2). The author argues that some of these methods should be rejected as unsound and probably also as outdated (1), some might be valid but are based on controversial assumptions and in fact too novel to be regarded as solid enough at this point in time (2) and others, despite their weaknesses, are likely to be the best suited to justify the (or some) applicability of customary international human rights law to the UN (3 and 4).

The discussion is further set against the background of the main international organisations theories (principal-agent theory, functionalism and constitutionalism approaches) as each of the aforementioned approaches inevitably reveals a certain view of the interrelationship between international organisations and their member States and

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<sup>19</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Merits)* [1986] ICJ Rep 14, 96 [179].

<sup>20</sup> *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo) (Preliminary Objections)* [2007] ICJ Rep 582, 599 [39].

<sup>21</sup> Zeegers only reviews the transfer and subject theories in Chapter 2 of his book. Krit Zeegers, *International Criminal Tribunals and Human Rights Law* (Asser Press, 2016).

thus affects the rights and obligations of international organisations. The author contends that the most ill-suited approaches to justify the applicability of customary international human rights law to the UN are in fact those that espouse a principal-agent and/or functionalist theory. Moreover, this article seeks to establish which approach furthers best the protection of human rights and draws the conclusion that there is a close correlation between approaches that do not adopt a principal-agent and/or functionalism theory and those that adequately protect individuals. Ultimately the answer is that the general rules of international law, rather than customary human rights law, bind the UN.

### **1. The UN Inheriting the Human Rights Obligations of its Member States**

The theory that the UN has inherited the human rights obligations of its Member States epitomises the principal-agency theory. This theory which stems from the fields of economics and management implies that a principal or several principals establish an entity to carry out certain tasks for the benefit of the principal(s). Consequently, the principal-agent theory is a useful way to analyse the issue of delegation of authority. Applied to international organisations, it means that Member States set up an international organisation with specific aims and purposes, yet with some autonomy as Member States recognise that granting autonomy is the best strategy to achieve such aims and purposes. Should the international organisation not fulfil these objectives ('agency slack') Member States are able to intervene (to reduce 'agency costs') and thus accountability of the international organisation should be maintained via its Member States.<sup>22</sup>

Although this international organisation theory recognises the autonomy of international organisations it also acknowledges that the straightjacket has been imposed by the States. Likewise, the idea that international organisations inherit the human rights obligations of their Member States, whilst recognising that the rights and duties of

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<sup>22</sup> Jan Wouters and Philip De Man, 'International Organizations as Law-Makers' in Jan Klabbbers and Åsa Wallendahl, *Research Handbook on the Law of International Organizations* (Edward Elgar, 2012) 190, 190-191.

international organisations are to be distinguished from those of their Member States,<sup>23</sup> is based on a ‘passerelle’ between the obligations of Member States and those of the international organisation. This legal avenue must be generally rejected as unpersuasive in relation to customary law.

*Stricto sensu*, as Le Floch expounds, there are two legal sub-theories used to derive the human rights obligations of the UN from those of its Member States.<sup>24</sup> The sub-theory of transitivity is based on the old adage *nemo plus juris transferre potest quam ipse habet*. In other words, States can only transfer their powers to an international organisation subject to existing international obligations.<sup>25</sup> This sub-theory, in line with the principal-agent theory, tends to see international organisations “as vehicles through which states operate” and thus consider the link between States and international organisations as vertical.<sup>26</sup> Combined with a functionalist approach<sup>27</sup> that understands “international organizations as entities created to execute functions through specifically conferred powers, delegated to them by their member states”<sup>28</sup> this sub-theory is best expressed by the ICJ in the *Reparation Advisory Opinion* in the following manner: “[i]t must be acknowledged that its Members, by entrusting certain functions to it, with the

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<sup>23</sup> Bardo Fassbender, ‘Targeted Sanctions and Due Process’, Study Commissioned by the United Nations Office of Legal Affairs – Office of the Legal Counsel -, Final Version 20 March 2006, reproduced in (2006) 3 *International Organisation Law Review* 437, 459-460 [3.5].

<sup>24</sup> See Le Floch, above n 6, 389-390. De Schutter and Moelle also distinguish between the approach based on ‘*nemo plus juris transferre potest quam ipse habet*’ and the succession theory. de Schutter, above n 12, 9-18; Moritz P Moelle, *The International Responsibility of International Organisations. Cooperation in Peacekeeping Operations* (Cambridge University Press, 2017) 273-276. Some authors however do not distinguish between the two sub-theories, see Mégret and Hoffmann, above n 16, 318, Tawhida Ahmed and Israel de Jesús Butler, ‘The European Union and Human Rights: An International Law Perspective’, (2006) 17 *European Journal of International Law* 771, 788 or Jean-Paul Jacqué, ‘L’adhésion de la Communauté Européenne à la Convention Européenne des Droits de l’Homme. Aspects juridiques et techniques’ in Julia Iliopoulos-Strangas (ed), *Grundrechtsschutz im europäischen Raum: der Beitritt der EG zur EMRK* (Nomos, 1993) 302, 303-305.

<sup>25</sup> Ahmed and Butler, above n 24, 788. In relation to the EU, see discussion in Jacqué, above n 24, 304; Daniel Halberstam and Eric Stein, ‘The United Nations, the EU, and the King of Sweden’ (2009) 46 *Common Market Law Review* 13, 22-23.

<sup>26</sup> See Daugirdas, above n 5, 327.

<sup>27</sup> Functionalism is often considered as based on the principal-agent theory. See Laurence Boisson de Chazournes, ‘Functionalism! Functionalism! Do I Look Like Functionalism?’ (2016) 26 *European Journal of International Law* 951, 954-955; Guy Fiti Sinclair, ‘The Original Sin (and Salvation) of Functionalism’ (2016) 26 *European Journal of International Law* 965, 966.

<sup>28</sup> Klabbers, above n 1, 645.

attendant *duties* and *responsibilities*, have clothed it with the competence required to enable those functions to be effectively discharged”.<sup>29</sup>

Applied in relation to human rights, the theory requires that any transfer of powers to an international organisation be accompanied by the international organisation providing equivalent human rights protection, ie the UN is bound by the human rights obligations of its Member States and must therefore exercise its powers in accordance with such obligations or more accurately described by de Schutter “the international organization would not be allowed to act in violation of the preexisting obligations of its member States, not precisely because it would be bound by the same obligations, but rather because it would thereby be acting beyond its powers, so that any acts violating those obligations should be considered void”.<sup>30</sup> Such a refined understanding of the obligations of international organisations is visible in the jurisprudence of the bodies of the European Convention on Human Rights<sup>31</sup> and in the literature.<sup>32</sup> To some extent it sets a certain standard though forged on the lowest common denominator.

The sub-theory of *Funktionsnachfolge* (functional succession) is primarily used in the context of State succession.<sup>33</sup> Applied to an international organisation,<sup>34</sup> it prescribes that by taking over certain functions from its Member States the organisation

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<sup>29</sup> *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 179. (emphasis added)

<sup>30</sup> de Schutter, above n 12, 14.

<sup>31</sup> See eg *M & Co v Germany*, Application No 13258/77, 9 February 1990, available at <http://hudoc.echr.coe.int/eng?i=001-863> (no paragraph); *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v Ireland*, Application No 45036/98, 30 June 2005, 45-46 [155]-[156].

<sup>32</sup> See eg Martin Faix, ‘Are International Organisations Bound by International Human Rights Obligations?’ (2014) 5 *Czech Yearbook of Public and Private International Law* 267, 283; Henry G Schermers, ‘The Legal Basis of International Organization Action’ in René-Jean Dupuy, *Manuel sur les organisations internationales* (Nijhoff, 1998) 403.

<sup>33</sup> See Robert Uerpmann, *International Law as an Element of European Constitutional Law: International Supplementary Constitutions*, Max Planck Institute for Comparative Public Law and International Law, Jean Monnet Working Paper 9/03, 2003, available at <http://www.jeanmonnetprogram.org/archive/papers/03/030901-02.pdf>, 31, referring to W Schroeder and M Selmayr, ‘Die EG, das GATT und die Vollzugslehre: oder: Warum der EuGH manchmal das Völkerrecht ignoriert’ (1998) 53 *JuristenZeitung* 344 and C Tomuschat, ‘Article 210’ in H v d in Groeben, J Thiesing and C-D Ehlermann (eds), *Kommentar zum EU-/EG-Vertrag* (Beck, 5<sup>th</sup> ed, 1997) [52], [64].

<sup>34</sup> Waldemar Hummer, ‘Untergang, “Entkernung” und Funktionsnachfolge Internationaler Organisationen – dargestellt am Beispiel der EGKS und der WEU’ in Franz Zehetner (ed), *Festschrift für Hans-Ernst Folz* (Neuer Wissenschaftlicher Verlag, 2003) 117-144; Uerpmann, above n 33.

participates in their obligations under international law. It is in fact *substituting* its Member States in the performance of certain acts “because of the competences that have been attributed to [it]”.<sup>35</sup> This approach has been adopted (though with conditions attached) by the Court of Justice of the European Union in relation to treaties.<sup>36</sup> When applied to human rights, “there is a delegation by member states to the UN of their responsibilities under human rights law”.<sup>37</sup> This again reflects an understanding of the relation between the international organisation and the Member States under the principal-agent theory whereby the agent acts on behalf of the principal. It might be possible to go a step further as, in this sub-theory, States and international organisations are not only regarded as peers in the sense that they co-exist. In fact international organisations replace or displace the State:<sup>38</sup> the agent replaces the principal.

The basic and correlated tenet of these sub-theories is that States should not be able to divest themselves of their duties by claiming that an international organisation is in charge.<sup>39</sup> Brownlie explains that a “State cannot by delegation (even if this be genuine) avoid responsibility for breaches of its duties under international law.... This approach of public international law is not *ad hoc* but stems directly from the normal concepts of

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<sup>35</sup> Le Floch, above n 6, 390. This theory is also sometimes called the ‘theory of substitution’, see Bjørn Kunoy and Anthony Dawes, ‘Plate Tectonics in Luxembourg: The ménage à trois between EC Law, International Law and the European Convention on Human Rights Following the UN Sanctions Cases’ (2009) 46 *Common Market Law Review* 73, 97. See *International Fruit Company NV v Produktschap voor Groenten en Fruit* (21-24/72) [1972] ECR 1219, 1227 [18].

<sup>36</sup> *International Fruit Company*, above n 35; *Air Transport Association of America et al v Secretary of State for Energy and Climate Change* (C-366/10) [2011] ECR I-13755, 13874-13875 [62]-[63]. See analysis in Ilona Cheyne, ‘International Agreements and the European Community Legal System’, (1994) 19 *European Law Review* 581, 587; Ahmed and Butler, above n 24, 788-789.

<sup>37</sup> Nigel D White, ‘Towards a Strategy for Human Rights Protection in Post-Conflict Situations’ in Nigel D White and Dirk Klaasen (eds) *The UN, Human Rights and Post-Conflict Situations* (Manchester University Press, 2006) 461, 464.

<sup>38</sup> Daugirdas, above n 5, 370.

<sup>39</sup> See *Bosphorus* above n 31, 45 [154]; *International Fruit Company*, above n 35, 1226 [11]. See also “... the four States, in forming the AOI, did not intend wholly to disappear behind it, but rather to participate in the AOI as ‘members with liability’”. *Westland Helicopters Ltd v Arab Organization for Industrialization, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt and Arab British Helicopter Company*, 5 March 1984, 80 ILR 600. See also discussion in Robert McCorquodale, ‘International Organisations and International Human Rights Law: One Giant Leap for Humankind’, in Kaiyan H Kaikobad and Michael Bohlander (eds), *International Law and Power. Perspectives on Legal Order and Justice. Essays in Honour of Colin Warbrick* (Brill, 2009) 141, 150; 154-156 and Zeegers, above n 21, 13.

accountability and effectiveness”.<sup>40</sup> Therefore States should not be allowed to obviate human rights standards by setting up an autonomous international actor.<sup>41</sup> In fact, regional<sup>42</sup> as well as UN Charter and treaty bodies<sup>43</sup> have reminded States that they cannot breach human rights law whilst acting as an international organisation. The international organisation should in fact enable the Member States to fulfil, rather than divest, their international obligations<sup>44</sup> since they were created as a mechanism to pool resources.

The International Law Association Committee seems to indicate that this approach might be the most appropriate method to describe why an international organisation is bound by human rights law.<sup>45</sup> Yet, McCorquodale rejects this type of automatization, stressing that such a method does not solve the issue as to whether the UN has its *own*, distinct international human rights obligations.<sup>46</sup> Indeed an international organisation is a distinct and autonomous subject of international law that has functions, rights and duties of its own<sup>47</sup> and cannot be directly legally bound by the duties of its Member States.<sup>48</sup> As the ICJ underlined, “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

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<sup>40</sup> Ian Brownlie, ‘State Responsibility: the Problem of Delegation’, in Konrad Ginther et al (eds), *Völkerrecht zwischen normativen Anspruch und politischer Realität, Festschrift für Karl Zemanek zum 65. Geburtstag* (Duncker & Humblot, 1994) 299, 300-301.

<sup>41</sup> White, above n 37, 464; Ahmed and Butler, above n 24, 777; de Schutter, above n 12, 10; Parliamentary Assembly of the Council of Europe, above n 5, 2 [5], 10 [55].

<sup>42</sup> *Waite v Germany*, Application No 26083/94, 18 February 1999, 15 [67].

<sup>43</sup> Committee on Economic, Social and Cultural Rights, General Comment 15: The Right to Water, UN Doc E/C.12/2002/II (2002), 20 January 2003, 12 [36]; UN High Commissioner for Human Rights, *Liberalization of Trade in Services and Human Rights*, UN Doc E/C.4/Sub.2/2002/9, 25 June 2002, 8 [5].

<sup>44</sup> *Yassin Abdullah Kadi v Council and Commission* (T-315/01), [2005] ECR II-3649, 3725 [229] and *Ahmed Ali Yusuf and Al Barakat International Foundation v Council and Commission* (T-306/01) [2005] ECR II-3533, 3606 [204].

<sup>45</sup> ILA Report, above n 9, 18.

<sup>46</sup> McCorquodale, above n 10, 141, 155-156.

<sup>47</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request by WHO) (Advisory Opinion)* [1996] ICJ Rep 66, 75 [19]. See also CF Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, 2005) 390.

<sup>48</sup> Niels Blokker, ‘International Organizations and their Members. “International Organizations Belong to All Members and to None” – Variations on a Theme’ (2004) 1 *International Organizations Law Review* 139, 152 *et seq.* In relation to the EU being bound by the European Convention on Human Rights via its Member States, see *Bosphorus*, above n 31, 45 [152] and see discussion in Pierre-Henri Imbert, ‘De l’adhésion de l’Union Européenne à la CEDH’ (2002) 2 *Droits Fondamentaux* 11, 19.

which *they are parties*".<sup>49</sup> Therefore the theory that the UN has inherited the human rights obligations of its Member States might not be as robust as originally believed.

There are five additional hurdles to applying these sub-theories, either in isolation or as a set, to the UN. First, the theory of functional State succession is meant to apply between States<sup>50</sup> and it is thus questionable whether it can so easily be transposed on a State-international organisation interface. The only known cases are in European Union law.<sup>51</sup> Second this sub-theory is based on the assumption that international organisations replace States. De Schutter notes that international organisations are not sovereign entities and thus no succession can occur.<sup>52</sup> More specifically, as Naert explains, "it is clear that international organizations hardly ever, not even in the case of the EU, entirely replace their Member States in the responsibility for their international relations".<sup>53</sup> Even if one disagrees with such scholarly opinions by pointing out that the Court of Justice of the European Union has fully and repeatedly embraced this sub-theory it must be highlighted that in its latest jurisprudence the Court has elucidated that the functional succession theory only applies when the EU has exclusive competences in the field.<sup>54</sup> Clearly, the UN has no exclusive competences and this sub-theory is very much limited to supranational organisations like the European Union. Third, both sub-theories have essentially been used by courts<sup>55</sup> and developed by scholars in relation to

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<sup>49</sup> *Interpretation of the WHO-Egypt Agreement (Advisory Opinion)* [1980] ICJ Rep 73, 89-90 (emphasis added).

<sup>50</sup> "The law of state succession to treaties has traditionally applied where the territorial sovereignty of an area is passed from one *state* to another". Pauline Hilmy, 'The International Human Rights Regime and Supranational Regional Organizations: The Challenge of the EU' (2014) 36 *Michigan Journal of International Law* 179, 196.

<sup>51</sup> See discussion in Hilmy, above n 46, 184-187.

<sup>52</sup> de Schutter, above n 12, 9.

<sup>53</sup> Frédéric Naert, 'Binding International Organisations to member State Treaties or Responsibility of Member States for their Own Actions in the Framework of International Organisations' in Jan Wouters et al (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010) 130, 132-133. Daugirdas adds that 'IOs almost never exercise that degree of control'. Daugirdas, above n 5, 370. See also Zeegers, above n 21, 16.

<sup>54</sup> See *Air Transport Association of America et al*, above 36, 13874-13875, 13877 [62], [71]. See discussion in Geert De Baere and Cédric Ryngaert, 'The ECJ's Judgment in *Air Transport Association of American* and the International Legal Context of the EU's Climate Change Policy' (2013) 18 *European Foreign Affairs Review* 389, 395-396.

<sup>55</sup> See jurisprudence of the Court of Justice of the European Union relating to the obligations of the then European Community pursuant to the General Agreement on Tariffs and Trade: *International Fruit Company*, above n 35.

treaty and not customary obligations of Member States.<sup>56</sup> Even the Court of Justice of the European Union has not used this theory to justify the customary law obligations of the European Union.<sup>57</sup> In other words, applying it to customary international human rights law is highly speculative and utterly untested. Fourth, both sub-theories can only work if all Member States are bound by the same obligations.<sup>58</sup> For universal organisations such as the UN this is highly problematic<sup>59</sup> and in terms of customary human rights law is probably limited to binding the UN to those human rights obligations that are of *jus cogens* nature. Fifth, it would only cover the obligations that the Member States had prior to becoming a member of the international organisation since the theory depends on the timing of the transfer of power.<sup>60</sup> In the case of the UN this would mean that none of the modern human rights standards could be applied.<sup>61</sup> Likewise, this theory fails to cater for the growing membership of States to international organisations.

In light of all these flaws the theory that the UN has inherited the human rights obligations of its Member States under customary law appears to lack persuasive value and should therefore be rejected as unsound not only in its application to the UN but also to any international organisation's legal obligations under customary law more generally.<sup>62</sup> What is more, it does not offer adequate human rights protection as such protection entirely depends on the obligations of the Member States.

## **2. The UN as Participant in the Formation of Customary Human Rights Law**

A second theory claims that, owing to the fact that the UN is a participant in the formation of customary human rights law, it is bound by it. Whilst it might be perceived

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<sup>56</sup> See discussion in Daugirdas, above n 5, 349-357.

<sup>57</sup> It is also noteworthy that the CJEU has devised two different tests in cases when individuals wish to rely on treaty law or customary law. See discussion in De Baere and Ryngaert, above n 54, 397-398.

<sup>58</sup> For a detailed discussion on the numerous difficulties to align the obligations of international organisations on that of its Member States, see discussion in Daugirdas, above n 5, 350-353 and Zeegers, above n 21, 18-20.

<sup>59</sup> Le Floch, above n 6, 390; Moelle, above n 24, 274.

<sup>60</sup> Le Floch, above n 6, 390; Naert, above n 53, 134; Moelle, above n 24, 275. In relation to the European Union, see discussion in Jacqué, above n 24, 304.

<sup>61</sup> Zeegers, above n 21, 19.

<sup>62</sup> Zeegers draw a similar conclusion. Zeegers, above n 21, 20.

as a contested approach, it is worth being considered in light of the current work of the ILAC and Odermatt's seminal work on how international organisations contribute to the development of customary law.<sup>63</sup>

This theory is grounded in the idea, reinforced by a consensual approach towards international law,<sup>64</sup> that customary law emerges as practice between subjects of international law and cannot be imposed on those subjects that do not take part in its formation.<sup>65</sup> This approach does not sit well with the principal-agent international organisation theory as it views the international organisation as a completely separate entity whose will is unrelated to that of its members. Yet, it is this theory that is most enlightening to understand why this approach to binding the UN to customary human rights law is so difficult to apply.

Here consent is understood as 'recognition' or 'acceptance' in the sense that practice becomes law and is 'recognised' as obligatory.<sup>66</sup> Consent or acquiescence endow practice "with a general stamp of approval".<sup>67</sup> This consensual vision of customary law is evidenced by the fact that only protest in the formation period can invalidate the claim that the law is binding on all subjects of international law.<sup>68</sup> In other words, if an international organisation has contributed to the process of formation of the rule, then it is also bound by it. After all, in creating it, it recognises and accepts it as obligatory.

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<sup>63</sup> Jed Odermatt, 'The Development of Customary International Law by International Organizations' (2017) 66 *International and Comparative Law Quarterly* 491.

<sup>64</sup> Ben Chigara, *Legitimacy Deficit in Custom. A Deconstructionist Critique* (Routledge, 2001) 73. See *a contrario* Andrew Guzman and Jerome Hsiang, 'Some Ways that Theories on Customary International Law Fail: A Reply to Laszlo Blutman' (2014) 25 *European Journal of International Law* 553.

<sup>65</sup> *Case of the S.S. Lotus (France v Turkey)*, PCIJ Reports, Series A, No. 10 (1927), 18 [168]; *Case Concerning Right of Passage over Indian Territory (Portugal v India)*, [1960] ICJ Rep 6, 43-44; See discussion in Albert Bleckmann, 'Zur Verbindlichkeit des allgemeinen Völkerrechts für internationale Organisationen' (1977) 37 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 107, 110; AV Lowe, 'Do General Rules of International Law Exist?' (1983) 9 *Review of International Studies* 207, 207-208; Jan Klabbers, 'The Sources of International Organizations Law: Reflections on Accountability' in Jean d'Aspremont, Samantha Besson and Sévrine Knuchel (eds), *Oxford Handbook on Sources of International Law* (Oxford University Press, 2017) as cited in Daugirdas, above 5, 334.

<sup>66</sup> See by analogy the discussion in relation to State and consent in Oscar Schachter, 'Towards a Theory of International Obligation' (1968) 8 *Virginia Journal of International Law* 301, 312; Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-1954: General Principles and Sources of Law' (1953) 30 *British Yearbook of International Law* 1, 68.

<sup>67</sup> Anthony D'Amato, 'Treaties as a Source of General Rules of International Law' (1962) 3 *Harvard International Law Journal* 1, 20.

<sup>68</sup> See Lowe, above n 65, 207-208.

This theory undoubtedly stands in contrast to those who view international organisations as subjects/addressees of international law (see 4) or having legal personality (see 3) as, under the latter theories, consent is deemed irrelevant. It must be stressed that if a non-consensual approach towards the formation of customary international law is espoused, then this theory cannot work at all.

Although a literal interpretation of Article 38(1)(b) of the ICJ Statute precludes the formation of customary law by actors other than States<sup>69</sup> most authors, often taking into account the evolution of international law, acknowledge that international organisations can play a role in the formation of a customary norm.<sup>70</sup> It is widely accepted that acts of international organisations can be regarded as collective acts of States that are evidence of the creation of customary law.<sup>71</sup> Yet, the fundamental question is whether the UN can express a practice and an *opinio juris* as a collective entity (with its own voice) rather than a collection of the individual voices of the Member States (the sum of its parts). Such a tension between the idea that international organisations are independent actors (in a horizontal relationship with States) contributing to the formation of customary law and the view that they chiefly represent the collective will of their members (because they are in a vertical relationship with Member States) is underlying in the work of the Special Rapporteur of the ILC on the Identification of Customary International Law.<sup>72</sup>

Customary international law being formed by practice and *opinio juris* it is necessary to probe the two elements separately. Whilst it can be shown that the UN has ‘practised’ human rights law it is more problematic to expose the *opinio juris*.<sup>73</sup> With regard to

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<sup>69</sup> Odermatt, above n 63, 496.

<sup>70</sup> “As subjects of international law, intergovernmental organizations participate in the customary process in the same manner as States”. Tullio Treves, ‘Customary International Law’ in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2006) [50]; Chigara, above n 64, 76; Michael Wood, ‘International Organizations and Customary International Law’ (2015) 48(3) *Vanderbilt Journal of Transnational Law* 609, 614; Karol Wolfke, *Custom in Present International Law* (Martinus Nijhoff, 1993) 151-154. In contrast, see Brian D Lepard, *Customary International Law. A New Theory with Practical Applications* (Cambridge University Press, 2010) 181.

<sup>71</sup> Isabelle Gunning, ‘Modernizing Customary International Law: The Challenge of Human Rights’ (1990-1991) 31 *Virginia Journal of International Law* 211, 221-223.

<sup>72</sup> See Odermatt, above n 63, 492.

<sup>73</sup> It is not the aim of this article to actually explore in a comprehensive manner whether there is an *opinio juris* and practice of the UN, rather it is to show that there are ways to ascertain that the UN is bound by customary international human rights law.

practice generally, the Special Rapporteur has in his fourth report stated that “the practice of international (intergovernmental) organizations as such in certain cases may contribute to the creation, or expression, of customary international law”.<sup>74</sup> For this purpose, only external practice of the international organisation (ie what international organisations have practiced towards other subjects such as third States and international organisations) counts.<sup>75</sup> According to the Special Rapporteur international organisations contribute towards the formation of customary international law in three ways:

- States acting through international organisations, in which case the international organisation is nothing but a facilitator of State action;<sup>76</sup>
- the international organisation acts as a catalyst, a platform of State practice,<sup>77</sup> in which case the practice is created by States after being called upon to provide responses to draft texts or act in a specific manner;<sup>78</sup>
- the international organisation, as a legal actor autonomous from its members, contributes as such to customary international law.<sup>79</sup>

Strictly speaking, the first two methods are unsuitable for the purpose of this study, for the theory discussed in this section is based on the very idea that the UN is bound by customary human rights law because it has, as an *independent* actor, contributed to its formation. The dearth of references to practice and academic literature<sup>80</sup> on that method is unfortunate and thus already raises a substantial number of issues as to the credibility of the applicability of such a theory (or the lack of interest in it). Wood, one of the few experts writing in this field, observes that the practice of an international organisation can be discerned from the acts of its organs.<sup>81</sup> In other words an inquiry into the way

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<sup>74</sup> Michael Wood, *Fourth Report on Identification of Customary International Law*, 68<sup>th</sup> Session, 2 May-10 June and 4 July-12 August 2016, UN Doc A/CN.4/695 (8 March 2016) 7 [20].

<sup>75</sup> Michael Wood, *Third Report on Identification of Customary International Law*, 67<sup>th</sup> Session, 4 May-5 June and 6 July-7 August 2016, UN Doc A/CN.4/682 (27 March 2015) 48-49 [71]-[72].

<sup>76</sup> *Third Report*, above n 75, 51 [74].

<sup>77</sup> *Third Report*, above n 75, 51-52 [75].

<sup>78</sup> See discussion in Odermatt, above n 63, 500.

<sup>79</sup> *Third Report*, above n 75, 52-53 [76] and accompanying footnote 179.

<sup>80</sup> See Odermatt, above n 63, 510.

<sup>81</sup> Wood, above n 70, 615 and 618.

UN organs have practised human rights law towards individuals is needed. Whilst such an investigation goes beyond the scope of this article, this theory cannot be completely dismissed.

With regard to the *opinio juris* the issue has unfortunately not yet been addressed by the Special Rapporteur.<sup>82</sup> First, it is argued that international organisations can, provided some conditions are present, formulate and express an *opinio juris*. Analogy can be drawn from the distinction between the European Union and the European Community.<sup>83</sup> The acts of the European Community, an international organisation that had an international legal personality distinct from that of the Member States, counted as practice of the EC itself since the EC functioned autonomously and decisions were not necessarily taken on the basis of unanimity. Moreover such acts faithfully represented the *opinio juris* of the EC as States had agreed under the principle of sincere cooperation to accept EC law as legally binding and to comply with its acts. Consequently, the EC could create norms of customary nature. In contrast, the EU, though acting collectively, did not appear to have legal personality until 2001 (as least implicitly)<sup>84</sup> and thus wield the capacity to form an *opinio juris* as some scholars doubt that the EU operated as an independent subject of international law.<sup>85</sup> Here the EU worked as an organisation enabling the Member States to pool their wills rather than a separate entity with its own will (or *volonté distincte*).<sup>86</sup> The acts were thus attributed to the Member States rather than to the international organisation.<sup>87</sup> After all, the leitmotiv

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<sup>82</sup> Blokker, above n 16, 6.

<sup>83</sup> This analysis is based on arguments made by Jan Vanhamme in 'Formation and Enforcement of Customary International Law: The European Union's Contribution' (2008) XXXIX *Netherlands Yearbook of International Law* 127, 130-131.

<sup>84</sup> Blokker explains that only in 2001 when the EU became a party to a treaty in its own name did it assume that it had the capacity to do so. Blokker, above n 4, 156. See also discussion in Niels Blokker, 'International Legal Personality of the European Communities and the European Union: Inspirations from Public International Law' (2016) 35 *Yearbook of European Law* 471, 478.

<sup>85</sup> This relates to the EU acting in the field of the European Security and Defence Policy. Aurel Sari, 'The Conclusion of International Agreements by the European Union in the Context of the ESDP' (2008) 57 *International and Comparative Law Quarterly* 53, 85. Generally, see discussion in Vanhamme, above n 83, 131-132.

<sup>86</sup> On the concepts of 'a will of its own' and 'volonté distincte', see Blokker, above n 4, 154.

<sup>87</sup> Roberto Virzo, 'The Proliferation of Institutional Acts of International Organizations. A Proposal for their Classification' in Virzo and Ingravallo, above n 6, 293, 295.

was cooperation rather than integration.<sup>88</sup> Bearing this in mind, it is more likely that the UN functions like the pre-2001 EU and is thus unable to produce its own *opinio juris*. As a result it is difficult to identify a UN *opinio juris*, at least using this method.

Two other alternative methods might assist in identifying the *opinio juris* of international organisations. First, it might be possible to pinpoint “organs which are not composed of representatives of States, such as the United Nations Secretariat [, that] can also create rules of customary law .... Nor must one overlook the legal opinions of the United Nations Secretariat”.<sup>89</sup> In other words, which organs of an international organisation<sup>90</sup> are relevant to the customary process? In this instance a distinction can be drawn between organs where individuals represent the States (a collection of wills) and organs where they do not (and form a collective will). Jenks already maintained in 1945 that representatives could be regarded as members of an international organ with a collective international responsibility<sup>91</sup> and Blokker noted in 2004 that what is relevant is that decisions emanate “from a body upon which powers have been bestowed to adopt such decisions, a body that is therefore more than the sum of its members”.<sup>92</sup> It can therefore be argued that the UN General Assembly and the UN Security Council might be considered such organs and their resolutions viewed as *opinio juris* of the UN (in addition to that of the Member States).<sup>93</sup> Moreover, UN bodies unrelated to Member States and their policies such as the UN Secretary General (sometimes in conjunction with other bodies) have adopted legal instruments and thus shown an independent will. Such instruments do not simply reiterate human rights law and policies relevant to States but are specific to the UN and govern the relationship between the UN and other subjects of international law. Examples are the Human Rights Due Diligence Policy on

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<sup>88</sup> Yet, it might be likewise argued that for external actors the EU acted as one single entity rather than the collection of wills of the EU Member States.

<sup>89</sup> Michael Akehurst, ‘Custom as a Source of International Law’ (1975) 47 *British Yearbook of International Law* 1, 11 as cited in *Third Report*, above n 75, footnote 169.

<sup>90</sup> For a definition of an ‘organ of an international organisation’, see *Report: Responsibility of International Organizations*, above n 2, Article 2(c), 73 and commentary 79 [22].

<sup>91</sup> Clarence W Jenks, ‘Some Constitutional Problems of International Organizations’ (1945) 22 *British Year Book of International Law* 11, 27-28.

<sup>92</sup> Blokker, above n 4, 154. See also Wood, above 70, 618.

<sup>93</sup> Yet, as Blokker points out, the ILC does not seem to believe that this is possible. Blokker, above n 16, 9.

United Nations Support to Non-United Nations Security Forces<sup>94</sup> and the Special Measures for Protection from Sexual Exploitation and Sexual Abuse.<sup>95</sup> This approach no doubt shows that it is possible to identify a distinct *opinio juris* for the UN though only in limited fields.

Second, rather than focus on the body that can produce the *opinio juris*, it might be more useful to investigate whether a set of human rights *opinio juris* can be derived from the totality of UN bodies. Such a proposition works on the premise that the creation of a normative framework of international human rights law by the UN can as a whole be considered as *opinio juris*. Decisions taken by some bodies can be built on further, as a result of which a *corpus* of decisions, reflecting a certain UN belief, can emerge and develop.<sup>96</sup> After all, the UN has been the facilitating organisation for the adoption of countless human rights treaties.<sup>97</sup> Moreover, not only has the UN provided the stimulus and forum for the adoption of such treaties, but the General Assembly has actually penned them,<sup>98</sup> often in the initial form of declarations that have “served as a basis for the subsequent negotiation of major multilateral treaties”.<sup>99</sup> That being said, adopting by analogy the ILC Special Rapporteur’s typology of the way international organisations are involved in the formation of practice, it is difficult to dissociate this collective *opinio juris* from the two other methods (the UN as a (1) facilitator of State action and (2) catalyst of State practice). Yet, this does not mean that this method can be dismissed for the *opinio juris* could be attributed to both Member States and the UN; per definition, *opinio juris* is not exclusive to a single international law actor. Consequently, it might be possible to consider the entire body of human rights law

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<sup>94</sup> *Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces*, UN Doc A/67/775-S/2013/110 (5 March 2013).

<sup>95</sup> Special measures for protection from sexual exploitation and sexual abuse, UN Doc ST/SGB/2003/13, 9 October 2003.

<sup>96</sup> Blokker, above n 4, 149. It should be noted that this proposition is not based on examining the UN Charter as it was created by States but on what UN bodies have declared.

<sup>97</sup> Examples are ICCPR, above n 15; ICESCR, above n 15; ICERD, above n 15; CEDAW, above n 15; CRC, above n 15; and CRPD, above n 15.

<sup>98</sup> See eg the ICCPR, above n 15; CRPD, above n 15; ICERD, above n 15; and CRC, above n 15.

<sup>99</sup> Miguel de Serpa Soares, ‘UN70: Contributions of the United Nations to the Development of International Law’ (2016) 40(1) *Fletcher Forum of World Affairs* 99, 104.

created by the UN as expression of its *opinio juris*, ie as an expression of its own will rather than an expression of its constituent parts.

This theory should not be completely dismissed all the more as it offers a solid human rights protection to individuals with whom the UN comes into contact. After all, the application of this theory means that any human rights norm of customary nature binds the UN. However, as shown, it relies on a number of assumptions and arguments that are controversial both in practice and in legal literature. This theory suffers from a number of weaknesses. First, it is grounded on a consent-based view of international law and many scholars beg to differ, arguing that consent is not necessary for customary international law to exist.<sup>100</sup> Second, some scholars contend that only States can create customary international law.<sup>101</sup> Third, further investigation in relation to how much the UN has practiced human rights law must be carried out. Fourth, several problems remain as to how to identify the *opinio juris* of the UN rather than that of States acting in the framework of the UN institutions. It is argued that at this stage this method is not strong enough all the more as in the Draft Conclusions on the Identification of Customary International Law the ILC has shied away from any discussion on whether international organisations can produce *opinio juris* that is essential to the formation of customary law.<sup>102</sup> Interestingly, this theory also strongly highlights the prevalence of the principal-agency international organisation theory: we are so far unable to view the UN as a completely autonomous agent capable of creating customary international law independently of its member States. Even despite Boisson de Chazournes's claim that having "pierced the veil of inter-state cooperation" international organisations have become "authorities in their own right",<sup>103</sup> it is clear from the way international organisations are treated in relation to the formation of customary law that we might not have moved that far yet. It is thus argued that for as long as the UN is essentially a

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<sup>100</sup> See discussion in Lepard, above n 70, 17, 105-107.

<sup>101</sup> Lepard, above n 70, 181.

<sup>102</sup> International Law Commission, *Identification of Customary International Law, Text of the Draft Conclusions as Adopted by the Drafting Committee on Second Reading*, UN Doc A/CN.4/L.908 (17 May 2018).

<sup>103</sup> Boisson de Chazournes, above n 27, 953.

forum of States and a platform of their voices it is difficult, if not impossible, to distinguish between its will and the will of its principals, the member States.

That being said, this would not put an end to the never-ending battle between those who understand international law as fundamentally consensual and those who do not. In other words, it is contended that even though some of these weaknesses can be remedied, the fundamental assumption of this theory can be challenged and so the theory can be dismissed as unpersuasive.

### **3. The Legal Personality of the United Nations**

A more persuasive theory is that, as the UN has legal personality, it is bound by all sources of international law<sup>104</sup> including customary human rights law. Such theory is firmly grounded in the functionalism approach of international organisation law. After examining the concept of international legal personality, this section investigates the notion of functional legal personality and its consequences on the applicability of customary human rights law.

International organisations are subjects that have rights and duties in close correlation to their legal capacity to act on the international plane as autonomous subjects.<sup>105</sup> Such autonomy is expressed in the form of a separate legal personality distinct from that of the creators of the entity. It has its own legal personality.<sup>106</sup> Sometimes legal personality is expressly stipulated in the constituent instrument and thus determinative of the issue but sometimes it is silent on the subject-matter. Whilst the UN constituent document, the UN Charter, does not endow the UN with legal personality, such personality can be derived from its powers. In its Advisory Opinion on *Certain Expenses of the United Nations* the ICJ ascertained that the UN had the capacity to act as an *autonomous*

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<sup>104</sup> Eric de Brabandère, 'Human Rights Accountability of International Administrations: Theory and Practice in East-Timor' in Wouters et al, above n 53, 331, 337 as cited in Zeegers, above n 21, 22 footnote 61.

<sup>105</sup> Manuel Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations', (1970) 44 *British Yearbook of International Law* 111, 138); Sanna Kyllönen, 'The Legal Framework for the Responsibility of International Organizations' (2010) 1 *Nordic Journal of Commercial Law* 1, 3; Parliamentary Assembly of the Council of Europe, above n 5, 3 [12]; Zeegers, above n 21, 10.

<sup>106</sup> *Report: Responsibility of International Organizations*, above n 2, commentary 76 [10].

subject on the international plane and was endowed with such powers as were necessary for the exercise of its functions and fulfilment of its purposes.<sup>107</sup> This is often referred to as the doctrine of implied powers<sup>108</sup> which “is clearly indebted to a functional approach”.<sup>109</sup> Undoubtedly, the UN is an international legal person.

As underlined by Wood, some authors incorrectly state that the mere fact that international organisations have legal personality means that they are bound by international law in the same fashion as States.<sup>110</sup> Indeed, possessing international legal personality means very little: it is nothing but a shell or as Klabbers puts it, “a descriptive notion: useful to describe a state of affairs, normatively empty, as neither rights nor obligations flow automatically from a grant of personality”.<sup>111</sup> Even if one accepts that possessing legal personality means that an entity has rights and duties the granting of such personality does not identify these rights and duties. For example the International Committee of the Red Cross, the Sovereign Order of Malta or insurgents (provided some conditions are fulfilled) have all legal personality (albeit to a greater or lesser degree) and yet their rights and duties are different. As the ICJ recognised, “the subjects of law in any legal system are not necessarily identical in their nature and in their extent of their rights”.<sup>112</sup> That being said, because international legal personality is closely related to the capacity of an entity to act in the realm of international law, it is a relatively useful concept in relation to the rights and duties of an entity.<sup>113</sup>

International organisations, unlike States, do not possess a general competence.<sup>114</sup> As a result, “the precise catalogue of rights and duties is ... impossible to list in advance”.<sup>115</sup>

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<sup>107</sup> *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Advisory Opinion)* 1962 ICJ Rep 151; *Reparation*, above n 29, 180.

<sup>108</sup> See discussions in Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, 2009) 71-73; Marc Darrow and Louise Arbour, ‘The Pillar of Glass: Human Rights in the Development of the United Nations’ (2009) 103 *American Journal of International Law* 446, 468. The ICJ initially spelled out the implied powers theory in the Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*. *Reparation*, above n 29, 182. See discussion in Amerasinghe, above n 47, 78-86; Rama-Montaldo, above n 104, 124-131.

<sup>109</sup> Wouters and De Man, above n 22, 200.

<sup>110</sup> Wood, above n 70, 619.

<sup>111</sup> Klabbers, above n 9, 51.

<sup>112</sup> *Reparation*, above n 29, 178.

<sup>113</sup> Faix, above n 32, 276.

<sup>114</sup> *Report: Responsibility of International Organizations*, above n 2, commentary 70 [7].

This is compounded by the fact that international organisations come in all forms and shapes, ie functions, membership, objectives, structures, facilities, and powers.<sup>116</sup> And so, to know which powers and competences the organisation has, it is necessary to examine its constitutive document. Under the functionalist approach, “[i]nternational organizations are creatures of their mandates, brought into being by states to perform certain tasks”<sup>117</sup> and thus must operate within the framework of the powers endowed to it by the Member States.<sup>118</sup> Clearly, the UN’s legal personality hinges upon its functions and purposes which are “specified or implied in its constituent documents and developed in practice”.<sup>119</sup> Its subjectivity is critically linked to the principle of speciality<sup>120</sup> which means that the powers as well as the legal personality of the UN are limited by its material competences.

Accordingly, the duties are concomitant to the functions and powers exercised by the international organisation.<sup>121</sup> Customary human rights law thus binds an international organisation<sup>122</sup> to the extent that it is acting in a field related to its purpose and function.<sup>123</sup> Put differently, customary human rights law only applies to those UN activities that are related to its purpose and function *and* have an impact on human rights. As Amerasinghe observes, “under customary international law ... international organizations can also have international obligations towards other international persons

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<sup>115</sup> Malcolm Shaw, *International Law* (Cambridge University Press, 7<sup>th</sup> ed, 2014) 192.

<sup>116</sup> *Report: Responsibility of International Organizations*, above n 2, commentary 70 [7]; *Fourth Report*, above n 68, 7 [20].

<sup>117</sup> de Serpa Soares, above n 99, 99; Chigara, above n 64, 77.

<sup>118</sup> Shaw, above n 115, 947.

<sup>119</sup> *Reparation*, above n 29, 180. For a discussion on the difference between ‘attributed’, ‘implied’ and ‘inherent’ powers, see Kyllönen, above n 105, 7.

<sup>120</sup> See Kyllönen, above n 105, 1.

<sup>121</sup> “The capacity of international organizations to be held responsible under international law corresponds to their respective capacities to operate under international law.” Kyllönen, above n 105, 1.

<sup>122</sup> C Amerasinghe, ‘The Law of International Organizations: A Subject which Needs Exploration and Analysis’ (2004) 1 *International Organizations Law Review* 9, 20. See also Rebecca Everly, ‘Reviewing Governmental Acts of the United Nations in Kosovo’ (2007) 8 *German Law Journal* 21-22. With regard to human rights law, see also Robert Kolb, Gabriel Porretto and Sylvain Vité, *L’articulation des règles de droit international humanitaire et de droits de l’homme applicables aux forces internationales et aux administrations civiles internationales transitoires* (CUDI, 2003) 132ff.

<sup>123</sup> Mégret and Hoffmann (2003), above n 16, 317; Amerasinghe, above n 47, 518; Gabriele Porretto and Sylvain Vité, *The Application of International Humanitarian Law and Human Rights Law to International Organizations*, Research Paper Series No 1, CUDI, Geneva, 2006, 46. See also Amerasinghe, above n 122, 20; Everly, above n 122, 21-22. With regard to human rights law specifically, see also Kolb, Porretto and Vité, above n 122, 132ff; Moelle, above n 24, 280-281.

arising from *the particular circumstances* in which they are placed or *from particular relationships*".<sup>124</sup> In other words, the UN can be bound by customary human rights law provided these 'circumstances' and 'relationships' are present. Moreover, only those human rights that are relevant to the given circumstances and relationships are applicable. Kolb, Porretto and Vité clearly expose that "an organization conducting activities relating *ratione materiae* to the sphere of application of customary human rights rules cannot avoid observing them".<sup>125</sup> Consequently, many authors submit that the UN is obliged to respect human rights law whenever it acts in a field that impacts on individuals' rights.<sup>126</sup> The key functions of the UN are the maintenance of international peace and security, the promotion and protection of human rights as well as development,<sup>127</sup> the chief goal being to ensure peace and security.<sup>128</sup> Sanctions adopted by the UN Security Council targeting individuals undoubtedly show that the UN can have a direct impact on the rights and freedoms of individuals, eg the right to fair trial, and that, in this respect it must observe standards of due process.<sup>129</sup> Further, the UN, having undertaken new and greater operational tasks, has become involved in a range of human rights activities, mostly taking place in a peace and security context, e.g. within peacekeeping and peacebuilding operations.<sup>130</sup> It is mainly in this environment that the UN engages in direct contact with individuals<sup>131</sup> and that it is bound by human rights law. Moreover, the UN has been involved in an array of social, economic and

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<sup>124</sup> Amerasinghe, above n 47, 400 (emphasis added).

<sup>125</sup> Kolb, Porretto and Vité, above n 122, 46.

<sup>126</sup> Marten Zwanenburg, 'Compromise or Commitment: Human Rights and International Humanitarian Law Obligations for UN Peace Forces' (1998) 11 *Leiden Journal of International Law* 229, 234; Boris Kondoch, 'Human Rights Law and UN Peace Operations in Post Conflict Situations' in White and Klaasen, above n 37, 19; Carla Bongiorno, 'A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor' (2002) 33 *Columbia Human Rights Law Review* 623, 678; McCorquodale, above n 10, 144; White, above n 37, 464; Fassbender, above n 23, 469 [6.7].

<sup>127</sup> *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60<sup>th</sup> sess, 8<sup>th</sup> plen mtg, Agenda Items 46 and 120, Supp No 49, UN Doc A/RES/60/1 (24 October 2005) 2 [9].

<sup>128</sup> Article 1 UN Charter; *Reparation*, above n 29, 179; Oscar Schachter, 'United Nations Law' (1994) 88 *American Journal of International Law* 17; Martti Koskenniemi, 'The Police in the Temple. Order, Justice and the UN: A Dialectical View' (1995) 6 *European Journal of International Law* 325, 335.

<sup>129</sup> Fassbender, above n 23, 468-469 [6.6]. It can also be argued that "sanctions, by depriving individuals of essential necessities, violate their economic and social rights, and in the worst cases their rights to life." Verdirame, above n 2, 269.

<sup>130</sup> Fassbender, above n 23, 467 [6.3].

<sup>131</sup> Moelle, above n 24, 163.

humanitarian activities that are not necessarily linked to a security discourse<sup>132</sup> - notably in relation to its development policies<sup>133</sup> - and has thus assumed greater powers on individuals in a *de facto* manner. As a conclusion, since the UN is allowed to exercise its powers and, in fact does so, in a way that may affect the rights and freedoms of individuals it is thus bound by customary human rights law in these special circumstances.

Overall, this method of binding the UN to customary human rights law appears to be legally sound. Yet, critically, the functionalist approach that underpins the legal personality of the UN and thereby, through the principle of speciality, limits its obligations does not further the protection of human rights. The applicability of customary human rights law is limited to instances where the UN is acting in a very specific field that touches upon the lives of individuals. This requires the adoption of a case-by-case, pragmatic approach inasmuch as each time it is necessary to identify the action undertaken and whether there are concomitant human rights obligations.<sup>134</sup> Unfortunately, it appears to be a *post factum* assessment as it might not be possible to gauge accurately in advance whether a particular act or activity will have an impact on individuals. Further, such *ad hoc* applicability might lead to similar situations being treated differently, thus revealing a lack of consistency and coherence in the scope of applicability. Also as the UN expands its operations so does the scope of its obligations too.<sup>135</sup> Such a situation-specific, piecemeal, approach does not appear to chime well with the principle of legal certainty and does not offer the best human rights protection. It is therefore contended that this method is overall unsatisfactory and other methods of binding the UN to customary human rights law must be scrutinised.

#### **4. The UN as an International Organisation Embedded in International Law and thus Subject of International Law**

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<sup>132</sup> See discussion in Koskenniemi, above n 128, 337.

<sup>133</sup> Darrow and Arbour, above n 108, 446.

<sup>134</sup> Faix, above n 32, 290.

<sup>135</sup> As Moelle notes this is also linked to the ‘humanisation’ of international law which has “expanded the reach of norms protecting the individual to the areas of activities of international organisations”. Moelle, above n 24, 161.

As Klabbers vindicates “controlling the activities of international organizations is the ‘blind spot’ of functionalism”<sup>136</sup> which means that recourse must be had to other international organisation theories to understand whether other avenues, these ones relating to the constitutionalism approach, are available to elucidate whether the UN is bound by customary human rights law. Constitutionalism looks at how laws and institutions are (to be) designed in such a way that the interests of individuals are best protected and the possibility for the abuse of government powers limited.<sup>137</sup> Succinctly, in international organisation theory the constitutionalism approach requires “placing limits on the activities of international organizations, subjecting those organizations to standards of proper behaviour”.<sup>138</sup>

Thus a method of binding the UN to customary human rights law is to contend that, as international organisations find their roots in international law,<sup>139</sup> - for their constitutive documents tend to be treaties<sup>140</sup> - they are required to accept the totality of its norms.<sup>141</sup> As Shaw observes, “the applicable or ‘proper’ or ‘personal’ law of international organisations is international law”.<sup>142</sup> As “creatures of international law” they are obliged to follow international law obligations and “[n]o superiority over international law can be pleaded on their behalf”.<sup>143</sup> More specifically, the point is made that “like all

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<sup>136</sup> Klabbers, above n 1, 674.

<sup>137</sup> Ernst-Ulrich Petersmann, ‘How to Reform the UN System? Constitutionalism, International Law, and International Organisations’ (1997) 10 *Leiden Journal of International Law* 421, 422 and 425.

<sup>138</sup> Jan Klabbers, ‘Constitutionalism Lite’ (2004) 1 *International Organizations Law Review* 31, 32. See also Petersmann, above n 137, 423; Erika de Wet, ‘The International Constitutional Order’ (2006) 55 *International and Comparative Law Quarterly* 51, 53.

<sup>139</sup> Bongiorno, above n 126, 641; Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity within Diversity* (Kluwer Law, 3<sup>rd</sup> ed, 1995) 983-984. Koen de Feyter, ‘The International Financial Institutions and Human Rights: Law and Practice’ (2004) (October-December) *Human Rights Review* 56, 57.

<sup>140</sup> Blokker, above n 4, 140. *Report: Responsibility of International Organizations*, above n 2, Art 2(a) and commentary 74, para 4. Article 2(a) nonetheless recognises that some international organisations are based on “other instrument governed by international law” (Art 2(a) and commentary 74, [4]). Examples of such organisations are the Organizations of the Petroleum Exporting Countries and the Organization for Security and Cooperation in Europe.

<sup>141</sup> Ahmed and Butler, above n 24, 776; Zeegers, above 21, 24.

<sup>142</sup> Shaw, above n 115, 948-949.

<sup>143</sup> Schermers and Blokker, above n 139, 983-984. See discussion in Zeegers, above n 21, 24.

subjects of international law” they are “bound by rules of customary international law”.<sup>144</sup>

At this juncture, the difference between an international organisation being a subject of international law and being endowed with legal personality (see 3) must be emphasised. Whilst in the first case the subject is the addressee of legal norms (rights or duties) in the second instance the person is the holder of any right or obligation that falls within the remit of a specific legal order.<sup>145</sup> International legal personality describes the ‘quality’ of the entity. As explained well by Faix, international legal personality represents the entity’s *ability* to possess rights and duties and to participate in international relations.<sup>146</sup>

In this method, international organisations (in this case the UN) are viewed as addressees of international (human rights) legal norms enshrined in their own constitutive document or in the general rules of international law. Fundamentally, this method espouses a constitutional approach of international organisations and in fact, neatly falls into two strands of constitutionalism.<sup>147</sup> The first strand focuses on internal limits ie monitoring the UN via its constitutive document, and the second on external limits ie binding the UN to rules applicable to all subjects of international law.<sup>148</sup> The author argues that despite some flaws this method is the least contentious and thus the most appropriate to maintain that the UN is bound by customary human rights law. In fact the second strand appears the most convincing.

#### ***4.1 The UN Charter and Human Rights Standards***

The argument is that, as an international organisation founded on a treaty, the UN is bound by all relevant human rights provisions enshrined in the UN Charter and as developed by itself.<sup>149</sup> It is the primary addressee of the norms contained therein. This

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<sup>144</sup> Wouters and De Man, above n 22, 194.

<sup>145</sup> See Manfredi Siotto-Pintor, ‘Les sujets du droit international autres que les Etats’ 41 *Recueil des Cours* 251 (1932) as cited in Rama-Montaldo, above n 105, 137.

<sup>146</sup> Faix, above n 32, 276.

<sup>147</sup> de Wet, above n 138.

<sup>148</sup> Klabbers, above n 138, 33.

<sup>149</sup> Klabbers, Peters and Ulfstein, above n 108, 79. See also Fassbender, above n 23, 471 [8].

appears to be a solid legal foundation inasmuch as the UN Charter, as the constitution of the UN,<sup>150</sup> should be taken as the primary point of reference when investigating the obligations, including those of a human rights nature, imposed on the organisation.<sup>151</sup> After all, the founding documents of international organisations are regarded as the *lex specialis* binding international organisations.<sup>152</sup>

The UN Charter specifies in Article 1(1) that one of the purposes of the UN is “to maintain international peace and security ... in conformity with the principles of justice and international law”.<sup>153</sup> Combined with the UN obligation to promote “universal respect for ... human rights and fundamental freedoms”,<sup>154</sup> this suggests at first sight, that the UN is bound by virtue of its own founding treaty to conform to international human rights standards,<sup>155</sup> which are likely to be further elaborated upon in customary international law. Yet, on its face, this appears to be a flawed position as “rights and obligations enumerated [in the UN Charter] are, *in grosso modo*, directed to the Member States”.<sup>156</sup> A literal interpretation of the UN Charter reveals that the human rights provisions are directed towards States rather than imposed on the UN: the peoples of the UN are “determined to reaffirm faith in fundamental human rights” (preamble); the purpose of the UN is “[t]o achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all” (Article 1(3)); and the UN shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all” (Article 55). In fact “[n]one of the previous

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<sup>150</sup> The word ‘constitution’ is used by reference to a constitutive document. See *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (Advisory Opinion)* [1948] ICJ Rep 56, 64. For a discussion on whether the UN Charter is a constitution as understood on the domestic level, see the writings of Erika de Wet, Jan Klabbers, Anne Peters, and Geir Ulfstein.

<sup>151</sup> It must be noted that this discussion is not only relevant for the UN itself but also for its agencies. See eg Balakrishnan Rajagopal, ‘Crossing the Rubicon: Synthesising the Soft International Law of the IMF and Human Rights’ (1993) 11 *Boston University International Law Journal* 81, 94-95.

<sup>152</sup> Daugirdas, above n 5, 329 and 377-380.

<sup>153</sup> United Nations Charter, 16 June 1945

<sup>154</sup> UN Charter, Art 55(b).

<sup>155</sup> Jennifer Murray, ‘Who Will Police the Peace-builders? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-conflict Bosnia and Herzegovina’ (2003) 34 *Columbia Human Rights Law Review* 475, 519.

<sup>156</sup> Kyoji Kawasaki, ‘Accountability of the United Nations from the Perspective of International Law’ in Sumihiro Kuyama and Michael Ross Fowler (eds), *Envisioning Reform. Enhancing UN Accountability in the Twenty-First Century* (United Nations University Press, 2009) 116-132, 125.

statements obligates the UN to conform to human rights law; rather, they oblige States to do so and the UN merely to promote human rights. In other words, the Charter endows the UN with the power to *promote* and *encourage* compliance with human rights norms whilst it imposes a duty upon States to *respect* and ensure the protection of such rights”.<sup>157</sup> Such a reading is supported by the case-law of the European Court of Human Rights which, after underlining the purposes and principles of the UN, asserts that it must be presumed that the UN Security Council “does not intend to impose any obligation on Member States to breach fundamental principles of human rights”.<sup>158</sup> Technically, the Court does not refer here to the UN obligations to comply with human rights law; rather, it underlines that the UN cannot require States to violate human rights law, for the UN must promote and encourage compliance with human rights law. Such a statement reinforces the view that the UN has obligations but these are limited to promoting and encouraging adherence to these human rights standards. Additionally, a historical interpretation supports this view. First, the drafters did not expect the UN to wield power over individuals and thus affect their rights.<sup>159</sup> Second, there was some disagreement among the drafters as to whether the UN should even be competent to promote the observance of human rights.<sup>160</sup> After all, “[t]raditionally it was thought that the purposes and principles of the United Nations, like international law generally, are addressed only to states, and can be violated only by state actors”.<sup>161</sup>

Nonetheless a more purposive and contextual interpretation of the Charter supports the argument that the combination of the aforementioned UN provisions binds the UN to human rights law. The argument is that the UN must act “in accordance with the Purposes and Principles of the United Nations”<sup>162</sup> and thus must comply with human

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<sup>157</sup> Quénivet, above n 16.

<sup>158</sup> *Al-Jedda v United Kingdom*, Application No 27021/08, 7 July 2001, 60 [102].

<sup>159</sup> Fassbender, above n 23, 471 [8.2].

<sup>160</sup> See discussion in Koskeniemi, above n 128, 335-336.

<sup>161</sup> *Pushpanathan v Canada*, [1998] 160 DLR (4th) 193, 231, 1998 DLR [131].

<sup>162</sup> It should however be noted that this argument has so far only been made in relation to the UN Security Council rather than the entire UN as an international organisation. See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))*, Order, [1993] ICJ Rep 325, 84-85 [101]-[102] (Judge Lauterpacht); *Bossuyt Report*, above n 7, 7 [23]; Joy Gordon, ‘The Sword of Damocles: Revisiting the

rights. The case-law of the then Court of First Instance of the European Union buttresses this approach inasmuch as it declared – without much explanation though – that the principles enshrined in Article 1(3) of the UN Charter are binding not only upon the Member States of the UN but also upon its bodies.<sup>163</sup> Moreover, in international organisations law, the principle of effectiveness (or its variant, the “*effet utile*” principle)<sup>164</sup> that requires to adopt an interpretation that “better ensures the fulfilment of the purposes of the international organisation”,<sup>165</sup> has become a predominant interpretation tool besides teleological methods of interpretation. Constitutive documents should be understood as living instruments<sup>166</sup> or else their creations, ie international organisations, appear archaic, unable to adapt to current realities and thus unfit for purposes and so unable to discharge the functions they were created for. As a result, “IO’s international law obligations must extend at least somewhat beyond those that touch on the powers their charters formally confer”.<sup>167</sup> Consequently, it is argued that the Charter in its ‘new’ reading obliges the UN to respect human rights whenever it exercises functions assigned to it or whenever it has by virtue of practice developed new functions.

Additionally, it might be contended that if the UN is bound to promote and encourage respect for human rights, such an obligation certainly contains an obligation not to violate human rights itself. For example Klabbers, Peters and Ulfstein claim that “it follows from the UN Charter that the UN shall promote human rights and therefore should also be under an obligation to respect such standards”.<sup>168</sup> Since the UN is involved in the creation and development of human rights norms and has in fact been

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Question of Whether the United Nations Security Council is Bound by International Law’ (2011-2012) 12 *Chicago Journal of International Law* 605-645.

<sup>163</sup> *Kadi*, above n 44, 3725 [229] and *Yusuf*, above n 44, 3627 [280]. It is however unclear from the judgment whether these principles are binding upon the UN bodies because they are encapsulated in Chapter I of the UN Charter or because they are peremptory norms of international law (see discussion in *Kadi*, 3724 [227] and *Yusuf*, 3626 [278]).

<sup>164</sup> See Wouters and De Man, above n 22, 200.

<sup>165</sup> Chigara, above n 64, 80.

<sup>166</sup> In relation to the UN, see Fassbender, above n 23, 472 [8.3].

<sup>167</sup> Daugirdas, above n 5, 366.

<sup>168</sup> Klabbers, Peters and Ulfstein, above n 108, 79.

extremely prolific in this field it might be legitimate to expect the UN to comply with such norms.<sup>169</sup> As the ICJ stated – with little explanation

“it would ... hardly be consistent with the expressed aim of the charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them”.<sup>170</sup>

Such a statement is often sensed as an acknowledgment that the UN cannot ignore human rights norms which it must encourage and promote as it would otherwise be open to criticism.<sup>171</sup> Nevertheless, whilst there might be such expectation, only a teleological interpretation of the Charter would allow for such a result. A step further is to apply the legal maxim of *venire contra factum proprium*, a general principle of law which obliges an entity to act in such a way that it is not in contradiction to its previous conduct. The application of this principle would thus require the UN to comply with the same rights and obligations it imposes upon States.<sup>172</sup>

If, *arguendo*, it might be agreed upon that the UN Charter has become a document that obliges the UN to comply with human rights law, the question is: has the UN itself accepted this interpretation? To some extent, it has. For example, the Brahimi report stressed “[t]he essential importance of the United Nations system adhering to ... international human rights instruments and standards”<sup>173</sup> and the *In Larger Freedom* report more tentatively stated “the United Nations system *should* reaffirm its commitment to respect, adhere to and implement ... fundamental human rights ...” though it does also assert that “United Nations peacekeepers and peacebuilders have a solemn responsibility to respect the law themselves, and especially to respect the rights

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<sup>169</sup> Fassbender, above n 23, 466 [6].

<sup>170</sup> *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion)* [1954] ICJ Rep 47, 57.

<sup>171</sup> Le Floch, above n 6, 386.

<sup>172</sup> Fassbender, above n 23, 468-469 [6.6].

<sup>173</sup> *Report of the Panel on United Nations Peace Operations*, UN Doc A/55/305, S/2000/809 (21 August 2000) 1 [6(e)].

of the people whom it is their mission to help.”<sup>174</sup> The Vienna Declaration and Programme of Action of 1993 also generally exhorts “international organisations ... to create favourable conditions at the national, regional and international levels to ensure the full and effective enjoyment of human rights”<sup>175</sup> without specifically accepting that the UN is bound by such norms. Likewise, codes of conduct adopted by the UN oblige its staff members to comply with human rights norms but tend to be frustratingly vague and couched in moral terms.<sup>176</sup> The UN has however accepted on an *ad hoc* basis to report to human rights mechanisms such as the Human Rights Committee.<sup>177</sup> An additional problem with such pronouncements and documents is that they do not refer to the UN Charter as such but more generally to human rights.<sup>178</sup>

Espousing a *lex lata* interpretation of the UN Charter it is impossible to derive any direct obligations of the UN to abide by the human rights principles anchored in the UN Charter and developed via customary law. Thus, it is difficult to conceive that the UN is bound by customary international human rights law as derived from the UN Charter unless a broader and more modern approach is taken whereby elements of legitimacy are integrated in the discussion and the obligation to abide by human rights norms is viewed as a corollary of the obligation to *promote* and *encourage*. Given the fact that the UN has an increasing impact on individuals, there is a compelling case for espousing a more *lex feranda* approach, especially as this would lend more credence to the work undertaken by the UN. If such an approach is adopted then customary human rights law is of utmost importance, namely because the Charter only refers to human rights without specifying their scope and content. Customary international human rights

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<sup>174</sup> UN Secretary General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc A/59/2005 (21 March 2005) 31 [113] (emphasis added).

<sup>175</sup> *Vienna Declaration and Programme of Action of 1993*, [13].

<sup>176</sup> See eg UN Secretary General, *Staff Regulations*, Reg 1.2(a) at 24, UN Doc ST/SGB/2017/1 (30 December 2016).

<sup>177</sup> See eg *Report Submitted by the UN Interim Administration in Kosovo to the Human Rights Committee on the Human Rights Situation in Kosovo since 1999*, UN Doc CCPR/C/UNK/1 (13 March 2006) and Human Rights Commission, *Comments by the United Nations Interim Administration Mission in Kosovo (UNMIK) on the Concluding Observations of the Human Rights Committee*, UN Doc CCPR/C/UNK/CO/1/Add.1 (1 April 2008).

<sup>178</sup> See also eg *Report of the Secretary General: Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, UN Doc S/2004/616 (23 August 2004), 5 [10]. That being said, this may mean that the UN recognises that a ‘higher’ set of international norms (such as general international law) applies to it (see 4.2).

law usefully fills the gap.<sup>179</sup> This position however seems to miss one crucial point: the limits of the powers of the UN are defined in its constitutive document which means that only those human rights related to its function and purposes are applicable.<sup>180</sup> Even a wide interpretation of such function and purposes has its limits.<sup>181</sup> The theory of functionalism creeps up and so the human rights protection offered to individuals in contact with the UN is, as explained above, inadequate. Furthermore, this position lacks the backing of any judicial institution. In contrast the proposition that the UN is bound by general rules of international law is more solidly grounded in case-law and literature and avoids the pitfalls of functionalism and the principle of speciality.

#### ***4.2 The UN Bound by General Rules of International Law***

As an addressee of international legal norms, the UN is also bound by the general rules of international law. In her in-depth and insightful article on how and why international law binds international organisations, Daugirdas asserts that international organisations are bound by general international law as a default matter: “[a]s members of the international community ... when IOs emerge they are bound by ... general international law as a default matter, just as new states are”.<sup>182</sup> The crux is that as general international law is general by nature it applies to all subjects of international law, including international organisations<sup>183</sup> and that for the sake of consistency and effectiveness of the international legal order all actors must abide by the same general rules.<sup>184</sup> Such an approach ties well with the second strand of (global) constitutionalism<sup>185</sup> that considers that there is a set of rules that governs all subjects of

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<sup>179</sup> It is however not the place to discuss which human rights are deemed customary and thus applicable to the UN.

<sup>180</sup> See discussion in Klabbers, above n 138, 38-40.

<sup>181</sup> On the problem of *ultra vires* acts and how they might not be viewed as such if accepted by the Member States, see Klabbers, above n 138, 40-41 and 43.

<sup>182</sup> Daugirdas, above n 5, 367. See also Zeegers, above n 21, 23-24.

<sup>183</sup> Article 101.d of the Third Restatement of the Law: Foreign Relations Law of the United States (Washington DC American Law Institute Publishers, 1986); As Cameron explains “the generality of general international law makes that it applies to all subjects”. Lindsey Cameron, ‘Human Rights Accountability of International Civil Administrations to the People Subject to Administration’ (2007) 1 *Human Rights and International Legal Discourse* 267 as cited in Zeegers, above n 21, 22 footnote 61.

<sup>184</sup> See discussion in Zeegers, above n 21, 23.

<sup>185</sup> Global constitutionalism is defined as “an academic and political agenda that identifies and advocates for the application of constitutionalist principles in the international legal sphere in order to improve the

international law. All ‘government’ (understood in a wider sense) and public powers must be limited and one such limit is human rights law.

As the ICJ exposed, as subjects of international law, “international organizations are bound by any obligations incumbent upon them under general rules of international law ...”.<sup>186</sup> In doing so, the ICJ has acknowledged that international organisations are indeed “parts of a broader world” and that “they could have obligations towards this broader outside world”.<sup>187</sup> It thereby rejected a functionalist approach.<sup>188</sup> Despite the fact that there is little to no reasoning to support this statement,<sup>189</sup> and only one ICJ pronouncement on the subject-matter this statement has led scholars to maintain that international organisations such as the UN are bound by human rights law.<sup>190</sup> Interestingly, this scholarly opinion is supported by a number of similar *obiter dicta* of international and European courts as if there was no need to justify any further why ‘general rules of international law’ bind international organisations. The Court of Justice of the European Union in *Poulsen* stated that “the European Community must respect international law in the exercise of its powers”<sup>191</sup> whilst the International Criminal Tribunal for the Former Yugoslavia even admitted that “[i]t is trite that the International Tribunal is bound by customary international law”.<sup>192</sup> In spite of the lack of jurisprudential justification for this legal position one must concur with Zeegers: “[t]his theory has been widely accepted in international legal theory and practice”.<sup>193</sup>

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effectiveness and fairness of the international legal order.” Anne Peters, ‘The Merits of Global Constitutionalism’ (2009) 16 *Indiana Journal of Global Legal Studies* 397, 397.

<sup>186</sup> *WHO and Egypt*, above n 49, 89-90. See discussion in Amerasinghe, above n 47, 400.

<sup>187</sup> Jan Klabbers, ‘The EJIL Foreword: The Transformation of International Organizations Law’ (2015) 26 *European Journal of International Law* 9, 61.

<sup>188</sup> Klabbers, above n 187, 62.

<sup>189</sup> Zeegers, above n 21, 21. Jan Klabbers, ‘The Paradox of International Institutional Law’ (2008) 5 *International Organisations Law Review* 151, 65.

<sup>190</sup> See eg Eyal Benvenisti, *The Law of Global Governance* (Brill 2014) 99; de Schutter, above n 12, 22. See also discussion in Zeegers, above n 21, 21.

<sup>191</sup> *Anklagemyndigheden v Poulsen and Diva Navigation Corp* (C-286/90) [1992] ECR I-06019, 6052 [9] and repeated in *Racke GmbH & Co v Hauptzollamt Mainz* (C-162/96) [1998] ECR I-03655, 3704 [45] and more recently in *Air Transport Association of America et al*, above n 36, 13892 [123] (see also 13885 [101]).

<sup>192</sup> Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, *Prosecutor v Simic et al* (IT-95-9-PT), 27 July 1999, [42].

<sup>193</sup> Zeegers, above n 21, 41.

Nonetheless, under this approach, it must first be ascertained whether customary international law is included under the concept of ‘general rules of international law’ which is not specifically mentioned in Article 38 of the ICJ Statute. It seems that general international law refers “to the corpus of international law other than treaty law”<sup>194</sup> though it is also accepted that some treaties might form part of general international law.<sup>195</sup> It is commonly accepted that general international law embraces both international customary law and general principles of international law<sup>196</sup> and that it is applicable to all subjects of international law, including international organisations.<sup>197</sup> After all, “customs and general principles are in principal sources of general law”.<sup>198</sup> In addition, some scholars posit that the language of ‘general rules of international law’ is equated with customary international law rather than the general principles of law<sup>199</sup> or that customary international law is “the principal construction material for general international law”<sup>200</sup> or that “all existing general rules of international law are customary”.<sup>201</sup> The latter stances in fact feed the argument that the UN is bound by customary law inasmuch as it removes any doubts as to a potential second primary source (ie general principles of law) of the UN’s obligations. This is supported by the case-law of the ICJ inasmuch as the Court has often deduced general

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<sup>194</sup> Anthony Aust, *Handbook of International Law* (Cambridge University Press, 2005) 10. Josef Kunz, ‘General International Law and the Law of International Organizations’ (1953) 47 *American Journal of International Law* 456, 457.

<sup>195</sup> Whether treaties form part of general international law as such or once their provisions become customary law is highly debated in literature. See eg Alfred Verdross, ‘General International Law and the United Nations Charter’ (1954) 30 *International Affairs* 342; Kunz, above n 194 and Grigory Tunkin, ‘Is General International Law Customary Law Only?’ (1993) 4 *European Journal of International Law* 534.

<sup>196</sup> Parliamentary Assembly of the Council of Europe, above n 5, 3 [14]; Daugirdas, above n 5, 331; Moelle, above n 24, 278; Zeegers, above n 21, 21; Guglielmo Verdirame, *The UN and Human Rights, Who Guards the Guardians?* (Cambridge University Press, 2011) 211

<sup>197</sup> Samantha Besson, ‘European Legal Pluralism after *Kadi*’ (2009) 5 *European Constitutional Law* 237, 244.

<sup>198</sup> Beatrice I Bonafé and Paolo Palchetti, ‘Relying on General Principles in International Law’ in Brölmann and Radi, above n 18, 160, 165.

<sup>199</sup> Richard Lillich, ‘The Growing Importance of Customary International Human Rights Law’ (1995-1996) 35 *Georgia Journal of International and Comparative Law* 1, 16-17; Antonio Cassese, ‘Modern Constitutions and International Law’ (1985-III) 192 *Recueil des Cours* 331, 391; Prosper Weil, ‘Towards Relative Normativity in International Law?’ (1983) 77 *American Journal of International Law* 413, 436.

<sup>200</sup> VI Kuznetsov and BR Tuzmukhamedov, *International Law – A Russian Introduction* (edited by Butler 2009) 77 as cited in Sender and Wood, above n 18, 134.

<sup>201</sup> Treves, above n 70, [1].

principles from existing international law, including customary law<sup>202</sup> and, in fact, “draws no distinctions between general principles of law and customary law”.<sup>203</sup> More to the point, several authors<sup>204</sup> readily accept that general rules of international law encompass customary international law which includes human rights obligations.<sup>205</sup>

Second, the International Court of Justice has not elaborated on the scope of applicability of human rights norms, ie in which circumstances the UN is bound by these norms. Is the UN generally in all its actions bound by customary human rights law? Again, reference should be made to the principle of speciality and the powers and functions of international organisations which will determine the scope of this duty. In other words the UN must be engaged in an activity that affects or is likely to affect individual rights.<sup>206</sup> On balance, some of the general rules of international law might be irrelevant to the UN. Yet, if, according to the most prevalent view, the general rules of international law are truly general and thus apply to all subjects of international law (“all members of the international community”<sup>207</sup>) irrespective of their subjectivity,<sup>208</sup> the question relating to the application of the principle of speciality should not arise: they apply to all activities of the UN.

Despite the fact that this theory has only appeared in *obiter dicta* and in legal literature and thus seems *prima facie* to lack persuasive value it is difficult to find solid arguments to dismiss it as unsound. What is more, it is supported by the second strand of constitutionalism which views international law as a system “underpinned by a core value system common to all communities”<sup>209</sup> and nurturing the idea of an international

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<sup>202</sup> See discussion in Bonafé and Palchetti, above n 198, 170-171.

<sup>203</sup> Lepar, above n 70, 63.

<sup>204</sup> McCorquodale, above n 10, 154; Besson, above n 197, 244; De Feyter, above n 139, 57; August Reinisch, ‘The Changing International Legal Framework for Dealing with Non-State Actors’ in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press, 2005) 46.

<sup>205</sup> See also Parliamentary Assembly of the Council of Europe, above n 5, 3 [14].

<sup>206</sup> Fassbender, above n 23, 463 [5.2].

<sup>207</sup> Kunz, above n 194, 456.

<sup>208</sup> Zeegers, above n 21, 22 (see also literature cited in footnote 61).

<sup>209</sup> de Wet, above n 138, 53 .

community based on a global constitution.<sup>210</sup> International organisations are members of an international community governed by the same (constitutional) rules which encompass human rights law. Indeed, “[t]here is undoubtedly something inherently constitutional in the very nature and subject-matter of international human rights law, in that one of its primary functions is to specify limits on what governments can lawfully do to people within their jurisdictions.”<sup>211</sup> For example, de Wet refers to “community-oriented obligations”<sup>212</sup> and asserts that as human rights are of a collective nature the international community has an interest in abiding by them.<sup>213</sup> Likewise Peters argue that human rights are fundamental to such a degree that they represent global constitutional law.<sup>214</sup> Such a view is bolstered by a humanisation of international law in which the principle of humanity is the foundation and *telos* of the international legal order. For sure, human rights law has been very successful in “infiltrating and influencing the development of modern general international law”.<sup>215</sup> In this light, it is obvious that this legal avenue to bind the UN to customary human rights law provides the best human rights protection.

Certainly, doubts remain as to whether the source of such obligation is customary law or the general principles of (international) law but it is generally agreed that customary international law is a (substantial) part of the sources feeding into the concept of general international law. As with (3) it appears *prima facie* that the scope of applicability is first linked to the principle of speciality and second limited to situations when the UN is exercising its powers and such powers have an impact on individuals. If that is the case, and the functional approach again creeps in, then much alike (3) such an approach does not offer adequate human rights protection. However, if this is not the case and general

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<sup>210</sup> See eg discussion in Benedict Kingsbury and Lorenzo Casini, ‘Global Administrative Law Dimensions of International Organizations Law’ (2009) 6 *International Organizations Law Review* 319, 340-341.

<sup>211</sup> Stephen Gardbaum, ‘Human Rights as International Constitutional Rights’ (2008) 19 *European Journal of International Law* 749, 752.

<sup>212</sup> de Wet, above n 138, 54.

<sup>213</sup> Erika De Wet, ‘The Emergence of International and Regional Value System as a Manifestation of the Emerging International Constitutional Order’ (2006) 19 *Leiden Journal of International Law* 611, 617.

<sup>214</sup> Anne Peters, ‘Global Constitutionalism Revisited’ (2005) 11 *International Legal Theory* 39, 43-44.

<sup>215</sup> Arnold Pronto, “‘Human-Rightism’ and the Development of General International Law’ (2007) 20 *Leiden Journal of International Law* 753, 763.

rules of international law apply to all subjects irrespective of their shape, form and function then this method of binding the UN to customary human rights law is unquestionably the most persuasive of all.

## **Conclusion**

The review of these theories allows us to conclude that the theory that the UN has inherited the human rights obligations of its Member States lacks persuasive value and should be dismissed. It also reflects an outdated view of international organisations as agents of Member States without much legal autonomy. There is no need for scholars to continue exploring this avenue until a highly unlikely court case using this method.

Second, the theory that the UN is bound by customary international law because it takes part in the formation of its rule is based on mere assumptions and therefore must be set aside especially after the ILC missed a tremendous opportunity to shape international discourse and settle the issue as to whether and how more specifically international organisations can create customary international law. By failing to engage in the subject-matter it perpetuates the entrenched view that international organisations are not able to take a full part in the formation of customary international law (as they can only create practice).<sup>216</sup> At this stage “the international community is still predominantly composed of States, as they remain central to the process of international law-making.”<sup>217</sup> The ILC Draft Conclusions support this approach and so it might be argued that the world is not yet ready for this type of horizontal, almost equal, relationship between States and international organisations.

Third, the theories viewing the UN as a legal person or an addressee of international law norms are among the most persuasive to bind the UN to customary human rights law. Yet, these theories fail to acknowledge that the key problem is that they are based on functionalism and/or principal-agency theories that are unable to explain and govern the relationship between international organisations and individuals for, as Klabbers stresses, functionalism focuses on the relationship between the Member States and the

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<sup>216</sup> Draft Conclusions, above n 102, Conclusion 4(2), 2.

<sup>217</sup> de Wet, above n 138, 55.

international organisation: “other dimensions simply do not, and possibly cannot, enter the picture”.<sup>218</sup> Moreover, customary human rights law does not bind the UN in all its activities. According to the principle of speciality it is only bound by the norms that are applicable in the given circumstances and these circumstances are that the UN activities have an impact on individuals. As a result, these theories do not offer adequate human rights protection. Hence it might be possible to side with Ulfstein who simply declares that “[i]n dealing with individuals, international organizations have to respect human rights as embodied in customary international law”<sup>219</sup> whilst pointing out that this piecemeal approach might lead to inconsistencies and limited human rights protection.

From the two theories, the latter (4) appears the strongest as it considers international organisations as subjects of international law. The UN was born at a time when the world thought in terms of principal-agent (and functionalism) but increasingly international organisations have cut and shed their umbilical cord to become their own master. Thus, we need to move beyond these theories and use a constitutionalism approach to understand their relationship with the world. Whilst freeing the international organisations from the straightjacket imposed by Member States constitutionalism obliges international organisations to comply with international law. Yet, although both theories examined under (4) can be understood as falling within the broad constitutionalism paradigm and can thus be viewed as suitable avenues to ensure that international organisations comply with international human rights law, it is argued that the first one – the UN is bound via its constitutive document – is fundamentally based on a principal-agent relationship: the States use the UN Charter as a way to direct the agent. So far, States have been reluctant to bind the UN to human rights law (and so has the UN itself!). As a matter of fact, for as long as we will see the UN caught in a principal-agent relationship with Member States and/or view this relationship as functional<sup>220</sup> it will be difficult, if not impossible, to bind the UN to customary (human rights) law. As Klabbbers explains, functionalism precludes the applicability of a “public

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<sup>218</sup> Jan Klabbbers, ‘Transforming Institutions: Autonomous International Organisations in Institutional Theory’ (2017) 6 *Cambridge International Law Journal* 105, 119. See also Klabbbers, above n 187, 63 focusing on the *WHO-Egypt* Case.

<sup>219</sup> Klabbbers, Peters and Ulfstein, above n 108, 79.

<sup>220</sup> Alternatives are examined and dismissed in Klabbbers, above n 218, 119-130.

law model of responsibility” and so human rights law obligations cannot be binding upon international organisations.<sup>221</sup> Additionally (4)(1) raises questions as to the scope of applicability of human rights law since the principle of speciality applies and thus no comprehensive and adequate human rights protection can be offered to individuals coming into contact with the UN.

Overall, the theory that international organisations are bound by general rules of international law applicable to all subjects of international law is probably the most sound: “[c]learly, the principle that all subjects of international law are bound by general international law—primarily in the form of custom—has gained widespread acceptance”.<sup>222</sup> As for the problem of the indeterminacy of the term ‘general rules of international law’ it might be wise to espouse Le Floch’s astute approach: “[w]hether human rights law is customary or is rooted in general principles law does not change anything. The norm is binding on all subjects of international law. IOs are bound to respect human rights on the basis of general international law”.<sup>223</sup> This theory is grounded in the second strand of the constitutionalist theory of international organisations as it views international organisations in a horizontal relationship with other entities and yet in a vertical relationship with general rules of international law (that include human rights law). The problem is that inasmuch as one is tempted to espouse a constitutionalist approach of the international society (as honed by scholars of global administrative/constitutional law) doubts remain as to whether we have in practice embraced such a view of international affairs. The consequence of this lack of a true international community is that the international (legal) system, as it stands, might not be ready yet to elucidate why the UN is bound by customary human rights law. Moreover, the fact that the UN and international organisations more generally are created by States with specific aims and purposes means that functionalism stands in the way of explaining why the UN is bound by customary human rights law.

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<sup>221</sup> Klabbers, above n 187, 73 and 76.

<sup>222</sup> Zeegers, above n 21, 24.

<sup>223</sup> Le Floch, above 6, 393.

So, the answer to the bigger question set in the introduction that this article sought to answer: ‘what is the international legal source of the UN human rights law obligations?’ is likely to be: the general rules of international law. Such an assertion has two implications that need to be further analysed and explored in legal literature. First, the question remains as to whether such general rules apply to international organisations irrespective of a pre-determination as to whether their acts and activities have an impact on individuals. In other words, is general international law truly general? Second, and this relates to application rather than applicability, more clarity is needed as to which human rights norms fall within the scope of general international law.<sup>224</sup> Once that is carried out, then and only then will it be possible to fully appreciate the legal basis of the responsibility of the UN for violations of human rights law rather than take it for given.

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<sup>224</sup> A partial answer to this question is given by Zeegers in Zeegers, above n 21, 26-41.