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The Nikolic Case.
Enquiring into the Legitimacy of
Supra-National Organizations

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Summary

The purpose of this thesis is to arrive at a definition of lawfulness with respect to the international legal system of today. The idea is to show, how Kelsen's monist theory of international law and Communitarian theory can be used, together, to legitimize the international legal structure, by means of employing, qua concept of approach, the security argument ("peace" being understood in the broadest sense of the word).

The starting point, in Chapter Two, is a case from the ICTY, the Nikolic case. This case is interesting from a juridical-theoretical point of view since questions such as the limits of jurisdiction of the international tribunal and the limits of NATO's mandate are raised. Furthermore, the tribunal in the Nikolic case had to decide on questions such as state sovereignty and the status of other principles of international law. Finally, the tribunal had to deliver their view on the interplay between different bodies of national and international law.

In Chapter Three, the development of supranational organizations, often referred to as the international community, is sketched. More specifically, the role and position of NATO is examined. This since NATO played an important role in the capture and transportation of Mr Nikolic to the ICTY. Are the different organizations to be seen as communities based on shared common values? Examining the development of organizations such as the UN, NATO and the EU leads to the conclusion that a hierarchical structure of international law can be visualized. Could this structure then be analyzed along the communitarian theory?

Chapter Four focuses on the main features of Kelsen's positivist theory. As suggested in Chapter Three, it is found to be a useful tool to analyze the international structure.

In Chapter Five, the main features of philosophical and political communitarian theory are sketched with focus on communitarian attitude towards international law. Does this theory have the necessary features to achieve the purpose of international law? It is argued that communitarian theory not sufficiently provides for the obligatory, normative character of law. There is however a solution to this problem.

The solution anticipated in the previous chapter is examined more closely in the final chapter, Chapter Six. It is also suggested how this solution could be applied to the international structure and to the Nikolic case. It does help us understand the reasoning of the Tribunal in this particular case, and the interplay of supra-national organizations.

Preface

The subject of this thesis turned out to be more comprehensive than I had imagined. In addition, it appears to me as if, the subject were more important than estimated in the beginning. It certainly earns a lengthier and more thorough survey than was possible to achieve within the present context.

I would like to thank my supervisor Uta Bindreiter for her guidance and valuable advice during the work with this thesis and for showing enthusiasm for this project right from the start.

Finally, I would like to thank all those whom I have tormented with questions and arguments during the process of writing this thesis and for proofreading the manuscript.

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Abbreviations

Art.	Article
CFSP	Common Foreign and Security Policy
CSCE	Conference on Security and Cooperation in Europe
ECT	Treaty on European Community
EPIL	Encyclopaedia of Public International Law
EU	the European Union
GA	General Assembly of the United Nations
GT	Kelsen, General Theory of Law and State
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the former Yugoslavia since 1991
IFOR	Multinational military Implementation Force
ILM	International Legal Materials
ILO	International Labour Organization
LT	Kelsen, Introduction to the Problems of Legal Theory, translated by Paulson
ISAF	International Security Assistance Force
NAC	North Atlantic Council
NAT	North Atlantic Treaty
NATO	North Atlantic Treaty Organization
OTP	The Office of the Prosecutor
PCIJ	the Permanent Court of International Justice
PfP	Partnership for Peace
PIL	Kelsen, Principles of International Law
PThrL	Kelsen, Peace Through Law
PTL	Kelsen, Pure Theory of Law, 2 nd edition
RR	Kelsen, Reine Rechtslehre
SC	Security Council of the United Nations
SFOR	Stabilisation Force established by Security Council resolution 1088
SG	The Secretary General of the United Nations
TEU	Treaty on European Union
UN	the United Nations
WEU	Western European Union, former Brussels Pact

1 Introduction

The United Nations is not the only actor on the international arena but a number of organizations such as the European Union, Conference on Security and Cooperation in Europe, NATO and regional arrangements such as Organization of African Unity, League of Arab States, etc. cooperate with the UN. What is more, it seems to be the case that NATO is evolving towards a new role within the international structure. NATO and EU are playing an ever-larger role in the development of Central and Eastern Europe. Furthermore, they are taking an active part in the international peacekeeping work. Thus, it seems essential to understand why regional organizations on a case-by-case basis choose to act to enforce the international order. It can be seen as a will to safeguard common values but if the legitimacy of these actions is indeterminate, the international order is endangered.

Both NATO and the EU are expanding, that is, adopting new member states. Therefore, it is a matter of importance what position supra-national organizations and organizations like NATO have within the international legal system. The following questions arise: Are such-like organizations governed by the rule of law? In addition, how do we define legitimacy in an international context? Is the view of national and international system monist – and if not, would this be preferable? Is there an order of subsidiarity among the actors on the international arena?

The EU and NATO are acting to create a pan-European order based on the security concept.¹ However, little effort has been put into developing the theoretical foundations of this new order. What are the ideological bases for this project? The concept of security needs to be defined. Barry Buzan has identified five dimensions to international security. His definition of security contains the elements of military, political, economic, societal and environmental security.² Clive Archer³ advocates an overall definition of security. This would clarify the context in which the EU and NATO now operate.⁴ Archer sees security as being the content of a triangle where peace, freedom and stability constitute the three sides.

Peace can be described as the absence of war or violence, a state of harmony between people or groups, freedom from strife, or law and order within a state. Freedom is autonomy, self-government, independence for a state or its

¹ The European Security and Defence Identity.

² Barry Buzan quoted in Smith, Martin A, Graham Timmins: *Building a Bigger Europe: EU and NATO enlargement in comparative perspective* (Aldershot: Ashgate Publishing Ltd, 2000) [hereinafter Smith & Timmins] p. 14.

³ Clive Archer expressed this opinion in “Security Aspects of the EU’s Northern dimension”. Paper delivered at Political Studies Annual Conference, University of Nottingham 1999. Here quoted from Smith & Timmins p. 15.

⁴Smith & Timmins p. 16.

peoples or the sense of enjoying personal or civil liberties. Finally, stability can be described as steadiness, firmness, being lasting or permanent. The three sides interact to create different aspects of security. Using Archer's model, the interaction of peace and freedom creates the "security of surviving", peace and stability creates the "security of thriving".⁵ These three, peace, freedom and stability, interact, thus creating security.

Thus, what security implies is "law and order". According to communitarian theory, law and order is the basic principle that holds society together. What then upholds law and order in the international context?

The ICTY has jurisdiction over natural persons and the ICJ over states. Organizations seem to fall outside this structure when defying the spirit of international conventions. If no sanction is applicable, can one then talk about a legal order? The international order is thought to provide a solution to these difficulties but here we are left wanting. What we are in need of, is a model that would, so to speak, impose "law and order" onto the empirical material.

Classical moral theories and rights theories claim to be universal. This position has caused a lot of difficulties; in theory as well as in trying to project these theories onto the world. MacIntyre, Sandel, Walzer and other communitarians are criticising the thought that basic rights must be universal. Communitarianism can be seen as a reaction to the theories of liberal individualism.⁶ To the communitarian, an understanding of an individual's position in the community and the tradition in this community is necessary for a meaningful discourse (of moral). He emphasises the importance of values common to the inhabitants in different communities. Hence, the central question of how one should act is determined by the tradition to which the acting subject belongs and the position that he has within this community.

However: How comprehensive – one might ask - is a community? Is it just a village community or can it be stretched to include the EU or the western world?

⁵ "The CSCE and arms control agreements of the late 1980's went some way to fostering a security of thriving mentality. They also pointed towards the possible eventual creation of a security regime involving 'social institutions consisting of agreed principles, norms, rules and procedures and programmes that govern interactions of actors in specific issue areas.'" Archer: *Security Aspects of the EU's Northern dimension*, quoted in Smith & Timmins p. 16.

⁶ Communitarianism has developed as a protest to and result of the criticism towards Rawls' "*A Theory of Justice*". Rawls did in fact take impression from this criticism and in "*Political Liberalism*" he explains that he underestimated the problems of creating a consistent and universal theory of law. Hence, he now prefers a clear distinction between moral and political doctrine of Justice, where the former has universal claims but the latter satisfies with trying to establish a reasonable structure of society.

According to the communitarians, man is stamped by the values in the community and cannot form an opinion of right and wrong independently of her cultural heritage. The limit then seems to be common basic assumptions. According to liberal theories of international relations, the fundamental agents in international relations are not states but individuals acting in a social context. The concept of freedom is linked to a life form shared with others. In this sense, freedom implies peace.

In communitarian theory, it is the law and order argument that holds society together. According to Kelsen, the purpose of the law and order argument on an international level, is the struggle for world peace. The question now is; are the two theories related to each other? Could those two, seemingly different theories, be linked together to create a structure for an international law argument that would suggest a possible solution to our problem?⁷ At this stage, it appears as if a connection between the two theories might be found in the fundamental concept of peace.

Purpose of the thesis

The purpose of this thesis is to arrive at a definition of lawfulness with respect to the international legal system of today. The idea is to show, how Kelsen's monist theory of international law and communitarian theory can be used, together, to legitimize the international legal structure, by means of employing, qua concept of approach, the security argument ("peace" being understood in the broadest sense of the word).

Problems

Is there a hierarchy among the acting parties? If no such structure is to be found, should there be one and, then, why? Where does an organization such as NATO fit in within the international structure, when acting as peacekeeper? What would make such a structure lawful? Does the rule of law apply to this international system? If so, how does it apply?

Delimitations

The subject I have chosen is extensive. Therefore, democracy aspects will not be included since the concept of democracy is very comprehensive and definitions are strongly debated. Another, closely related issue is the discussion on law *vis-à-vis* morality. This interesting and intensive discussion has, however, been eliminated here since it is not fundamental to the problems formulated above. So far as the European Union is concerned, it will be dealt with from an external point of view and the special nature of EU law and internal processes will not be included here. The organisation of UN, NATO and EU will be discussed only in as far as concerns the structure of these organizations and their role in the international structure. With respect to Kelsen's theory, the focus is on his theory of international law;

⁷ Max Huber laid his finger on a central question in international law when he, in 1910, described international organizations as entities in which states pool their sovereignty. Addressing this issue in 1920, Kelsen called it "*Das Problem der Souveränität und die Theorie des Völkerrechts*" (Tübingen: J.C.B. Mohr, 1920).

hence, his general theory of law is only sketched briefly. Concerning the Communitarians, the main focus is on philosophical communitarianism since it is more relevant to this thesis than political communitarianism.

Material

The material that Chapter Two is based upon consists mainly of case documentation from the ICTY web site. This is due to the circumstance that the case is fairly recent and there is a lack of printed sources. However, this would not affect the quality of the material. On the contrary, this allows the public to keep updated with new developments within a short period of time from the actual event. Much has been written about the ICTY but this material mainly concerns evidence matters. Hence, this presentation is limited to material emanating from the Tribunal.

Concerning Chapter Three, I relied heavily upon an article by Jan Klabbers. The main purpose is to sketch the development of International Organizations and not to account for the whole of the debate on International Organizations. With respect to NATO, the NATO Handbook has been of much use in describing the ontology of the organization. Concerning the strategy of NATO and its relations to the UN and the EU, a few monographs and articles are available. Furthermore, the Mission of Sweden to NATO⁸ has been helpful in clarifying some questions and suggesting further sources of information. For the section about the UN, I relied heavily upon “The Charter of the United Nations, a Commentary” edited by Bruno Simma. This since it seems to be the most consistent presentation of the subject. The purpose, as with the International Organizations, has not been to give a full account of the debate regarding the effectiveness of the UN system, but to show the structure of the UN and account for articles of the UN Charter, relevant to this presentation.

With respect to the positivist theory of Hans Kelsen in Chapter Four, the presentation is mainly based on Stanley Paulson’s translation of the first edition of Kelsen’s *Reine Rechtslehre*. It seems as if this theory, or the implications of the theory, is experiencing a renaissance. Therefore, the presentation is supplemented with some fairly recent articles on Kelsen and International Law and with references to other relevant publications of Kelsen’s extensive production.

What concerns Chapter Five, finally; there were some problems in connection with the communitarian attitude towards International Law. It seems to be the case that International Law is not one of the main concerns of the Communitarians. Inspiration has been drawn from John Rawls’ “The Law of Peoples”. Although not at all in the communitarian line, this book and the references, proved to be useful for the understanding of communitarian thinking. Furthermore, texts by MacIntyre, Sandel and Taylor have been used to pinpoint the core of communitarian thinking.

⁸ See <http://www.swedenembassy.be/natoen/> for further information.

Especially “After Virtue” by Alasdair MacIntyre has been very useful for the understanding of basic perceptions within communitarian thinking.

Method

This thesis is based on the Nikolic case. By reasoning in terms of legal theory and, at the same time, adducing certain aspects of philosophical communitarianism, I attempt to highlight the implications of the case.

Structure

Chapter Two sets the stage by discussing the Nikolic case as an illustration of the problems we are facing in international relations today. Mr Nikolic, originally indicted for 24 counts of crimes against humanity, violations of the laws or customs of war and grave breaches of the Geneva Conventions, pleads not guilty and claims that he is the victim of crimes committed by actors within the international order.

Thereupon, in Chapter Three, the role of international organizations within the international order is outlined. The main focus is on NATO, but to understand the interplay on the international arena, the UN, the EU, and their relation to NATO is also briefly described. Concepts such as security and peacekeeping are outlined. Is there then a structure in this field of study?

In Chapter Four, I render the essentials of Hans Kelsen’s theory of international law.

Chapter Five gives an overview of communitarian theory and the Communitarians’ view of international law. The concepts of community and tradition are outlined.

In Chapter Six, finally (Analysis and Conclusion), an attempt is made to connect the two theories together to create a structure for the arguing of International Law.

2 The Nikolic case

2.1 The Tribunal

The International Criminal Tribunal for the former Yugoslavia (ICTY)⁹ was established by Security Council resolution 827. This resolution was passed on May 25, 1993 in the face of the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and as a response to the threat to international peace and security posed by those serious violations.¹⁰

ICTY jurisdiction covers, according to the statute, the prosecution and trying of four clusters of offences: Grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity. The geographical and temporal jurisdiction is limited to these crimes, committed on the territory of the former Yugoslavia since 1991. ICTY jurisdiction covers natural persons and not organisations, political parties, administrative entities or other legal subjects. The ICTY and national courts have concurrent jurisdiction over serious violations of international humanitarian law committed in the former Yugoslavia. However, the ICTY can claim primacy over national courts, and may take over national investigations and proceedings at any stage if this proves to be in the interest of international justice.¹¹

2.2 Background

Following the Dayton Agreement¹², the multinational military Implementation Force¹³ was created. The agreement was concluded between the governments of Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia. SFOR was established as the legal successor to

⁹ International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the former Yugoslavia since 1991.

¹⁰ ICTY official web site: www.un.org/icty/.

¹¹ See AMENDED STATUTE OF THE INTERNATIONAL TRIBUNAL Adopted 25 May 1993 by Res. 827, as amended 17 May 2002 by Res. 1411, established by the SC acting under Ch. VII of the Charter of the UN.

¹² Signed in Paris on 14 December 1995. Office of the High Representative official web site: www.ohr.int.

¹³ Annex 1-A to the Dayton Agreement contains the “Agreement on the Military Aspects of the Peace Settlement”. Article I (1)(a) of this Agreement, entitled “General Obligations”, invites the Security Council “[t]o adopt a resolution by which it will authorize Member States or regional organizations and arrangements to establish a multinational military Implementation Force”. Article I (1)(b) provides that “NATO may establish such a force, which will operate under the authority and subject to the direction and political control of the North Atlantic Council (“NAC”) through the NATO chain of command”.

IFOR for a period of 18 months in 1996 by the Security Council.¹⁴ This mandate of SFOR was subsequently renewed by several Security Council resolutions¹⁵ and remained applicable throughout the period in question here. IFOR and SFOR have the authority to arrest, detain and transfer persons indicted by the tribunal. If IFOR or SFOR come into contact with war criminals, it is their responsibility to turn them over to the tribunal.¹⁶

2.3 Proceedings

Subsequently, two warrants were issued for the arrest of Dragan Nikolic, one addressed to the Federation of Bosnia and Herzegovina and the other to the Bosnian Serb administration in Pale. On October 20, 1995, the Trial Chamber found that there were reasonable grounds for believing that Mr Nikolic had committed the alleged crimes. Accordingly, an international arrest warrant was issued and transmitted to all states.

It is not entirely clear how Mr Nikolic came into the custody of SFOR but it is asserted that he was arrested in Serbia, territory of the Former Republic of Yugoslavia, by a number of unknown individuals and brought across the border into the custody of SFOR officers stationed in the Republic of Bosnia and Herzegovina. The mandate of SFOR extends only to the territory of Bosnia and Herzegovina. Nikolic was detained by SFOR on April 21, 2000 and was transferred to the ICTY on April 22, 2000. Mr Nikolic was originally indicted for 24 counts of crimes against humanity, violations of the laws or customs of war and grave breaches of the Geneva Conventions.¹⁷ Following two amendments¹⁸ to the indictment by the prosecution, the accused now stands charged with eight counts of crimes against humanity. Most of the crimes alleged are said to have occurred during 1992 within the Susica camp¹⁹ of which Nikolic is alleged to have been the commander. Mr Nikolic pleaded not guilty to all counts on his initial appearance before the court on 28 April 2000. No date of commencement has been set yet.²⁰

At the Status Conference of 12 October 2000, Nikolic challenged the jurisdiction of the Tribunal to hear the allegations against him pursuant to

¹⁴ See Security Council resolution 1088 (12 December 1996).

¹⁵ See Security Council resolutions 1174 (15 June 1998) and 1247 (18 June 1999).

¹⁶ See Dayton Peace Agreement Annex 1A, article IX, 1g. and NAC Rule of Engagement: [h]aving regard to the United Nations Security Council Resolution 827, the United Nations Security Council Resolution 1031, and Annex 1-A of the General Framework Agreement for Peace in Bosnia and Herzegovina, *IFOR should detain any persons indicted by the International Criminal Tribunal who come into contact with IFOR in its execution of assigned tasks*, in order to assure the transfer of these persons to the International Criminal Tribunal. Emphasis added.

¹⁷ See ICTY Case No. IT-94-2-I.

¹⁸ ICTY Case No. IT-01-46-I and Case No. IT-94-2-PT.

¹⁹ The Susica camp was formerly a military installation converted by Bosnian Serbs into a detention camp.

²⁰ This was still the case on September 5, 2003.

Rule 72(A) (i)²¹ of the Rules of Procedure and Evidence. On 17 May 2001, Nikolic filed a motion for relief based upon alleged illegality of arrest following his alleged unlawful kidnapping and imprisonment. A similar application²² followed by an order for disclosure, made against SFOR, brought appeals from NATO countries, which threatened to delay the process immensely.²³ However, since the Nikolic “Susica Camp” case is at a pre-trial stage, the best way to advance the case was to let prosecution and the defence agree on which preliminary issues would require resolution (by way of hearing) in order to determine whether the relief should be granted.²⁴ Hence, the following was agreed:

1. If it can be established by the accused that the accused’s arrest was achieved by any illegal conduct committed by, or with the material complicity of;
 - (a) any individual or organisation (other than SFOR, OTP or the Tribunal),
 - (b) SFOR,
 - (c) OTP or
 - (d) the Tribunalwould the accused be entitled to the relief sought.
2. Does SFOR act as an agent of the OTP and/or the Tribunal in the detention and arrest of suspected persons?²⁵

Furthermore, it was agreed that the burden of proof lies with the defence to prove illegal conduct on the balance of probabilities.²⁶

The defence argues firstly, that by taking over the accused from the unknown individuals, SFOR and/or the prosecution have acknowledged and adopted the alleged illegal conduct of those individuals. According to the defence, this leads to the conclusion that the ICTY is barred from exercising jurisdiction over the accused. Secondly, the illegal character of the arrest in and of itself should bar the tribunal from exercising jurisdiction over the accused. Here, the defence relies on the argument that the maxim *male captus, bene detentus*²⁷ should not form a basis for the exercise of jurisdiction, in this case.²⁸

²¹ Section 6 Motions. Rule 72: Preliminary Motions. (A) Preliminary motions, being motions which: (i) challenge jurisdiction.

²² That application was later withdrawn. See Overview of Court Proceedings regarding the Nikolic “Susica Camp” Case Update No. 162. www.un.org/icty/news/Nikolic/nikolic-cp.htm

²³ Overview of Court Proceedings regarding the Nikolic Case, Update No. 181.

²⁴ Ibid. and Update No. 186.

²⁵ See Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, [hereinafter Decision on Defence Motion] para. 18.

²⁶ Ibid. para. 21.

²⁷ The maxim *male captus, bene detentus* expresses the principle that a court may exercise jurisdiction over an accused person regardless of how that person has come into the jurisdiction of that court; The Tribunal in para. 70. A classic example of a decision close to the application of the principle of *male captus, bene detentus* is the case of *Eichmann. Attorney-General v. Eichmann*, 36 I.L.R 18 (District Court of Israel) and 304 (Supreme Court).

²⁸ See Decision on Defence Motion, para. 29.

This submission comes down to three separate grounds for alleging a violation of international law, according to the defence. First, abduction in this manner would constitute a violation of the state sovereignty. Second, such abduction could constitute a serious curtailment of basic inalienable rights and lead to a subsequent irregular exercise of jurisdiction over an individual by an adjudicating court. Third, the Defence argues that such an abduction *per se* and the subsequent exercise of jurisdiction constitutes an abuse of due process and a breach of the rule of law.²⁹

2.4 Findings of the Tribunal

The legal question that arises is whether the duty to cooperate, as laid down in article 29³⁰ of the Statute of the International Tribunal, applies to states only, or if it might apply also to SFOR. Read literally, article 29 seems to relate to states only but in the *Simic*-decision the tribunal concluded: “In principle, there is no reason why Article 29 should not apply to collective enterprises undertaken by States, in the framework of international organisations and, in particular, their competent organs such as SFOR in the present case.[...] The need for such cooperation is strikingly apparent, since the International Tribunal has no enforcement arm of its own – it lacks a police force.”³¹

The tribunal comes to the same conclusion in the present case and continues by concluding that by arresting and transferring Nikolic to SFOR, he can be said to have “come into contact with” SFOR.³² According to rule 59*bis* in combination with article 29 interpreted purposively³³, SFOR forces had no other option than to detain the accused.³⁴

²⁹ See Decision on Defence Motion, para. 71.

³⁰ Article 29 Co-operation and judicial assistance

1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(a) the identification and location of persons;
(b) the taking of testimony and the production of evidence;
(c) the service of documents;
(d) the arrest or detention of persons;

(e) the surrender or the transfer of the accused to the International Tribunal.

³¹ *Prosecutor v. Blagoje Simic, Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric*, Case No. IT-95-9, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, 18 October 2000, pp. 18-19.

³² See Decision on Defence Motion, para. 54.

³³ [...] A purposive construction of the Statute yields the conclusion that such an order should be as applicable to collective enterprises of States as it is to individual States; Article 29 should, therefore, be read as conferring on the International Tribunal a power to require an international organization or its competent organ such as SFOR to cooperate with it in the achievement of its fundamental objective of prosecuting persons responsible for serious violations of international humanitarian law, by providing the several modes of

At this stage, the court had to decide if there is a legal impediment to the exercise of jurisdiction over the accused. The decision whether or not to exercise jurisdiction over an accused lies inherently with the Chamber³⁵ and is not regulated by charter text (in uncharted waters). For this reason, the court finds it necessary, emphasizing that the relationship between the tribunal and national jurisdictions is not horizontal but vertical, to examine national case law.³⁶ The defence notes with regard to the national case law that: “In cross-border abduction cases where there was some evidence to indicate State involvement (...) the violation of international law was regarded as a breach of State sovereignty.”³⁷ On the other hand: “where the abduction has been perpetrated by private individuals, the law remains unsettled and thus, the remedy for such a breach also remains unsolved.”³⁸

The court found that as long as the capture and transportation not amounted to an undermining of the principle of due process of law³⁹, bearing in mind the fact that no extradition treaties are applicable, sovereignty by definition cannot be attached the same importance in an enforcement measure under Chapter VII of the UN Charter as in the vertical context. Hence, there has been no violation of state sovereignty.⁴⁰ That is to say, that SFOR is obliged to cooperate and no relationship of agency could be established. The allegations that Mr Nikolic’s human rights had been violated or that proceeding with the case would violate the fundamental principle of due process of law were rejected.

assistance set out therein. *Prosecutor v. Blagoje Simic, Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric*, Case No. IT-95-9, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, 18 October 2000, pp. 18-19.

³⁴ Decision on Defence Motion, para. 55 and 71.

³⁵ See the Decision of the Appeals Chamber in *Jean-Bosco Barayagwiza v. the Prosecutor*, ICTR-97-19-AR72, of 3 November 1999, pp. 42 and following; quoted in para. 74 of the Decision on Defence Motion.

³⁶ [...] national case law must be “translated” in order to apply to the particular context in which this Tribunal operates. Para 76.

³⁷ Defence Second Motion quoted in para. 97.

³⁸ *Ibid.* para. 98.

³⁹ No agency relationship could be established. Para. 102 and 105.

⁴⁰ Decision on Defence Motion, pp. 100-105.

3 Supra-national Organizations

3.1 General Remarks on the Development of Supra-national Organizations

Jan Klabbers describes the theory of International Organizations as developed through three stages.⁴¹ The first stage, roughly the interbellum period, was mainly concerned with coming to terms with the new phenomenon of International Organizations. In the 1950s and 1960s, the law was concerned with solving practical problems. This characterizes the second stage. The present third stage is distinguished by attempts to “conceptualize and to place organizations in a larger normative perspective”⁴². The comparative approach has reached its limits and the study now aims at “theorization and a self-conscious infusion of normative thinking”.⁴³ Academic study of international organizations is closely linked with the study of global governance. The action of different International Organizations raises questions as to “the means by which they acquire their powers [...] and the democratic and judicial control over their activities.”⁴⁴ This could be expressed as examining the legitimacy of the existence and activities of the international activities.

According to Klabbers, International Organizations are no longer conceived of as inherently good, but have to justify their actions both in legal⁴⁵ and in moral terms. The first part of the problem concerns the legal status of international organizations. The very core of the law of International Organizations is the doctrines of implied powers⁴⁶ and attributed powers⁴⁷; two concepts invented by the PCIJ, contrasting to early attempts to integrate International Organizations into existing categories of thought. In the 1949 case *Reparation for Injuries*⁴⁸, the Court laid down the requirements for international legal personality and strengthened the doctrine of implied powers by linking an implied power to the purpose of the organization at large. A theoretical rationale for the implied powers doctrine is that it might rest upon the consent of the member states⁴⁹ but in a world of sovereign states, the concept of attributed powers seemed more natural. Member states are considered to be acting in national interest when pooling

⁴¹ Jan Klabbers ‘The Life and Times of the Law of International Organizations’, *Nordic Journal of International Law* 70, 2001, pp. 287-317.

⁴² Klabbers p. 287.

⁴³ Klabbers p. 291.

⁴⁴ Klabbers p. 287.

⁴⁵ Does the organization in question have the power to engage in this activity?

⁴⁶ Further power which can be derived from a power expressly granted.

⁴⁷ The powers of an organization are limited to that what has been explicitly and expressly conferred upon the organization. Also referred to as the doctrine of specialty.

⁴⁸ “*Reparation for Injuries Suffered in the Service of the UN*”, [1949] ICJ Reports 174.

⁴⁹ See for example “*Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*”, [1926] Publ. PCIJ, Series B, No. 13.

their sovereignty into the entity of an International Organization.⁵⁰ However, this view leads to complications regarding the relationship between an organization and its member states, i.e. if an organization falls under national or international jurisdiction and which one that has supremacy.⁵¹

The second part of the problem concerns the legal nature of decisions of International Organizations. What makes these decisions binding and to whom are they binding? One unfortunate suggestion is that the decisions are binding on the basis of the (implicit) consent of the parties and to the consenting parties. This argumentation gives rise to a legitimacy problem and is nothing more than an analogy to treaty interpretation. Not only does this line of thought deny the organization its separate identity, but also inhibits majority decisions, thus rendering the organization into merely a platform for negotiations.⁵² The problem to be solved is what privileges and immunities organizations enjoy, i.e. the identity of International Organizations.

In the Certain Expenses opinion from 1962⁵³ ICJ formulated a new position: Decisions of international organs must be presumed to be *intra vires*. As long as there is a considerable amount of agreement between the members of an International Organization, the organization would be able to act along its own wishes.⁵⁴ The theoretical safeguard presented by the doctrine of *ultra vires* seems to be just theoretical, with this approach. It is not questioned that member states are bound by decisions of the organs. In the case of the United Nations, it is by virtue of article 25 of the Charter. Concerning non-members, the Court said in the Barcelona Traction case that certain obligations are owed *erga omnes*.⁵⁵ However, obligations for non-members cannot be the same as for member states.

What if morality would be the utmost rationale for *erga omnes* obligations? This notion is based on the perception of International Organizations as generally good things created for the salvation of mankind. Anyhow, the separate identity of International Organizations is to a large extent their *raison d'être* and they are not to be used as a veil, covering the actions of member states. This is guaranteed by the normativity of international law. One argument advocated by the International Commission on Intervention and State Sovereignty is that state sovereignty should be regarded not as a right but rather as the state being entrusted with economic duties, human

⁵⁰ The theoretical approach to international relations can be divided in three separate stands: republicanism, transnationalism and institutionalism.

⁵¹ Compare Kelsen: *Das Problem der Souveränität und die Theorie des Völkerrechts*.

⁵² Klabbers p. 297.

⁵³ "Certain Expenses of the UN (Art. 17, para. 2, of the Charter)", [1962] ICJ Reports 151. The case concerns peacekeeping activities of the GA. These are not provided for in the Charter.

⁵⁴ See Klabbers p. 305.

⁵⁵ "Case Concerning the Barcelona Traction, Light and Power Company, Limited" (Belgium v. Spain), second phase, [1970] ICJ Reports 3.

rights protection duties and social duties. Then the international community can intervene if the state does not fulfil its responsibilities towards its citizens.⁵⁶

The recent development in the field of international law with a strengthened doctrine of Human Rights and furthermore, the new practice of “humanitarian intervention” to protect these Human Rights, limits the internal autonomy.⁵⁷ This development can be described as a more communitarian view of international law is taking form. The idealist school of international law derived from Kant appears to be gaining upon the realist school of thought.⁵⁸ However, one strong state possessed of military and economic power and embarked on expansion and glory is sufficient to perpetuate the cycle of war and preparation for war.⁵⁹

3.2 NATO and the Relation to UN and the EU

3.2.1 General remarks about NATO and the concept of security

To the creation and maintenance of a comprehensive pan-European security order, the EU and NATO is said to be indispensable. NATO, PfP and CSCE, have a growing role in peacekeeping and cooperation with the UN. It seems like NATO is evolving from a military alliance towards becoming a security and peacekeeping organization. The EU and NATO are working to support the transformation of Central and Eastern Europe. This is supposedly caused by NATO and EU finding themselves compelled to redefine their roles in a broader European perspective. “This common identity and feeling of closeness committed the allies to joint decision-making in institutions such as NATO [...]”⁶⁰ The balance of power system needs to be replaced after the end of the Cold War.⁶¹ The question arises as to what has come in its place.⁶² The activity in Central and Eastern Europe

⁵⁶ International Commission on Intervention and State Sovereignty Official website: The Department of Foreign Affairs and International Trade: <http://www.iciss-ciise.gov>.

⁵⁷ John Rawls *The Law of Peoples with The Idea of Public Reason Revisited* (Cambridge Massachusetts, London England: Harvard University Press, 1999) p. 27.

⁵⁸ This line of thought is inspired by graduate students at Harvard Law School. Their work is available at <http://cyber.law.harvard.edu/evidence99/pinochet/IntlLawHome.htm>.

⁵⁹ Rawls p. 48. “Over the long term the interests of the United States and the international community will be best served by the Charter-based system of world order. If international terrorists have a coherent goal, it is to undermine this system – an objective the United States is perhaps unwittingly promoting by its actions” (i.e. acting outside the Security Council). Jonathan I. Charney ‘The Use of Force against Terrorism and International Law’ *American Journal of International Law*, 95 Issue 4 (2001) p. 838.

⁶⁰ Thomas Risse-Kappen; *Cooperation among Democracies – The European Influence on US Foreign Policy* (New Jersey: Princeton University Press, 1995) pp. 199-200.

⁶¹ Smith & Timmins p. 10.

⁶² Buzan argues that it has been replaced by a security community. Barry Buzan et al: *The European Security Order Recast*. London Pinter 1990 p. 40; Smith & Timmins p. 10.

has been justified by NATO member governments as spreading western-style democratic values and cultures into Central and Eastern Europe.⁶³ How can NATO act on those grounds when a clear military threat does not exist? It exists neither towards Central and Eastern Europe nor towards NATO members. Bearing in mind that NATO never insisted *de facto* that all its member states be democratic.

This has been answered by the argument that if the habits of co-operation are progressively lost, the prospect of tension and even conflict in Europe will increase. This could happen if the renationalisation of defence policy and military strategy is not prevented.⁶⁴ Increasing interdependence lowers the risk of war. This would be the essential foundations of a western (European) security community.⁶⁵

Neither the EU nor NATO is capable of providing adequate foundations for the prospective construction of a pan-European security order independently from each other.⁶⁶ This since the EU represents a political economy and NATO a military and security alliance. Both perspectives are needed to create a security order in the broadest definition of security. One view is that “NATO’s future utility lies mainly in a revised, but still essentially military, role of deploying and commanding peace enforcement operations in conjunction with the UN.”⁶⁷ Some predicted instability in Europe after the end of the Cold War if not the military alliance was replaced by a body that can provide a security guarantee. This would be the EU and a new NATO, acting as a security alliance according to those who advocate a broader view of NATO as a security alliance. Which organization being the best safeguard of a security community is determined by the definition of security. If emphasis is put on the military dimension, NATO is the best guarantee but if a broader definition of security is argued, encompassing at least economic and political factors, the EU has a significant role to play. Prosperity and peace are closely related.

This gives rise to the question of how the NATO/EU and UN/NATO relations are shaped in this field and also the theoretical foundations for NATO and the EU to act legitimate outside their multi-lateral areas. Apparently, there is not complete consensus regarding these matters.⁶⁸ Differences in opinion appear due to differences in attitude towards these and related topics.⁶⁹

⁶³ Smith & Timmins p. 105.

⁶⁴ Smith & Timmins p. 109.

⁶⁵ Smith & Timmins p. 154.

⁶⁶ Smith & Timmins p. 11.

⁶⁷ Smith & Timmins pp. 15-16.

⁶⁸ Marco Carnovale of NATO’s Political Affairs Division has pointed out that: “there are no universally accepted definitions or models of democratic control of defence.” M. Carnovale ‘NATO partners and allies: Civil-military relations and democratic control of the armed forces’ in NATO Review 45, No 2 (1997) at p. 32.

⁶⁹ Carnovale continues: “NATO itself cannot provide a model, simply because each ally follows its own unique cultural, political and military traditions.” p. 32.

The member states do not have a common view of NATO's past and future. For the USA, the approach to NATO has been fundamentally one of leadership and preserving the American right to their point of view in European security affairs.⁷⁰ On the other hand, the Germans tend to see NATO as representing an entrenched community of values.⁷¹ At the end it could be argued that these different approaches are consistent because they flow in part from the common values shared by the US and Germany.⁷² Since the end of the Cold War, NATO has transformed into an alliance protecting and projecting a particular value system.⁷³

3.2.2 The North Atlantic Treaty

Under article 5 of the North Atlantic Treaty, NATO member states can take measures to deal with an armed attack themselves and merely report to the Security Council what actions they have taken.⁷⁴ This right to defence is limited by article 1 of the North Atlantic Treaty, establishing that the signatories commit themselves to refraining from the threat, or use, of force in any manner inconsistent with the UN Charter. Article 7 NAT reaffirms UN Security Council primary responsibility for peace and security⁷⁵. A response under article 5 to an attack is not limited to NATO-treaty territory. Article 12 NAT includes a clause providing for the Treaty to be reviewed after ten years if any member requested so. This possibility has never been exercised though the Treaty is under continuous review. SHAPE⁷⁶ was simply faced by a *fait accompli*; they had not considered what a NATO doctrine for "peace support operations" might look like and suddenly it was already decided.⁷⁷ The working relations between NATO and the UN had remained limited from the creation of NATO in 1949 until now.⁷⁸ In 1991, NATO presented a revised strategic concept. It highlighted three core missions for NATO:

1. Article 5 NATO Treaty. Defence of member states
2. To act as the essential trans-Atlantic forum for allied consultations on any issues that affect [member states'] vital interests, including possible developments posing risk for members' security, and appropriate co-ordination of their efforts in the fields of common concern.

⁷⁰ Smith & Timmins p. 117.

⁷¹ Risse-Kappen p. 223.

⁷² Emil J. Kirchner and James Sperling 'The Future Germany and the Future of NATO' in *German Politics* 1, No 1 (1992) p. 74.

⁷³ Kirchner & Sperling p. 54.

⁷⁴ Refers to art. 51 of the UN Charter.

⁷⁵ Regarding the incompatibility UN Charter/NATO Treaty, see Lawrence Kaplan: *The United States and NATO* (Lexington: University Press of Kentucky, 1984) in ch. 3.

⁷⁶ Supreme Headquarters Allied Powers in Europe.

⁷⁷ Smith & Timmins p. 112.

⁷⁸ Compare Gregory Schulte 'Bringing peace to Bosnia and Change to the Alliance' in *NATO Review* 45, No 2 (1997) p. 23.

This paragraph is linked to article 4⁷⁹ of the NAT and could be the legality and justification of NATO actions in Bosnia. It does not say anything about the relation to the UN and the UN Charter.

3. NATO shall contribute to effective conflict prevention and engage actively in crises management, including crisis response operations.

This paragraph is linked to article 7 of the NAT, which theoretically acknowledges the primacy of the UN in the maintenance of international peace and security. There is however an escape route in article 4. Operations conducted under this article falls under NATO's exclusive competence as a collective self-defence alliance.

3.2.3 The relationship between NATO and the UN

The ongoing civil war in Bosnia led to institutional and operational relations between the UN and NATO. NATO itself described this as a case-by-case basis co-operation.⁸⁰ The relevance of the UN Charter to NATO is that it provides the juridical basis for the creation of the Alliance. The Charter also establishes the overall responsibility of the UN Security Council for international peace and security according to NATO.⁸¹ It is the framework within which the Alliance operates.⁸²

In June 1992, the UN requested support for humanitarian relief operations in (former) Yugoslavia. In July 1992, NATO began operations in support of a UN arms embargo and in December 1995, NATO was given a mandate by the UN to implement the Bosnian Peace Agreement⁸³ on the basis of Security Council Resolution 1031.⁸⁴ This was subsequently followed by the Kosovo Force (KFOR)⁸⁵ to provide for peace and reconstruction of Kosovo. The intensification of cooperation between NATO and the UN signifies a new role in crisis management for NATO.

3.2.3.1 Peacekeeping within the UN system

Article 51 of the UN Charter regulates the matter of Self-defence. The concept of armed attack in art. 51 lacks a definition. Collective self-defence is allowed under this article. It authorizes a non-attacked state to lend its

⁷⁹ Article 4: The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened.

⁸⁰ See Press Communiqué M-NAC-2(92) 106 Brussels; NATO 1992.

⁸¹ NATO Handbook, Ch. 15. www.nato.int/docu/handbook/2001/hb.htm.

⁸² See Preamble to North Atlantic Treaty.

⁸³ Signed in Paris on 14 December 1995.

⁸⁴ The NATO-led Implementation Force (IFOR) began operations on 16 Dec 1995 and was replaced by a Stabilisation Force (SFOR) in Dec 1996.

⁸⁵ Established on the basis of SC Res. 1244 of 12 June 1999.

assistance to the attacked state.⁸⁶ The right of self-defence in public international law has been narrowly defined since the Caroline-case⁸⁷ of 1837. An anticipatory right of self-defence would be contrary to the wording of art. 51.⁸⁸ The right in art. 51 is only meant to be of a subsidiary nature until the SC has taken the necessary measures. Art. 51 however is much narrower than the right to self-defence according to customary law. Some states still try to invoke this wider concept but at least for UN Member States art. 51 must be seen as a *lex specialis* if not the new content of customary law.

Further, art. 52⁸⁹ regulates the relationship between regional arrangements or agencies for the settlement of local disputes and the UN. According to art. 4, regional arrangements are not UN-members. They can consist of a union of states either with or without its own legal personality under public international law. In the former situation, the addressee of the norms in question is the union itself but when the organization lacks legal personality of its own, the addressees are the states that are parties to the treaty. An organization with its own legal personality must meet the consistency criteria itself and guarantee the fulfilment of the Charter.⁹⁰

Regionalism in Chapter VIII is a concept of its own; a sub-system within the framework of a higher comprehensive system.⁹¹ The regionalist approach stresses the heterogeneity of the world and argues that a regional sub-system represents indispensable intermediary structures of cooperation over which a universal superstructure – although merely supervisory in nature – could possibly span.⁹² According to the principle of reinforced subsidiarity in Chapter VIII, regional agencies are under the obligation to act under art. 52(2). The Security Council is not to act until measures taken by regional agencies has proved ineffective, art. 52(4). Regionalism is recognized only in the areas of maintenance of peace and pacific settlement of disputes, namely in Chapter VIII. Its structural relationship to the other chapters and to unwritten instruments such as peacekeeping operations is difficult to define.⁹³ The purpose of Chapter VIII is to maintain international peace and security by granting powers to certain international organizations who can resolve local disputes within their own jurisdiction. NATO and WEU are designed to be collective self-defence alliances and have their

⁸⁶ For the gap between "use of force" in art. 2(4) and "armed attack" see *Nicaragua v. United States of America*, Judgement ICJ Reports (1986) p. 14; The Charter of the United Nations. A Commentary. Edited by Bruno Simma, 1994, p. 675.

⁸⁷ The Caroline EPIL <3>, pp. 81-2.

⁸⁸ Simma p. 676.

⁸⁹ Article 52 (1) of the UN Charter reads: Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

⁹⁰ Simma p. 697.

⁹¹ Simma p. 684.

⁹² Simma p. 684.

⁹³ Simma p. 687.

legal basis in Chapter VII, art. 51 of the UN Charter. The meaning of regional arrangements or agencies under art. 52 is that these are designed only to confine local disputes and this does not seem like a suitable description of NATO of today.

However, in spite of distinguishing features between regional arrangements and self-defence alliances, pragmatic mixing of collective self-defence measures and autonomously undertaken regional measures for the pacific settlement of disputes occurs frequently. “[T]his vagueness at times allows regional organizations to elude control by the SC, or it allows the super-powers to use regional agencies to secure their strategic spheres of influence [...]”⁹⁴ In “*Agenda for Peace*”,⁹⁵ the Secretary General stated, “The Charter deliberately provides no precise definition of regional arrangements and agencies, thus allowing useful flexibility for undertakings by a group of States to deal with a matter appropriate for regional action which also could contribute to the maintenance of international peace and security.”⁹⁶ As an example, the SG lists the Conference on Security and Cooperation in Europe (CSCE).⁹⁷

The closer relations between UN and regional agencies has been categorised as the two organizations working out together what needs to be done and the regional organization becomes the executing agency.⁹⁸

Regional agencies also have the right to collective self-defence under art. 51 and the two systems clearly can coexist. The question of what is “appropriate” in art. 52(1) for regional action is decided by the regional agencies themselves. Settlement by peaceful means in art 52(2) and (3) means negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement etc as enumerated in art. 33(1). Consistency with the Charter is a condition for legal admissibility.

Furthermore, in article 53 it is laid down that “The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, [...]”. Hence, when the authorization of the Security Council is not required, they must be fully informed.⁹⁹ Does it follow from the obligatory function of dispute settlement that the regional agency must have a procedure for coercive settlement in the case that

⁹⁴ Simma p. 695.

⁹⁵ ‘An Agenda for Peace. Preventive diplomacy, peacemaking and peacekeeping’ [hereinafter *Agenda for Peace*]. Report of the Secretary-General 17 June 1992 pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992. <http://www.un.org/Docs/SG/agpeace.html>; ILM 31 (1992).

⁹⁶ *Agenda for Peace*. Para. 61.

⁹⁷ *Agenda for Peace*. Para. 62.

⁹⁸ Martin A Smith *On Rocky Foundations: NATO, the UN and Peace Operations in the Post-Cold War Era* (United Kingdom: University of Bradford, 1996) p. 18.

⁹⁹ See art. 54 of the UN Charter.

peaceful settlement fails? According to art 53(1), the SC can authorize regional arrangements to adopt coercive measures or employ it to implement coercive measures. This would mean that it is not an obligation but only permission to coercive settlement.¹⁰⁰

It has been said that the essence of international peacekeeping lies in the fact that enforcement plays no part in it.¹⁰¹ However, in 1993 Kofi Annan argued for what he called a “more muscular peacekeeping”.¹⁰² This could be interpreted as UN peacekeeping actions together with a NATO playing its traditional role? It is true that the Yugoslav crises changed the way that we regard peacekeeping. On the other hand, article 2(7) of the UN Charter prevents from intervening in domestic jurisdiction and it might cause legitimacy problems.

Peacekeeping-forces are formally created by the resolution of a UN organ, as a rule the SC. The military force created has four basic functions:

- observation and verification
- interposition
- maintenance of law and order
- humanitarian assistance.

In the Congo a concept, recognized as legal by the ICJ, called active self-defence was developed. The forces have the right to freedom of movement and any attempt to hinder them was countered by force in the name of self-defence.

The legal basis of peacekeeping-forces is that they are an element of the maintenance of international peace and security. They are not expressly provided for in the Charter. The justification is determined on the basis of defining the powers of different organs.¹⁰³ The GA has substantial organizational powers¹⁰⁴ but enforcement actions under arts. 41 and 42 can only be taken by the SC.¹⁰⁵

Peacekeeping-forces are organs of the UN, subsidiary organs of the SC or GA, created under arts. 22 and 29. The organization is responsible for the acts of its members.¹⁰⁶ Hence, it is the law applicable to the UN as a legal person that determines the conduct, rights and duties of the peacekeeping

¹⁰⁰ Art. 53(1) first sentence and second sentence second clause. Simma p. 698.

¹⁰¹ Indarjit Rikhye quoted in Smith p. 56.

¹⁰² Kofi Annan ‘UN Peacekeeping Operations and Cooperation with NATO’ in NATO Review 41, No 5 (1993) at pp. 3-7. Kofi Annan was at the time the UN Under-Secretary-General for Peacekeeping Operations.

¹⁰³ Simma p. 590.

¹⁰⁴ Under arts. 22 and 98.

¹⁰⁵ According to art. 11(2), second sentence.

¹⁰⁶ Simma p. 592. This is not the case with forces, which are organized by member states in order to support a UN operation, for example the UNITAF. The UNITAF was set up by the US to restore normal conditions in Somalia. UNOSOM II (replaced UNITAF) was involved in serious fighting, but UNOSOM soldiers also killed civilians. This led to a political controversy. See SC Res. 837 of June 6, 1993; Simma p. 586.

force.¹⁰⁷ The law of war is applicable, but only to belligerent forces, which possesses the powers of an occupation army.

The organization of peacekeeping-forces can be divided into four hierarchical / organizational levels.¹⁰⁸ National contingents are provided by states on the basis of agreement between state and the SG. Hence, a chain of command is established from the UN down to the individual soldier. The UN has exclusive control over the members of the force but the contributing state retain criminal and disciplinary jurisdiction over their nationals. This since the UN has no law enforcement or judicial organs of its own. National criminal and disciplinary law is thus used to implement not national obligations but the international obligations of the UN and to this extent, to enforce international legal rules. This modification of the national legal order must however stem from an agreement concluded with parliamentary consent¹⁰⁹ to be brought about.¹¹⁰

Peacekeeping operations can be undertaken even by regional organizations either as armed forces created by existing regional organizations or as armed forces created ad hoc by certain states.

The United Nations Protection Force (UNPROFOR) in (former) Yugoslavia was established under Chapter VII by the SC¹¹¹ in coordination with EU monitors. The EC Monitor Mission in Yugoslavia was based on memoranda of understanding between the EC member states and the government of former Yugoslav Republics of Croatia and Bosnia-Herzegovina and Yugoslav Federal Executive Council. This mission was based on the CSCE process. If the legal personality of the CSCE were denied this would be an ad hoc initiative. They are based on bilateral agreements between the concerned parties and have the legal status of a foreign force stationed in a country.

3.2.4 NATO-EU Relations

The foundation of the strategic alliance between NATO and the EU was the arrangements made for cooperation between NATO and the WEU. Following the entry into force of the Amsterdam Treaty on 1 May 1999, the EU decided to implement the common European Security and Defence Policy by assuming the role previously undertaken by the WEU. This transfer of responsibilities from the WEU to the EU meant a new dimension

¹⁰⁷ Simma p. 599. The Convention on the Privileges and Immunities of the UN applies. In addition, general customary rules of international law concerning liability apply whether the force is the victim or the culprit.

¹⁰⁸ Simma p. 593. These are Principal organ, The Secretary General, The Commander-in-chief (appointed by the SG) and his staff and National contingents headed by a contingent commander.

¹⁰⁹ See for example: Regeringens proposition 2002/03:58 Svenskt deltagande i Förenta nationernas fredsoperation i Demokratiska republiken Kongo.

¹¹⁰ Simma p. 597.

¹¹¹ SC Res. 743 of 21 February 1992.

to the relationship between NATO and the EU leading to developments in both organizations. The Common Foreign and Security Policy (CFSP) was decided as the EU dimension of the European Security and Defence Identity. As part of this process, the concept of Combined Joint Task Force was developed. “Taking full advantage of the Combined Joint Task Force concept, the strengthened European identity would be based on sound military principles supported by appropriate military planning [...]”¹¹² The transformation of responsibilities meant that the future development of a European security and defence policy would be assumed by the EU. The provisions on CFSP are to be found in Article 11 TEU.¹¹³ Listed in this article are the objectives of the CFSP, which shall be:

- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the United Nations Charter;
- to strengthen the security of the Union in all ways;
- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, [...];
- to promote international cooperation;
- to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.

Liberal theory assumes that Human Rights, the rule of law and democratic governance is the content of a collective identity.¹¹⁴ This internal structure of constitutional democracies is one of the main reasons for peace among them. Since they are safe from each other, peace reigns among them.¹¹⁵

Following the critical situation in the Balkans, contact has become a regular feature between NATO Secretary General and the EU High Representative. When the monitoring operation of the EU failed, they had no military options in reserve. The strengthening of the political process in the Balkans has become a priority of both NATO and the EU. This process continues and recent events has only deepened it. Special EU envoys have been appointed to Bosnia¹¹⁶, the Great Lakes region in Africa and to the Middle East. WEU is to elaborate and implement CFSP decisions, which have defence implications, together with other states and organizations being invited to EU-led operations. The intention is that the CFSP is to be comprehensive and cover all areas of foreign and security policy. It is not clear if this only regards situations where the EU is acting on a UN mandate.

¹¹² NATO Handbook Ch 4. <http://www.nato.int/docu/handbook/2001/hb0401.htm>.

¹¹³ Former Article J.1.

¹¹⁴ Risse-Kappen p. 204.

¹¹⁵ Rawls p. 8.

¹¹⁶ Carl Bildt was the first to be appointed after the London Conference on Yugoslavia, held in August 1992.

In addition to this, the European Parliament launched a resolution on the “Right of Intervention on Humanitarian Grounds”.¹¹⁷ In this resolution, the European Parliament accepted the concept of Humanitarian Intervention.

The first combined EU-UN international operation was the London Conference on Yugoslavia¹¹⁸ and it represented a new departure for the EU regarding the foreign policy. It was subsequently the CSCE that was made a regional arrangement under chapter VIII of the UN Charter and not NATO itself. The approach to NATO/EU relations is still that the two organizations shall cooperate and constitute a complement to each other.

3.3 Summary

IFOR and SFOR were unique operations. They broke new ground in bringing NATO together with other organizations and with partners in a common effort.¹¹⁹ NATO and EU have a strategic partnership based on what is referred to as a comprehensive agreement, which is aimed at strengthening the European Security and Defence Policy. The so-called Berlin Plus¹²⁰ arrangements paved the way for EU-led operations using NATO troops.

As seen, these actions are not a question of morality but a way to secure the surviving of all actors in Europe. Hence, legitimacy for these actions cannot be sought in moral arguments. With NATO’s growing role as peacekeeper the legitimacy question becomes ever more central. Does the structure of today provide for NATO actions in Central and Eastern Europe, Yugoslavia and furthermore in Iraq and Afghanistan¹²¹, i.e. NATO acting outside the treaty territory?

In answering this question, legitimacy and legality aspects cannot be separated. The term legitimate can be understood as meaning that the source of validity of the rules lays within the norm system. It can also be understood in the sense of actions being justified from a point of view different from the legal. The claim of legitimacy here lies in the realisation of certain values; in this case international peace and security, which is achieved through law and order.

¹¹⁷ See Resolution of April 4 1994, Deutscher Bundestag - Drucksache 12/7513 - 10th Mai 1994; EPOQUE A3-0227/94 – 20th April 1994; <http://www.bundestag.de>.

¹¹⁸ Chaired jointly by the SG of the UN and the President of the European Council.

¹¹⁹ Schulte p. 24.

¹²⁰ Berlin Plus includes issues such as: [t]he provision of assured EU access to NATO planning capabilities able to contribute to military planning for EU-led operations; the further adaptation of NATO’s defence planning system to incorporate more comprehensively the availability of forces for EU-led operations; etc. See NATO Handbook Chapter 4. See also NATO Press Release (2003)025, Brussels 17 March 2003.

¹²¹ See the ISAF mission. <http://www.isafkابل.org> "NATO Update" – 17 APRIL: NATO decided on 16 April 2003 to enhance its support to ISAF, the international peacekeeping mission in Afghanistan, by taking on the command, coordination and planning of the operation. <http://www.nato.int>.

The legitimacy of NATO actions then lies in the legality of their actions from this point of view. Legitimacy in this sense must not be confused with political legitimacy. A breach of international law is still a breach although justified politically. Hence, decisions in the sphere of international relations must be based on objectivity. It is important not to confuse the description of how international law is with beliefs about the way international law should be. In the Persian Gulf War, Security Council authorization was viewed as essential by all coalition members to, via a series of resolutions, provide legitimacy for international political and military activity there.¹²² NATO is furthermore an organization with limited membership, which makes it difficult for the alliance to “mobilize the force of global opinion”.¹²³ Decisions of legal nature should be based on law whence political decisions fall outside the scope of this text.

However, the role of the EU in international relations extends beyond the CFSP. The union is the largest trade entity in the world and its influence will only increase with the establishment of a single currency. It is also one of the largest providers of funds for developing countries and one of the biggest financial contributors in the context of the Middle East.¹²⁴

The UN is viewed as a source of legitimacy falling back on the UN Charter as a codification of international custom. The current development in the field of protection of the international order appears to be difficult to accommodate under the UN-structure. This is because the limits of threats to international security, sufficient to require the use of force, are set by the practice of the Security Council. This practice has not evolved in the same pace as other areas.¹²⁵

At this point, one might ask if it is at all possible to describe this scenery as a structure and to accommodate this structure under a legal theory.

One common denominator seems to be the security concept. Analysing how security is defined by the international actors, the concept is found to imply international peace as well as the rule of law. From this point of departure, a structure consisting of several levels can be observed to emerge for the protection of the international order. Although the actors are protecting their individual independence, a hierarchical structure has emerged among the different organizations and this system shows signs of formal unity. Although the international community is not organized as a state with centralized use of force, different organizations come together to fulfil the

¹²² Smith p. 12.

¹²³ Smith p. 35.

¹²⁴ Through the European Community Humanitarian Office, ECHO, http://www.europa.eu.int/comm/echo/presentation/background_en.htm.

¹²⁵ Anne- Marie Slaughter ‘A Chance to Reshape the UN’ in Washington Post, Sunday, April 13, 2003; p. B07. Slaughter suggests that this could be achieved by linking the human rights side of the UN with the security side.

tasks of a legal system. Consequently, the structure is, if not yet organizational, at least hypothetical.

As exemplified by the ICTY in the Nikolic case, the type of theory that best can accommodate this structure is a monistic theory. Hence, the structure might be analysed, for instance, along the lines of Kelsen's *Stufenbaulehre* with respect to international law. Kelsen's theory may be useful in providing us with a tool with which we can organize and illuminate what we know about the (international) law.¹²⁶

¹²⁶ See Richmond p. 381.

4 A Monistic View of Law: Hans Kelsen's Legal Theory

4.1 General Remarks

Generally speaking – and anticipating Chapter Four - the legal positivist view of law is opposite of the communitarian's – that is, on the face of it: according to positivist theory, the law comes from above, from the sovereign, and not from underneath, i.e. society.

Hans Kelsen has been chosen as representing the positivist and monist¹²⁷ approach to international law since it is argued that his theory of legal system can provide a tool with which to comprehend International Law as a system.

According to Kelsen, there are two types of monism.¹²⁸ According to the one type, international public law is conceived of as a part of national law; and according to the second type international public law is conceived of as being superior to all the national systems. The difference has no practical meaning according to Kelsen himself,¹²⁹ since according to both models the legal system is conceived of as a coherent system of norms, arranged hierarchically and the difference only concerns the basis of validity of international law.¹³⁰

In Kelsen's view, the utmost foundation for the validity of the law and its formal legitimacy cannot consist of a fact. This allows for the dynamic, inherent in law. The actual efficiency of the legal order is only a *conditio sine qua non* and not the foundation. The motivation of the validity of a norm, by a higher norm, is identical with the formal legitimacy of the norm.¹³¹

The *Grundnorm* is what the majority of those who apply law presuppose. It is more or less automatically presupposed by those who regard the law as a

¹²⁷ The term monism is here used in both a legal-theoretical and a legal-technical sense of referring to the relation between national and international law and also to the method of how to receive into domestic law the norms of international law.

¹²⁸ The two types of monism are *Primat der staatlichen Rechtsordnung* and *Primat der Völkerrechtsordnung*.

¹²⁹ Kelsen, *Pure Theory of Law*, [hereinafter *PTL*], University of California Press, 2 ed. 1967, §44, p. 345.

¹³⁰ However, Kelsen reacted strongly against the school of thought following Hegel that favoured a state-linked monism. According to this school, international law was regarded as a "common law" of nations.

¹³¹ Uta Bindreiter, *Why Grundnorm? A Treatise on the Implications of Kelsen's Doctrine* (The Hague: Kluwer, 2002) at p. 46: "With Kelsen, the Begründung of the validity of a single norm – its Geltungsgrund – is the same as the norm's (purely formal) legitimacy."

system of binding norms. By presupposing the basic norm, one highest legal authority is presupposed.¹³² The Grundnorm says in short that: “One ought to behave as the constitution prescribes”¹³³. In my view, one might say that the presupposition of the basic norm implies a “law and order argument”.

The concept of the basic norm is an epistemological *and* a legal concept.¹³⁴ This hypothetical, non-positive “norm” endows the positive norms with objective validity without being tied to their content and invests the constitution with binding force.¹³⁵ This construction makes a non-evaluative legal science possible.¹³⁶

All legal actions or interests are to be referred to a legal norm whose validity is grounded in the *Grundnorm*. Constructing the legal order as a pyramid of interrelated norms gives a guarantee for respect of the rule of law and can as such be an enlightened pattern of democracy.¹³⁷

4.2 The Norm Hierarchy of International Law according to Kelsen

The concept of freedom is linked to a life form shared with others, i.e. the social order. In this sense, freedom means peace. According to Kelsen, the social order makes the use of force a monopoly of the community.¹³⁸ The law is conceived of as a coercive order¹³⁹ that makes this use of force a centralized monopoly of the state and this arrangement brings peace to the society.

By analogy, this applies to the world state as well,¹⁴⁰ since according to Kelsen’s monistic theory, international and municipal law have the same subject matter. It follows that international law is a branch of law and not a

¹³² The preposition of the basic norm in Kelsen’s theory, leads to a non-moral ought. Normativity flows from the top of the hierarchy down through the entire legal system.

¹³³ *PTL* at p. 201: “Coercive acts sought to be performed under the conditions and in the manner which the historically first constitution, and the norms created according to it, prescribe. (In short: One ought to behave as the constitution prescribes.)”.

¹³⁴ Bindreiter p. 43.

¹³⁵ Bindreiter p. 44.

¹³⁶ Rigaux summarizes Kelsen’s monistic and logical approach in four basic elements:

- Identification of law and state
- The idea that a legal order is a compound of norms, the validity of which relies on the *Grundnorm*
- The exclusion of any factual element in the construction of a legal order
- The repudiation of any reference to other non-logical premises, such as morals or

natural law. François Rigaux ‘Hans Kelsen on International Law’ in *European Journal of International Law* 9, number 2 (1998) at p. 329.

¹³⁷ Rigaux p. 330.

¹³⁸ Kelsen, *Peace Through Law* [hereinafter *PThrL*] 1944. Reprint: (New Jersey: The lawbook exchange Ltd, 2000) p. 3: “It is the essential characteristic of law as a coercive order to establish a community monopoly of force”.

¹³⁹ Zwangsordnung.

¹⁴⁰ *PThrL*, p. 3.

mere province of morals if and only if it disposes of its own means of coercion.¹⁴¹

The fact that the international community lacks specialized organs for implementing the (international) law does not prevent its normative system from being a legal system.¹⁴² However, to achieve universal peace, the international order must evolve towards a more mature legal system, meaning a more centralized monopoly of the use of force. War is permitted only as a sanction for violations of international law, i.e. the concept of *bellum iustum*.¹⁴³ This is the physical coercion that is the requisite of the international legal normative order.¹⁴⁴ In other words, the *bellum iustum* doctrine¹⁴⁵ is the cornerstone of the characterization of international law as a legal order.¹⁴⁶ This doctrine is to be understood as the codified rules of international tradition since everything international ethics considers just is very likely to become international law.¹⁴⁷

The essence of the international order in Kelsen's theory, inspired by Kant's moral unity of humanity,¹⁴⁸ is the idea of a community of states, despite their diversity, endowed with equal rights. This is, however, only possible if there is a legal system above the states that delimits the spheres of validity of the national legal systems.¹⁴⁹

From the basic contention of coinciding subject matters, it can be concluded that international law is not confined to relations between states, but can encompass all aspects of human activity.¹⁵⁰ Individual persons cannot then but be subjects of international law. As a consequence, international law is competent to deal with a state's duties towards its citizens.¹⁵¹ Other means of coercion, than use of force, could then be necessary. Perhaps the concept of coercion should not be interpreted as to be limited to the means of physical force.

The efficiency requirement becomes a central question in debating the *Grundnorm* of international law since without permanent effectiveness, the

¹⁴¹ Rigaux p.334; Kelsen, *Principles of International Law* [hereinafter *PIL*] (New York: Rinehart, 1952).

¹⁴² 2nd edn. 1967, ed. Richard W. Tucker, p.17.

¹⁴³ Danilo Zolo: *Hans Kelsen: International Peace through International Law*; European Journal of International Law, vol. 9, number 2, Florence 1998, pp.311-312.

¹⁴⁴ *PThrL*, p. 3.

¹⁴⁵ Rigaux p. 325.

¹⁴⁶ Rigaux and Koskenniemi among others criticize the just war argument as being indefinable morality that can be manipulated to justify anything. See Rigaux p. 341 and Martti Koskenniemi: *From Apology to Utopia. The Structure of International Legal Argument*, Helsinki 1989, p. 443.

¹⁴⁷ Rigaux p. 341; Zolo p. 315.

¹⁴⁸ Kelsen: *Law and Peace in International Relations, The Oliver Wendell Holmes Lectures 1940-41 (Law and Peace)* (1952) pp. 36-37 quoted in Zolo p. 312.

¹⁴⁹ See Zolo pp. 306-307.

¹⁵⁰ *PIL* p. 586.

¹⁵¹ Rigaux p. 332.

¹⁵² *Law and Peace* pp. 90-102; Zolo p. 314.

basic norm is not assumed. However, the “*conditio per quam*” of a valid norm is still the *Grundnorm*. The hypothetical *Grundnorm* of the entire system must be found in the international agreement that will be the organizing structure of the community it has set up.¹⁵²

Pacta sunt servanda is put forward as *Ursprungsnorm*¹⁵³ in the field of international law.¹⁵⁴ This is, however the most important norm, not alone the content of the basic norm of international law. International law is not only the content of multilateral treaties. “The basic norm of international law, therefore, must be a norm which countenances custom as a norm-creating fact, and might be formulated as follows: The states ought to behave as they have customarily behaved.”¹⁵⁵ The positive norm *Pacta sunt servanda*, which is a part of the international customary law, is the base of the binding force of treaties. In Kelsen’s hierarchical structure, international law created by treaties rests upon a higher norm of general international law.¹⁵⁶ It then follows that the presupposed basic norm of international law must be a “norm”, which establishes custom constituted by the mutual behaviour of states as law-creating fact.¹⁵⁷

Furthermore, in a monistic approach, the assumption that an international legal order exists must with a monistic approach lead to the conclusion of primacy of international law in Kelsen’s view. Then, the principal function of the primacy of international law is to determine the scope of validity of national law.¹⁵⁸ Another aspect of Kelsen’s monism is that a legal order is exclusive of any other. Hence, there is no possibility of a conflict of duties arising from a so-called conflict of laws.

Positivism is often thought to be tending towards individualism and is criticized as lacking a communitarian perspective. However, the term international law implies a notion of community, and it has been pointed out¹⁵⁹ that both of Kelsen’s monistic constructions, *Primat der staatlichen Rechtsordnung* and *Primat der Völkerrechtsordnung* imply a communitarian outlook; the primacy of international law implying pacific communitarianism.¹⁶⁰ In *Pure Theory of Law* Kelsen says as follows¹⁶¹:

¹⁵² Rigaux pp. 327-328.

¹⁵³ The time-element conveyed in *Ursprungsnorm* was later abandoned and the concept was developed into the hypothetical *Grundnorm*.

¹⁵⁴ Kelsen: *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920) p. 217; Rigaux p. 327.

¹⁵⁵ *PIL* pp. 417-418; Rigaux p. 328.

¹⁵⁶ *PTL* p. 324.

¹⁵⁷ *Ibid*; *LT* p. 108; Rigaux n. 20.

¹⁵⁸ Another aspect of Kelsen’s monism is that a legal order is exclusive of any other. Hence, there is no possibility of a conflict of duties arising from a so-called conflict of laws.

¹⁵⁹ Koskenniemi p. 426, n. 14.

¹⁶⁰ For Kelsen’s view see ‘Die Einheit von Völkerrecht und staatlichem Recht’ in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 19, 1958 p. 234-248, quoted in Koskenniemi p. 426, n. 14.

¹⁶¹ *PTL* p. 86.

“This becomes particularly clear in the case of a legal order (or the legal community constituted by it) which includes men of different tongues, races, religions, views of the world, and - particularly - men belonging to different antagonistic groups of interests. They all form one legal community so far as they are subject to the same legal order, that means, so far as their mutual behaviour is regulated by the same normative order.”¹⁶²

Pacific communitarianism is implied in the sense that a formal conception of peace is linked to the Rule of Law. In turn, the Rule of Law implies law and order.¹⁶³ That is the core of Kelsen’s theory. The concept of security, as discussed above,¹⁶⁴ implies law and order.

To put it plainly: Presupposing the *basic norm* implies a law and order argument. Law and order promotes peace. Peace is the cornerstone of the concept of security.

The usefulness of Kelsen’s theory lies in organising and illuminating what we know about the law.¹⁶⁵ It is a theory of legal system. The concept of a legal system implies coherence and unity.¹⁶⁶ Kelsen explains the structure of international law as a hierarchical structure where general international law provides for the creation of bodies of “particular” international law. These bodies are described as “communities not having the character of states”.¹⁶⁷ Each community may have its own autonomous legal order but the fact remains that they are still legal orders of international law. The UN falls within this category and possibly even the EU.¹⁶⁸ Along these terms, Richmond analyses the EU and finds it a fruitful model of “making intelligible what we observe”.¹⁶⁹

Nevertheless, the basis for the Kelsenian international order still seems uncertain; the content of the basic norm of International Law remains to be clarified and the criteria for legal system,¹⁷⁰ as put up by Kelsen, seem unsatisfactory with regard to the society of today. Obviously, there is no universally respected international law.

¹⁶² What might be seen here is a glimpse of Kelsen’s own cultural heritage, namely Kelsen’s upbringing in and acquaintance with the Habsburgian “Vielvölkerstaat”.

¹⁶³ Koskenniemi p. 443.

¹⁶⁴ See above chapter 3.2.1.

¹⁶⁵ Richmond p. 381. According to Richmond, Kelsen’s theory is even applicable on the EU structure: Catherine Richmond ‘Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law’ in *Law and Philosophy* 16, 1997 pp. 377-420.

¹⁶⁶ Richmond p. 382.

¹⁶⁷ PIL, p. 251 quoted in Richmond p. 383.

¹⁶⁸ Richmond p. 397.

¹⁶⁹ Richmond p. 378.

¹⁷⁰ Hierarchical structure of norms, centralized exercise of power and a certain amount of efficiency.

What then, would be the ground of legitimacy? Maybe it could be found in the common values shared by the inhabitants of the international community. One of the most prominent of these is security.

5 The Communitarian View of Law

5.1 General Remarks on Communitarianism

In general, the term “Communitarians” is comprehensive. Within communitarian theory, two fractions can be identified. They are usually referred to as philosophical communitarianism and political communitarianism.

The school of philosophical communitarianism was founded in the 1970’s. What binds the philosophical communitarians together is their criticism of John Rawls’ theory according to *A Theory of Justice*, and Robert Nozick’s theory according to *Anarchy, State and Utopia*¹⁷¹ and the ideas they represent. The main point of the communitarian criticism is a distinctive anti-individualism.¹⁷² Rather, they focus on belonging to a community and the thought of common good as opposite to tolerance as put forward by the liberals.¹⁷³ Charles Taylor, Michael Sandel, Alistair MacIntyre and Michael Walzer, to name the most influential, have been placed in this category, although not necessarily by themselves.

The best known representatives of political communitarianism are Amitai Etzioni and Robert Bellah¹⁷⁴. This particular type of communitarianism owes a lot of its basic concepts to philosophical communitarianism. The main features of this branch of communitarianism are the focus on community as a central concept supported by the concepts of family, values and the central role of education. This would in the view of Etzioni finally lead to a new moral, social and public order.¹⁷⁵ Political communitarianism

¹⁷¹ Emil Uddhammar (ed.) *Gemenskaparna* (Stockholm: Timbro, 1993) p. 7.

¹⁷² [...] the community, or the state, is *more real* than the individual and the individual who does not fit in with the social norms or the law is objectively *irrational*.” In ‘Rights, Responsibilities and Communitarianism’ edited and published by Kelley L. Ross at <http://www.friesian.com/rights.htm>. The author is strongly critical to the implications of communitarian theory.

¹⁷³ Communitarianism wishes to deny the liberty and give to the public (the “community”) the power to regulate the behaviour of individuals (impose disabilities) in order to limit public liabilities. That is the point: the Communitarian emphasis on the “community” makes everyone a ward of the community and responsible to the community, rather than their own keeper and responsible to themselves for their own actions. In ‘Rights, Responsibilities and Communitarianism’.

¹⁷⁴ “Robert Bellah especially believes that the only true community is one created and controlled by democratic political power, which also happens to mean that of the largest political unit possible.” See ‘Rights, Responsibilities and Communitarianism’.

¹⁷⁵ Amitai Etzioni *The Spirit of Community. Rights responsibilities and the communitarian agenda* (London: Fontana Press, 1995) quoted in ‘Communitarianism’, communitarianism@the informal education homepage. <http://www.infed.org/biblio/communitarianism.htm>.

emphasizes (moral) unity as the source of strength in a community. Contrary to philosophical communitarians, political communitarians believe in moral unity¹⁷⁶ as opposed to the idea of a common good. The question that follows is whether moral conflict threatens the ability to establish a community or if it is possible to establish a community despite moral disagreement. On this point political communitarians disagree. However interesting this might be, the particular school of political communitarianism falls outside the scope of this presentation.¹⁷⁷

5.2 A Brief Introduction to Philosophical Communitarianism

Communitarian criticism is not only directed towards traditional ideological and political notions. To a larger extent, it is directed towards basic conceptions in our view of Man and society. Classical liberal theory is based on general, abstract rules and rights. Communitarians claim that such customs and rules emanate within a specific community or society. Subsequently, they become valid within that society. However, it does not follow automatically from the fact that rules are borne in a specific context, that they cannot have general validity. The essential here is, in what way they have come into being.

Some ideas of communitarian theory can be traced back to Hegel and beyond. Like Kant, Hegel asserts that the binding force of rules lies in the free and reasonable will of man. Contrary to Kant,¹⁷⁸ Hegel maintains that the free will is characterized by the society in which the individual lives. To the communitarian, the individual is not the point of departure (basis). The essential is that the law is binding because of its relation to individual morality. This connection is constituted by the concept of virtue.¹⁷⁹ The citizen feels obliged to follow the implications of this morality since it is only within this specific society/culture that he/she can maintain his/her

¹⁷⁶ As opposed to for example MacIntyre. See below in note¹⁹⁴.

¹⁷⁷ For an outline of key positions of political communitarianism see Amitai Etzioni: *The Spirit of Community. Rights, responsibilities and the communitarian agenda*, (London: Fontana Press, 1995)

¹⁷⁸ See Joakim Nergelius (red.) *Rättsfilosofi. Samhälle och moral genom tiderna*. (Lund: Studentlitteratur, 2001) p. 94. Communitarians draw inspiration from Aristotle when he argues that the value of the state is the good it represents. MacIntyre draws strongly on Aristotle when he argues for virtue as a concept.

¹⁷⁹ "For what constitutes the good for man is a complete human life lived at its best, and the exercise of the virtues is a necessary and central part of such a life, not a mere preparatory exercise to secure such a life. [...] the suggestion therefore that there might be some means to achieve the good for man without the exercise of the virtues makes no sense." Alasdair MacIntyre *After Virtue*, 2nd edn. (Notre Dame, Indiana: University of Notre Dame Press, 1984) at p. 149.

identity.¹⁸⁰ Virtue¹⁸¹ manifests itself in custom and practice¹⁸², in tradition¹⁸³.

In MacIntyre's words, "The immediate outcome of the exercise of a virtue is a choice which issues in right action".¹⁸⁴ Hence, it is necessary to the communitarian to interpret and refine values that are immanent in societies and communities. This means that there cannot be a universal list of significant values since this will depend upon the traditions in each society.

According to classic liberal thinking, which claims to be universal,¹⁸⁵ the solution to all problems lies in providing the individuals with the opportunity to realize themselves. This opportunity can be provided by the state or the market, according to liberal theory. Each individual can then make his or her own choices. Making a choice is an independent act of will and all choices are equally valid. All types of social contract theories assume that the individual is self-sufficient and entitled with unconditionally binding rights. The duty to belong to a society or obey the state is deduced from the social contract concluded by consent.

To the communitarian, this line of argument overlooks one important element, namely, that people interact. In opposition to classical liberal thinking, Communitarianism focuses not on the individual but on society and the significance of collectives, institutions etc. Communitarians do not think that the individual is in direct, unmediated relationship with the state and with society but argue for the significance of status and local networks, and the potential of other intermediate institutions.¹⁸⁶ In addition, the communitarians do not view a free unregulated market as the key social institution.¹⁸⁷ Rather, they focus on the role of mediating institutions¹⁸⁸ and

¹⁸⁰ "The virtues are precisely those qualities the possession of which will enable an individual to achieve *eudaimonia* and the lack of which will frustrate his movement towards that *telos*." MacIntyre p. 148.

¹⁸¹ "A virtue is an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods." MacIntyre p. 191.

¹⁸² "By a 'practise', MacIntyre writes, I am going to mean any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended." MacIntyre p. 187.

¹⁸³ "For all reasoning takes place within the context of some traditional mode of thought, transcending through criticism and invention the limitations of what had hitherto been reasoned in that tradition [...] when a tradition is in good order it is always partially constituted by an argument about the goods the pursuit of which gives to that tradition its particular point and purpose." MacIntyre p. 222.

¹⁸⁴ MacIntyre p. 149.

¹⁸⁵ MacIntyre p. 266. MacIntyre criticizes here Kant's categorical imperative as not being universal.

¹⁸⁶ Elizabeth Frazer *The Problems of Communitarian Politics. Unity and Conflict* (New York: Oxford University Press, 1999) pp. 21-22.

¹⁸⁷ Frazer p. 22.

¹⁸⁸ As a non-exhaustive list of such institutions Taylor mentions museums, symphonic orchestras, universities, laboratories, political parties, courts, elected bodies, newspapers,

norm-governed procedures.¹⁸⁹ The question of what is a good deed cannot be answered without paying attention to the tradition to which the acting subject belongs and what position (status) that person upholds within his community.¹⁹⁰ This means that ethically, communitarians look to the social individual or collective and the significance of concepts such as reciprocity, trust, solidarity etc. A person's identity is determined by certain values and evaluations, inseparable from the acting subject.¹⁹¹

This disposition is the foundation of our thinking, following communitarian reasoning. Then, the choices we make cannot be separated from the context in which they are made.¹⁹² The (moral) law is created by an act of will.¹⁹³ Law is perceived of as an expression of common values. Hence, it is clear that in a communitarian view, the focus is on a certain type of society. However, which type of society implied is not possible to determine from this point of view. This is a weakness in communitarian argumentation.

The word "community" is often understood and used to mean small groups like the family, the congregation or the small town. However, the concept of community is based on shared values and shared goals. For a community to exist, must there then be a complete consensus regarding the shared values or goals? Community is not a question about silent consensus¹⁹⁴ but implies agreements about substance.¹⁹⁵ It is about the dynamics of the pluralistic society. In reality, this would mean that a person belongs to many different communities. Religious, philosophical or moral unity does not seem to be possible, nor is it necessary for social unity in a community.¹⁹⁶

The term community used in the sense of a community of shared values can be of considerable proportions as well, if community is properly understood or defined, as argued by Bellah.¹⁹⁷ In a community of shared values and shared goals there must be an agreement regarding the best *process* of achieving these goals since the circumstances, in relation to the community, change over time. Hence, the best procedure to achieve the goals must be dynamic.

publishers, TV-stations etc. See Charles Taylor *Philosophical papers, vol. I and II* translated in Uddhammar p. 81.

¹⁸⁹ Frazer p. 22.

¹⁹⁰ Michael Sandel *The procedural republic and the unencumbered self*, Political theory 12, 1984, translated in Uddhammar, at p. 102.

¹⁹¹ Taylor in Uddhammar, p. 46.

¹⁹² MacIntyre p. 113.

¹⁹³ Sandel in Uddhammar p. 95.

¹⁹⁴ See MacIntyre pp. 252-253.

¹⁹⁵ Robert N. Bellah: *Community Properly Understood: A Defence of "Democratic Communitarianism"* in *The Essential Communitarian reader*, Ed Amitai Etzioni (Oxford: Rowman & Littlefield Publishers Inc., 1998) p. 15.

¹⁹⁶ Rawls p. 16.

¹⁹⁷ Ibid.

5.3 Communitarian View of International Law?

The communitarian perception of law applied to international law means that states do not have the status of legal persons. Rather, they are collections of the will of the people and cannot be separated from the people. Furthermore, international law is perceived of as working towards certain world goals that incorporate and transcend the interests of each state - ultimately towards world peace.

For the concept of community to have any real significance in the context of international law, its definition must be based on general ideas, or principles that anyone reasonably would agree upon, such as democracy, rule of law etc. Otherwise, the definition becomes too immediate and fragmentary.

The extent of the community is a complex question, and no definite answer can be provided. This is another weakness in communitarian argumentation. Communitarianism is a reaction to liberal individualism and its claim to universality: If “community” is too narrowly defined, it risks individualism; if on the other hand, community is too comprehensive, it tends towards becoming universal. Thus, the strength of a communitarian theory lies in the argumentation about the definition of the community.

What is it, then, that holds a society or community together, according to communitarian theory? The ultimate argument is that it is law and order that holds society together. Law is perceived of as an expression of common values. In the international context, this perception of law gives rise to, *inter alia*, the problem of conflicting state values and individual values. What happens then to the binding force of law?

“Legal systems may contain principles, values or ‘ethical cores’, but they are ‘governed by juridical norms’. Any theory which aims particularly to focus on the principled, value-orientated side to law must also provide for the obligatory, normative character of law.”¹⁹⁸ It appears as if Communitarianism does not meet this standard:¹⁹⁹ to achieve the goal of world peace, communitarian theory needs something in addition.

What is needed is a normative theory of law to accommodate a theory of shared values and goals. This can be achieved by linking the latter to a monistic theory such as Kelsen’s: Kelsen’s basic norm implies “law and order” which in turn promotes peace.

¹⁹⁸ Richmond pp. 386-387.

¹⁹⁹ The Communitarians have been accused of lacking a positive theory of their own. See Uddhammar p. 9 with references in note 3.

6 Analysis and Conclusion

It has been said that historically the weakness of international law is that it has always manifested itself as a horizontal system lacking effective enforcement mechanisms to enforce legal norms. There is no legislature to create international law and there is no police force to enforce it. Some would argue that its rules are uncertain and obedience is voluntary.

In view of recent developments, it might be said that a more communitarian view of international law is taking form. The idealist school of international law derived from Kant appears to be gaining upon the realist school of thought.²⁰⁰ The communitarian view sees international law as working towards certain world goals that incorporate and transcend each state's own interests. The paradox of international law in this view is that it should be both normative and concrete. Thus, if international law tries to be too normative it becomes utopian and irrelevant. On the other hand, if it yields too much to states, it ends up in the defence of sovereignty.

The European Parliament launched a resolution of April 4 1994 on the "Right of Intervention on Humanitarian Grounds".²⁰¹ In this resolution the European Parliament accepted the concept of Humanitarian Intervention, considered that current international law does not necessarily represent an obstacle to the recognition of the right of Humanitarian Intervention but also, that, where all else has failed, the protection of Human Rights may justify Humanitarian Intervention. This seems to be a strengthening of the practice of human rights in the international relations but without institutions to guarantee this practice and a structure for these institutions, it will not be lasting. This together with the increasingly closer cooperation between NATO, EU and UN seen in the light of the *Nicolic* judgement leads us to conclude that a structure of international institutions would be beneficial to us.

The tribunal in the *Nicolic* case concluded that the findings in the *Simic*-decision applied here as well: "In principle, there is no reason why Article 29 should not apply to collective enterprises undertaken by States, in the framework of international organisations and, in particular, their competent organs such as SFOR in the present case. [...] The need for such cooperation is strikingly apparent, since the International Tribunal has no enforcement arm of its own – it lacks a police force."²⁰² Hence, the tribunal is here promoting a monistic view of international institutions and international law by interpreting the statute teleologically²⁰³ and not simply textually. Deciding upon the question of a legal impediment to exercise jurisdiction over the accused, the tribunal continues to emphasize the

²⁰⁰ See above on page 16, note⁵⁸.

²⁰¹ See above on page 25, note¹¹⁷.

²⁰² See above on page 12.

²⁰³ See above note³³.

vertical perspective. Drawing inspiration for their argumentation from national case law, the tribunal finds no impediment to the exercise of jurisdiction over the accused. Regarding the question of state sovereignty the tribunal concludes that sovereignty by definition cannot be attached the same importance in an enforcement measure under Chapter VII of the UN Charter as in the case of two states disputing.

The decision of the tribunal in the Nikolic case clearly shows the advantages of a vertical/monistic perspective in deciding and promoting international law. Clearly, the tribunal perceives of international law as being a legal *system*. Richmond finds that “The concept of a legal system implies a coherence and unity unfamiliar to the ‘empirical reality’ of Community law”.²⁰⁴ This is just as valid in the context of international law.

Arguing that when two systems show irresolvable contradictions, be it morality and positive law, international law and state law or the legal systems of two states, this would result in reciprocal independence is simply not correct since this has as consequence that they cannot both be valid. Contrary to this, in the monist view,²⁰⁵ a unified system of valid law, comprising all the positive legal orders, emerges. This unity is however only cognitive and not organizational. The State as a social order must be identical with the law.²⁰⁶ The system of international law according to Communitarian theory seems to lack the necessary legal structure. It is *prima facie* legitimized by reference to the doctrine of community values. What is needed is a unifying legal theory.

One strong state possessed of military and economic power and embarked on expansion and glory is sufficient to perpetuate the cycle of war and preparation for war.²⁰⁷ What the protection of the international order here comes down to is how the Security Council defines which threats to international security are sufficient to require the use of force, i.e. are sufficient to act on. According to Slaughter, a more adjusted definition could be achieved by linking the human rights side of the UN with the security side. This would mean that the international system would focus more on peoples than states which is something that is possible in Kelsen’s theory, since he enlarges the field of subjectivity to include natural persons even under international law. The doctrine of Human Rights limits the internal autonomy,²⁰⁸ and the growing assertion of the doctrine of human rights and the new practice of “humanitarian intervention” to protect them, contributed *de facto* to extending the subjectivity of international law to individuals. The creation of ICTR and ICTY mandated to judge war crimes and crimes against humanity committed by individuals and subsequently the International Criminal Court can be seen as a manifestation of the aforesaid.

²⁰⁴ See above note¹⁶⁶.

²⁰⁵ This from the standpoint of the Pure Theory of Law is simply an epistemological corollary.

²⁰⁶ See above chapter 4.1.

²⁰⁷ See above note⁵⁹.

²⁰⁸ See above note⁵⁷.

According to Kelsen, the purpose of the law and order argument on an international level is the struggle for world peace. In communitarian theory, it is the law and order argument that holds society together. The question now is; are the two theories related to each other? Could those two, seemingly different theories, be linked together to create a structure for an international law argument that would suggest a possible solution to our problem?²⁰⁹

In my view, there is a connection between the two theories in the fundamental concept of peace. Taken seriously, Kelsen's theory implies a communitarian outlook.²¹⁰ This theory does not claim to be universal in the sense that it would oblige everyone but it obliges the citizens, i.e. those whom the legal order is directed to. This group, or community, is determined by Kelsen's purely formal criteria of a valid legal order.²¹¹ Hence, it can be said that the Pure Theory of Law is a theory for a certain community. This coincides with the communitarian view of citizens as a special community. The community intended in Kelsen's theory is the legal community constituted by the legal order or in other words the state.

Kelsen explains the structure of international law as a hierarchical structure where international law created by treaties is based on a principle of general international customary law.²¹² Legal norms created by international courts constitute a third level in this hierarchy, since these courts are created by means of international treaties. Hence, the basic norm of international law must be a "norm" establishing custom as a "law-creating material fact".²¹³

Applying this tool to the field of modern relations proves that the content of the presupposition is order; law and order. This would mean that what is really presupposed, is authority; more specifically, a single legal authority. Historically, this presupposition is made out of tradition. It is custom in western culture. Custom is an act of will, individual or collective.²¹⁴ Such a presupposition could even be identified as part of our *cultural heritage*.

According to Communitarian theory, states are not legal persons but mere collections of the will of people. Law is perceived of as an expression of common values. That which holds a "community" together is, ultimately, "law and order".

Applied to international law, this results in the perception of international law as the realization of certain world goals. The goals and values are associated with and cannot be separated from the people. These common values, manifested in the virtue of each citizen, stem from the *cultural heritage* of the community in question.

²⁰⁹ See above note⁷.

²¹⁰ See above on p. 32.

²¹¹ See above note¹⁷⁰.

²¹² See above note¹⁵⁷.

²¹³ Ibid.

²¹⁴ See above chapter 4.2.

The notion of a “type of society” that Communitarians bear upon, impossible to determine within Communitarian theory, becomes clearer when interpreted in the light of Kelsen’s positivism. In Kelsen’s view, the state is one with its legal system. This means that the society intended in this view is the legal society of the state. In the international context, it is the international community that is intended. One of the weaknesses of communitarian theory is the difficulty to assess the scope of the community in question. This problem is avoided if the concept of community is interpreted as suggested by Kelsen. This means that the concept of *cultural heritage* is at the basis of *both* theories.

It has been said that what is needed is a normative theory of law for the theory of shared values and goals. This can be achieved by the link to Kelsen’s *Stufenbau* and his theory of the basic norm of international law. This line of thought would promote a structure where the values in our cultural heritage, such as world peace, could be promoted by the international legal order.

Interpreting international law in the above sense would mean that state sovereignty could not be forwarded as a defence of non-compliance with international law. This would empower the Security Council to act in a broader variety of situations. For example, interpreting the UN Charter according to communitarian theory would affect the validity of SC and GA decisions. Decisions by the Security Council are valid as long as these decisions realize certain world goals that are inherent in international law. These goals incorporate and transcend each state's own interests.

Although acknowledging the circumstance that each community has its own autonomous legal order, the fact still remains that they are legal orders of international law.²¹⁵ Applied to NATO, this would mean that although it has its own legal framework it is still a part of a larger community. Following the argumentation here, the legitimacy of NATO actions then lies in realizing the values inherent in that community.

To my mind, this is exactly what happened when NATO detained the accused Mr. Nikolic and the Tribunal found itself not to be barred from jurisdiction, even considering the specific circumstances of his arrest.

²¹⁵ See above on p. 33.

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