# General International Law in the Relations between International Organizations and Their Members

**1. Introduction**

While the position that international organizations occupy in the international legal system remains elusive, it has been a progressively accepted that customary international law – or at least some of it – applies to them.[[1]](#footnote-1) Nothing exemplifies this trend more than the projects that the International Law Commission carried out to codify and progressively develop the law of treaties and the law of responsibility of international organizations. The essential premise behind the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (‘VCLT 1986’) and the 2011 Articles on the Responsibility of International Organizations for Internationally Wrongful Acts (‘ARIO’) is that most of the customary rules on treaties and responsibility that govern the relations between States can be extended to international organizations.

If one accepts that international organizations are subject to the rules of general international law,[[2]](#footnote-2) one of the fundamental questions that arise concerns the scope of application of those rules. It should be uncontroversial that general international law applies when international organizations relate to the outside world, that is, when they maintain relations with third parties on the international plane that are not – nor could be – governed by constituent instruments and other internal rules. Those ‘external relations’ correspond, however, to just a small fraction of the functions that international organizations are set up to perform. The bulk of their activities takes place on the institutional plane, where internal rules provide for powers, rights and duties for the organization to pursue its mandate, normally involving action directed at member States. What is then the role, if any, that general international law can play in the relations between international organizations and their members?

The assumption underlying the ILC’s codification efforts is that the general law of treaties and general the law of responsibility apply not only when international organizations relate to the outside world but also to interactions between organizations and members. That assumption is left implicit in VCLT 1986, but is fleshed out in the ARIO, with Article 10(2) providing that the existence of a breach of an international obligation triggering the responsibility of an organization ‘includes the breach of any international obligation that may arise… towards its members under the rules of the organization’.[[3]](#footnote-3) My aim in this article is to question and further qualify that assumption. I investigate the applicability of general international law between international organizations and their members by distinguishing between two categories of relations.[[4]](#footnote-4) The first comprises relations that take place on the international plane notwithstanding that they involve entities which remain bound by the internal rules of the organization. The second concerns relations situated on the institutional plane, where rights, obligations and capacities are governed by constituent instruments and other internal rules. I argue that general international law applies by default to relations belonging to the first category (2.1), only being displaced when the internal law of an organization contains applicable *lex specialis* (2.2). General international law cannot, however, claim a similar role at the level of internal institutional relations (3.1). The question there becomes one concerning the dialogue between relatively autonomous international legal orders similar to that posed when one addresses the relations between international law and domestic legal systems. That means that it is the internal law of each organization that ultimately defines the terms on which rules of international law are allowed into the institutional plane (3.2). At the same time, I advance a normative argument for a ‘monistic presumption’ for the application of general international law in cases where the rules of the organization are silent (3.2.1), and consider some of the limits of this presumption (3.2.2). The article concludes with an illustration of how the analytical framework that it sketches can be applied (4).

 Because it delves into questions of applicable law, the main contribution that this article makes is methodological in character. Its ambition is to help international lawyers dealing with complex disputes opposing international organizations and their members structure the legal analysis. In any given case, should general international law be the starting point for the analysis, with the rules of the organization only playing a role to the extent that they contain applicable *lex specialis*? Or should one rather start with the rules of the organization, with general international law filling the occasional gap only to the extent allowed by those rules? In either case, what is the analytical framework that explains the interplay between general international law and the rules of the organization?

It is often the case that an act performed by an organization or one of its members gives rise both to questions of international law (their rights and obligations as international legal subjects on the international plane) and to questions of institutional law (their rights and obligations under the rules of the organization). General international law may have a role to play in tackling both categories of questions, but it does so on different grounds and to varying extents. Much confusion can result when the international and institutional planes are unreflectively conflated,[[5]](#footnote-5) ranging from sloppy assumptions that general international law is always immediately applicable to objectionable strategies to limit its application. In addressing the possible facets of any given dispute, international lawyers must be able to identify and follow the steps of the legal analysis that pertains to the category to which the aspect being considered belongs. That is why the methodological inquiry carried out in this article is apposite.

## **2. Relations on the international plane**

### **2.1 General international law as the applicable law**

Because international organizations and their members act in tandem on the international plane, not all of the relations between them fall under the institutional framework laid down by constituent instruments and other internal rules. Consider, for example, transactions taking the form of a bilateral treaty. When an organization and a member express their consent to be bound by a headquarters agreement, they do not do so in their ‘institutional capacity’, but rather as autonomous legal persons operating on the international plane. The International Court of Justice took this view in its advisory opinion on *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*. Tasked with identifying the rules and principles governing the World Health Organization’s transfer of its regional office from Egypt, the Court described the rights and obligations arising from the headquarters agreement concluded between them as a ‘contractual legal régime’ reached by the parties by ‘mutual understandings’.[[6]](#footnote-6) Likewise, the Court noted in its seminal opinion on *Reparation for Injuries Suffered in the Service of the United Nations* that it would be ‘difficult to see’ how the 1946 Convention on the Privileges and Immunities of the United Nations ‘could operate except upon the international plane and as between parties possessing international personality’.[[7]](#footnote-7) Neither the 1951 Agreement nor the 1946 Convention derive their validity from the internal law of the WHO or the UN. Instead, both are subject to the general law of treaties.

The same idea can be traced back to the ILC’s work on the law of treaties involving international organizations. While the Commission avoided taking a clear position on the project’s scope of application, the term ‘treaty’ was broadly defined as ‘an international agreement governed by international law and concluded in written form between one or more States and one or more international organizations or between international organizations’.[[8]](#footnote-8) In the commentary to the draft articles (later sent for adoption at the 1986 Vienna Conference on the Law of Treaties), the Commission stated that agreements between organizations and members were governed by international law unless a contrary intention was expressed:

If an agreement is concluded by organizations with recognized capacity to enter into agreements under international law and if it is not by virtue of its purpose and terms of implementation placed under a specific legal system (that of a given State or organization), it may be assumed that the parties to the agreement intended it to be governed by general international law.[[9]](#footnote-9)

It is true, as Special Rapporteur Paul Reuter pointed out, that the ‘internal law’ of an international organization could constitute ‘a highly developed legal system of its own, to which… a conventional act should be subject in its entirety’. In such cases, the relations between the organization and members would be ‘removed in their entirety from the sphere of general international law’ and placed under that ‘highly developed legal system’.[[10]](#footnote-10) But unless this is provided for or otherwise inferred, the ultimate source of the validity of treaties between members and international organizations remains the customary principle *pacta sunt servanda*.

The same applies to responsibility for breaches of international obligations owed between organizations and members. Whenever international organizations and their members can be viewed as legally autonomous entities operating on the international plane, their relations will be governed by general international law.

### **2.2 The rules of the organization as lex specialis**

That general international law covers relations external to the institutional framework of an international organization does not mean, however, that it is always applicable between organization and members to the same degree that it would be in relations opposing the organization and a third party. Under the principle *pacta tertiis nec nocent nec prosunt*,[[11]](#footnote-11) the rules of organization are *res inter alios acta* between the organization and a third party, and cannot have the effect of displacing the general rules of public international law applying between them. The commentary to the ARIO accurately observes that the internal law of an organization ‘cannot *per se* affect the obligations that arise as a consequence of an internationally wrongful act’ vis-à-vis a State which is not a member of that organization.[[12]](#footnote-12) In contrast, between an organization and its members, constituent instruments and other internal rules may be part of the applicable law as *lex specialis*. To the extent that the rules of the organization constitute a source of rights and obligations both for the organization and its members, they may affect the general law applying to their relations even on the international plane.

But can the rules of the organization be indeed characterised as *lex specialis* applicable on the international plane? In an insightful study, Christiane Ahlborn suggested that because an international organization ‘is not a contracting party to its constituent instruments under international law’, restrictions imposed by those instruments do not apply to relations taking place outside the institutional framework.[[13]](#footnote-13) It is doubtful, however, that the notion of *lex specialis* has to be construed this narrowly. *Lex specialis* is a ‘technique of interpretation and conflict resolution’ according to which ‘wherever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific’.[[14]](#footnote-14) Applying it to relations between an organization and its members means recognising that, even if the character of the rules of the organization is ‘institutional’ (or ‘constitutional’) as opposed to ‘contractual’, the rules of the organization remain a source of rights and obligations for the entities concerned. There is no reason why such rules should not displace the general law in the same way as any other special rule: as the ILC pointed out in its Conclusions on the Fragmentation of International Law, ‘[t]he source of the norm (whether treaty, custom or general principle of law) is not decisive for the determination of the more specific standard’.[[15]](#footnote-15)

Consider, for example, the rule in Article 103 of the UN Charter, which prescribes that ‘[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail’. If the UN Security Council (‘UNSC’) were to adopt a resolution under Chapter VII of the Charter that conflicts with the provisions of a headquarters agreement between the UN and a member State, there would be little sense in denying that that resolution, in the light of Article 103, would constitute *lex specialis* displacing the rule that applies to the parties on the international plane, even if the grounds on which the member and the organization are bound by the Charter differ. The relations between organization and members typically occur under the ‘vertical’ institutional framework established by the constituent instrument; but the fact that they can also interact on the ‘horizontal’ international plane creates the occasion for the two legal orders to intersect. That invites further reflection on the forms that *lex specialis* may take in international law, without losing sight of the rationale and the purpose of the doctrine, namely to provide a structural norm for solving conflicts between rules applying to the same situation.

The proposition that constituent instruments and other internal rules may constitute *lex specialis* applicable in the relations between organizations and members is expressed in a few provisions of the ARIO. First, Article 32 prescribes that the responsible organization ‘may not rely on its rules as justification for failure to comply with its obligations’ of cessation of or reparation for an internationally wrongful act that it has committed, but then emphasises that the general rule is ‘without prejudice to the applicability of the rules of an international organization to the relations between the organization and its [members]’. As a result, Article 32 is entitled ‘*relevance* of the rules of the organization’, in contrast to its counterpart in the Articles on the Responsibility of States for Internationally Wrongful Acts (‘ARS’), the title of which is ‘*irrelevance* of internal law’. Secondly, Articles 22 and 52 prescribe that countermeasures may be taken between organizations and members, in reaction to breaches of obligations other than those arising under the rules of the organization, only insofar as ‘the countermeasures are not inconsistent with the rules of the organization’. Third, the general clause on *lex specialis* contained in Article 64 clarifies that special rules that may affect the conditions for the existence of an internationally wrongful act or the content or implementation of the ensuing responsibility ‘may be contained in the rules of the organization applicable to the relations between an international organization and its members’.

Similar provisions are nowhere to be found in the 1986 Vienna Convention. The most glaring omission is in Article 27, with the rule whereby ‘[a]n international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty’ not making any special allowances – unlike Article 32 ARIO – for treaties between international organizations and members. Article 5, common to the 1969 Vienna Convention on the Law of Treaties (‘VCLT 1969’) and VCLT 1986, is the only provision to make a modest attempt at regulating the question of *lex specialis*.It prescribes that the application of the two Conventions to ‘the constituent instrument of an international organization’ and to ‘any treaty adopted within an international organization’ is ‘without prejudice to any relevant rules of the organization’. Article 5 provides, in the words of a leading commentator, a ‘broad and variable exception’ that may allow the law to develop ‘along lines peculiar and appropriate to those instruments and their function in the international community’.[[16]](#footnote-16) But because the scope of Article 5 is narrow, it can hardly be construed as a general *lex specialis* clause applying to treaties concluded between organization and members, unless the notion of ‘treaty adopted within an international organization’ is stretched far beyond its ordinary meaning.[[17]](#footnote-17)

The reason why the ILC did not inquire into the effect of constituent instruments and other internal rules on treaties concluded an organization and its members appears to be twofold. First, the Commission treated the matter as one going beyond the purview of the law of treaties. The commentary states that the rule now contained in Article 27 VCLT 1986 pertains ‘more to the regime of international responsibility than to the law of treaties’ and as such constitutes ‘an incomplete reference to problems’ which not even the 1969 Vienna Convention purported to tackle.[[18]](#footnote-18) Second, the ILC made a conscious effort not to delve into the boundaries between general international law and the internal law of each organization. As Special Rapporteur Reuter noted in the debate, if an organization ‘concluded a treaty with one of its member States and at a later stage made changes in its rules that were binding on all its member States, its constitution might be in conflict with the treaty and with a treaty right or a right derived from a treaty’; to his mind, the Commission ‘was not required to resolve problems of that type, since they constituted a special case of conflict, which was covered by the rules of each organization’.[[19]](#footnote-19)

Adding even more ambiguity to an already convoluted approach is a statement that Special Rapporteur Reuter made when the Commission debated the rule now found in Article 46 VCLT 1986, concerning ‘provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties’. Reuter suggested that ‘in the case of a treaty between an organization and one or more of its members, the question of invalidity was not subject to rules of general international law’,[[20]](#footnote-20) for ‘[c]ases of that kind must be settled by the special law and practice of the organization’.[[21]](#footnote-21) Yet, the commentary that the Commission eventually adopted arrives to the opposite conclusion. It goes as far as pointing out that members ‘must be aware of the rules regarding the conclusion of treaties’ as they participate in the decision-making of the organization and thus ‘assume a share of the responsibility for the conclusion of irregular treaties’.[[22]](#footnote-22) The rule in Article 46 is thus affirmed to apply between organizations and members.

That the ILC embraced the proposition that the rules of the organization are *lex specialis* for organizations and their members in the ARIO, but dodged it in the project on the law of treaties, suggests that there is some uncertainty as to the precise ways in which rights and obligations assumed on the international plane may affect rights and obligations accruing on the institutional plane. In some cases, constituent instruments will seek to clarify the issue, as with Article 103 of the UN Charter as discussed above. In others, no automatic priority between rules arising from one category or the other should be assumed in cases of conflict. Conflict should be treated as a matter for ‘contextual appreciation’ taking into account other norms of interpretation or conflict resolution, in particular the overarching goal envisaged by the ‘principle of harmonization’, according to which ‘when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations’.[[23]](#footnote-23)

### **2.3 Mutual obligations of cooperation and good faith**

While the rules of the organization are the source of *lex specialis* most likely to affect the relations between international organizations and members taking place on the international plane, attention must also be paid to special (customary) rules in the law of international organizations that can emerge as practice and precedent evolve.[[24]](#footnote-24) A potentially relevant special rule was identified by the ICJ in *Interpretation of the Agreement*. Having described the arrangements between the WHO and Egypt leading to the establishment of a regional office of the WHO in Alexandria as a ‘contractual legal régime’, the Court observed that ‘[t]he very fact of Egypt’s membership of the Organization entails certain mutual obligations of co-operation and good faith incumbent upon Egypt and upon the Organization.’[[25]](#footnote-25) Judge Ago further noted, in this connection, that the ‘legal relations between an international organization and the host State constitute a special régime’.[[26]](#footnote-26)

The ILC relied on the notion of mutual obligations and good faith when it considered rules on countermeasures applicable to relations taking place outside the institutional framework. Articles 22(2) and 52(1) ARIO first of all prescribe that countermeasures must not be ‘inconsistent with the rules of the organization’. The two provisions go beyond that, however, by specifying that countermeasures may only be taken if ‘no appropriate means are available for otherwise inducing compliance with the obligations of the responsible international organization concerning cessation of the breach and reparation’. This additional requirement, which finds no counterpart in the law of State responsibility, is meant to give expression to the ‘principle of cooperation underlying the relations between an international organization and its members’.[[27]](#footnote-27) Such a ‘principle of cooperation’ could potentially also justify the rule found in paragraph 4 of Article 51 ARIO, which provides that countermeasures are to be taken ‘in such a way as to limit their effects on the exercise by the responsible international organization of its functions’.[[28]](#footnote-28)

 The proposition that transactions between an organization and members on the international plane may be affected in various ways by normative considerations arising from the ‘organic link’[[29]](#footnote-29) that brings them together on the institutional plane is one worth considering. But the extent to which insisting in a special category of ‘mutual cooperation and good faith’ for international organizations and members is helpful in addressing concrete problems is up for debate. Does it add much to the principle of good faith under general international law, which, as the ICJ stated in *Nuclear Tests*, is ‘[o]ne of the basic principles governing the creation and performance of legal obligations’, for ‘[t]rust and confidence are inherent in international co-operation’?[[30]](#footnote-30) Good faith is, after all, an essentially contextual obligation, the specific requirements of which can only be formulated in the light of the particular circumstances of any given relationship.

When international organizations and members interact on the international plane, the degree of trust and confidence that characterises their relationship means good faith can be particular demanding. But it is telling that in *Interpretation of the Agreement*, the mutual obligations of co-operation and good faith merely provided a starting point for the Court’s reasoning.[[31]](#footnote-31) To determine the ‘legal principles and rules applicable to the question under what conditions and in accordance with that modalities a transfer of the [WHO’s] Regional Office from Egypt [could] be effected’, the Court relied on a number of comparable host agreements and on the rule found in Article 56(2) of the two Vienna Conventions on the Law of Treaties, from which it extrapolated obligations of consultation and reasonable notice.[[32]](#footnote-32) It was only able to spell out what precisely mutual cooperation and good faith entailed for the WHO and Egypt in the circumstances by drawing from relevant international practice and general international law itself. Thus, one should be cautious not to overplay the role that mutual obligations of cooperation and good faith can play in the abstract. They are unlikely to affect, to a significant extent, the proposition that general international law applies to the relations between organizations and members on the international plane.

## **3. Relations on the institutional plane**

### **3.1. Distinguishing between international legal orders**

In the codification and progressive development of the law of treaties, the ILC maintained an ambiguous position on the scope of application of its project, in particular as regards the relations between organizations and members. The Commission’s ambition for the responsibility project was expressed in much clearer terms. The Working Group established to initiate work on responsibility acknowledged that ‘the great variety of relations existing between international organizations and their member States and the applicability to this issue of many special rules’ would ‘probably limit the significance of general rules in this respect’.[[33]](#footnote-33) It concluded, however, that questions of responsibility arising from those relations should not be excluded from the purview of the project.[[34]](#footnote-34) As a consequence, the definition of ‘breach of an international obligation’ adopted in Article 10 ARIO includes breaches of obligations ‘that may arise for an international organization towards its members under the rules of the organization’. The ARIO purport to cover not only responsibility arising from the breach of obligations on the international plane, but also questions of responsibility arising on the institutional plane.

But is this a claim that the ARIO can plausibly make? The ILC adopted Article 10(2) against the backdrop of a heated doctrinal debate, which it did not handle well. This debate concerns the character of the ‘rules of the organization’: whether they are part of public international law or rather constitute ‘internal law’ that is comparable to the domestic law of States. The Commission conceded that this question was ‘far from theoretical’ for the purposes of the project, as it affected ‘the applicability of the principles of international law with regard to responsibility for breaches of certain obligations arising from the rules of the organization’.[[35]](#footnote-35) But it decided not to express ‘a clear-cut view’.[[36]](#footnote-36) Instead, the commentary suggests, cryptically, that ‘to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present article apply’.[[37]](#footnote-37) It then points out that ‘[b]reaches of obligations under the rules of the organization are not always breaches of obligations under international law’.[[38]](#footnote-38) The debates suggest that this distinction between ‘international’ and ‘institutional’ obligations would be one between obligations arising from ties of membership (for example, those that arise for members of the United Nations when the UNSC adopts a resolution under Chapter VII of the Charter) and obligations concerning the functioning of the organs of the organization (for example, the law applicable to international civil servants).[[39]](#footnote-39) The view that ties of membership give rise to international obligations extrapolates from the proposition that treaties (here, constituent instruments) are a source of obligations for States on the international plane.

This is, however, a slippery slope. The rules of the organization are no doubt part of international law if by this it is meant that, unlike the constitution of a State, they derive their validity from international law.[[40]](#footnote-40) But as the International Court observed in *Nuclear Weapons (WHO Request)*, while ‘[f]rom a formal standpoint, the constituent instruments of international organizations are multilateral treaties’, they are ‘treaties of a particular type’, their object being ‘to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals’.[[41]](#footnote-41) The dual character of these treaties, which are ‘conventional and at the same time institutional’,[[42]](#footnote-42) distinguish them from other multilateral treaties. While the fact that international organizations are established by treaty means that their internal law is international in origin, the treaty performs a constitutional role by laying down a discrete legal system governing the relations between international organizations and their members on the institutional plane.[[43]](#footnote-43) In his individual opinion in *Appeal Relating to the Jurisdiction of the ICAO Council*, Judge de Castro expressed this idea as follows:

each [international] organization has a constitution which provides it with a general rule to which all its members are subject... It is the fact that the organization is a legal person which prevents the legal relationships between its members being considered as governed by a series of independent bilateral treaties... Members of the organization are linked together by the constitution, and their relationships are governed by the constitution. Such relationships are those resulting from the status of member of the organization, and not the status of a party to bilateral treaties. This is of the very essence of organizations; it is required by the common interest, and is a necessity for their functioning and effectiveness.[[44]](#footnote-44)

The relative autonomy of the internal law of personified entities is an inherent attribute of their legal personality. As Hans Kelsen has explained, the constituent rules of a ‘juristic person’ always constitute a ‘partial legal order’ which is an extent separate from – albeit in a relationship with – the ‘total legal order’ under which that juridical person is established. [[45]](#footnote-45) The rules of each international organization constitute ‘partial legal orders’ of international law, so that, as Ahlborn puts it, ‘they operate as a constitution that guarantees the autonomy of an international organization and that of its internal legal order’.[[46]](#footnote-46) The relations taking place on the institutional plane are thus characterised by the ‘organic link’ existing between the organization and its members, a link whose logic is comparable to that of regimes of constitutional and administrative law within the State.[[47]](#footnote-47) Lazar Facsaneanu helpfully distinguishes between ‘le droit international’, applying between international legal subjects on the international plane, and ‘le droit interne des sujets de droit international’, comprising the related categories of ‘droit interne étatique ou national’ – municipal law – and ‘droit interne des entités non-étatiques’ – the internal law of international organizations.[[48]](#footnote-48) These two categories occupy ‘des positions symétriques’,[[49]](#footnote-49) in that they govern the internal affairs of the international legal subject with relative autonomy from international law.

From this it follows that general international law cannot claim a direct or immediate role in regulating the relations between an international organization and its members on the institutional plane. Rather, the key to understanding its role lies in identifying the terms on which relations between legal orders of an international originoccur.[[50]](#footnote-50)

### **3.2 The terms of the relations between international legal orders**

From the perspective of the international legal system, the terms on which international law relates to domestic law take the form of two broad and complementary principles. First, domestic rules cannot be invoked as a justification not to comply with international obligations.[[51]](#footnote-51) Second, States are free to choose the means by which they implement their obligations so long as the action that they take results in compliance with the international rule.[[52]](#footnote-52) Thus, international law seeks neither to determine the content of domestic law[[53]](#footnote-53) nor to affect its validity.[[54]](#footnote-54) On the international plane, conflict between international law and domestic law is treated as an instance of State responsibility, giving rise to obligations of cessation and/or reparation for the State acting wrongfully. That means that States may adopt whatever constitutional arrangements they wish to regulate the incorporation of international rules into domestic law: the choice between ‘monism’ and ‘dualism’ is left to domestic law.[[55]](#footnote-55)

By comparison, the relations between legal orders or an international origin are under-conceptualised and the principles that govern them are less clear. The terms of those relations must depend, on the first instance, on what general international law – the ‘total legal order’ under which the different ‘partial legal orders’ are constituted – has to say. In contrast to the rules of incorporation found in many domestic systems, which impose several requirements for the establishment and functioning of companies and other juridical persons, there are very few limits to the freedom that States enjoy in setting up international organizations to fulfil tasks of international cooperation. Most of international law is, after all, *jus dispositivum* from which States are free to contract out in their mutual relations.[[56]](#footnote-56) As a result, general international law leaves it to the internal law of each international organization to determine how the ‘partial legal order’ will relate to the ‘total legal order’. The rules of general international law will be applicable between an organization and its members on the institutional plane to the extent that the rules of the organization so allow. There is thus a marked similarity between the terms of the relations between international legal orders and those of the relations between international law and domestic legal systems.

That said, as the ‘total legal order’, general international law can claim at least three direct or immediate roles with regard to the ‘partial legal order’ of an international organization. First, it constitutes the ultimate source of validity of the institutional framework. Should rules pertaining to the internal law of an organization stand in violation of peremptory norms of international law, they would be void *ipso jure* as prescribed by Articles 53 and 64 VCLT 1969.[[57]](#footnote-57) Second, nothing prevents general international law from evolving over time so as to establish more detailed and demanding requirements for the creation and operation of international organizations, just as is the case with the rules of incorporation found in domestic systems. Articles 17 and 61 ARIO, for example, envisage the responsibility of organizations or member States in situations when one circumvents its international obligations by taking advantage of the separate legal personality of the other.[[58]](#footnote-58) While doubts remain as to the legal pedigree of those rules and the conditions for their application, they illustrate the general law’s potential to intersect with the institutional plane as the legal system becomes more sophisticated. Third, the general law will play a crucial role in the settlement of questions arising from the withdrawal from or dissolution of an organization, that is, whenever the ‘organic link’ ceases to exist.[[59]](#footnote-59) If a member is expelled from the organization or exercises a right of withdrawal, outstanding issues arising from its lapsed membership are devolved by the ‘partial legal order’ to the ‘total legal order’.

#### 3.2.1 A monistic presumption?

At the most basic level, the terms of the relations between international legal orders are such that, subject to the limits imposed by *jus cogens*, the internal law of an international organization can determine the extent to which it is open to general international law. But the question arises of what role there is for general international law when – as it is often the case – the rules of the organization are silent on the matter.[[60]](#footnote-60) That is, of course, a question concerning the interpretation of constituent instruments and other internal rules.

In domestic systems, general international law is typically treated as susceptible of automatic incorporation, that is, as a source of domestic law on which courts are entitled (and sometimes required) to rely without express authorisation by acts passed by the legislature.[[61]](#footnote-61) In fact, the only alternative to some form of automatic incorporation for international custom would be its full exclusion, since it would be unfeasible and unproductive for parliaments around the world to legislate on unwritten rules deriving from the practice and *opinio juris* of States. Yet, despite the rhetorical openness to custom that many domestic systems showcase, the actual application of customary rules in domestic law is fraught with difficulties, has a rather exceptional character and raises a number of legitimacy concerns.[[62]](#footnote-62) As a result, domestic courts tend to be circumspect in entertaining claims based on custom.

This is where one should avoid the temptation to push an analogy between domestic law and internal law of international organizations too far, and caution international organizations against developing dualist constitutional sensibilities similar to those found among domestic courts. There are convincing reasons to regard the rules of the organization as more permeable to general international law than domestic constitutions. On the one hand, the historical, political and practical context in which the question of relations involving international legal orders is posed differs from that of the relations between international law and domestic law. Normative debates about the character of sovereignty do not have a place here, as international organizations are a direct creation of the international legal system. Likewise, most of the political values underpinning dualist positions that assert the autonomy of domestic law in relation to international law – such as democracy, separation of powers and (national) self-determination[[63]](#footnote-63) – do not have the same import when one regards intergovernmental institutions. There is, moreover, a practical reason for constituent instruments to embrace international law. The internal law of most international organizations does not contain rules exhaustively determining how the obligations and responsibility of the organization and its members vis-à-vis each other are to be ascertained. Organizations such as the European Union, which comprises a robust internal legal system overseen by courts with compulsory jurisdiction, remain the exception. In fact, the practical relevance of rules of general international law for international organizations was one of the reasons why the ILC sought to extend the scope of application of the ARIO to matters arising on the institutional plane:

even if one [considers] that the rules of the organization [are] special rules that prevailed over general international law, it must be acknowledged that they [do] not cover all questions relating to responsibility of the organization. It [is] therefore important to determine whether the international law of responsibility [provides] a backdrop that filled any gaps in the existing special rules.[[64]](#footnote-64)

Of course, general international law can only be relevant for relations on the institutional plane if it is capable, in light of its structure and its content, of providing solutions to problems that constituent instruments and other internal rules fail to address. One of the classic arguments invoked in support of the view of that international law and domestic law must be viewed as separate legal systems is that they have different sources, comprise different subjects and regulate different subject-matters.[[65]](#footnote-65) Even if one were to take this proposition at face value, it surely does not make sense of legal orders sharing an international origin. Most rules that apply in the relations between States on the international plane are capable, in structure, of playing a role in relations involving members and the organization on the institutional plane. To press the point, one just has to think of those internal rules that, in the context of the ARIO, the ILC thought would give rise to ‘international’ obligations. When a member fails to comply with a binding decision taken by a political organ of the organization, general rules regarding attribution of conduct, existence of the breach, circumstances precluding wrongfulness and the duty to provide reparation can be readily applied between organizations and members if this is not precluded by the rules of the organization.[[66]](#footnote-66)

On the other hand, a systemic justification for a more nuanced approach to relations between international legal orders can be found in the ILC’s Conclusions on Difficulties arising from the Diversification and Expansion of International Law adopted in 2006. The Conclusions, based on the work of a Study Group on the Fragmentation of International Law, deal with the position of so-called ‘special’ or ‘self-contained’ regimes vis-à-vis general international law.[[67]](#footnote-67) These are defined as groups of ‘rules and principles concerned with a particular subject matter’, applicable as *lex specialis* and often having ‘their own institutions to administer the relevant rules’.[[68]](#footnote-68) While the Commission did not specifically address personified entities with legal autonomy to operate on the international plane – which is puzzling given that international organizations may have the strongest claim to form self-contained regimes[[69]](#footnote-69) – its analysis provides a useful starting point for articulating principles applicable to relations between international legal orders.

According to the ILC’s Conclusions, while a special regime ‘prevails over general law’ as *lex specialis*,[[70]](#footnote-70) general law applies to fill the gaps left by the special rules[[71]](#footnote-71) and to take over from the special rules whenever the special regime ‘fails’.[[72]](#footnote-72) That general international law will be applicable to issues arising from the dissolution of an international organization or from a member’s withdrawal has been noted above. But why should one presume that general law may fill gaps in the autonomous legal systems of international organizations?

The report prepared by the Study Group on Fragmentation begins by noting that ‘the claim (almost never heard) that self-contained regimes are completely cocooned outside international law resembles the views by late-nineteenth century lawyers about the (dualist) relation between national and international law’.[[73]](#footnote-73) It then argues that ‘[w]hatever the validity of this view under national law, it is very hard to see how it could be applied to relations between international legal “regimes” and general international law’,[[74]](#footnote-74) and concludes that:

It is in the nature of ‘general law to apply generally’ – namely inasmuch as it has not been specifically excluded. It cannot plausibly be claimed that these parts of the law… have validity only as they have been ‘incorporated’ into the relevant regimes. There never has been any act of incorporation. But more relevantly, it is hard to see how regime-builders might have agreed not to incorporate (that is, opt out from) such general principles.[[75]](#footnote-75)

This echoes Joost Pauwelyn’s suggestion that ‘in their treaty relations states can “contract out” of one, more or, in theory, all *rules* of international law (other than those of *jus cogens*), but they cannot contract out of the *system* of international law’.[[76]](#footnote-76)

Those are propositions worth considering. While the legal systems established by treaties constituting international legal subjects are arguably even more ‘autonomous’ from general international law than highly specialised treaty regimes, they are also creations of the international legal system. The institutional plane on which the relations between organizations and members take place is a derivation of the international plane where the general law applies. This is why the monistic presumption that the ILC adopted in its work on fragmentation is also relevant for the relations between general international law and the internal law of international organizations. In the debates on responsibility of international organizations at the ILC, Martti Koskenniemi, who then served as Chairman of the fragmentation group, noted that the question of relations between international legal orders ‘was clearly closely linked to the interaction between *lex specialis* and *lex generalis*’ and argued that it should not be implied that the ‘internal law’ of an organization ‘constituted a self-contained or entirely separate regime’.[[77]](#footnote-77)

Given that most organizations lack courts where issues of the applicability of general international law on the institutional plane can be probed, it can be hard to test the monistic presumption against their practice. But the presumption is to an extent reflected in the context of the European Union, where the Court of Justice (‘CJEU’) has been as consistent in affirming the autonomy of the Union’s legal order[[78]](#footnote-78) as in affirming its openness to international law. On the grounds that the EU ‘must respect international law in the exercise of its powers’, the Court has stated that rules of customary international law ‘are binding upon the Community institutions and form part of the Community legal order’.[[79]](#footnote-79) This position is now underpinned by Article 3(5) of the Treaty on European Union, which prescribes that ‘[i]n its relations with the wider world, the Union shall contribute to the strict observance and development of international law, including respect for the principles of the United Nations Charter’.

#### 3.2.2 Limits of the monistic presumption

3.2.2.1 Limits to the identification of competences

While there are good reasons to adopt a monistic presumption for the application of general international law on the international plane, the internal law of international organizations presents certain specificities when compared to the specialised treaty regimes on which the ILC focused its study on fragmentation. Applying the general law to special regimes normally involves construing the special rules in a way that meets the requirements of the ‘principle of harmonization’.[[80]](#footnote-80) The goal is to guarantee that the special regime will interfere to the least extent possible with other rights and obligations that the parties owe to each other or third parties. But when a special regime has the effect of creating a personified entity, the application of general international law to the relations between the organization and their members may give rise to a significant constitutional concern: that the rights, obligations and capacities that the organization is capable of enjoying on the international plane are unduly invoked to expand the competences that the organization was given at the institutional level.

Finn Seyersted’s argument on the ‘inherent powers’ of international organizations illustrates the problem. More than anyone, Seyersted championed the view of international organizations as legal subjects enjoying rights, obligations and capacities analogous to those of States.[[81]](#footnote-81) He emphasised the distinction between general international law and the internal law of organizations, and convincingly argued that rights, obligations and capacities to operate on the international plane could only derive from international law. On this basis, he launched an attack at the ‘implied powers doctrine’ developed by the ICJ.[[82]](#footnote-82) For Seyersted, international organizations did not need to rely on the powers expressly or implicitly provided in their constituent instruments to perform international acts. Rather, he seems to suggest, constituent instruments are only relevant insofar as they contain expressprohibitions.[[83]](#footnote-83)

It seems that at this point Seyersted’s doctrine of ‘inherent powers’ turns into an argument on how constituent instruments must be construed.[[84]](#footnote-84) But what Seyersted may have failed to appreciate is that even if the implied powers doctrine fails to explain the rights, obligations and capacities that international organizations enjoy under general international law, it may be convincing as a doctrine of constitutionalinterpretation on the institutional plane. As developed by international courts and tribunals, it has the merit of combining a principle of effective interpretation with a principle of legality. On the one hand, if international organizations are to perform their functions and fulfil their purposes, it is necessary that their skeletal constituent instruments be construed purposefully with the aid of teleological considerations.[[85]](#footnote-85) On the other hand, just as is the case with any other institution exercising authority under a public law framework, organizations must be able to show that their acts are based on pre-defined competences.[[86]](#footnote-86) This is not to say that the proposition that rights, obligations and capacities under general international law may not be a relevant factor for the interpretation of constituent instruments. In *Reparation for Injuries*, that the United Nations was deemed to be capable, as a subject of international law, of bringing international claims for injuries that it suffered militated in favour of implying from the Charter the competence to perform that act.[[87]](#footnote-87) Still, complex questions of constitutional interpretation should not be dealt with uncritically via the implementation of the monistic presumption or perfunctory analogies with States.

The ILC’s debate on the permissibility of countermeasures against breaches of rules of the organization provides an example on point. Following a debate as to whether the regime of countermeasures in the ARS should be extended to international organizations at all, the Commission initially adopted a provision allowing for countermeasures between organizations and members to the extent that they ‘are not inconsistent with the rules of the organization’ and ‘no appropriate means are available for otherwise inducing compliance’ of the responsible entity.[[88]](#footnote-88) It followed that, under that version of the ARIO, countermeasures could have a place in relations taking place on the institutional plane. On second reading, however, the Commission changed its position. A new paragraph was added to Articles 22 and 52 ARIO to the effect that countermeasures may not be taken by organizations or their members ‘in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules’. The Commission justified adding this default prohibition on countermeasures taken on the institutional plane on the grounds of the ‘obligation of close cooperation that generally exist between an international organization and its members’ and the ‘special ties’ between them.[[89]](#footnote-89) The CJEU had adopted a similar position in *Commission v. Luxembourg and Belgium*.[[90]](#footnote-90)

The new paragraph that the ILC drafted on second reading is problematic because it is doubtful that a prohibition on countermeasures on the institutional plane can be proposed as a matter of general international law in the absence of practice and precedent pointing in that direction. [[91]](#footnote-91) Rather, whether such countermeasures are allowed will depend on how the internal law of each organization is construed. However, if viewed as a guideline for constitutional interpretation, the provisions proposed by the ILC are not necessarily out of place. A provision in the ARIO that endorsed the availability of countermeasures to breaches of obligations on the institutional plane might have taken the monistic presumption too far, paving the way for arguments of questionable normative value. In fact, the position taken in the ARIO on first reading had been used as authority for the proposition that members of the United Nations could take lawful countermeasures against the Security Council under international law by disobeying resolutions adopted under Chapter VII of the UN Charter.[[92]](#footnote-92) According to Antonios Tzanakopoulos, the Charter does not ‘explicitly prohibit countermeasures, and since they provide no appropriate means for otherwise inducing compliance of the UN with its obligation of cessation and reparation, the availability of countermeasures by [member states] against the UN must be affirmed’.[[93]](#footnote-93) It is not difficult to discern the reason why the Commission would wish to distance itself from this line of argument. Rules devised for a decentralised community comprising legally autonomous entities are not always suited for application in institutional settings characterised by stronger ties of solidarity as is the case with the United Nations. This provides a reason to construe constituent instruments as limiting unsanctioned unilateral action rather than uncritically filling the gap with the means of ‘private justice’ found in the international law that applies to States. In the words of a member of the Commission:

international organizations [are] typically governed by special regimes and [have] renounced, at least implicitly, taking the law into their own hands. In setting up international organizations, States [create] the mutual expectation that the application of the rules of the organization [will] ultimately lead to the settlement of any dispute that might arise… That [is] true not only for organizations such as the European Community, which [has] a system of judicial remedies, but also for the United Nations and its specialized agencies. The Charter of the United Nations [has], after all, established the organized international community of States and [has] created a legal framework and procedures that risked being undermined if secondary rules which, while making sense in the context of the responsibility of reciprocally sovereign States, were formally imposed on relations between an international organization and its members.[[94]](#footnote-94)

## 3.2.2.2 The reality of institutional sensibilities and practices

 While it is important not to take the monistic presumption too far, the constitutional sensibilities and practices found in certain international organizations suggest that the presumption is sometimes not taken far enough. The expansion and consolidation of ‘partial legal orders’ are often accompanied by a tendency to regard the ‘total legal order’ with a certain reserve. The judicial system of the European Union provides an apt illustration. For all its commitment to upholding and promoting international law, one can identify a couple of trends in the case law of the CJEU that make the Union look suspiciously like a domestic legal system.

First, the Court of Justice has been slow to allow challenges to EU law based on rules of customary international law.[[95]](#footnote-95) The *Air Transport Association* case provides a recent restatement of the position that custom may be ‘relied upon by an individual for the purpose of the Court’s examination of the validity of an act of the European Union’ whenever the claim has a foothold in EU law, that is, ‘in so far as, first, those principles are capable of calling into question the competence of the European Union to adopt that act… and, second, the act in question is liable to affect rights which the individual derives from European Union law or to create obligations under European Union law in his regard’.[[96]](#footnote-96) While that confirms that custom has a role to play in EU law, the standard of review which the Court proposed to apply to such challenges is very narrow:

[S]ince a principle of customary international law does not have the same degree of precision as a provision of an international agreement, judicial review must necessarily be limited to the question whether, in adopting the act in question, the institutions of the European Union made manifest errors of assessment concerning the conditions for applying those principles.[[97]](#footnote-97)

That shows that EU courts are hesitant to engage in full with arguments based on general international law and that they tend to defer to the interpretation and implementation of custom by the political organs of the EU. It is no wonder that, in the cases in which the standard of review of ‘manifest errors of assessment’ was applied, the CJEU found no incompatibility between custom and the internal law of the EU.

 Second, there is the eminently dualistic stance adopted by the CJEU in the *Kadi* case. The claimants in *Kadi* challenged EU regulations enforcing sanctions imposed by the UN Security Council against individuals suspected of terrorism. In his submission to the Court, Advocate-General Poiares Maduro raised the question of ‘how the relationship between the international legal order and the Community legal order must be described’.[[98]](#footnote-98) In his view, the Treaty on the Functioning of the European Union (as it is now known) ‘created a municipal legal order of trans-national dimensions’, the upshot being that ‘the relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community’.[[99]](#footnote-99) The Court decided in the claimants’ favour, stating that EU law was ‘an autonomous legal system which is not to be prejudiced by an international agreement’.[[100]](#footnote-100) For the Court, the Union was based on ‘the rule of law’ and comprised ‘a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions’.[[101]](#footnote-101) Even if the Court did not fully embrace the Advocate-General’s dualistic rhetoric, the judgment illustrates the tendency that institutions of a ‘partial legal order’ may exhibit to assert their supremacy over the ‘total legal order’ in normatively charged cases involving, for instance, fundamental rights.[[102]](#footnote-102)

In *Kadi*, the Court was not dealing with the issue of applicability of general international law in EU law, but, as Gianelli has argued, its ‘key dualist approach can hardly be limited to EU agreements’.[[103]](#footnote-103) That kind of institutional sensibility is bound to be more general as it reflects ‘a choice of the EU system to open itself up to international law’, which is ‘neither absolute nor unconditional, but may require limitations’.[[104]](#footnote-104) The *Kadi* judgment serves as a reminder not only of the role of institutions in the setting of the terms for the relations between relatively autonomous legal orders, but also of the dilemmas that officials appointed under any given legal order face when required to serve two masters.[[105]](#footnote-105)

 With its burgeoning legal system, the European Union may provide the neatest example of an institutional reality limiting the application of a monistic presumption to the institutional relations between members and their organization, but it is not the only one. Article 103 of the Charter of the United Nations functions as a broad clause affirming the supremacy of UN law over all other engagements of their members. Interestingly, Article 103 does not state that obligations under the Charter prevail over general international law, but only over ‘obligations under any other international agreement’.[[106]](#footnote-106) The mainstream position is, however, that Article 103 also covers obligations by which members are bound under general international law.[[107]](#footnote-107) That provides great leeway for the UNSC to depart from custom by adopting resolutions under Chapter VII of the Charter, a practice that has been a source of normative anxiety in recent times.[[108]](#footnote-108) The only specific limitation on the powers of the UNSC found in the Charter is the obligation to ‘act in accordance with the Purposes and Principles of the United Nations’,[[109]](#footnote-109) though it is also accepted that the UNSC is subject to *jus cogens*, given that the UN Charter itself derives its validity from general international law.[[110]](#footnote-110) Be that as it may, applying a monistic presumption to the relations between the UN and its members when the UNSC takes action may be tricky. This is perhaps why a monistic approach has been promoted at the level of interpretation of UNSC resolutions, with commentators suggesting that ‘it is to be presumed that the [Council] does not intend to abrogate or suspend applicable international law when this is not explicit or at the very least implicit in the text of a resolution in question’.[[111]](#footnote-111) That position has found favour in the case law of the European Court of Human Rights.[[112]](#footnote-112)

 Of course, the fact that the UN has achieved virtually universal membership blurs the line between UN law and general international law. The treaty rules contained in the Charter, applicable to all States whose existence is undisputed (minus the Vatican City State), can be viewed as a *de* facto constitution for the international community in that they are binding across the board.[[113]](#footnote-113) The special place that the Charter occupies in the international legal system is even recognised in the ARS and in the ARIO, both of which contain clauses providing that the ‘draft articles are without prejudice to the Charter of the United Nations’.[[114]](#footnote-114) But the commentary to the ARIO makes the point that the saving clause is ‘not intended to exclude the applicability of the principles and rules set forth in the preceding articles to the international responsibility of the United Nations’,[[115]](#footnote-115) presumably meaning that general international law continues to apply to the UN on the international and institutional planes whenever it is not displaced by the Charter. Article 103 is, in short, an instance of an internal rule promoting the autonomy of the legal order of an international organization to the point at which that legal order upheaves general international law.

## **4. Towards a framework for identifying the applicable law between organizations and members**

 When States were viewed as the sole subjects of international law, the question of how legal orders relate to one another concerned the interplay between international law and domestic law. The picture has been made more complex with the emergence of personified entities created by States, as one must now also consider the relations between legal orders sharing an international origin. I have argued in this article that, even if the internal law of international organizations derives its validity from general international law, the way in which international legal orders interact is similar to that in which international law interacts with domestic law, in that the ‘partial legal order’ established by the internal rules of the organization determines the extent to which general international law applies on the institutional plane. That is a consequence of the fact that general international law contains very few rules, if any, concerning the internal functioning of international organizations. It is thus a mistake to assume, as the ILC sometimes does, that customary rules always apply between international organizations and their members.

 That does not mean, however, that general international law has no part to play. For one, a distinction must be made between relations taking place on the international plane and those taking place on the institutional plane. In the former, general international law applies by default to the extent that it is not displaced by *lex specialis*. And even on the institutional plane there are good reasons to postulate a monistic presumption for the application of general international law when the internal rules of an organizations are silent. That presumption is justifiable on systemic, practical and normative grounds. Yet, the presumption will play different roles in different organizations as it gets co-opted and domesticated by the political realities and institutional sensibilities prevailing in each of them.

 It should be fitting to conclude this article with an illustration of how the framework to identify the applicable law between organizations and members sketched here helps structure legal analysis.[[116]](#footnote-116) Consider an international organization established by a constituent instrument which provides that headquarters agreements may be concluded with member States, allocating to the Secretary-General the competence to negotiate, adopt and express consent to the text after securing the approval of the organization’s Assembly. If the Secretary-General were to conclude a headquarters agreement with a member State without the Assembly’s approval, the other members might wish to look into available legal options to challenge that transaction. They might, for example, wish to know whether the treaty is voidable. They might wish to know, in addition, whether disciplinary action can be taken against the imprudent Secretary-General, and what measures can be taken against the organization or the member State that agreed to the irregular treaty.

In looking at those scenarios, a legal advisor to the member States would have to identify the rules that apply between the organization and its members. Considering the potential claim that the treaty concluded without the approval of the Assembly is voidable, she would first have to characterise the issue as one arising on the international plane, for the treaty was formed when the organization and the host State expressed their consent on the international plane and derives its binding force from the principle *pacta sunt servanda*. The rule in Article 46(2) VCLT 1986 (assuming that it reflects customary international law) would then apply, with the effect that the organization can only claim that ‘its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties’ if ‘that violation was manifest and concerned a rule of fundamental importance’. It would not be sufficient to show that the Secretary-General acted *ultra vires* or that a provision of the constituent instrument of the organization was breached. Rather, it would be necessary to consider the significance of that breach under the rules laid down in the general international law of treaties. An imaginative legal advisor might seek to argue that the constituent instrument creates a special rule concerning the expressing of consent to headquarters treaties which would displace the general rules of international law applicable between the organization and its members on the international plane. But it should be clear that the methodological standpoint in this scenario is that the rules of general international law apply between the organization and its members by default. Arguments aimed at displacing those rules will seek to show that the provisions of the constituent instrument constitute *lex specialis* applicable between the parties on the international plane.

Considering whether the organization may take disciplinary measures against the Secretary-General or which measures can be taken against the organization or the recalcitrant member State, the legal advisor would first have to classify the scenario as one of relations arising on the institutional plane. She would thus advise the members that the default rules are to be found in the internal law of the organization, and that general international law can only be invoked as a source of rights and obligations to the extent that internal law allows. If the constituent instrument were silent on the issue and she was persuaded by the appropriateness of adopting a monistic presumption as argued in this article, she might conclude that standards from, say, the international law of human rights can be invoked as constraints to the range of possible disciplinary measures to be taken against the Secretary-General. The availability of international law countermeasures against the recalcitrant member State would be more doubtful given that, as discussed above, that kind of unilateral action may not sit comfortably with the logic of cooperation that defines the institutional plane – she might well find them to be incompatible with the internal law of the organization. Whichever specific arguments are made, the methodological standpoint in this scenario is that the analysis must start with the rules of the organization, and that any attempts to rely on general international law will need to be anchored in an argument that shows that its incorporation is permissible under such rules.

 In conclusion, the question of the extent to which general international law applies between international organizations and their members can present itself in multifaceted scenarios that require careful unpacking and methodological rigour. In dealing with particular cases, it is important to know which questions to ask, while maintaining a structural understanding of an international legal system that keeps growing increasingly intricate. This is where, I hope, the present analysis can make a contribution.

1. E.g. H. Schermers, ‘The Legal Bases of International Organization Action’ in R. Dupuy (ed.), *A Handbook on International Organizations* (1998), 401 at 402; P. Sands and P. Klein (eds.), *Bowett’s* *Law of International Institutions* (2009), 463-4; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2005), 386-387; A. Reinisch, ‘Sources of international organizations’ law: why custom and general principles are crucial’ in S. Besson and J. D’Aspremont (eds.), *The Oxford Handbook of the Sources of International Law* (2017); K. Daugirdas, ‘How and why international law binds international organizations’ (2016) 57 *Harvard International Law Journal* 325; and, taking a more cautious approach, J. Klabbers, ‘Sources of International Organizations’ Law: Reflections on Accountability’ in J. d’Aspremont and S. Besson, T*he Oxford Handbook on the Sources of International Law* (2017), 998-9. Support for the proposition that international organizations are bound by general international law is found in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep. 73, at 89-90 and *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Appropriate Remedy (2007), para. 48. I investigate this issue in Fernando Lusa Bordin, *The Analogy between States and International Organizations* (2018), pp. 13-85. [↑](#footnote-ref-1)
2. I shall use the phrase ‘general international law’, found e.g. in Art. 53 VCLT 1969, in the sense that it has been used in the case law of the ICJ and in the work of the ILC, that is, to describe default rules of general application to be distinguished from special rules agreed between specific parties (*lex specialis*): see e.g.Conclusions of the Work of the Study Group on the Fragmentation of International Law, YILC 2006/II, part two, p. 179, and *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010,[2010] ICJ Rep.403, at 436-439, paras. 79-84. In the scheme of sources found in art. 38(1) of the ICJ Statute, that would comprise customary international law (including rules achieving the status of *jus cogens*) and general principles of law. The phrase has not always been used consistently: in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, for example, the ICJ has used the puzzling variation ‘general rules of international law’, which a prominent commentator has understood to refer to ‘secondary rules’ of international law only: Klabbers, *supra* note 1, 998-9. Despite this inconsistency in usage, the phrase is favoured over ‘customary international law’ for its inclusivity: it encapsulates norms of general application without taking a position as to how they are formed or identified. [↑](#footnote-ref-2)
3. Art. 2(d) ARIO defines ‘rules of the organization’ as ‘the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established prac-tice of the organization’; cf. also the slightly different formulation in art. 2(i)(j) VCLT 1986. I shall use the phrase interchangeably with ‘internal law’ or ‘internal rules’ of IOs. [↑](#footnote-ref-3)
4. The ILC made this distinction when it considered the applicability of the regime of countermeasures to IOs. In his Eighth Report, Gaja invited the Commission to consider the difference between ‘on the one hand, non-compliance by a State with its obligations as a member of the organization and, on the other, non-compliance with obligations that the member State may have otherwise acquired’: A/CN.4/640 (2011), at. 23, para 66. Also, Wood, A/CN.4/SR.3084 (2011), at 5. [↑](#footnote-ref-4)
5. The *Reparation for Injuries* advisory opinion is a case in point. The ICJ failed to distinguish between the question of general international law of whether the UN had the capacity *qua* international legal subject to bring claims on the international plane and the question of United Nations law of whether it had been given the competence to exercise that capacity under the UN Charter. That makes its reasoning both misleading and confusing. See *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion of 11 April 1949,[1949] ICJ Rep174, at 177-180. [↑](#footnote-ref-5)
6. *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, *supra* note 1, at 92. [↑](#footnote-ref-6)
7. *Reparation for Injuries Suffered in the Service of the United Nations, supra* note 5, at 179. Though the Court’s analysis of the character of the 1946 Convention is persuasive, it should be noted that the example that it chose is somewhat misleading: the UN is the beneficiary, but not itself a party, to the 1949 Convention. [↑](#footnote-ref-7)
8. Art 2(1)(a) VCLT 1986. [↑](#footnote-ref-8)
9. Commentary to Art. 2, *Yearbook of the International Law Commission* (hereinafter ‘YILC’) 1982/II, part one, at 18, para. 4. [↑](#footnote-ref-9)
10. Reuter (Third Report), YILC 1974/II, part one, at 140, para. 6. Reuter had initially proposed to define a ‘treaty concluded between States and international organizations or between two or more international organizations’ as an agreement governed ‘principally’ by ‘general’ international law. [↑](#footnote-ref-10)
11. Cf. Art. 34 of VCLT 1969: ‘A treaty does not create either obligations or rights for a third State without its consent’. [↑](#footnote-ref-11)
12. Commentary to Art. 32, YILC 2011/II, part two, at 78, para. 3. [↑](#footnote-ref-12)
13. C. Ahlborn, ‘The Rules of International Organizations and the Law of International Responsibility’ (2012) 8 IOLR 397, at 471-2. [↑](#footnote-ref-13)
14. Conclusions of the Work of the Study Group on the Fragmentation of International Law, *supra* note 2, para. 5. [↑](#footnote-ref-14)
15. Ibid. [↑](#footnote-ref-15)
16. S. Rosenne, *Developments in the Law of Treaties 1945-1986* (1989), 257. [↑](#footnote-ref-16)
17. The commentary to the provision ultimately adopted as Art 5 VCLT 1969 explains that the phrase ‘*adopted* within an international organization’ was ‘intended to exclude treaties merely drawn up under the auspices of an organization or through use of its facilities and to confine the reservation to treaties the text of which is drawn up and adopted within an organ of the organization’: YILC 1966/II, p. 191, para. 3. [↑](#footnote-ref-17)
18. Commentary to Art. 27, YILC 1982/II, part two, at 38-9, para. 4. This was also the opinion of Roberto Ago, then rapporteur on State responsibility: YILC 1977/I, at 110-11, para. 14. The commentary adds that under the law of responsibility an IO could ‘deny a contracting State the benefit of the performance of a treaty if that State has committed a wrongful act against the organization’, including *‘a breach of the rules of the organization if the State is also a member of the organization*’ (para. 4, emphasis original). In this odd passage, the Commission appears to be referring to countermeasures. [↑](#footnote-ref-18)
19. Reuter, YILC 1981/I, at 167, para. 24. [↑](#footnote-ref-19)
20. Reuter, YILC 1979/I, at 94-5, para. 28. [↑](#footnote-ref-20)
21. Ibid. In an essay on the Vienna Conference, Reuter reiterated that the relations between organizations and members ‘sont régies par un système juridique individualisé pour chaque organisation’: P. Reuter, ‘La Conférence de Vienne sur le Droit des Traités entre Etats et Organisations Internationales ou entre Organisations Internationales’ in F. Capotorti and others (eds.), *Du Droit International au Droit de l'Intégration* (1987), 563-54. [↑](#footnote-ref-21)
22. Commentary to Art. 46, YILC 1982/II, part two, at 52, para. 8. [↑](#footnote-ref-22)
23. Conclusions of the Work of the Study Group, *supra* note 2, conclusions 4 and 6. [↑](#footnote-ref-23)
24. Commentary to Art. 64, YILC 2011/II, part two, at 102, para. 1: ‘Special rules relating to international responsibility may supplement more general rules or may replace them, in whole or in part. These special rules may concern the relations that certain categories of international organizations or one specific international organization have with some or all States or other international organizations.’ [↑](#footnote-ref-24)
25. *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, *supra* note 1, at93. [↑](#footnote-ref-25)
26. Ibid. at 158 (Judge Ago, Separate Opinion). It should be noted that the Court does not provide a clear explanation of the source of the ‘mutual obligations of co-operation and good faith’, rather making a blank reference to ‘general international law… the Constitution of the Organization… and the agreements in force between Egypt and the Organization’ (para. 48). An argument could be made that the obligations of cooperation and good faith derive *ipso jure* from the rules of the organization, in which case the latter would be the source of the obligation, applicable as *lex specialis*, as opposed to a special customary rule addressed at organizations and members. [↑](#footnote-ref-26)
27. Commentary to Art. 52, YILC 2011/II, part two, at 93, para. 2. [↑](#footnote-ref-27)
28. It should be noted that Art. 51(4) is meant to apply to *all* countermeasures, even those that third parties may take against international organizations. Why the performance of the organization’s functions should be of any concern to non-members – which surely are under no special obligations of mutual cooperation and good faith – is unclear. [↑](#footnote-ref-28)
29. The expression is borrowed from Ahlborn, *supra* note 13, at 450. [↑](#footnote-ref-29)
30. *Nuclear Tests (Australia v. France)* (Judgment) [1974] ICJ Rep. 253, at 286. [↑](#footnote-ref-30)
31. The Court notes, at para. 48, that its ‘essential task’ was to ‘determine the specific legal implications of the mutual obligations incumbent upon Egypt and the Organization in the event of either of them wishing to have the Regional Office transferred from Egypt’. [↑](#footnote-ref-31)
32. *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, *supra* note 1, paras. 45-47. [↑](#footnote-ref-32)
33. YILC 2002/II, part two, at 93, para. 467. [↑](#footnote-ref-33)
34. Ibid. [↑](#footnote-ref-34)
35. Commentary to Art. 10, YILC 2011/II, part two, at 64, para. 7. [↑](#footnote-ref-35)
36. Ibid. [↑](#footnote-ref-36)
37. Ibid. [↑](#footnote-ref-37)
38. Ibid. [↑](#footnote-ref-38)
39. In the commentary, the Commission refers to the school of thought that draws ‘a distinction according to the source and subject matter of the rules of the organization, and exclude, for instance, certain administrative regulations from the domain of international law’ (ibid., at 63, para. 5). [↑](#footnote-ref-39)
40. As Pellet pointed out, the rules of the organization are ‘anchored in general international law’: YILC 2003/I, at 27, para 51. Balladore Pallieri has argued, on the grounds that a constituent instrument is ‘un acte international, régit par les normes générales du droit international ou par des norms particulières existant à ce sujet dans le droit international’, that there is no such a thing as the ‘internal law’ of IOs. His convoluted analysis conflates question of the character of the rules of the organization with the question of whether general international law applies to IOs: G. Balladore Pallieri, ‘Le Droit Interne des Organisations Internationales’ (1969) 127 RCADI 1, at 16-17. [↑](#footnote-ref-40)
41. *Legality of the Use of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996 [1996] ICJ Rep. 66, at 74, para. 19. [↑](#footnote-ref-41)
42. Ibid. For a recent discussion of the dual character of constituent instruments, see L. Gabarri, ‘The Dual Legality of the Rules of International Organizations’ (2017) 4 IOLR 87. [↑](#footnote-ref-42)
43. Ahlborn, *supra* note 13, at 413. In the words of the ICJ, constituent instruments are ‘treaties of a particular type’ that ‘create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals’: *Legality of the Use of Nuclear Weapons in Armed Conflict*, *supra* note 41, at 74, para. 19. [↑](#footnote-ref-43)
44. *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment of 18 August 1972, [1972] ICJ Rep. 46, at 130 (Judge De Castro, Separate Opinion). [↑](#footnote-ref-44)
45. H. Kelsen, *General Theory of Law and State* (1945), at 99-100. See also L. Facsaneanu, ‘Le Droit Interne de l’Organisation des Nations Unies’ (1957) III *Annuaire Français de Droit International* 315, at319-320; 324-325 (refering to *la théorie de l’institution* developed by German private lawyers which points to the ‘aptitude’ of all organised – or, more precisely, personified – communities to establish their own autonomous legal system) and G. Hartmann, ‘The Capacity of International Organizations to Conclude Treaties’ in K. Zemanek (ed.), *Agreements of International Organizations and the Vienna Convention on the Law of Treaties* (1971), at 150. In contrast, while viewing the ‘internal law’ of IOs as an autonomous legal order, Cahier observes that ‘[l]a personnalité juridique apparaît donc dans ce domaine comme sans importance’: P. Cahier, ‘Le Droit Interne des Organisations Internationales’ (1963) 67 RGDIP 563, at 574; that makes his argument weaker: the sense in which the rules of the organization can claim to be autonomous from international law is the same sense in which the by-laws of a juristic person can claim to be autonomous from the domestic law of States. [↑](#footnote-ref-45)
46. Ahlborn, *supra* note 13, at 413. [↑](#footnote-ref-46)
47. Ibid. [↑](#footnote-ref-47)
48. Facsaneanu, *supra* note 45, at 326. [↑](#footnote-ref-48)
49. Ibid. [↑](#footnote-ref-49)
50. As Kelsen explains, the ‘[t]he relation between the total legal order constituting the State, the so-called law of the State or national legal order, and the juristic person of a corporation is the relation between two legal orders, a total and a partial legal order, between the law of the State and the by-laws of the corporation’: *General Theory*, *supra* note 45, at 100. For Kelsen, it should be clarified, the same logic applies to the juristic person of the State: ‘the State too is a corporation’, with ‘external obligations and rights… stipulated by the international, internal ones by the national legal order’: *Pure Theory of Law* (1967), 290. His work does not deal with international organizations, but the analysis is no doubt apposite. See also G. Arangio-Ruiz, ‘International law and Interindividual Law’ in J. Nijman and A. Nollkaemper, *New Perspectives on the Divide between National and International Law* (2007), 17 at 42-3 (pointing to a ‘*high degree of similarity* between the relationship of international organs’ legal orders to international law and the relationship of national legal systems to international law’). At the ILC, see Koskenniemi, YILC 2005/I, at 78, para. 34. [↑](#footnote-ref-50)
51. Cf. Art. 27 VCLT 1969 and Art. 3(2) ARS. [↑](#footnote-ref-51)
52. The point is clearly stated in A. Cassese, *International Law* (2005), 219. [↑](#footnote-ref-52)
53. Unless, of course, an international obligation specifically requires the adoption of legislation, as is the case with Art. 2, 1969 American Convention on Human Rights and Art. 4, 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. [↑](#footnote-ref-53)
54. In the words of the PCIJ, ‘[f]rom the standpoint of International Law and the Court which is its organ, national laws are merely facts which express the will and constitute the activities of States’: *Certain German Interests in Polish Upper Silesia*, PCIJ Rep Series ANo 7, at 19. [↑](#footnote-ref-54)
55. The mainstream position is that the debate between monism – the view of international and municipal law constituting one legal system – and dualism – the view of international and municipal law constituting two distinct legal systems – is otherwise fruitless and often fails to make sense of the practice of national courts: e.g. J. Crawford (ed.), *Brownlie’s Principles of Public International Law* (2012), 50. [↑](#footnote-ref-55)
56. As recognised, in the context of IOs, by Art. 64 ARIO on *lex specialis*. [↑](#footnote-ref-56)
57. Cf. Arts 53 and 64 VCLT 1969. On the invalidity of decisions of IOs that are in breach of peremptory norms, see A. Orakhelashvili, *Peremptory Norms in International Law* (2006), 465-9. [↑](#footnote-ref-57)
58. For commentary, see O. Murray, ‘Piercing the Corporate Veil: The Responsibility of Member States of an International Organization’ (2011) IOLR 291. [↑](#footnote-ref-58)
59. Cf e.g. Conclusions of the Work of the Study Group, *supra* note 2, at 180, para. 16. [↑](#footnote-ref-59)
60. A separate question, which is beyond the scope of this study, is how treaties are incorporated into the internal law of IOs. [↑](#footnote-ref-60)
61. For example, this is the established position, whether via constitutional provisions or court decisions, in the United Kingdom, the United States, Germany, Italy and Russia: Crawford, *supra* note55, 67-71; 80-2; 88-93. [↑](#footnote-ref-61)
62. See e.g. O’Keefe’s discussion of the paucity of examples of meaningful application of custom by courts in the United Kingdom: ‘The Doctrine of Incorporation Revisited’ (2008) 79 BYIL 7, 23-44. Also: P. Sales and J. Clemens, ‘International Law in Domestic Courts: The Developing Framework’ (2008) 124 *Law Quarterly Review* 388, at 415-16. [↑](#footnote-ref-62)
63. See D. Feldman, ‘Monism, Dualism and Constitutional Legitimacy’ (1999) 20 *Australian Year Book of International Law* 105, at 106-7. Also, Sales and Clemens, *supra* note 62, at 389-94. [↑](#footnote-ref-63)
64. Gaja, YILC 2005/I, at 64, para. 55. [↑](#footnote-ref-64)
65. H. Triepel, ‘Les Rapport entre le Droit Interne et le Droit International’ (1923) 1 RCADI 77, at 80-91. [↑](#footnote-ref-65)
66. In *Walz v. Clickair SA*, for example, the Court of Justice of the EU referred to the concept of injury enshrined in art 31(2) ARS as ‘common to all the international law sub-systems’ and expressing ‘the ordinary meaning to be given to the concept of damage in international law’: Case C-63/09, *Walz v. Clickair SA* [2010] ECR I-4239, para. 27. [↑](#footnote-ref-66)
67. Conclusions of the Work of the Study Group, *supra* note 2, paras. 11-12. [↑](#footnote-ref-67)
68. Ibid., para. 11. [↑](#footnote-ref-68)
69. The focus of the ILC was on specialised treaty regimes, especially the European system of human rights and the WTO. While the WTO is an IO, it is peculiar in that it mostly serves as a forum for the adoption of trade-related regulation by States and as a mechanism for dispute settlement. Thus, the ILC study did not specifically look into the role of general law in the relations between the WTO and its members on the institutional plane. [↑](#footnote-ref-69)
70. Conclusions of the Work of the Study Group, *supra* note 2, p. 178, para. 14. [↑](#footnote-ref-70)
71. Ibid., p. 179, para. 15. [↑](#footnote-ref-71)
72. Ibid., p. 180, para. 16. [↑](#footnote-ref-72)
73. Koskenniemi (Rapporteur), ‘Report of the Study Group of the ILC: Fragmentation of International Law’, A/CN.4/L.682 (2006) 93, para. 176. [↑](#footnote-ref-73)
74. Ibid., at 93-94, para. 177. [↑](#footnote-ref-74)
75. Ibid., at 96-97, para. 185. [↑](#footnote-ref-75)
76. J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (2003), 37. Similarly, Simma and Pulkowski have argued that ‘general international law provides a systemic fabric from which no special regime is completely decoupled’, and that ‘by framing a prescription in legal terms, states have opted to subordinate a particular issue to the logic of international law as a whole’: B. Simma and D. Pulkowski, ‘Of Planets and the Universe: Self-Contained Regimes in International Law’ (2006) 17 EJIL 483, at 529. [↑](#footnote-ref-76)
77. Koskenniemi, YILC 2005/I, at 78-79, para. 34. He added that ‘[m]ost of the major international organizations had special rules to deal with a breach of an internal rule, and it was clear that such rules ought to take precedence over the general rules that the Commission was drafting, but that certainly did not mean that general law was set aside’. [↑](#footnote-ref-77)
78. As per the *Van Gend en Loos* case and the classic affirmation that ‘the Community constitutes a new legal order of international law’: Case C-25/62, *Van Gend en Loos v. The Netherlands* [1963] ECR 1, 12. [↑](#footnote-ref-78)
79. Case C-162/96, *Racke GmbH & Co v. Haptzollant Mainz* [1998] ECR I-3655, para. 46. Also, Case C-286/90, *Anklagemyndigheden v. Poulsen and Diva Navigation* [1992] ECR I-6019, para 9. Whether in *Racke* the Court accurately applied the rule allowing for treaty termination/withdrawal on the ground of a fundamental change of circumstances is doubtful; as noted in a leading textbook, the Court’s ‘relaxed interpretation’ was at odds with the position adopted by the ICJ in its case law: Crawford, *supra* note 55, 393-394. [↑](#footnote-ref-79)
80. Conclusions of the Work of the Study Group, *supra* note 2, p.178, para. 4. [↑](#footnote-ref-80)
81. F. Seyersted, *Common Law of International Organizations* (2008), at 396. [↑](#footnote-ref-81)
82. E.g. ibid., pp. 32-33. [↑](#footnote-ref-82)
83. See his account of constitutional limitations in F. Seyersted, ‘International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend upon Their Constitutions?’ (1964) 4 *Indian Journal* *of International Law* 1, at 23-25. [↑](#footnote-ref-83)
84. It should be noted that this may not have been Seyersted’s intention, given his insistence on the distinction between ‘the inherent external legal capacity to act on a voluntary basis as an equal partner and inherent internal jurisdiction over organs and their members as such – on the one hand – and extended power to exercise functional jurisdiction over or in… member States or private individuals… on the other hand’: *supra* note 81, at 69. Yet, perhaps because his main concern was to demolish the idea that the source of the rights, obligations and capacities of IOs is their internal law alone, he failed to give a more nuanced treatment to the constitutional question. [↑](#footnote-ref-84)
85. It was in this spirit that cases such as *Reparation for Injuries* (*supra* note5)and *Certain Expenses of the United Nations* (Advisory Opinion of 20 July 1962, [1962] ICJ Rep. 151) were decided. [↑](#footnote-ref-85)
86. Cases that capture this idea include: *Conditions of Admission of a State to Membership in the United Nations*, Advisory Opinion of 28 May 1948, [1948] ICJ Rep. 57, at 64; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion of 8 June 1960, [ICJ] Rep. 150, at 170-171; and *Legality of the Use of Nuclear Weapons in Armed Conflict*, *supra* note 41, paras. 21-24. [↑](#footnote-ref-86)
87. *Reparation for Injuries*, *supra* note 5, at 178-180. The Court did not distinguish between the international and the institutional planes, but its conception of what the organization was under international law clearly informed its conclusion as to what the organization was authorised to do under the Charter. [↑](#footnote-ref-87)
88. Cf. Arts. 21 and 51 as adopted on first reading: YILC 2009/II, part two, at 47 and 67. [↑](#footnote-ref-88)
89. Commentary to Art. 22, YILC 2011/II, part two, at 72, para. 6; commentary to Art. 52, ibid., at 94, para. 8. [↑](#footnote-ref-89)
90. Joined Cases C-90/63 and 91/63, *Commission v. Luxembourg and Belgium* [1964] ECR 625, at 631 (concluding that ‘except where otherwise expressly provided, the basic concept of the Treaty [on the functioning of the EU] requires that the Member States shall not take the law into their own hands, except where otherwise expressly provided, the basis concept of the Treaty’). [↑](#footnote-ref-90)
91. Indeed, Special Rapporteur Gaja was hesitant to state a general rule on the issue: Gaja (Eighth Report), YILC 2011/I, part one, at 99, para. 67. [↑](#footnote-ref-91)
92. A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions* (2011), 154-190. [↑](#footnote-ref-92)
93. Ibid., at 157. This line of reasoning was compatible with the text of Arts. 22 and 52 as adopted on first reading. [↑](#footnote-ref-93)
94. Nolte, YILC 2009/I, at 11, para. 51. [↑](#footnote-ref-94)
95. See the discussion in T. Konstadinides, ‘Customary International Law as a Source of EU Law: A Two-Way Fertilization Route? (2016) YEL 513, at 519-525 (concluding that despite creating a ‘window of opportunity’ for claims based on custom to be made ‘the CJEU does not appear confident in exposing the EU to uncontrolled liability’ and ‘has demonstrated a blanket intolerance towards claims based on international custom’). [↑](#footnote-ref-95)
96. C-366/10 *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change* [2011] ECR I-13755, para. 107. [↑](#footnote-ref-96)
97. Ibid., para. 110. Previously, see *Racke*, *supra* note 79, para. 52. [↑](#footnote-ref-97)
98. Opinion of Advocate-General Poiares Maduro in Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-635, para. 21. [↑](#footnote-ref-98)
99. Ibid., para. 21. [↑](#footnote-ref-99)
100. Ibid., para. 24. [↑](#footnote-ref-100)
101. *Kadi*, *supra* note 98, paras. 281 and 316. [↑](#footnote-ref-101)
102. Though P. Eeckhout offers a more nuanced reading of *Kadi* (‘The Integration of Public International Law in EU Law: Analytical and Normative Questions’, in P. Eeckhout and M. López-Escudero (eds.), *The European Union’s External Actions in Times of Crisis* (2016), 189 at 196-198), which puts the Court of Justice’s approach into context, his analysis also point to tendencies of the European judicial system to insulate itself from regimes of international law such as the World Trade Organization and the European System of Human Rights (at 200-203). [↑](#footnote-ref-102)
103. A. Gianelli, ‘Customary International Law in the European Union’, in E. Canizzaro et al (eds.), *International Law as Law of the European* Union (2012), 93 at 100-1. [↑](#footnote-ref-103)
104. Ibid. [↑](#footnote-ref-104)
105. For a discussion of the ‘two masters’ dilemma with respect to the relations between international law and domestic law, see J. Crawford, ‘Chance, Order, Change: The Course of International Law’ (2013) 365 RCADI 13, at 160-182. [↑](#footnote-ref-105)
106. This omission was reportedly deliberate: J.R Leiæ and A. Paulus, ‘Article 103’, in B. Simma et al (eds.), *The Charter of the United Nations: A Commentary*, Vol. II (2012), 2010 at 2132-3. [↑](#footnote-ref-106)
107. E.g. Higgins et al, *Oppenheim’s International Law: United Nations* (2017), 427. [↑](#footnote-ref-107)
108. As discussed in Crawford, *supra* note 105, at 296-321. [↑](#footnote-ref-108)
109. Art. 24 UN Charter. [↑](#footnote-ref-109)
110. Leiæ and Paulus, *supra* note 106, at 2133. [↑](#footnote-ref-110)
111. Ibid., at 2127. [↑](#footnote-ref-111)
112. *Al-Jedda v. United Kingdom,* Judgment of 7 July 2011, 2011-IV ECHR, para. 105: *‘*[i]n the absence of clear provision to the contrary, the presumption must be that the Security Council intended States within the Multi-National Force to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law’. [↑](#footnote-ref-112)
113. In *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *supra* note 2, para. 118, the ICJ implies that Security Council resolutions can bind even non-State actors. But crucially, international organizations are not party to the UN Charter, and the basis on which they can be bound by UN law is unclear. See the discussion in commentary to Art. 67, YILC 2011/II, part two, at 104-5. [↑](#footnote-ref-113)
114. Art. 59 ARS; Art. 67 ARIO. [↑](#footnote-ref-114)
115. Commentary to Art. 67, YILC 2011/II, part two, at 105, para. 3. [↑](#footnote-ref-115)
116. I owe this example to a helpful exchange with one of the reviewers for this piece, to whom I am very grateful. [↑](#footnote-ref-116)