

**Assistance in Administrative Matters between International Organizations and States:
Towards a Clearer Legal Framework**
Edouard Fromageau*

CONTENTS

1. INTRODUCTION.....	1
2. ISSUES OF TERMINOLOGY.....	3
2.1 – <i>Assistance</i>	3
2.2 – <i>Assistance in Administrative Matters</i>	4
2.3 – <i>Assistance in Administrative Matters at the International Level</i>	5
2.3.1 – The Distinction between International Assistance in Criminal Matters and International Assistance in Administrative Matters.....	6
2.3.2 – Bilateral Administrative Assistance between States.....	8
2.3.3 – Assistance through International Organizations.....	9
2.3.4 – Assistance with International Organizations.....	11
3. LEGAL BASIS OF ASSISTANCE IN ADMINISTRATIVE MATTERS BETWEEN INTERNATIONAL ORGANIZATIONS AND STATES.....	13
3.1 – <i>Legal Basis of the Assistance at the International Level</i>	13
3.2 – <i>Legal Basis of the Assistance at the Domestic Level</i>	18
4. A PROPOSAL FOR A LEGAL REGIME FOR ASSISTANCE IN ADMINISTRATIVE MATTERS BETWEEN INTERNATIONAL ORGANIZATIONS AND STATES.....	18
4.1 – <i>Confidentiality</i>	19
4.2 – <i>Proportionality and Speciality</i>	21
4.3 – <i>Good Faith</i>	21
4.4 – <i>The Question of Reciprocity</i>	22
5. CONCLUSION.....	23

* PhD Candidate and Research Assistant, University of Geneva. I am deeply indebted to Prof. Laurence Boisson de Chazournes for her ideas, comments and suggestions. I would also like to thank Katherine Del Mar and Makane Mbengue for their very useful suggestions and comments. An earlier version of this paper was presented at the Conference entitled "Practical Legal Problems of International Organizations", held at the University of Geneva in March 2009 and jointly organized by the University of Geneva, the Institute for International Law and Justice (New York University School of Law) and the Istituto Di Ricerche Sulla Pubblica Amministrazione. E-mail: edouard.fromageau@unige.ch.

1. INTRODUCTION

This paper proposes possible ways for the establishment of a legal framework for a practice that already exists at the political level. On a frequent basis international organizations' organs have requested information from the administrations of States, and *vice versa*. The issue here is to determine which norms should be applied to this specific form of cooperation. We will begin our study by examining two recent examples of requests for documents between international organizations' organs and States.

In order to investigate allegations of fraud and corruption on the part of United Nations officials, personnel and agents, as well as contractors, in the United Nations Oil-for-food Programme, former UN Secretary-General Kofi Annan appointed, in April 2004, an Independent Inquiry Committee¹ (hereinafter the 'Volcker Commission') specially devoted to this matter. Following this, the United Nations Security Council unanimously adopted Resolution 1538 (2004), which endorses the inquiry and calls for full cooperation in the investigation by all United Nations officials and personnel, the Coalition Provisional Authority, Iraq, and all other Member States, including their national regulatory authorities. As soon as its mission began, the Volcker Commission requested assistance from a number of States, among them Switzerland and its State Secretariat for Economic Affairs (SECO)². The Swiss Federal Council authorised the SECO to cooperate with the Volcker Commission on 22 December 2004 and subsequently roughly 170 federal files, including numerous banking documents, were communicated by the Swiss Federal Banking Commission (CFB) to the Volcker Commission and interviews with 30 different representatives of banks, merchants in oil and other enterprises took place, under the supervision of the SECO, in Switzerland³.

In addition to the Volcker Commission, at least six Congressional panels, the Treasury Department, the United States attorney for the Southern District of New York, and the Manhattan district attorney were also investigating allegations of corruption and mismanagement in the United Nations oil-for-food Programme⁴. During a meeting organized

¹ The Committee was chaired by Paul A. Volcker, former Chairman of the Board of Governors of the United States Federal Reserve. The other members were Richard J. Goldstone, Justice of the Constitutional Court of South Africa from 1994 to 2003 and Visiting Professor of Law at Harvard Law School, and Mark Pieth, Professor of Criminal Law and Criminology at the University of Basel. See: <http://www.iic-offfp.org/members.htm>.

² Three requests for administrative assistance were made by the IIC. The first was made on 21 October 2004, the second and third on 22 November 2004.

See: <http://www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=fr&msg-id=9500>.

³ See: <http://www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=fr&msg-id=9635>.

⁴ See J. MILLER, "U.N. and Congress in dispute over Iraq oil-for-food inquiries", *The New York Times*, 28 July, 2004.

in Washington on 13 July 2004, officials and diplomats representing United States stated that Paul A. Volcker had rejected requests from members of the Congress for access to review documents and to interview United Nations officials being scrutinized by the Volker Commission⁵.

The Al Qaeda and Taliban Sanctions Committee (hereinafter 'the 1267 Committee') was established on 15 October 1999. Its main task was to determine those individuals and entities whose funds and other financial assets or economic resources must be frozen by States⁶. In Resolution 1267, the Security Council clearly "calls upon all States to cooperate fully with the Committee (...) in the fulfilment of its tasks, including supplying such information as may be required by the Committee in pursuance of this resolution".

The listing process carried out by the 1267 Committee is an interesting example on how information is transmitted from the United Nations to States, but also from States to the United Nations. The names included in the list are submitted by States to the 1267 Committee, on the basis of their own sources of information. The list established by the 1267 Committee provides then a central and coordinated source of information for measures that may be taken at the domestic level.

Although this practice of co-operating is a recurrent reality for both international organizations and States, and that it can be a crucial means to fulfil the functions of international organizations, its legal framework remains unclear. The determination of applicable rules may not be a priority for international organizations and States as long as no particular problems arise, and as long as exchanges of information can take place through informal and political processes. Nevertheless, the lack of a clear legal framework could hamper the requesting authority in fulfilling its missions when the authority which received the request is reluctant to furnish confidential or sensible documents in the absence of any legal guarantees. Given the absence at the international level of a norm especially devoted to this type of cooperation, we will try to identify a possible legal framework for this practice by using a legal tool that has been developed at the domestic level, namely assistance in administrative matters.

We will first define the concepts involved (2), before examining the legal basis (3) and the conditions that should be applied to international administrative assistance between international organizations and States (4).

⁵ *Idem.*

⁶ <http://www.un.org/sc/committees/1267/index.shtml>.

2. ISSUES OF TERMINOLOGY

Given that different names were sometimes used to describe the same reality, it seems necessary before going any further to define what we mean by assistance in administrative matters. We will successively define 'assistance' (2.1), 'assistance in administrative matters' (2.2) and 'international assistance in administrative matters' (2.3).

2.1 – ASSISTANCE

Assistance generally means the "activity of contributing to the fulfilment of a need or furtherance of an effort or purpose"⁷. As it is traditionally understood, the concept of assistance is used to determine two different types of relationships, depending of which kind of subjects are involved.

Originally, mutual assistance mechanisms were developed between authorities of one and the same State. Obligations to give assistance could be found at the constitutional level, especially in federal States. Article 35 of the Fundamental Law of Germany provides, for example, that "all federal and Land authorities shall render legal and administrative assistance to one another"⁸. If there is no provision in the State's Constitution, assistance is rendered on the basis of laws or agreements⁹.

At the international level, mutual assistance mechanisms are mainly envisaged at the inter-State level through bilateral and multilateral treaties. In that context, assistance may be distinguished from cooperation, insofar as cooperation underlines the existence of a common interest between collaborating entities¹⁰. Cooperation in international law is conceived broadly, and is found in a number of different and developing areas: economic,

⁷ Collins Essential Thesaurus, 2nd Edition, 2006, <http://www.thefreedictionary.com/assistance>.

⁸ Comparable provisions can be found in article 22 of the Constitution of the Republic of Austria, which states as well that "all authorities of the Federation, the States, and the Counties are bound within the framework of their legal sphere of competence to render each other mutual assistance". Article 44 of the Federal Constitution of the Swiss Confederation provides that "the Confederation and the Cantons shall support each other in the fulfilment of their duties and shall generally cooperate with each other. They owe each other a duty of consideration and support. They shall provide each other with administrative assistance and mutual judicial assistance". See F. BELLANGER, "L'entraide administrative en Suisse", in F. BELLANGER & T. TANQUEREL (eds.), *L'entraide administrative*, Schulthess, 2005, pp.9-28.

⁹ E. LOEBENSTEIN, "International Mutual Assistance in Administrative Matters", *Österreichische Zeitschrift für öffentliches Recht*, Supplementum 2, Springer-Verlag, Wien-New York, 1972, p.12.

¹⁰ The cooperation is defined, in international law, as the "coordinated action of two or more subjects in order to reach common purposes in a given field". J. SALMON (ed.), *Dictionnaire de droit international public*, Bruylant, 2001, p.268 (Our translation).

environmental, monetary, nuclear and so on¹¹. There does not appear to be any legal consequence when the term "cooperation" is used instead of "assistance"¹². Thus, assistance can be seen as a specific form of cooperation.

2.2 – ASSISTANCE IN ADMINISTRATIVE MATTERS

The concept of assistance in administrative matters designates "assistance given on the request of an authority or another government agency to the requesting authority (...) in order to enable or to facilitate the execution of (its) functions"¹³. Basically, assistance in administrative matters refers to co-operation between administrative authorities. It must be distinguished from assistance in criminal and civil matters.

Mutual assistance in criminal matters covers all proceedings for international co-operation in the enforcement of criminal law¹⁴. However, this distinction is not always clearly made because administrative authorities may also deal with criminal matters in some cases¹⁵. Another criterion of distinction is that administrative assistance is not of a contentious nature. It does not take place in the context of a judicial procedure before a Court, like is the case for judicial assistance¹⁶. In a nutshell, to determine whether a request falls in one or other type of assistance we can use three criteria: the nature of the requesting and the receiving authorities (*institutional*), the nature of the matter concerned (*functional*) and the occurrence of an ongoing judicial procedure.

Similar to assistance in criminal matters, assistance in civil matters has a contentious nature¹⁷. If in administrative and criminal procedures there is always a public interest to be addressed, in civil procedures the private interest prevails¹⁸. This latter type of procedure aims to insure the settlement of disputes between individuals, concerning their own interests¹⁹.

¹¹ *Idem*.

¹² For example, article 43 of the United Nations Convention against Corruption, which provides *inter alia* that States Parties shall consider assisting each other in investigations of and proceedings in administrative matters relating to corruption, is entitled "international cooperation". See the full text of the Convention at: http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

¹³ E. LOEBENSTEIN, *op.cit.*, p.11.

¹⁴ B. FREY, *International Mutual Assistance in Criminal Matters: Guideline*, Federal Office for Police Matters – Section for International Mutual Assistance, Bern, 8th ed., 1998, p.3.

¹⁵ *Idem*. See *infra.*, p.6.

¹⁶ <http://www.efd.admin.ch/dokumentation/zahlen/00579/00608/01256/index.html?lang=fr>.

¹⁷ R. SANSONETTI, *L'entraide administrative internationale dans la surveillance des marchés financiers: Standards internationaux et réception en droit suisse*, Etudes suisses de droit bancaire, Schutthess Polygraphischer Verlag, Zürich, 1998, p.46.

¹⁸ *Idem*.

¹⁹ More generally on International Assistance in Civil Matters: F. POCAR, *L'assistenza giudiziaria internazionale in materia civile*, CEDAM, Padova, 1967, 352 p.; P. VOLKEN, *Die Internationale Rechtshilfe in*

Starting from this distinction, each kind of assistance will call upon specific and more or less strict procedures.

Administrative assistance is provided through the exchange of information. The term 'information' is broadly understood here. It can cover, for example, the exchange of banking or fiscal documents, access to databases, or interviewing witnesses.

Administrative assistance is generally more straightforward to implement than assistance in criminal matters. Trust between administrative bodies is more easily established, the content of requests is quickly understood, and confidentiality is more likely to be maintained²⁰. With respect to assistance in criminal matters, this form of assistance has the advantage of permitting implementation of important coercive measures and of providing more elaborate means of inquiry. It includes *inter alia* extradition, the transfer of criminal proceedings, execution of foreign criminal judgements, and co-operation in police work²¹.

The use of assistance in civil matters aims to allow the execution of probatory measures and notifications during an ongoing trial at the domestic level. It can also include the recognition and the execution of judgements²².

The number of fields in which mechanisms of administrative assistance can be found is impressive. Our intention here is not to make an exhaustive list of them but to give some examples in the main areas concerned. As we will see below, administrative assistance takes place essentially in the tax²³, customs²⁴, banking and, more broadly, financial fields.

2.3 – ASSISTANCE IN ADMINISTRATIVE MATTERS AT THE INTERNATIONAL LEVEL

The concept of international assistance in administrative matters can cover a variety of different situations at the international level. An attempt will be made here to distinguish between these different situations. Administrative assistance is conceptually rooted at the domestic level. It takes place, as we have seen, between authorities within the same State, and

Zivilsachen, Schulthess Polygraphischer Verlag, Zürich, 1996, 365 p.; P. VOLKEN, "Die Internationale Rechtshilfe in Zivilsachen: Zustellungs- und Beweisaufnahmehilfe (I)", in P. BERNASCONI, G. BROGGINI, F. COMETTA, P.-L. MANFRINI & P. VOLKEN, *Assistenza giudiziaria internazionale in materia civile, penale, amministrativa ed esecutiva*, CFPG, Lugano, 1999, pp.1-34; G. BROGGINI, "Assistenza giudiziaria internazionale in materia civile (II)", in P. BERNASCONI, G. BROGGINI, F. COMETTA, P.-L. MANFRINI & P. VOLKEN, *op.cit.*, pp.35-58.

²⁰ *Ibid.*, p.45.

²¹ *Idem.*

²² R. SANSONETTI, *op.cit.*, p.46.

²³ See for example A. PIATIER, *L'évasion fiscale et l'assistance administrative entre états*, Sirey, 1938, 362 p.

²⁴ See the Additional Protocol on mutual administrative assistance on customs matters signed between Switzerland and the European Union on 9 June 1997, [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21997A0627\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21997A0627(01):EN:HTML).

also between authorities from two different States (2.3.2). If the legal framework for bilateral inter-State assistance appears relatively clear, this is because it is framed by specific domestic rules or a treaty-based regime. However, the same cannot be said when the assistance takes place between two different categories of subject of international law. The study of this type of relationship is becoming increasingly relevant given the evolution of functions of international organizations. We can note, and especially within the United Nations system, that international organizations deal with matters that need the administrative cooperation of States to be effectively addressed. In such cases, two types of situations may be distinguished. We can see, first, that administrative assistance can take place *through* the international organization (2.3.4) and that, second, it can take place directly *with* the international organization (2.3.5).

This is the last situation that we describe here as an example of administrative assistance between international organizations and States. Before proceeding any further, however, it is important to distinguish international assistance in administrative matters from international assistance in criminal matters (2.3.1).

2.3.1 – THE DISTINCTION BETWEEN INTERNATIONAL ASSISTANCE IN CRIMINAL MATTERS AND INTERNATIONAL ASSISTANCE IN ADMINISTRATIVE MATTERS

Administrative assistance in criminal matters at the international level is formalized first in bilateral treaties concluded between States. In order to increase this type of cooperation, a model treaty on mutual criminal assistance²⁵ was adopted by the United Nations General Assembly in Resolution 45/117 (1990). In this Resolution, the General Assembly explicitly recognized "the importance of a model treaty [...] as an effective way on dealing with the complex aspects and serious consequence of crimes, especially in its new forms and dimension"²⁶. Some time before this initiative, the European Convention on Mutual Assistance in Criminal Matters²⁷ adopted on 20 April 1959 by the Council of Europe, was already in place to enhance criminal cooperation in a multilateral way within Europe.

Criminal assistance also takes place between States and International Courts and Tribunals. According to article 29 and 28 of the their respective Statutes, all member States of the United Nations have the obligation to cooperate with the International Criminal Tribunal

²⁵ See the amended version of the model treaty (by General Assembly resolution 53/112) at http://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf.

²⁶ <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/565/06/IMG/NR056506.pdf?OpenElement>.

²⁷ <http://conventions.coe.int/Treaty/en/Treaties/Html/030.htm>.

for the former Yugoslavia²⁸ and the International Criminal Tribunal for Rwanda²⁹. Under Articles 86 to 102 of the Statute of Rome establishing the International Criminal Court, States Parties have an obligation to furnish assistance to the Court as well. However, the regime of those obligations will not be the same, as the obligation to cooperate with ICTY and ICTR is foreseen by Security Council Resolutions, and the obligation to cooperate with the ICC is treaty-based. Only States becoming a party to the Statute will be in principle under an international obligation to cooperate with the Court, whereas with the *ad hoc* Tribunals established on the basis of Chapter VII of the UN Charter, all member States of the UN are under an obligation to cooperate with the Tribunals³⁰.

We can also note that both ICTY³¹ and ICC³² can collaborate with States when they are leading investigations or trials for crimes which falls under the competence of these jurisdictions.

The establishment of the Special Tribunal for Lebanon could provide an interesting case in order to clarify the difference between international assistance in criminal and international assistance in administrative matters. Article 15 of the Statute of the Special Tribunal for Lebanon is especially devoted to the cooperation between the Government of Lebanon and the organs of the Special Tribunal³³. This type of assistance is fundamentally different from that provided by States to the United Nations Committee of Inquiry on the assassination of former Lebanese Prime Minister Rafik Hariri³⁴, even if it concerned the same type of information. This Committee was not a judicial entity and it had no criminal

²⁸ Article 29 of the Statute of ICTY: "1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (a) the identification and location of persons; (b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons; (e) the surrender or the transfer of the accused to the International Tribunal".

http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf.

²⁹ Article 28 of the Statute of the ICTR, which is formulated *mutatis mutandis* identically as Article 29 cited above.

³⁰ See A. CIAMPI, "The Obligation to Cooperate", in A. CASSESE, P. GAETA & J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, Oxford University Press, 2002, pp.1607-1638.

³¹ Article 11 *bis* of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev42_en.pdf.

³² Article 93 § 10 of the Statute.

³³ Article 15 of the Statute of the Special Tribunal for Lebanon, Annexed to Resolution 1757 (2007): "1. The Government shall cooperate with all organs of the Special Tribunal, in particular with the Prosecutor and defence counsel, at all stages of the proceedings. It shall facilitate access of the Prosecutor and defence counsel to sites, persons and relevant documents required for the investigation. 2. The Government shall comply without undue delay with any request for assistance by the Special Tribunal or an order issued by the Chambers, including, but not limited to: (a) Identification and location of persons; (b) Service of documents; (c) Arrest or detention of persons; (d) Transfer of an indictee to the Tribunal",

<http://daccessdds.un.org/doc/UNDOC/GEN/N07/363/57/PDF/N0736357.pdf?OpenElement>.

³⁴ Resolution 1595 (2005) of the Security Council.

jurisdiction. Its mandate was "to assist the Lebanese authorities in their investigation of all aspects of this terrorist act, including to help identify its perpetrators, sponsors, organizers and accomplices"³⁵. This inquiry was *per se* of an administrative nature, albeit it constituted a preliminary step before a criminal procedure. The establishment of the Special Tribunal was consequently needed to prosecute persons responsible of the attack resulting in the death of the former Lebanese Prime Minister. According to principle of speciality³⁶, the consent given by a State to cooperate with the Committee will not automatically be granted to the jurisdiction. As the procedure and purpose of the entity requesting cooperation has changed, the consent of a State must be given a second time for information provided by the State to the Committee which the Tribunal may now wish to use. It seems that there is no need for the State's consent to be reaffirmed if it was clear from the outset that it consented to providing information with respect to both procedures.

2.3.2 – BILATERAL ADMINISTRATIVE ASSISTANCE BETWEEN STATES

At the international level, assistance mechanisms were originally, and continue to be, established between State authorities, through specific treaties. These treaties can address the issue of assistance in general, both administrative and criminal, like the treaty signed on 31 May 1988 between the Federal Republic of Germany and Austria³⁷, or they can focus on one specific matter, like the treaty on administrative assistance in customs matters signed on 21 March 1975 between France and Senegal³⁸.

The legal framework of inter-State assistance rests on a vast web of specific bilateral agreements. There is no general treaty that provides a requirement for assistance that can be applied to all forms of assistance, and on any matters.

Even if treaties remains a traditional mechanism for formally establishing assistance between two States, such assistance can take other forms like administrative arrangements

³⁵ *Ibid.*, p.2, §1.

³⁶ See *infra.*, p.21.

³⁷ http://untreaty.un.org/unts/60001_120000/30/26/00059300.pdf.

³⁸ http://untreaty.un.org/unts/1_60000/29/16/00056791.pdf.

between two executive authorities³⁹, exchanges of letters⁴⁰, or discretionary practices of national administrative authorities⁴¹.

2.3.3 – ADMINISTRATIVE ASSISTANCE THROUGH INTERNATIONAL ORGANIZATIONS

Through the elaboration of a specific mechanism, international organizations provide a platform and an infrastructure that enhance cooperation between different national authorities in an increasing numbers of fields. In such situations the exchange of information will not take place between States and international organization, but between States through the use of a mechanism established by an international organization.

With respect to tax matters, international administrative assistance mechanisms are provided, for example, in treaties to avoid double-taxation⁴². Specific multilateral treaties, like the OCDE/Council of Europe Convention on mutual administrative assistance in tax matters, provide national tax administrations with instruments in order to simplify this type of co-operation⁴³. In the United Nations, an Ad Hoc Group of Experts on Tax Treaties between Developed and Developing Countries was established in 1968 pursuant to ECOSOC resolution 1273 (XLIII) of 4 August 1967. In 1978 and 1980 it finalized a set of Guidelines for tax treaties and a Model Double Taxation Convention between developed and developing countries⁴⁴. The mandate of the Group of Experts was broadened in April 1980 to include the tax treaties between developed and developing countries as well as bearing on international co-operation in tax matters⁴⁵. In Resolution 2004/69 of 11 November 2004, ECOSOC renamed the Group the "Committee of Experts on International Cooperation in Tax Matters"⁴⁶.

³⁹ See Article 9 of the Administrative arrangement concluded between the Swiss Federal Social Insurance Office and the government of United States on 18 July 1979, <http://www.admin.ch/ch/f/rs/i8/0.831.109.336.11.fr.pdf>.

⁴⁰ P.-L. MANFRINI, "Entraide administrative internationale", in Ch.-A. JUNOD & A. HIRSCH (eds.), *L'entraide judiciaire internationale en matière pénale, civile, administrative et fiscale*, Georg Editeur SA, Geneva, 1986, p.133.

⁴¹ *Ibid.*, p.134.

⁴² B. GANGEMI, *L'échange d'informations dans le cadre de l'assistance administrative internationale – rapport général*, CDFI vol. LXXVb, Deventer/Boston, 1990, p.57.

⁴³ See OCDE, "La Convention concernant l'assistance administrative mutuelle en matière fiscale – Edition du XXème Anniversaire", Les éditions de l'OCDE, 2008, 135 p.

⁴⁴ See S. SURREY, *United Nations model convention for tax treaties between developed and developing countries: a description and analysis*, International Bureau of Fiscal Documentation, 1980, 113 p.

⁴⁵ Resolution 1980/13 of the ECOSOC, 28 April 1980, <http://daccessdds.un.org/doc/UNDOC/GEN/NR0/766/73/IMG/NR076673.pdf?OpenElement>.

⁴⁶ The Fourth Session of this Committee took place in Geneva on 20-24 October 2008, http://www.un.org/esa/ffd/tax/fourthsession/EC18_2008_CRP1.pdf.

The fight against money-laundering is also a significant field in which administrative assistance is used. Starting from 1988, efforts were taken in the UN through the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances⁴⁷. In October 1996, a Global Programme against Money-Laundering, Proceeds of Crime and the Financing of Terrorism (GPML) was launched by the United Nations International Drug Control Programme (UNDCP) to be applied in collaboration with the United Nations Centre for International Crime Prevention (CICP)⁴⁸. Both are now part of the United Nations Office on Drugs and Crimes (UNODC). This field has also been developed in the last few years principally through recommendations of the Financial Action Task Force⁴⁹. In November 2000, the United Nations Convention against Transnational Organized Crime was adopted by the General Assembly⁵⁰ in order to promote cooperation to prevent and combat transnational organized crime more effectively⁵¹. The first treaty in the development of the fight against corruption was the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions⁵² signed on 17 of December 1997. According to article 9 of this Convention, each Party shall "provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party (...). The requested Party shall inform the requesting Party, without delay, of and additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance". In December 2005 the United Nations Convention against Corruption came into force, which in article 43 calls for co-operation between States in criminal, civil and administrative matters⁵³.

The prevention of terrorism is also a field that requires administrative assistance between States. Prior to September 2001, mechanisms of administrative assistance were contained in treaties such as the United Nations Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic

⁴⁷ http://www.unodc.org/pdf/convention_1988_en.pdf.

⁴⁸ R. SANSONETTI, *op.cit.*, p.93.

⁴⁹ Recommendation 35 – 40, <http://www.fatf-gafi.org/dataoecd/7/40/34849567.PDF>.

⁵⁰ Resolution of the General Assembly 55/25 of 15 November 2000.

⁵¹ Article 7.1 b of this convention: "Each State Party (...) shall ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law".

⁵² <http://www.oecd.org/dataoecd/4/18/38028044.pdf>.

⁵³ "States Parties shall cooperate assisting each other in investigations of and proceedings in civil and administrative matters", http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

Agents⁵⁴ and the International Convention against the Taking of Hostages⁵⁵ adopted by the General Assembly in 1973 and 1979, respectively. In September 2001, the UN Security Council adopted Resolution 1373 which imposed certain obligations on Member States under Chapter VII, such as the prevention and the suppression of the financing of terrorist acts, the criminalization of terrorism-related activities and of the provision of assistance to carry out those acts, the denial of funding and providing a safe haven for terrorists, and the exchange of information to prevent the commission of terrorist acts. Subsequently, the United Nations International Convention for the Suppression of the Financing of Terrorism⁵⁶ and the International Convention for the Suppression of Acts of Nuclear Terrorism⁵⁷, came into force in April 2002 and April 2005, respectively.

Assistance between States through mechanisms established by international organizations will not be examined here. However it seems relevant to note that there is an increasing need for States to co-operate with one another at the multilateral level, to address problems that cannot be solved, or at least only partly, at the bilateral level.

2.3.4 – ADMINISTRATIVE ASSISTANCE WITH INTERNATIONAL ORGANIZATIONS

In some cases, international organizations create bodies in order to specifically execute one of their functions. Consequently, assistance no longer takes place only through a mechanism established by an international organization, but directly with the organs of such

⁵⁴ Article 4.b of this Convention: "States Parties shall co-operate in the prevention of the crimes particularly by (...) exchanging information and co-ordinating the taking of administrative and others measures as appropriate to prevent the commission of those crimes", <http://untreaty.un.org/English/Terrorism/Conv4.pdf>.

⁵⁵ Article 4.b of this Convention: "States Parties shall co-operate in the prevention of the crimes particularly by (...) exchanging information and co-ordinating the taking of administrative and others measures as appropriate to prevent the commission of those offences", <http://untreaty.un.org/English/Terrorism/Conv5.pdf>.

⁵⁶ Article 12 of this Convention: "States Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in article 2, including assistance in obtaining evidence in their possession necessary for the proceedings. 2. States Parties may not refuse a request for mutual legal assistance on the ground of bank secrecy. 3. The requesting Party shall not transmit nor use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party", <http://untreaty.un.org/English/Terrorism/Conv12.pdf>.

⁵⁷ Article 7.1 b of this Convention: " States Parties shall cooperate by (...) exchanging accurate and verified information in accordance with their national law and in the manner and subject to the conditions specified herein, and coordinating administrative and other measures taken as appropriate to detect, prevent, suppress and investigate the offences set forth in article 2 and also in order to institute criminal proceedings against persons alleged to have committed those crimes. In particular, a State Party shall take appropriate measures in order to inform without delay the other States referred to in article 9 in respect of the commission of the offences set forth in article 2 as well as preparations to commit such offences about which it has learned, and also to inform, where appropriate, international organizations", http://untreaty.un.org/English/Terrorism/English_18_15.pdf.

organizations. The examples provided by the UN Security Council Committees are particularly interesting in this regard.

First, administrative assistance mechanisms can be found in the relationship between States and fact-finding committees established by the United Nations. Early examples of this practice are the establishment of inquiry committees concerning incidents at the borders of Greece, or in the Corfu Channel incidents⁵⁸. In these early cases, it was already foreseen that these committees "shall have authority to call upon the Governments, officials and nationals of (involved) countries, as well as such other sources as the Commission deems necessary, for information relevant to its investigation"⁵⁹.

Fact-finding missions which particularly aim to inquire on the responsibility of individuals were only recently established. Inquiry Commissions were created in relation to the former Yugoslavia⁶⁰ in 1992, Rwanda⁶¹ in 1994, Darfur⁶² in 2004, the United Nations Oil-for-Food Programme⁶³ in 2004, and the assassination of former Lebanese Prime Minister Rafik Hariri⁶⁴ in 2005.

Second, administrative assistance mechanisms can be found in the relationship between States and the sanction committees established by the United Nations. To date, eleven sanction committees have been created⁶⁵. In one of the first of such cases, namely the Committee that was established by the Security Council pursuant to resolution 751 (1992) concerning Somalia, it was underlined that one of the Committee's tasks was to "seek from all States information regarding the action taken by them"⁶⁶. Through the recent emergence of targeted sanctions, sanction committees have also had to deal with questions concerning the involvement of individuals and entities. This is for example the case of the Security Council Committee established pursuant to resolution 1267 (1999), also known as "the Al-Qaida and Taliban Sanctions Committee", referred to above.

In a nutshell, assistance in administrative matters between international organizations and States materialises when an international organization requests information from a State, and *vice versa*, in order to fulfil one of the missions of the requesting authority that is

⁵⁸ Resolution 19 (1947) of the Security Council.

⁵⁹ Resolution 15 (1946) of the Security Council.

⁶⁰ Resolution 780 (1992) of the Security Council.

⁶¹ Resolution 935 (1994) of the Security Council.

⁶² Resolution 1564 (2004) of the Security Council.

⁶³ Resolution 1538 (2004) of the Security Council. The SC "calls upon (...) Member States, including their national regulatory authorities, to cooperate fully by all appropriate means to the inquiry".

⁶⁴ Resolution 1595 (2005) of the Security Council.

⁶⁵ <http://www.un.org/sc/committees/index.shtml>.

⁶⁶ Resolution 751 (1992) of the Security Council, par.11.a.

typically qualified as administrative⁶⁷. Contrary to assistance through international organizations, the information in this instance will be kept by the international organization and not shared among other States. Starting from this definition, the concept can cover other types of situations that require information from States or international organizations, like internal investigations managed by the relevant authorities of international organizations, such as the United Nations Office of Internal Oversight Services.

The Sanction and Inquiry Committees provides one example, but we can expect that as long as the functions of international organizations will increase, the domain of international assistance in administrative matters will likewise increase as well.

3. LEGAL BASIS OF INTERNATIONAL ADMINISTRATIVE ASSISTANCE

In order to determine the legal basis for assistance in administrative matters between international organizations and States, there are three different situations that must be distinguished. In the first situation, there is no legal basis for cooperation. The lack of a legal basis may be a justification for States to refuse to cooperate following a request made by an international organization, and *vice versa*. If the sending authority accepts to furnish the requested documents, the transfer will occur through informal processes. In a second situation, assistance is based on a particular legal basis that apply only in specific situations. This is the case for requests based on Chapter VII of the UN Charter (3.1). A third situation is when there is a domestic legal basis that specifically provides for cooperation (3.2).

3.1 – LEGAL BASIS OF THE ASSISTANCE AT THE INTERNATIONAL LEVEL

Given the absence of a general international treaty on the matter, is there a binding basis for assistance that obliges States to provide an international organization with the information it has requested? This question can be answered affirmatively when the request for assistance is based on the Chapter VII of the UN Charter.

Concerning fact-finding committees, cooperation has been based on Chapter VII on two occasions: when States were requested to co-operate with the commission on Darfur, and

⁶⁷ If the administrative dimension of Law can be seen more easily at the domestic level, and thus at the inter-State level, it is possible to analyze certain activities of international organizations from an administrative point of view. The question of the definition of Administrative Law and its potential application to international organization requires further and more in-depth discussion.

with the commission established to investigate the assassination of former Lebanese Prime Minister Rafik Hariri.

The legal basis of the commission on Darfur was article 41 of the UN Charter⁶⁸, used here for the first time to authorize the creation of a fact-finding committee. In its report released on 25 January 2005, the Commission considered that "both the Government of Sudan and the rebels (were) under a *bona fide obligation* to cooperate with it in the discharge of its various functions"⁶⁹. A *bona fide* obligation means that there is not simply an obligation to cooperate, but an obligation to cooperate in good faith⁷⁰. The report noted that both the Government of Sudan and the rebel groups had willingly accepted to cooperate with the Commission, notably by providing it with free access to all sources of information, including documentary material and physical evidence⁷¹.

Originally, the Commission on the assassination of former Lebanese Prime Minister Rafik Hariri was not based on Chapter VII of the UN Charter⁷². On 13 June 2005, a Memorandum of Understanding, defining the modalities of the cooperation, was signed by the Commission and the Lebanese Government⁷³. In this agreement it was decided that the Lebanese Government "shall guarantee that the Commission is free from interference in the conduct of its investigation, and is provided with all necessary assistance to fulfil its mandate, including: a- *Provision of all documentary, testimonial and physical information and evidence in possession of the Lebanese authorities* on the case as soon as possible, but no later than three days after the signature of this MOU. Any additional documentary, testimonial or

⁶⁸ Resolution 1564 (2004) of the Security Council. The SC, "Determining that the situation in Sudan constitutes a threat to international peace and security and to stability in the region, Acting under Chapter VII of the United Nations Charter", (par.12) "Requests that the Secretary-General rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable, calls on all parties to cooperate fully with such a commission, and further requests the Secretary-General, in conjunction with the Office of the High Commissioner for Human Rights, to take appropriate steps to increase the number of human rights monitors deployed to Darfur".

⁶⁹ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, UN doc. S/2005/60, http://www.un.org/news/dh/sudan/com_inq_darfur.pdf, p.14, § 27.

⁷⁰ See *infra.*, p.21.

⁷¹ *Idem.*

⁷² Resolution 1595 (2005) of the Security Council. The SC (par.3) "decides that, to ensure the Commission's effectiveness in the discharge of its duties, the Commission shall (...) Enjoy the full cooperation of the Lebanese authorities, including full access to all documentary, testimonial and physical information and evidence in their possession that the Commission deems relevant to the inquiry (and) Have the authority to collect any additional information and evidence, both documentary and physical, pertaining to this terrorist act, as well as to interview all officials and other persons in Lebanon, that the Commission deems relevant to the inquiry". However, in the meantime, the SC (par.7) "Calls on all States and all parties to cooperate fully with the Commission, and in particular to provide it with any relevant information they may possess pertaining to the above-mentioned terrorist act".

⁷³ <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Lebanon%20S2005393.pdf>.

physical information and evidence that may be collected by the Lebanese authorities after the signature of this MOU, shall also be provided to the Commission as soon as possible, but no later than three days from the date they were collected"⁷⁴.

In the first report released on 20 October 2005 the Commission emphasised the lack of cooperation of the Government of the Syrian Arab Republic, which had impeded the investigation⁷⁵. Following this report, the Security Council adopted Resolution 1636, which was based on Chapter VII, calling for full cooperation of all States with the Commission⁷⁶. This resolution was especially adopted to enhance the collaboration of Syria with the inquiry, which was accused of not cooperating or even trying to undermine the work of the Commission. It was noted in the second report, released after Resolution 1636, that the Commission's efforts to gain the cooperation of the Syrian authorities "have recently begun to bear fruit after delays which had an impact on the Commission's ability to effectively carry out its work"⁷⁷.

In a nutshell, it seems that the use of Chapter VII by the Security Council is a means to induce the cooperation of States. If the request for cooperation is not based on Chapter VII, it appears that there is no formal legal obligation to cooperate. As the "Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security"⁷⁸ provides: (par.22) "States *should cooperate* with United Nations fact-finding missions and give them, within the limits of their capabilities, the full and prompt assistance necessary for the exercise of their functions and the fulfilment of their mandate". Nevertheless, as discussed above, the current practice of the Security Council is to refer systematically to Chapter VII to strengthen the obligation to cooperate. The forthcoming

⁷⁴ *Idem*.

⁷⁵ First Report of the International Independent Investigation Commission established pursuant to Security Council resolution 1595 (2005) (S/2005/662), 20 October 2005, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Lebanon%20S2005662.pdf>, p.19.

⁷⁶ Resolution 1636 (2005) of the Security Council. The SC, "Acting under Chapter VII of the Charter of the United Nations", (par.3) "Decides as a step to assist in the investigation of this crime and without prejudice to the ultimate judicial determination of the guilt or innocence of any individual;(a) that all individuals designated by the Commission or the Government of Lebanon as suspected of involvement in the planning, sponsoring, organizing or perpetrating of this terrorist act, upon notification of such designation to and agreement of the Committee established in subparagraph (b) below, shall be subject to the following measures: (...) All States shall: cooperate fully in accordance with applicable law with any international investigations related to the assets or financial transactions of such individuals, entities or persons acting on their behalf, including through sharing of financial information".

⁷⁷ Letter dated 12 December 2005 from the Secretary-General addressed to the President of the Security Council (S/2005/775), 12 December 2005, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Lebanon%20S2005775.pdf>, p.1.

⁷⁸ General Assembly, "Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security" (A/RES/46/59), 9 December 1991, <http://www.un.org/documents/ga/res/46/a46r059.htm>.

establishment of a commission of inquiry on the assassination of former Pakistan Prime Minister Benazir Bhutto⁷⁹ will perhaps confirm this practice.

It must be noted here that the use of Chapter VII of the Charter should not be interpreted as requiring States to cooperate, but only as a way of enhancing their cooperation. In the end, the final decision to cooperate or not will be made by States. In the absence of their cooperation, committees will not risk a direct confrontation with the uncooperative State. They will simply refer to the Security Council when a State does not agree to furnish documents. If it is still necessary, they will recall that the State is not acting in accordance with its obligations⁸⁰.

Finally, it appears that Chapter VII, albeit useful to induce States to cooperate, cannot work in every case. It can serve as a legal basis but only in specific cases. As we noted before, international assistance in administrative matters between international organizations and States, as we defined it above, can cover situations that would not be qualified as a threat to the peace, breaches of the peace or as an act of aggression, which is a condition for decisions under Chapter VII to be taken. This is the case, for example, concerning investigations about frauds committed by United Nations or State agents.

If we examine others provisions of the UN Charter that can serve as a binding rule on States to assist an international organization, article 2 para.5 conveys the impression, at first glance, that it contains a general obligation for member States to give assistance to the organization⁸¹. However, as the obligation under this provision applies to "actions" and the last part of the sentence refers to "enforcement action", it is clear that "only enforcement measures taken by the Security Council according to Chapter VII can be envisaged"⁸².

Another argument may be to say that States have an obligation to assist United Nations each time the Security Council has so requested, by virtue of article 25 of the UN Charter⁸³. According to this reasoning, Article 25 could be a means to oblige States to give assistance when the Security Council so decides, even if its decision in this respect is not

⁷⁹ <http://www.un.org/News/Press/docs/2008/sgsm12023.doc.htm>.

⁸⁰ Before the Darfur and Lebanon Committees, the Security Council has called States to cooperate with Committees, but it was not based yet on Chapter VII. For example, in its Resolution 1053 (1996) the Security Council (par.8) "expresses concern at the lack of response by certain States to the Commission's inquiries, and calls upon those States that have not yet done so to cooperate fully with the Commission in its inquiries and to investigate fully reports of their officials and nationals suspected of violating the relevant Council resolutions".

⁸¹ Article 2 (5) of the UN Charter: "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action".

⁸² A. FROWEIN, "Article 2 (5)", in B. SIMMA (ed.), *The Charter of the United Nations: A Commentary*, Oxford University Press, New York, 1995, pp.129-131.

⁸³ Article 25 of the UN Charter: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

based on Chapter VII. According to the International Court of Justice, in the Advisory Opinion on Namibia, before determining if a resolution of the Security Council has binding force "the language used by the Security Council should be carefully analysed"⁸⁴. The Security Council "decides" in order, for example, to request Member States to implement economic sanctions, when it seems more important to emphasize the legal aspect of the obligation, than to highlight the political will of the Council⁸⁵. In contrast, the Security Council may hesitate to phrase an obligation in terms of a "decision" when it feels that this obligation will not be implemented immediately or when it seems more important to highlight its political will rather than the legal obligation to the addressee of the resolution⁸⁶. In practice, it appears that the Security Council tends rather to "call upon" States to cooperate fully than to "decide" that States have to cooperate.

At the international level, both Chapter VII and Article 25 of the Charter can sometimes provide a legal basis, but not one that is permanent and that will work in every case. It thus appears preferable to find a legal basis which results from the collaboration between international organizations and States and that can be applied to all types of administrative assistance.

Other examples of a legal basis for assistance in administrative matters can be found outside of the United Nations context. The need to frame such practices in binding rules led other international organizations to include specific provisions in their constituent instruments. The Convention on the Organization for Economic Co-operation and Development, in its article 3, provide for example that "Members agree that they will keep each other informed and furnish the Organisation with the information necessary for the accomplishment of its tasks, consult together on a continuing basis, carry out studies and participate in agreed projects, and co-operate closely and where appropriate take co-ordinated action"⁸⁷. Article 13 of the "Understanding on rules and procedures governing the settlement of disputes" (Annex 2 of the WTO Agreement) similarly provides that each panel shall have "the right to seek information and technical advice from any individual or body which it deems appropriate"⁸⁸.

⁸⁴ ICJ, Advisory Opinion of 21 June 1971, *Legal Consequences for States of the continued presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Rec. 1971, p.53, par.114.

⁸⁵ E. SUY & N. ANGELET, "Article 25", in J.P. COT, A. PELLET & M. FORTEAU (eds.), *La Charte des Nations Unies – Commentaire article par article*, 3rd edition, Economica, 2005, p.915.

⁸⁶ *Idem*.

⁸⁷ www.mnb.hu/Resource.aspx?ResourceID=mnbfile&resourcename=Convention_on_the_OECD_1960.

⁸⁸ Article 13 of the Understanding on rule and procedures governing the settlement of disputes: "1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems

Starting from these different legal bases, convergent points may be gleaned in order to articulate a general legal basis that could frame all cases of cooperative exchange of information between States and international organizations.

3.2 – LEGAL BASIS OF THE ASSISTANCE AT THE DOMESTIC LEVEL

In some cases, States feel the need to establish a clear legal basis, in order to avoid informal cooperation⁸⁹. That is the case of Switzerland with the Federal Law on the application of international sanctions or *loi sur les embargos (LEmb)*⁹⁰ which provides in article 7 that competent federal authorities may cooperate and coordinate their inquiries with international organisations. It appears that this law is not limited to collaboration with a Sanction Committee. It was used by the Swiss Federal Council as the legal basis for the cooperation with the Volcker Commission⁹¹.

The advantage of this legal basis is that cooperation between Switzerland and an international organization can be based on this law or on a resolution made by an international organization. However, the determination of a legal basis for the cooperation at the domestic level has obviously the disadvantage of being limited to a single State. Even if a majority of States has a domestic legal basis for cooperation, it is likely that the conditions will differ from State to State.

appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information. 2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4",

http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

⁸⁹ In Switzerland, the existence of a legal basis is one of the conditions for providing administrative assistance when the information that will be shared is covered by a secret protected by law. See JAAC 48/1984 n°28, p.170 (OFJ, 17.02.1983).

⁹⁰ *Loi fédérale sur l'application de sanctions internationales (loi sur les embargos, LEmb)*, 22 March 2002, <http://www.admin.ch/ch/f/rs/9/946.231.fr.pdf>. This law provides a permanent legal basis but Swiss policy is to implement sanctions decided by the Security Council on a case-by-case basis, with the adoption of specific ordinances. See, for example, the *Ordonnance instituant des mesures à l'encontre de personnes et entités liées à Oussama ben Laden, au groupe «Al-Qaïda» ou aux Taliban* (RS 946.203) or more recently *Ordonnance instituant des mesures à l'encontre de la République populaire démocratique de Corée* (RS 946.231.127.6). For an overview of measures taken by Switzerland on that matter see:

<http://www.seco.admin.ch/themen/00513/00620/00622/index.html?lang=fr>.

⁹¹ <http://www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=fr&msg-id=9635>.

4. A PROPOSAL FOR A LEGAL REGIME FOR INTERNATIONAL ADMINISTRATIVE ASSISTANCE BETWEEN INTERNATIONAL ORGANIZATIONS AND STATES

The focus of this section is the articulation of conditions for administrative assistance that could form the basis of a future legal regime. These conditions are derived from conditions that are applied at the domestic and at the inter-State level, and from the practice that already exists between international organizations and States.

The first condition for assistance for some States may be the existence of a legal basis for cooperation with the international organization. As discussed above, the current practice of the Security Council is to base the actions of its committees on Chapter VII of the UN Charter. Where a request for documents is not based on Chapter VII, the State may feel compelled to establish a legal basis in domestic law. Another criterion for assistance, which is required both at the domestic and inter-state level, is confidentiality (4.1). We will examine the question of the potential application of the principles of speciality, proportionality (4.2), and good faith (4.3) in the relationship between States and international organizations. The question of reciprocity is more problematic. It appears that it cannot be considered as a condition of international administrative assistance (4.4).

4.1 – CONFIDENTIALITY

As assistance with international organizations often concerns the transfer of information that is protected at the domestic level, committees must provide States with guarantees that this information will not be made public. As a consequence, States request confidentiality. For example, the Swiss Federal Law on the application of international sanctions provides that the international organisation is bound by the *secret de fonction* or by the *devoir de discrétion équivalent*, and must guarantee that will not engage in economic spying.

Provisions on confidentiality are found in the Guidelines of the committees concerned. In the "Investigations Guidelines"⁹² of the Independent Inquiry Committee into the United Nations Oil-for-Food Programme, it is stipulated that the committee may determine that special measures to ensure confidentiality of sources or witnesses are required. It may include the use of a confidential source registry and designation, limits to access to information about

⁹² <http://www.iic-offp.org/documents/Investigations%20Guidelines.pdf>.

identities of such persons and use of normal file protection. If there has been any unauthorized disclosure of information by any IIC staff member, this disclosure "will be reported by the Executive Director to the IIC Chairman so that prompt corrective action can be taken, which may include removal of the IIC staff member and notification to the affected person(s)".

Similar provisions can be found in the Guidelines of Sanction Committees. To take a recent example, the Guidelines of the Committee established pursuant to Resolution 1737⁹³ (Sanction against Islamic Republic of Iran) provides that "the information received by the Committee will be kept confidential if the provider so requests or if the Committee so decides"⁹⁴.

Even if these guidelines "do not and are not intended to confer, impose or imply any duties, obligations or rights that are enforceable in any court of law or administrative proceedings"⁹⁵, the credibility of the committee will largely depends on how, in practice, it can guarantee confidentiality. To self-impose a strict obligation of confidentiality may also hamper the activity of such organs. It is especially true for Sanction Committees which, in the case of drawing up a list of individuals or entities, must deal with different claims that come from States, depending on how they cooperate. On the one hand, States in which the listed individuals and entities (or their assets) are believed to be located may request as much information as possible from the Committee about the individuals and entities listed, whereas on the other hand, it will be a matter of priority for States which have submitted the names of the listed individuals/entities to receive assurances from the Committee that the information they have provided is kept confidential⁹⁶.

In April 2003, investigative offices of several international organizations agreed on the need to harmonize their practices and endorse a set of uniform guidelines for investigations⁹⁷. These guidelines state that investigators should endeavour to maintain both the confidentiality and, to the extent possible, protection of witnesses.

⁹³ <http://www.un.org/sc/committees/1737/pdf/revisedguidelinesfinal.pdf>.

⁹⁴ Same provision can be found in the Guidelines for the Committee 1718 (RPDK) (http://www.un.org/sc/committees/1718/pdf/guidelines_20_jun_07.pdf). In the guidelines of the Committee 751 (Somalia) (<http://www.un.org/sc/committees/751/comguide.shtml>) it provides that "The Committee invites States to provide information relating to any violations or alleged violations by any party of the mandatory arms embargo established by the Security Council with respect to Somalia in paragraph 5 of resolution 733 (1992). The Committee is to make an initial appeal to all States to that effect, advising them to submit their information in communications addressed to the Chairman in writing, *under assurance of confidentiality*. The Committee may renew the appeal as occasion warrants" (emphasis added).

⁹⁵ *Idem*.

⁹⁶ M. KANETAKE, "Enhancing Community Accountability of the Security Council through Pluralistic Structure: The Case of the 1267 Committee", *Max Planck United Nations Yearbook*, Vol.12, 2008, p.118.

⁹⁷ http://www.un.org/Depts/oios/investigation_manual/ugi.pdf.

In short, confidentiality in the case of international administrative assistance is guaranteed by a set of guidelines that are not binding for the committees. The imposition of an obligation of confidentiality, both on States and on international organizations, through a binding norm, could enhance the cooperation.

4.2 – PROPORTIONALITY AND SPECIALITY

The principle of speciality means that the information that will be transferred from States to international organizations, and *vice versa*, will be used exclusively in order to act in conformity with the object of the request⁹⁸. If the receiving authority wants or needs to use the information for the purpose of investigating or deciding on other infractions or facts, or to communicate such information to other entities, the consent of the sending authority must first be obtained. The application of the principle of speciality to the relationship between States and international organizations could be a guarantee that the information transferred will not be used for political purposes.

According to the principle of proportionality, the requesting authority shall not go beyond, on its request for information, what is strictly necessary to achieve the objects of its mission or mandate⁹⁹. The application of this principle would limit the requesting authority to request only those materials that are necessary in a given case, and prohibit it from pursuing other ends, such as other investigations, about which the sending authority is not informed.

4.3 – GOOD FAITH

An obligation to cooperate in good faith has been already affirmed, for example, in the case of the Committee on Darfur. The first report clearly states that Sudan has a *bona fide obligation* to cooperate with the Committee. This obligation comes presumably from the very fact of the State's membership of the Organization, which "entails certain mutual obligation of cooperation and good faith incumbent upon (the State) and upon the Organization"¹⁰⁰. Two

⁹⁸ R. SANSONETTI, *op.cit.*, p.170.

⁹⁹ This condition is derived from the principle of proportionality that operates in Community Law (Article 5 of the EC Treaty 'any action by the Community shall not go beyond what is necessary to achieve the objects of the Treaty'. For further information see R. WIDDERSHOVEN, "European Administrative Law", in R. SEERDEN (ed.), *Administrative Law of the European Union, its Member States and the United States*, Intersentia, 2nd ed., 2007, p.316) and the condition of proportionality that operates in Swiss Administrative Law in the case of a demand for assistance by another States. R. SANSONETTI, *op.cit.*, p.168.

¹⁰⁰ ICJ, Advisory Opinion of 20 December 1980, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Rec. 1980, p.93, par.43.

acceptations of good faith in that context may be distinguished. From a restrictive point of view, good faith is seen as providing a flexible basis with which to impose "some basic obligations that enable the Organization to protect itself from acts that could undermine its functioning"¹⁰¹. From a broader perspective, the obligation to cooperate in good faith is derived directly from the "fundamental feature which is the accomplishment without any disturbance of certain functions that aims to fulfil a common purpose"¹⁰². Accordingly, good faith operates not only to protect the activities of international organizations, but also to emulate cooperation by ensuring that all means available to cooperate will be used.

The principle of good faith consequently entails not only a negative obligation, namely that the sending authority shall refrain from deliberately providing incorrect information in order to jeopardize the fulfilment of the mission or mandate of the requesting authority, but also the positive obligation of the sending states to cooperate by all available means with the requesting authority¹⁰³.

4.4 – THE QUESTION OF RECIPROCITY

Is reciprocity a condition? On this question, the Swiss Federal Law on the application of international sanctions stipulates that competent federal authorities could communicate information to international organizations and renounce to the condition of reciprocity, which is usually an automatic condition for the provision of documents to a foreign State.

However, before the legislation was adopted, the Swiss Federal Tribunal clearly provided that reciprocity is not a condition for the granting of administrative assistance between States¹⁰⁴. This shows that in the absence of any mention of a legal basis, reciprocity will not be considered by Courts as a condition of administrative assistance, even when it takes place between States.

¹⁰¹ R. KOLB, *La bonne foi en droit international public: contribution à l'étude des principes généraux de droit*, PUF, 2000, p.509 (Our translation)

¹⁰² *Idem* (Our translation).

¹⁰³ Those two different approaches are complementary, as it is illustrated by Article 10 of the European Community Treaty on the principle of loyal cooperation. The second paragraph of Article 10 (Members States "shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty"), illustrate the restrictive approach, whereas the broader approach is illustrated by the first paragraph ("Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks").

¹⁰⁴ Swiss Federal Supreme Court, 25 January 1999 (2A.345/1998) para.3b. The Federal Supreme Court adopted a 'pragmatic' view saying that federal authorities may refuse in the future to communicate information to authorities which not respond positively to theirs demands.

If reciprocity is understood as a condition of the administrative assistance regime, it would mean that States could have an automatic right to obtain information from international organizations on the sole condition that States have previously communicated information to them. This automatic right to information would create a conflict of norms with the international organization's duty of confidentiality *vis-à-vis* the information it has obtained from other States. The viability of this system may be threatened by such a requirement. It is perhaps for this reason that the Swiss Government has decided, in the Law above-mentioned, to renounce reciprocity in specific cases of cooperation with an international organization.

5. CONCLUSION

The question of the determination of the legal framework of assistance in administrative matters between international organizations and States can find several institutional responses. The analysis of the relationship between domestic administrations and international organizations was an issue that was examined in the early days of the United Nations. In a study plan made by UNESCO on 11 April 1949 and entitled "domestic administrations in their relations with international organizations"¹⁰⁵, a proposal was made to study this relationship and to "encourage States to improve their own domestic mechanisms in order to be able to fulfil their obligations as members of international organizations"¹⁰⁶.

Recent events have once again brought to light this question. The main priority seems to be to establish a clear international legal basis for cooperation between States and international organizations. Such a legal basis should set out the conditions for its application. This legal basis could take different forms, like a multilateral treaty concluded under the auspices of United Nations, a model bilateral treaty or a set of uniform guidelines for international organizations.

Another type of relationship that must be taken into account within a future legal regime is the relationship between international organizations on the one hand, and private individuals and entities concerned by the sharing of information, on the other. It seems necessary to provide for mechanisms that allow individuals and entities, whose bank details have been transmitted for example, to contest or control the use of this information. In the absence of such procedures, international organizations may be confronted with problematic consequences like in the case of listed sanctions of the 1267 Committee, as was recently

¹⁰⁵ <http://unesdoc.unesco.org/images/0015/001578/157857fb.pdf>.

¹⁰⁶ *Ibid.*, pt.9 (Our translation).

illustrated in the *Kadi and Al Barakaat International Foundation* case before the European Court of Justice¹⁰⁷.

Concerning the possibility for individuals and entities to contest a decision of a State to transmit information about them at the domestic level, two cases judged before the Swiss Federal Tribunal¹⁰⁸ showed the inherent problems of the absence of a clear legal framework in this area. Two claims that contested the decision of the Swiss State Secretariat of Economic Affairs to transmit confidential information to the Inquiry Committee into the Oil-for-Food Programme were rejected by the Federal Tribunal, which clearly drew a distinction between treaty-based assistance and assistance accorded without any conventional basis. In the case of assistance based on a treaty, a claim made against the domestic legal basis of application will be admissible. According to the judges, "all transmission of information to foreign authorities will not be considered as an *acte de gouvernement*; in the majority of cases of assistance – in criminal or administrative matters –, foreign relations are without a doubt involved, but decisions taken on that matter takes place within the framework of *pre-established conventional relations*, and has not the political character that justify a subtraction to any judicial review"¹⁰⁹. The assistance accorded to the Inquiry Committee has been consequently qualified as a political decision, exempt of judicial review.

We can note finally that the question of assistance in administrative matters between international organizations and States is on the middle of two crucial concerns, which are confidentiality and transparency. In order to increase the legitimacy of their activities, international organizations have to establish mechanisms that enhance the transparency of their actions. It has become increasingly necessary to apply such principle in the relations between international organizations and States, but also between international organizations and individuals.

However, to be really efficient the principle of transparency also needs to be limited. It must not completely expose internal administrative activities to the public. A full application of the principle of transparency may hamper international organizations to work efficiently. It is especially true concerning assistance in administrative matters. International organizations may request information this is protected by an obligation of confidentiality at the domestic level. If such information is subsequently disclosed by international organizations or is not

¹⁰⁷ ECJ, Grand Chamber, 3 September 2008, *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council*, Joined Cases C-402/05 P and C-415/05 P.

¹⁰⁸ Swiss Federal Supreme Court, 1st Chamber of Public Law, 6 October 2005 (1A.157/2005 and 1A.189/2005); Swiss Federal Supreme Court, 1st Chamber of Public Law, 10 October 2005 (1A.173/2005 and 1A.203/2005).

¹⁰⁹ *Ibid.*, pt. 3.1 (6 October 2005) and pt. 3.3 (10 October 2005) (Our translation and emphasis).

sufficiently protected, it will first discredit international organizations to deal with such matters and, second, it will render States reluctant to furnish such information in the future. That is why the principle of transparency, to be applied efficiently, must be balanced by requirements of confidentiality. In the development of such a legal regime, all these considerations must be taken into account to ensure its sustainability and effectiveness.