Public International Law

Contemporary Principles and Perspectives

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cannot be challenged upon the independence of new states without consent.[245] As noted in the *Frontier Dispute* case, this is to promote stability and peace, and has the effect of confining self-determination to existing colonial territories, such that minorities have not been able to secede from pre-existing frontiers.[246] The modern principle[247] of *uti possidetis* was first, and mainly, used in Latin America, where the new independent states adopted administrative borders that existed from Spanish and Portuguese colonization.[248] This principle was also accepted by the Organization of African Unity and applied in Africa.[249]

Furthermore, the concerns for territorial integrity and peace and stability have continually been emphasized by the UN.[250] For example, in the case of Gibraltar, the UN General Assembly clearly applied the principle of territorial sovereignty in its adoption of Resolution 2353 (XXII),[251] determining that a colonial situation which even partially breaches the principles of national unity and territorial integrity is incompatible with the purposes and principles of the UN Charter. Nevertheless, the principle of self-determination and the application of *uti possidetis* have evolved in recent practice, such that *uti possidetis* may no longer operate as the constraint it once was.

4.9.3 Recent Developments

Since 1945 the legal consequences of the principle of self-determination for particular territories have evolved. Not surprisingly, it has been argued

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245 *Frontier Dispute* (*Burkina Faso and Republic of Mali*), above note 119, 565; Higgins, above note 5, 122; Shaw, above note 56, 311.

246 *Frontier Dispute* (*Burkina Faso and Republic of Mali*), above note 119, 565.

247 The principle has ancient roots, dating back to Roman Law and has been used throughout history in relation to territorial conquests.

248 Higgins, above note 5, 122.

249 *Frontier Dispute* (*Burkina Faso and Republic of Mali*), above note 119, 565–6.

250 See, e.g., Declaration on the Granting of Independence, above note 230; Declaration on Principles of International Law, above note 234; Question of Gibraltar, GA Res. 2353(XXII) UN GAOR, 22nd sess., 1641st plen. mtg, UN Doc. A/RES/2353 (1967). However, although *uti possidetis* is concerned with the stability of borders, it is not the same as the principle of territorial integrity. As David Raič explains, *uti possidetis* is only applicable temporarily, during the transition of sovereignty, while the principle of territorial integrity only applies after the transition has occurred and the territorial entity has been established as a state: David Raič, *Statehood and the Law of Self-Determination* (The Hague: Kluwer Law International, 2002), 303.

251 Question of Gibraltar, ibid.

that how and where self-determination applies has 'remained as much a matter of politics as law'.[252]

The clearest example of this is the break-up of the Socialist Federal Republic of Yugoslavia (SFRY) and the independence of several territories within it. The SFRY was formed in 1946 and comprised six republics: Croatia, Serbia, Slovenia, Montenegro, Bosnia-Herzegovina and Macedonia, and two autonomous entities which were both included in Serbia – the Autonomous Region of Kosovo-Metohija and the Autonomous Province of Vojvodina.[253] From the 1960s, tensions arose in different regions of the Republic, which contained separate groups with distinct cultures, languages and histories, and during the 1980s economic problems fuelled the tensions and anti-federalist sentiments.[254] A combination of events in the late 1980s and early 1990s led to the break-up of the SFRY.

In 1991 both Slovenia and Croatia proclaimed independence, which was declared illegitimate by the Yugoslav legislature, and which called for the federal army to prevent any changes or divisions to Yugoslavia and its borders. This led to the federal army occupying areas of Slovenia. The European community offered their good offices to the parties in order to mediate the conflict. However, there was no international recognition of the proclamations of independence. In July 1991, the Brioni Accord was reached between the federal, Croat and Slovene authorities; this reaffirmed the hold on the declarations of independence in order to complete negotiations on their future relations. The Brioni Accord stated that the negotiations should be based on the human rights principles of the Helsinki Final Act and the Paris Charter for a New Europe, and the right to self-determination should form this basis.[255]

However, in August 1991 tensions escalated and war broke out in Croatia, during which many Croats who lived in areas where Serbs formed the majority were killed, and towns and cultural and religious objects were destroyed, as Serb paramilitary forces took over more disputed Croatian territory. On 8 October 1991, Croatia once again proclaimed independence, and was recognized by the international community in the beginning of 1992.[256]

The Badinter Commission provided 15 opinions on the break-up of the

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[252] Crawford, above note 10, 115; Dickinson, above note 119, 558.

[253] Yugoslav Constitution 1946, Art. 2.

[254] Raič, above note 250, 344, 346.

[255] Brioni Accord, Europe Documents, No. 1725, 16 July 1991, 17.

[256] Raič, above note 250, 350–4. See also *Prosecutor v Milošević* (Decision on Motion for Judgment of Acquittal) IT-02-54-T (16 June 2004).

SFRY. Importantly, it held in Opinion 2 that 'the Republics must afford the members of those minorities and ethnic groups all the human rights and fundamental freedoms recognized in international law, including, where appropriate, the right to choose their nationality'.[257]

Although the Badinter Commission found that Croatia did not satisfy all the conditions needed for recognition,[258] Croatia issued a formal statement that these deficiencies would be resolved; it was recognized as an independent state and admitted into the European Union and United Nations in January 2002. An important factor in Croatia's successful secession was the considerable political support for independence it received in the international community. Despite Croatia clearly not being an instance of decolonization, the international community (or significant members of it) still viewed the right of self-determination as being applicable to Croatia, as well as other territorial units in the SFRY.[259]

The European Community declared in 1991 that it would not accept any outcome of the Yugoslav conflict that would violate the principle that all established borders cannot be changed by the use of force.[260] Opinion 3 of the Badinter Commission expressly recognized the applicability of *uti possidetis* to the SFRY, and stated that this principle was not confined to situations of decolonization.[261] In this way, both the principles of self-determination and *uti possidetis* were adapted to a non-colonial situation in ways that, as we shall see, raise more questions than they answer.

The most recent example of the principle of self-determination being invoked in the context of secession is the agreement by the Republic of Sudan to secede South Sudan. In January 2011, a referendum on independence for southern Sudan was held: 98.83 per cent of the electorate opted for secession.[262] The referendum was held in compliance with the Machakos Protocol, adopted in 2002. Although the government of Sudan enshrined the principle of self-determination in the national constitution in 1997, it was in 2002 that the government of Sudan agreed to hold a

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[257] Arbitration Commission of the International Conference on Yugoslavia, Opinion 2, 11 January 1992, 92 ILR 167.

[258] Arbitration Commission of the International Conference on Yugoslavia, Opinion 5, 11 January 1992, 92 ILR 173.

[259] See, e.g., Arbitration Commission of the International Conference on Yugoslavia, Opinion 5, ibid.; Raič, above note 250, 356.

[260] EC/US/USSR Declaration on Yugoslavia, The Hague, 18 October 1991.

[261] Arbitration Commission of the International Conference on Yugoslavia, Opinion 3, 11 January 1992, 92 ILR 170.

[262] 'South Sudan backs Independence – Results', *BBC News*, 7 February 2011, available at http://www.bbc.co.uk/news/world-africa-12379431

referendum on the self-determination of southern Sudan.[263] The government's commitment to hold a referendum was granted in exchange for the Sudan Peoples' Liberation Movement/Army (SPLM/A) giving up its demand for a secular Sudan.[264] Importantly, the referendum posed a choice between a united Sudan and an independent South Sudan. This choice was considered to be the mechanism for giving effect to the agreement to hold a referendum on the self-determination of southern Sudan.

4.9.4 Self-determination and Recognition in the Current Climate

It is clear that self-determination is a legal principle well established at international law. As seen, there appears to be a strong link between self-determination and statehood. However, whether self-determination has become a criterion of statehood,[265] or whether self-determination may compensate for a lesser standard of effective and independent government, or other requirements, is, in the contemporary environment, difficult to determine.

The effect of acknowledgement by the Badinter Commission of the right of groups within a territory to self-determination may be significant. Alain Pellet put it in this way:

> It is not insignificant that the Court[sic], without an express statement to that effect, appeared to link the rights of minorities to the rights of peoples. This shows that the notion of 'people' is no longer homogeneous and should not be seen as encompassing the whole population of any State. Instead of this, one must recognize that within one State, various ethnic, religious or linguistic communities might exist. These communities similarly would have, according to Opinion No. 2, the right to see their identity recognized and to benefit from 'all the human rights and fundamental freedoms recognized in international law, including, where appropriate, the right to choose their national identity'.[266]

The creation of Slovenia and Croatia as new states formed out of the dissolution of Yugoslavia was highly contentious – it was certainly not freely agreed to by (what is now) Serbia. At the same time, the minorities within these new states were accorded rights as 'peoples' – so that, for example,

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[263] 'In-depth: Sudan Peace Process', 2002, IRIN, available at http://www.irinnews.org/InDepthMain.aspx?InDepthId=32&&ReportId=70709

[264] Ibid.

[265] Crawford, above note 10, 107; Brownlie, above note 2, 582.

[266] Alain Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples' (1992) 3 *European Journal of International Law* 173, 179.

members of the Serbian population in Bosnia and Croatia were 'to be recognized under agreements between the Republics as having the nationality of their choice, with all the rights and obligations which that entails with respect to the states concerned'.[267]

What meaning does this carry in the context of post-colonial modern Europe, or elsewhere? Concerns expressed by certain countries upon the declaration of independence by Kosovo give some clue to the potential ramifications of this view. Spain and China[268] were two obvious concerned members of the international community, but they were far from alone. While the Badinter Commission reaffirmed the application of the principles of self-determination and *uti possidetis* to post-colonial Europe – to the extent that the echo of its opinions impacted upon Kosovo's declaration of independence (ostensibly sponsored by the US and Europe and made possible by the UN) – one is left to consider the potentially broad circumstances in which a group not subject to colonial rule might successfully seek not just a right to some form of self-determination, but perhaps to exclusive statehood.

4.10 CONCLUSIONS

At the beginning of this chapter I posed several questions. The first of these related to the subjects of international law. States are clearly the primary subjects of international law. They possess full capacity as participants in the international legal system that carries a vast array of rights and responsibilities. Nothing in this proposition, true now for close to 400 years, is really open to challenge. Of much less certainty is how precisely in the modern context statehood is to be attained. The traditional criteria, seemingly clear and rational, will not suffice to guarantee a privileged place at the table of world affairs. The differing practices of recognition, the potential relevance of factors beyond those required by the Montevideo Convention, and the preparedness of the international community of states to adjust the bar make certainty as to the creation of statehood extremely difficult to articulate.

Making this process more complex is the evolving position of self-determination. Created to effectuate a process of decolonization following

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[267] Arbitration Commission of the International Conference on Yugoslavia, Opinion 2, above note 257, [3].

[268] See, e.g., Bing Bing Jia, 'The Independence of Kosovo: A Unique Case of Secession?' (2009) 8 *Chinese Journal of International Law* 27, 28.

the Second World War, self-determination following the break-up of the former Yugoslavia may operate to create a far broader set of rights to groups within existing state boundaries – even to the extent that statehood may, in certain circumstances, be a valid expression of the right of these groups to self-determination. The comments of the Badinter Commission and the ascertainment of independence by Kosovo are an insufficient basis to conclude – let alone articulate the content of – evolving rights to statehood in international law. They do suggest that self-determination applies outside the traditional colonial context. They also suggest that, while the declaratory theory may be the express preference of the Badinter Commission, the actions of the international community and the Commission itself – in accepting Slovenia and Croatia, not to mention Bosnia-Herzegovina, well before they had established critical elements required for statehood as articulated in the Montevideo Convention – suggest that states will be constituted when powerful states say they are (the constitutive theory of recognition).

Kosovo further confounds the position. Created by the waging of armed aggression by powerful states of the international community against Milošević's pariah state of Serbia, Kosovo was given autonomy and the means to self-govern and control its territory only by virtue of a massive and expensive United Nations mission. Seen positively, it is an example of the power of humanitarian intervention[269] to rescue persecuted groups within an oppressive state regime. Seen negatively, Kosovo is like a sophisticated slow-motion version of the discredited US foreign policy of intervening in the political affairs of Latin American (and other) countries during the Cold War.

The development of events since the 1990s in the Balkans – particularly in light of recent events relating to South Ossetia and Abkhazia – reveal certain developments in world politics. They also raise the very real potential of changes in international law relating to the development and existence of statehood and the place of states in international law.

Other and related developments may even suggest that the status of sovereignty itself in international law is today under something of a threat. A demise of formalism and the growing idea of international law as a normative system, capable of rising to the great moral challenges of our times, suggest something of a trend towards cosmopolitanism, in the sense of a system of international governance based on shared

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[269] The use of force for purposes of 'humanitarian intervention', and other developing aspects of the use of force in international law, will be discussed in Chapter 8.

morality.[270] The increasing importance of non-state subjects of international law (considered in the following chapter) and a growing expression of normativism in the form of action (often UN-led or -sanctioned) on behalf of the international community (including armed interventions such as in Libya), suggest a movement away from the traditional profound respect for statehood by international law.[271] Koskenniemi, in a recent defence of the value of sovereignty, calls this move toward 'objectives' and 'values' a kind of international 'managerialism', threatening sovereignty itself and its inherent value as a system of rules.[272]

While it is, and is likely for some time to be, premature to talk of a system in which states are not the primary power brokers, there is something meaningful in the debate about a reduction of the unquestioned position of states in international law. After all, if sovereignty 'did not arise as a philosophical invention but out of Europe's exhaustion from religious conflict',[273] then it is not entirely out of the question that a post-modern world might arise from exhaustion over the failure of states to adequately reflect and regulate an increasingly global world.

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[270] See Carsten Stahn, *The Law and Practice of International Territorial Administration – Versailles to Iraq and Beyond* (Cambridge: Cambridge University Press, 2008), 762.

[271] For a discussion of the nature of international law itself in these terms, see discussion in Chapter 1, section 1.6.

[272] Koskenniemi, above note 201, 65.

[273] Quote from Koskenniemi, above note, 201 65. This reference is to the Peace of Westphalia (see Chapter 1, section 1.3.2).

5. Other subjects of international law: non-state actors and international law's evolution

This chapter focuses on the 'other' participants in international law – in other words, non-state actors who have, to a greater or lesser degree, rights and responsibilities as legal persons. These other subjects – international organizations, non-governmental organizations, individuals, groups, corporations and certain other anomalous entities – are, in a real sense, derivative subjects of international law. By definition, the phrase 'non-state actor' connotes a presumption in the relationship of power within the international community. As Philip Alston has said, defining actors in terms of what they are not combines 'impeccable purism in terms of traditional international legal analysis' and with it comes the capacity to marginalize other actors.[1] Indeed, if the history of international law teaches us anything, it is that states are infinitely jealous of their real or imagined claims to sovereignty and their usually conservative attitudes are the main drivers in the development or stagnation of the global normative order. International law then is still very much state-centric.[2] States still hold the keys to the international system and in this respect not much has changed since the time when scholars spoke of a *jus gentium* ('the law of nations').

Nonetheless, it is impossible to speak of international law today as though states are the only stakeholders within the international system. International law has evolved over the last century at a frenetic rate, such that the traditional owners of the modern system can hardly claim an exclusive domain. The recognition – by courts, international organs and,

[1] Philip Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?', in Philip Alston (ed.), *Non-State Actors and Human Rights* (Oxford; New York: Oxford University Press, 2005) 3, 3.

[2] Zoe Pearson suggests this state-centrism is a form of hierarchy, belying the much lamented horizontal nature of international law: Zoe Pearson, 'Non-Governmental Organisations and International Law: Mapping New Mechanisms for Governance' (2004) 23 *Australian Yearbook of International Law* 73, 75.

of course, states themselves – of the ever increasing and expanding role of non-state actors in international law speaks to a period of great diversity, renewal and progress in the international system. The trend of non-state participation has been accelerating since the establishment of the United Nations in 1945 and whole special areas have developed around other subjects – the law of international organizations, international administrative law and international criminal law being prominent examples.

A healthy and progressive international system will seek to harmonize the interests of states and non-state actors. Of course, this transformation of international law has been made possible in part by the preparedness of states to cede some of their authority. Indeed, the creation of the United Nations, with its expressed aims relating to international peace and security and respect for human rights, presaged such a development. Failures in the international system caused two world wars in the first half of the twentieth century. A genuine endeavour to avoid a third was always going to require an extraordinary shift toward pluralism and a meaningful and mostly – if not always – respected international legal system.

This chapter will begin with a consideration of international organizations, which are now so critical an aspect of the international system that it would doubtless collapse without them. The pre-eminent international organization is the United Nations, which will be considered, as will the nature of its international personality. The growing role of civil society in international law, expressed through the place of non-governmental organizations, will then be considered. The chapter will then examine the non-state actor that has impacted most upon the international legal system over the past half century or so – if not practically, then certainly morally. Individuals have developed a set of profound rights and duties within the international system, such that scholars have at times enthusiastically sounded the death knell of states as the primary actor of international law. While this is clearly an overstatement, the individual – after all, the real subject for whom all laws are made to serve – has caused something of a rupture in the statist conception of international law, such that it requires close attention. Corporations – entities wielding enormous economic power and yet still inadequately regulated as active bodies in the realm of international law – have played an important role as actors within the international legal system, at different times and in different ways, and warrant consideration. Finally, some miscellaneous non-state actors, including insurgents, terrorists and national liberation movements, will be considered briefly before conclusions are drawn about the contemporary place of the participants of international law and what the future may hold in this area.

5.1 INTERNATIONAL ORGANIZATIONS

International (or intergovernmental) organizations are a modern phenomenon linked to the maturing of the international legal system. The first international organizations were established in the late nineteenth century to coordinate mainly logistical matters. For example, the Universal Postal Union (UPU) was established in 1874 to coordinate the process of international mail handling and delivery. With 191 members, the UPU is now responsible for setting worldwide rules for international mail exchanges and constitutes a forum for discussing matters affecting the industry. The trend that started with international organizations like the UPU snowballed into a veritable 'move to institutions',[3] as the international community realized the utility of permanent collective bodies in many, if not most, aspects of their international relations.

Perhaps the greatest of all expressions of this tendency is the League of Nations and the United Nations (UN), set up after the First and Second World Wars respectively. Indeed, the institutionalization of international diplomacy was a product of an 'internationalist sensibility' and was gradually extended and reinforced, emphasizing collective interests. Even the extreme polarization of the Cold War did not reverse this trend; it only made progress in certain areas, such as the creation of a permanent international criminal court, more difficult to ascertain. José Alvarez summarizes the trend as:

> a move from utopian aspirations to institutional accomplishment; that is, a move to replace empire with institutions that would promote the economic development of the colonized, end war through international dispute settlement, affirm human rights and other 'community' goals through discourse, advance 'democratic' governance at both the national and international levels, and codify and progressively develop . . . international rules – all by turning to the construction of proceduralist rules, mechanisms for administrative regulation, and forums for institutionalized dispute settlement.[4]

The fall of the Soviet bloc in 1991 and the advent of increasing economic, social and political integration – the phenomenon of globalization – have accelerated the institutionalization of international society. For example, the international legal framework on international trade is near

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[3] David Kennedy, 'The Move to Institutions' (1987) 8 *Cardozo Law Review* 841; Martii Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2002).

[4] José Alvarez, 'International Organizations: Then and Now' (2006) 100 *American Journal of International Law* 324, 325.

comprehensive, as a result largely of the existence and work of organizations such as the World Trade Organization (WTO).[5] While initially it was largely idle, the International Court of Justice (ICJ) is now extremely busy and has been complemented by an increasingly important patchwork of international courts and tribunals. New international organizations are constantly being created or morphed so as to regulate the myriad of *sui generis* legal issues on the international plane.

From a legal perspective, international organizations are entities created by states as a vehicle to further their common interests. They are constituted by treaty and are usually composed of three organs: (1) a plenary assembly of all Member States, (2) an executive organ with limited participation, and (3) a secretariat, or administrative body.[6] The fact that international organizations have a personality distinct from their Member States distinguishes them from these states merely acting in concert.[7] Diplomatic conferences such as the G8, institutions lacking organs such as the Commonwealth, and treaties such as the former General Agreement on Tariffs and Trade (GATT) (now superseded by the WTO) are not international organizations. International organizations are analogous to corporations in domestic law and fulfil a similar function as an efficient network of contracts harmonizing the interests of their members.[8] Prominent international organizations include the UN, its specialized agencies such as the World Health Organization (WHO) and the International Labour Organization (ILO), and regional organizations such as the European Union (EU).[9]

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[5] Vaughan Lowe, *International Law* (Oxford: Oxford University Press, 2007) 12.

[6] Alvarez, above note 4, 324. Note that international organizations (IOs) can become members of other IOs. This does not affect the 'intergovernmental' nature of IOs, as member IOs are themselves ultimately traceable to states.

[7] Rosalyn Higgins, *Problems and Processes: International Law and How We Use It* (Oxford: Clarendon Press, 1994) 46–7.

[8] P.R. Menon, 'The Legal Personality of International Organizations' (1992) 4 *Sri Lanka Journal of International Law* 79, 93; Lowe, above note 5, 123.

[9] Note that until 2009 it was generally accepted that the EU did not have international personality: House of Commons Library Research Paper 07/80, 22 November 2007: 'The EU Reform Treaty: Amendments to the Treaty on European Union', 72, available at http://www.parliament.uk/commons/lib/research/rp2007/rp07-080.pdf (accessed 5 December 2010). Rather, international personality belonged to the European Community (EC), a separate organization. Recently, the Treaty of Lisbon 2009 amended the Treaty of Rome (which constituted the European Community) and the Treaty of Maastricht (which constituted the EU) so as to transfer the international personality of the EC to the EU. The Treaty of Lisbon was another step towards greater European integration.

As with states, international organizations can possess international personality, but while every state possesses full personality, international organizations only possess personality granted in either their constituent treaty or arising by necessary implication from their functions.[10] Being associations of states, their existence depends on the consent of Member States. States theoretically retain the power to close even the most prominent of international organizations; even though it is a separate legal person, the continued existence of an international organization depends on its members not winding it up, as is the case with corporations at domestic law. In this sense, international organizations possess a personality derived from grants by Member States, which are the 'original' persons of international law.[11] Although the long-standing and entrenched nature of some of these institutions, such as the UN, indicates that states are very unlikely to revoke the international personality conferred, this does not affect their derivative foundations.

It is generally accepted that an international organization must possess three core features before it can be said to have international personality: (1) a permanent association of states, made up of organs, (2) being legally distinct from its members and (3) possessing international rights and duties (for example, the capacity to enter into treaties with other international actors), not merely duties exercisable in domestic legal systems.[12] The following section examines the international organization that has come to dwarf all others on the international scene: the United Nations.

5.1.1 The United Nations

5.1.1.1 Organs and functions of the United Nations

After the Second World War claimed over 50 million lives, more than half of which were civilian,[13] the international community resolved to found a new world order to promote a gentler international society. At the San

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[10] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 178, 182; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Request by the World Health Organization) [1996] ICJ Rep 66, 79.

[11] Antonio Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1988) 76–7.

[12] Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2008, 7th edn) 677; Lowe, above note 5, 60.

[13] See, e.g., John Keegan, *The Second World War* (London; New York: Penguin, 1990), 590.

Francisco Conference in 1945, the overwhelming majority of states[14] concluded the United Nations Charter, which established the United Nations Organization. Its stated purpose was to 'save succeeding generations from the scourge of war', to 'reaffirm faith in fundamental human rights', to 'establish conditions under which justice and respect for the obligations arising from . . . international law can be maintained' and to 'promote social progress and better standards of life'.[15]

The UN was to be the successor organization to the League of Nations set up after the First World War and in many respects the drafters learned from the mistakes of the old order. Chapter II of the UN Charter provides for 'open' membership – 'all peace-loving states' that are willing and able to carry out the obligations under the Charter may join the Organization.[16] The organs of the United Nations are established by Chapter III; their compositions, functions and powers are laid out in following Chapters. The principal organs are:

- the General Assembly;
- the Security Council;
- the Economic and Social Council;
- the Trusteeship Council;
- the International Court of Justice; and
- the Secretariat.

Subsidiary organs may be established when deemed necessary, [17] as was the case when the Security Council controversially created the International Criminal Tribunal for the former Yugoslavia (ICTY) through SC Resolution 827 (1993), to try the major war criminals in the violent break-up of the former Yugoslavia.[18] The UN Human Rights Council (UNHRC, formerly the UN Commission on Human Rights (UNCHR)) is a subsidiary organ of the General Assembly.

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[14] *Reparation for Injuries Suffered in the Service of the United Nations*, above note 10, 185. Fifty states participated in drafting the UN Charter at the San Francisco Conference.

[15] Charter of the United Nations, Preamble.

[16] Ibid., Art. 4(1).

[17] Ibid., Arts 7, 22, 29.

[18] See, e.g., V. Gowlland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43 *International Criminal Law Quarterly* 55; Gabriël H. Oosthuizen, 'Playing Devil's Advocate: the United Nations Security Council is Unbound by Law' (1999) 12 *Leiden Journal of International Law* 549.

5.1.1.1.1 The General Assembly The General Assembly is the plenary body of the UN, consisting of representatives of all Members.[19] It is the forum *par excellence* for international debate, producing non-binding recommendations (by way of resolutions) to Members or the Security Council.[20] Resolutions on specified 'important' matters, such as the maintenance of international peace and security, are determined by a two-thirds majority, in contrast to a simple majority vote required for other matters.[21] Given the virtually universal membership of the United Nations, resolutions adopted by large majorities of the General Assembly may amount to very strong *opinio juris* as an element of customary international law. As discussed in Chapter 2, General Assembly resolutions have had a great influence on the development of customary law, so much so that the ICJ has at times engaged in the dubious practice of basing its findings on customary law entirely on such resolutions.[22]

The General Assembly may initiate studies for, among other things, 'promoting international co-operation' and 'encouraging the progressive development of international law and its codification'.[23] In accordance with this power, the General Assembly created the International Law Commission (ILC) in 1947, a permanent body of independent experts tasked with promoting the codification and progressive development of international law. The opinions of this knowledgeable body are highly persuasive in the interpretation of international law in numerous fora.[24] The General Assembly also controls the apportionment among Members of the Organization's expenses.[25]

5.1.1.1.2 The Security Council The Security Council is the executive arm of the UN Organization. The real power of the new world order is embodied by the endowment of the Security Council with primary responsibility for the maintenance of international peace and security. In addition to powers for overseeing the peaceful settlement of disputes,[26] the Security Council can take enforcement action against threats to the peace,

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19 Charter of the United Nations, Art. 9(1).
20 Ibid., Art. 10.
21 Ibid., Art. 18.
22 See discussion in Chapter 2, section 2.2.2.5.
23 Charter of the United Nations, Art. 13.
24 The considerable influence of the Commission on the making of important treaties such as the Vienna Convention on the Law of Treaties 1969 is discussed in Chapter 2.
25 Charter of the United Nations, Art. 17.
26 Ibid., Ch. VI.

breaches of the peace and acts of aggression.[27] Enforcement can consist of sanctions falling short of armed force, such as economic sanctions or the severance of diplomatic relations.[28] However, where such sanctions prove inadequate, the Security Council may deploy armed forces supplied by its Members, to forcibly maintain or restore international peace and security.[29] This power is the centrepiece of an international order based around the prevention of global war.

As discussed in Chapter 8, Article 2(4) of the UN Charter establishes the now customary law prohibition against the use of force other than in individual or collective self-defence. The UN has deployed 'peacekeepers' in areas such as Kosovo (UN Interim Administration Mission in Kosovo (UNMIK)), as well as forces more properly termed 'peacemakers' in enforcement actions, such as the intervention in the Congo during the Katanga secession crisis of the 1960s (UN Operation in the Congo (ONUC)).[30] At times the UN has put itself in an untenable position by deploying UN peacekeepers on the ground without extending their mandate to include the use of force other than in self-defence. This occurred most infamously during the Rwandan genocide in 1994, where the UN peacekeeping force (UNAMIR) was not authorized, nor provided with adequate resources, to do anything more than evacuate Westerners and watch while hundreds of thousands of Tutsis were massacred.[31] In 1995, the UN failed to prevent the Srebrenica genocide in Bosnia under similar circumstances.[32] These tragic incidents represent a clear failure of political will at the international level; the states with the means to intervene were not prepared to do so. The circumstances in which the Security Council has been prepared to take adequate – or any – measures has sometimes led to mission confusion (or 'creep')[33] as well as allegations of selectivity, based on the geopolitical interests of the permanent five members of the Council and their allies.[34]

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[27] Ibid., Ch. VII.

[28] Ibid., Art. 41.

[29] Ibid., Art. 42.

[30] UNSC Resolution 169 (1961); Georges Abi-Saab, *The United Nations Operations in the Congo 1960–1964* (Oxford: Oxford University Press, 1978).

[31] Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2008, 3rd edn) 292.

[32] Manuel Fröhlich, 'Keeping Track of UN Peace-keeping – Suez, Srebrenica, Rwanda and the Brahimi Report' (2001) 5 *Max Planck Yearbook of United Nations Law* 185, 187–8.

[33] Gray, above note 31, 150–75. See Chapter 8.

[34] A recent example of this might be the preparedness of the Security Council to authorize military action in Libya but not in other trouble-afflicted states of the Middle East (such as Bahrain, Yemen and Syria).

The UN has also set up interim administrations and otherwise offered its services after other states have unilaterally and without UN authorization deployed force, ostensibly justified by humanitarian intervention (as with the NATO bombing of Serbia)[35] or pre-emptive self-defence (as with the invasion of Iraq by the Coalition of the Willing).[36] The role of UN peacekeepers and their responsibilities under the laws on the use of force are very complex issues and the subject of much debate.[37] Various factors may hamper their performance on the ground: resourcing and mandate confusion, rapidly changing circumstances on the ground and the fact that the UN's role is in considerable part subject to global power politics.[38] The UN administration in Kosovo, UNMIK, even engaged in 'state building', providing Kosovo with the means necessary to function as an independent state and thus facilitating its declaration of independence from Serbia on 20 February 2008.[39] Another example of the enormous power open to the Security Council's authority to take measures to maintain and restore international peace and security is the creation of entire derivative international organizations, such as the war crimes tribunals for the former Yugoslavia and Rwanda – binding all states to cooperate with the exercise by these courts of their mandates and costing the international community over 200 million US dollars each year.[40]

Members of the UN undertake to implement the decisions of the Security Council, which includes providing troops for peacekeeping or enforcement missions.[41] Although the Security Council is composed of 15

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[35] Security Council, 3988th meeting, UN Doc. S/PV.3988, 24 March 1999.

[36] Gray, above note 31, 216ff. See Chapter 8, section 8.2.2. The infamous 'Bush Doctrine' asserts the right of the US to take 'pre-emptive action' against potentially belligerent states: see 'The National Security Strategy of the United States of America', White House, Washington, 15 September 2002.

[37] Christopher Greenwood, 'International Humanitarian Law and United Nations Military Operations' (1998) 1 *Yearbook of International Humanitarian Law* 3.

[38] For a general discussion of these issues, see Bruce Oswald, 'The Law on Military Occupation: Answering the Challenges of Detention during Contemporary Peace Operations' (2007) 8 *Melbourne Journal of International Law* 311–26. See also Secretary-General's Bulletin, 'Observance by United Nations Forces of International Humanitarian Law', 6 August 1999 ST/SGB/1999/13, available at http://www1.umn.edu/humanrts/instree/unobservance1999.pdf.

[39] See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 22 July 2010, ICJ General List No. 141. See also Chapter 4, section 4.5.1.

[40] For a discussion of the controversial creation of these Tribunals, see Gowlland-Debbas, above note 18; Oosthuizen, above note 18.

[41] Charter of the United Nations, Arts 25, 43–9.

Members, only five (China, France, Russia, the United Kingdom and the United States of America) are permanent members that have the power of veto over all non-procedural decisions. In practice, the stipulation that the veto does not apply to procedural decisions is not absolute, as a preliminary decision on whether a decision is procedural is considered itself to be non-procedural.[42] The power of veto entrenches the hegemony of the permanent members by effectively preventing action contrary to their interests. The veto must, however, be actually cast; an abstention will not constitute a veto, as the USSR discovered after its abstention from certain resolutions in 1950 – recommending that Members assist South Korea during the Korean War – proved to be ineffective in paralyzing the Security Council.[43]

5.1.1.1.3 The Economic and Social Council Economic and social cooperation is a major aspect of the UN's work, as the Charter considers this necessary for peaceful and friendly relations between nations.[44] The task of promoting solutions for international economic, social, health and related problems, and universal respect for human rights is bestowed specifically on the Economic and Social Council (ECOSOC).[45] Composed of 54 Members, ECOSOC may initiate studies and reports, make recommendations, draft conventions and convene international conferences on these issues.[46]

One of ECOSOC's primary functions is to coordinate the activities of the UN 'specialized agencies' that have been 'brought into relationship' with the UN.[47] This means that organizations that become specialized agencies of the UN shed their previous international personality and come under the umbrella of the international personality of the UN; however, they retain much of their previous autonomy.[48] The specialized agencies include the International Labor Organization (ILO), the World Health Organization (WHO), the World Bank,[49] the International Monetary Fund (IMF) and the United Nations Children's Fund (UNICEF).

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[42] Hans Kelsen, *Principles of International Law* (New York: Holt, Rinehart and Winston, 1966, 2nd edn), 276.

[43] Ibid., 277.

[44] Charter of the United Nations, Art. 55.

[45] Ibid.

[46] Ibid., Arts 61–2.

[47] Ibid., Arts 57, 59–60, 63–4.

[48] See discussion below at section 5.1.1.2.

[49] The World Bank is composed of the International Bank for Reconstruction and Development (IBRD), the International Finance Corporation (IFC), the International Center for Settlement of Investment Disputes (ICSID), the

A current example of work produced by ECOSOC with the aid of many of these specialized agencies is the Millennium Development Goals Report issued on 23 June 2010. The Report details the progress taken towards ending world poverty as well as providing information on other issues such as fighting the spread of AIDS and ensuring universal access to clean water. Through this Report and similar activities, ECOSOC conducts a leadership role in monitoring and coordinating advances in economic and social development.

5.1.1.1.4 The Trusteeship Council The Trusteeship Council was established to oversee the trusteeship system, whereby former colonies (mainly of defeated states) were administered by trustee states with a view to maintaining domestic peace and fostering the conditions for the trust territories' eventual independence.[50] Trustee states would conclude individual agreements for this purpose.[51] The principal objectives of the trusteeship system were, among other things, to further international peace and security by ensuring that former colonies would not fall into chaos and to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence.[52] The trusteeship system had replaced the system of mandates under the League of Nations. Although the trusteeship system was suspended in 1994 when the last trust territory, Palau, attained independence, it has historically been a potent mechanism for promoting the efficient transition of former colonies to independence.

5.1.1.1.5 The International Court of Justice The International Court of Justice (ICJ), commonly known as the 'World Court', is the principal judicial organ of the UN.[53] Its functions and powers are primarily determined by the ICJ Statute annexed to the UN Charter. The ICJ has power to determine cases referred to it by states that are parties to a dispute, or on the initiative of a state if the other state party has made a declaration that the jurisdiction of the Court is compulsory.[54] Advisory Opinions on legal questions can be requested by the General Assembly and other organs and

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International Development Association (IDA) and the Multilateral Investment Guarantee Agency (MIGA).

[50] Charter of the United Nations, Chs XII, XIII. See Chapter 4, section 4.9.1.2.
[51] Ibid., Art. 75.
[52] Ibid., Art. 76.
[53] Ibid., Art. 92.
[54] Statute of the International Court of Justice, Art. 36.

specialized agencies of the UN arising within the scope of their activities.[55] The bench is composed of 15 judges, representing the main forms of civilization and the principal legal systems of the world.[56]

The ICJ is the successor to the Permanent Court of International Justice (PCIJ). Operating from 1920 until the breakdown of the League of Nations system with the outbreak of the Second World War in 1939, the PCIJ was highly respected, no state daring to refuse implementation of its decisions.[57] The PCIJ was itself the result of a process that began at the Hague Peace Conferences of 1899 and 1907, where voices extolling the desirability of a truly international court succeeded in persuading states to establish the Permanent Court of Arbitration.[58] The PCIJ was the next logical step, made all the more imperative by the League of Nations' goal of preventing the recurrence of the First World War.

The ICJ Statute borrowed heavily from the PCIJ Statute, including replicating almost verbatim its Article 38(1) which sets out the now universally accepted sources of international law.[59] However, the ICJ, especially in its earlier years, was not as successful as the PCIJ. The denial of standing by the ICJ to Liberia and Ethiopia in the *South West Africa* cases[60] to review whether South Africa was fulfilling its obligations under the mandate for South-West Africa (now Namibia), sparked a furor in the UN General Assembly by the majority of states as being based on a Western conception of world order.[61] This led to a protracted period where defendants would refuse to appear before the Court and the ICJ generally had little work to do.[62] However, with the largely applauded decision in the *Nicaragua* case[63] – given the judgment's compelling analysis of principles such as those concerning the use of force, and its ostensibly unbiased finding against a major Western state (the United States) in favour of

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[55] Charter of the United Nations, Art. 96.

[56] Statute of the International Court of Justice, Art. 9.

[57] D.J. Harris, *Cases and Materials on International Law* (London: Sweet & Maxwell, 2004, 6th edn), 1027.

[58] Mohammed Bedjaoui, 'Preface', in Sam Muller, D. Raič and J.M. Thuránszky (eds), *The International Court of Justice: Its Future Role after Fifty Years* (The Hague; Boston: Martinus Nijhoff, 1997), xxvi.

[59] See Chapter 2.

[60] *South West Africa* cases (*Ethiopia v South Africa; Liberia v South Africa*) [1966] ICJ Rep 6.

[61] Harris, above note 57, 1027, fn 29.

[62] See, e.g., Hugh Thirlway, *Non-Appearance before the International Court of Justice* (Cambridge: Cambridge University Press, 1985).

[63] *Military and Paramilitary Activities in and against Nicaragua* (Merits) [1986] ICJ Rep 14.

Nicaragua – the World Court regained a general level of confidence within the international community.

The Court has been criticized as being of limited legal utility.[64] As discussed in Chapter 2, it has sometimes let its judicial function be superseded by political considerations, as its (non) opinion in the *Nuclear Weapons* case[65] indicates. Also, its judgments at times lack the rigour and poise appropriate to a Court of its stature, as evidenced by the slackening of its judicial method in relation to the discovery of customary international law and its over-reliance on its own prior decisions. However, the Court has rendered many important decisions and its rulings have, since the Court's revival in the late 1980s, been largely implemented and enforced, although the United States' veto of a draft General Assembly resolution insisting on 'full compliance' with the *Nicaragua* judgment is a disappointing exception.[66] That said, any assessment of the performance of the World Court must take into consideration the horizontal system of international law, which is not easily susceptible to enforcement by judicial pronouncements.

5.1.1.1.6 The Secretariat The final principal organ is the Secretariat, the administrative staff of the Organization. Its chief administrative officer and the UN's most prominent figure is the Secretary-General. The Secretariat is loyal only to the Organization and may not receive instructions from any external government or authority, or act inconsistently with its position as a body of international officials.[67] Article 101(3) of the UN Charter states:

> [T]he paramount consideration in the employment of staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity.

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[64] See, e.g., Eric Posner and Miguel de Figueiredo, 'Is the International Court of Justice Biased?' (2005) 34 *Journal of Legal Studies* 599; Andrew Coleman, 'The International Court of Justice and Highly Political Matters' (2003) 4(1) *Melbourne Journal of International Law* 29.

[65] *Legality of the Threat or Use of Nuclear Weapons (*Advisory Opinion) [1996] ICJ Rep 226.

[66] Noam Chomsky, 'The New War against Terror', in Nancy Scheper-Hughes and Philippe Bourgois (eds), *Violence in War and Peace: An Anthology* (Malden, MA; Oxford, UK: Blackwell Publishing, 2004) 217, 218; UN Information Centre London, *Newsletter*, 6 November 1986. See also Geoffrey DeWeese, 'The Failure of the International Court of Justice to Effectively Enforce the Genocide Convention' (1998) 26(4) *Denver Journal of International Law and Policy* 265.

[67] Charter of the United Nations, Art. 100(1).

This provision was the basis from which the ICJ considered that the General Assembly had implied power to create the UN Administrative Tribunal, which functions as an employment law court for the Secretariat.[68]

5.1.1.2 International personality of the United Nations

The seminal case on the international personality of the United Nations, and international organizations generally, is the ICJ decision in the *Reparations* case.[69] This case arose out of the death in September 1948 of Count Bernadotte in the state of Israel, which was not yet a Member of the UN. Bernadotte was a Swedish national performing functions as Chief UN Truce Negotiator in Palestine. Although he was allegedly killed by a group of private terrorists, Israel admitted international responsibility for failing to protect him. The General Assembly requested the Court provide an Advisory Opinion on two questions. The first question was whether the UN had the capacity to bring an international claim against a responsible state, for injury suffered by one of its agents in the performance of his duties and for damage caused to the UN, or to the victim or his estate.[70] The Court began by establishing that international persons are 'not necessarily identical in their nature or in the extent of their rights' and their nature 'depends on the needs of the community'.[71] The Court was laying down a functional test, rather than one grounded in principle. It found that, as a general proposition, the UN was an international person with broad powers.

The Court pointed to the fact that the UN Charter granted the UN 'political tasks of an important character', including the maintenance of international peace and security, and that Articles 104 and 105 granted the UN legal capacity, privileges and immunities in the territories of its Members. The Organization had also concluded a number of agreements with states, such as the Convention on the Privileges and Immunities of the United Nations 1946, indicating that it was an entity distinct from its Members. The UN was thus an international person.[72] More specifically, the Court had to consider whether, in the absence of an express Charter provision, the functions of the Organization implied the power to bring an international claim for damage caused to UN agents. It considered

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[68] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (Advisory Opinion) [1954] ICJ Rep 47.

[69] *Reparation for Injuries Suffered in the Service of the United Nations*, above note 10.

[70] Ibid., 175.

[71] Ibid., 178.

[72] Ibid., 178–9.

that the rights and duties of an international organization 'must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice'.[73] Thus, specific powers to operate on the international plane may be granted by states in the organization's constitution or 'by necessary implication as being essential to the performance of its duties'.[74]

The Court concluded that the UN had found it necessary to entrust its agents with 'important missions to be performed in disturbed parts of the world', which may involve 'unusual dangers'.[75] These duties could not be properly performed without the UN providing effective support for its agents, including the ability to bring a claim for damage caused to the victim and the UN itself in such circumstances. The fact that the victim's national state may also have a claim for diplomatic protection of its national, did not affect the necessity for the UN to possess this implied power, as the concerned state may not be entitled or inclined to sue in a particular case.[76] Having established that the UN had personality to bring such a claim, the Court concluded that the UN's personality was opposable even to states that were not Members of the Organization.[77]

The second question put by the General Assembly was how an action by the UN could be reconciled with rights possessed by the national state of the victim. The Court acknowledged that the death of a national in the territory of another state can give rise to a right of diplomatic protection leading to a claim by the national state for reparation, and that circumstances may occur where the UN might have a concurrent claim. The Court held that, as an international tribunal would not allow double recovery arising from the same wrong, it was up to the UN and national states to conclude agreements 'inspired by goodwill and common sense' to manage this overlap.[78]

The Court's Advisory Opinion involved a two-step process. First, it established that the UN was an international person, relying on an objective analysis[79] in view of the powers in the Charter and the actions already taken by the UN. But that was insufficient by itself to point to the specific power claimed. The right to bring a claim for damage to the UN's agents had to be expressed in the constitution or necessarily implied as 'essential'

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[73] Ibid., 180.
[74] Ibid., 182.
[75] Ibid., 183.
[76] Ibid.
[77] Ibid., 185.
[78] Ibid., 185–6.
[79] Higgins, above note 7, 46.

for the performance of its functions.[80] It appears that the Court was laying down a broad test of essentiality. The question is not whether the UN can function without the implied power claimed, but whether possession of the power would promote the functioning of the UN at its full capacity.[81]

The general principle outlined in the *Reparations* case does, however, have its limits. In 1996, the WHO, a specialized agency of the UN, asked the ICJ to render an Advisory Opinion on the legality of the threat or use of nuclear weapons. In a controversial decision, the ICJ held that the WHO did not have power to request an Advisory Opinion on that issue.[82] Under Article 96(2) of the UN Charter, a specialized agency may request an Advisory Opinion from the Court on legal questions arising within the scope of its activities. However, the Court held that the WHO was only authorized to deal with the *effects* on health of hazardous activities such as the use of nuclear weapons, and to take preventive measures to protect populations at risk.[83] The WHO request, in reality, related to the *legality* of the use of nuclear weapons *in view of* their health and environmental effects. The WHO's mandate to deal with human health, however, is not affected by whether health matters have been caused by legal or illegal acts.[84] Further, the Court opined that 'due account' should be taken 'of the logic of the overall system contemplated by the Charter'.[85] The WHO, as a specialized agency of the UN, possesses functions limited to public health and cannot encroach on the functions of other UN organs.[86] Accordingly, the Court held that:

> questions concerning the use of force, the regulation of armaments and disarmament are within the competence of the United Nations and lie outside that

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[80] See also *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, above note 68, 56.

[81] Dapo Akande, 'The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice' (1998) 9 *European Journal of International Law* 437, 444; Elihu Lauterpacht, 'The Development of the Law of International Organizations by the Decision of International Tribunals' (1976, IV) 152 *Recueil de Cours* 387,430–32. For a discussion of the unprecedented nature of this ruling, see Catherine Brölmann, 'The International Court of Justice and International Organisations' (2007) 9 *International Community Law Review* 181, 184–5.

[82] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, above note 10.

[83] Ibid., 76.

[84] Ibid.

[85] Ibid., 79–81.

[86] Ibid., 80.

> of the specialized agencies. Besides, any other conclusion would render virtually meaningless the notion of a specialized agency.[87]

Hence, a power to take steps to promote the unlawfulness of nuclear weapons was not an implied power of the WHO. Soon after the Court's ruling, the UN General Assembly submitted a similar request, which successfully extracted the Advisory Opinion. The Court's decision in the WHO *Nuclear Weapons* case is difficult to reconcile with the broad view espoused in the *Reparations* case and other ICJ decisions.[88] Despite acknowledging the preventive role of the WHO, the Court denied it the power to take steps calculated to make the use of nuclear weapons less likely. This finding is the more bizarre given that Article 2(k) of the WHO Constitution empowers the WHO to 'propose conventions, agreements and regulations' relating to health matters. Equally dubious is the principle that the notion of 'specialized agency' connotes exclusivity of functions. Legitimate overlap already exists: for example, the ILO has been the agency that proposes conventions and recommendations dealing with the health of workers, even though the WHO has concurrent power to regulate the health area.[89]

The extensive powers bestowed on the UN in its Charter, and the broad formulation of implied powers sanctioned by the ICJ, has led some to conclude that the UN is a 'world government' and the Charter is effectively a 'world constitution'.[90] Factors in support of this include the near universal membership of the UN[91] and the fact that the Charter establishes a regime

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[87] Ibid., 80–81.

[88] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, above note 68; *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 157.

[89] Akande, above note 81, 450. It is also important to note that the specialized agencies of the UN are not intended to possess international personality distinct from the UN. For example, the headquarters agreement for the ICTY was concluded between the Netherlands and the UN: see Christian Walter, 'Subjects of International Law', in *Max Planck Encyclopedia of Public International Law* (Heidelberg: Max-Planck-Institut, 2010) 4.

[90] Erika de Wet, 'The International Constitutional Order' (2006) *International and Comparative Law Quarterly* 51; Blaine Sloan, 'The United Nations Charter as a Constitution' (1989) *Pace Year Book of International Law* 61; N. White, 'The United Nations System: Conference, Contract, or Constitutional Order?' (2000) 4 *Singapore Journal of International and Comparative Law* 281.

[91] The UN currently has 192 Members out of the 195 states of the world. The three non-members are Taiwan (excluded from membership given the dissonance between Taiwan's claim to being the legitimate government of China and China's claim that Taiwan is part of its territory), Kosovo (a state that had only declared

for the non-use of force other than in self-defence *except* when the UN is undertaking enforcement under Chapter VII to maintain or restore 'international peace and security'. The Charter therefore envisages that the UN has greater international personality to use force than any state[92] and, according to Article 103, the Charter prevails over any inconsistent treaty between Members or between a Member and a non-Member. It may seem to follow that the Charter recalibrates the world order by placing the UN at the top of the hierarchy, making it a 'supranational' organization.

Although it is in some ways enticing to conceive of the UN in this way, it is more accurate to say that the UN possesses some elements consistent with world government, but ultimately falls short of such a characterization. The UN does possess a strong executive arm – the Security Council. However, it is entirely dependent on states to enforce its directives. The possibility in Article 43 of the Charter for states to enter into special agreements with the UN to provide a permanent UN allied army has never been acted on.[93] Further, the General Assembly is not a 'legislature' by any stretch of the imagination, since its resolutions are not binding and are often fragmented. Finally, the ICJ has no mechanism for judicial review to keep the UN within constitutional limits and it can only settle a dispute when states that are parties to a dispute have accepted its jurisdiction.[94] Any decisions of the ICJ must be implemented by states: if a state fails to comply with an order of the Court, all that the claimant state can do is apply to the Security Council, which may recommend action by states individually or collectively.[95] All of this comports with the intention of the drafters of the Charter to avoid all implications that the UN was a 'superstate'.[96]

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independence in February 2008) and the Holy See (which does not wish to become a Member).

92 White, above note 90, 35, 47.

93 Jean E. Krasno, *The United Nations: Confronting the Challenges of a Global Society* (Boulder, CO: Lynne Rienner Publishers, 2004), 225. For the legal basis of the creation of peacekeeping forces, see Gray, above note 31, 261–2.

94 See discussion above at section 5.1.1.1.

95 Charter of the United Nations, Art. 94(2).

96 Menon, above note 8, 83; Hersch Lauterpacht, 'The Subjects of the Law of Nations' (1947) 63 *Law Quarterly Review* 438, 447.