conferences.[4] The Congress system lasted, in various guises, for practically a century and institutionalised not only the balance of power approach to politics, but also a semi-formal international order.[5]

Until the outbreak of the First World War, world affairs were to a large extent influenced by the periodic conferences that were held in Europe. The Paris conference of 1856 and the Berlin gathering of 1871 dealt with the problems of the Balkans, while the 1884–5 Berlin conferences imposed some order upon the scramble for Africa that had begun to develop. These, and other such conferences, constituted an important prelude to the establishment of international institutions, but became themselves ever more inadequate to fulfil the job they had been intended to do. A conference could only be called into being upon the initiative of one or more of the states involved, usually following some international crisis, and this ad hoc procedure imposed severe delays upon the resolution of the issue. It meant that only states specifically invited could attend and these states made decisions upon the basis of unanimous agreement, a factor which severely restricted the utility of the system.[6]

The nineteenth century also witnessed a considerable growth in international non-governmental associations, such as the International Committee of the Red Cross (founded in 1863) and the International Law Association (founded in 1873). These private international unions[7] demonstrated a wide-ranging community of interest on specific topics, and an awareness that co-operation had to be international to be effective. Such unions created the machinery for regular meetings and many established permanent secretariats. The work done by these organisations was, and remains, of considerable value in influencing governmental activities and stimulating world action.[8]

In addition, there developed during the course of the nineteenth century a series of public international unions. These were functional associations linking together governmental departments or administrations for specific purposes, and were set up by multilateral treaties. The first instances of such inter-governmental associations were provided by the international commissions established for the more efficient functioning of such vital arteries of communication as the Rhine and Danube rivers,

[4] See e.g. El Erian, 'Legal Organization', p. 58. See also A. Zamoyski, *Rites of Peace*, London, 2007.

[5] See e.g. Reuter, *Institutions*, pp. 55–6. See also *Bowett's International Institutions*, chapter 1.

[6] *Bowett's International Institutions*, p. 3. [7] *Ibid.*, pp. 4–65.

[8] See as to the role of the International Committee of the Red Cross in international humanitarian law, above, chapter 21, p. 1200.

and later for other rivers of Central and Western Europe.[9] The powers given to the particular commissions varied from case to case, but most of them performed important administrative and legislative functions. In 1865 the International Telegraphic Union was set up with a permanent bureau or secretariat and nine years later the Universal Postal Union was created. This combined a permanent bureau with periodic conferences, with decisions being taken by majority vote. This marked a step forward, since one of the weaknesses of the political order of ad hoc conferences had been the necessity for unanimity.

The latter half of the nineteenth century was especially marked by the proliferation of such public international unions, covering transportation, communications, health and economic co-operation. These unions restricted themselves to dealing with specific areas and were not comprehensive, but they introduced new ideas which paved the way for the universal organisations of the twentieth century. Such concepts as permanent secretariats, periodic conferences, majority voting, weighted voting and proportionate financial contributions were important in easing administrative co-operation, and they laid the basis for contemporary international institutions.

International organisations (or institutions) have now become indispensable. In a globalised world they facilitate co-operation across state frontiers, allowing for the identification, discussion and resolution of difficulties in a wide range of subjects, from peacekeeping and peace-enforcement to environmental, economic and human rights concerns. This dimension of the international legal system permits the relatively rapid creation of new rules, new patterns of conduct and new compliance mechanisms. Indeed, if there is one paramount characteristic of modern international law, it is the development and reach of international institutions, whether universal or global, regional or subregional.

A brief survey of international institutions

Institutions of a universal character

The innovation of the twentieth century was, of course, the creation of the global, comprehensive organisations of the League of Nations in 1919 and the United Nations in 1945. These were, in many ways, the logical culmination of the pioneering work of the private and public international unions,

[9] See *Bowett's International Institutions*, pp. 6–9.

the large numbers of which required some form of central co-ordination. This function both the League[10] and the UN attempted to provide.[11] Associated with the UN are the specialised agencies. These are organisations established by inter-governmental agreement and having wide international responsibilities in economic, social, cultural and other fields that have been brought into relationship with the United Nations.[12] Most of the specialised agencies have devised means whereby the decisions of the particular organisation can be rendered virtually binding upon members. This is especially so with regard to the International Labour Organisation (established in 1919 to protect and extend the rights of workers), UNESCO (the UN Educational, Scientific and Cultural Organisation established to further the increase and diffusion of knowledge by various activities, including technical assistance and co-operative ventures with national governments) and the World Health Organisation (established in 1946 with the aim of unifying the standards of health care).[13] Although such institutions are not able to legislate in the usual sense, they are able to apply pressures quite effectively to discourage non-compliance with recommendations or conventions.[14]

The International Bank for Reconstruction and Development (IBRD – the World Bank) emerged from the Bretton Woods Conference of 1944 to encourage financial investment, and it works in close liaison with the International Monetary Fund (IMF), which aims to assist monetary co-operation and increase world trade. A state can only become a member

[10] See e.g. *Bowett's International Institutions*, chapter 2; G. Scott, *Rise and Fall of the League of Nations*, London, 1973; El Erian, 'Legal Organization', pp. 60 ff., and F. P. Walters, *A History of the League of Nations*, Oxford, 2 vols., 1952.

[11] See above, chapter 22.

[12] Article 57 of the Charter. See also articles 62–6 and e.g. J. Harrod, 'Problems of the United Nations Specialised Agencies at the Quarter Century', 28 YBWA, 1974, p. 187, and Klein, in Bernhardt, *Encyclopedia of Public International Law*, vol. V, pp. 349–69. See also El Erian, 'Legal Organization', pp. 55, 96–106.

[13] See also the Food and Agriculture Organisation, created in 1943 to collect and distribute information related to agricultural and nutritional matters: see e.g. R. W. Phillips, *FAO, Its Origins, Formation and Evolution 1945–1981*, Rome, 1981. See also www.fao.org/.

[14] The following specialised agencies should also be noted in passing: the International Civil Aviation Organisation; the Universal Postal Union; the International Telecommunication Union; the World Meteorological Organisation; the International Maritime Organisation; the World Intellectual Property Organisation; the International Fund for Agricultural Development; the UN Industrial Development Organisation and the International Fund for Agricultural Development. The International Atomic Energy Agency exists as an autonomous organisation within the UN. See e.g. L. Henkin, R. C. Pugh, O. Schachter and H. Smit, *International Law: Cases and Materials*, 3rd edn, St Paul, 1993, chapter 18.

of the World Bank if it is an IMF member. The plenary organ of these agencies is the Board of Governors and the executive organs are the Executive Directors. These agencies, based in Washington DC, are assisted by the International Development Association (IDA) and the International Finance Corporation (IFC), which are affiliated to the World Bank and encourage financial investment and the obtaining of loans on easy terms. These financial organisations differ from the rest of the specialised agencies in that authority lies with the Board of Governors, and voting is determined on a weighted basis according to the level of subscriptions made. Very important decisions require the consent of 70 to 85 per cent of the votes. The IBRD, IDA and IFC together with the Multilateral Investment Guarantee Agency constitute the 'World Bank Group'.[15]

A number of international economic arrangements and institutions (not being specialised agencies) of increasing importance have been established The GATT[16] arose out of an international conference held at Havana in 1947–8 at which it was decided to establish an International Trade Organisation. The organisation did not in fact come into being. However, a General Agreement on Tariffs and Trade (GATT) had been agreed shortly before the conference, involving a series of tariff concessions and trade rules, and this originally temporary instrument continued. The arrangement operated on the basis of a bilateral approach to trade negotiations coupled with unconditional acceptance of the most-favoured-nation principle (by which the most favourable benefits obtained by one state are passed on to other states), although there were special conditions for developing states in this respect. A series of tariff and trade negotiating rounds were held under the auspices of the GATT, which thus

[15] See e.g. *Bowett's International Institutions*, pp. 87 ff. See also W. M. Scammell, 'The International Monetary Fund' in *The Evolution of International Organizations* (ed. E. Luard), London, 1966, chapter 9; A. Shonfield, 'The World Bank', in *ibid.*, chapter 10; R. Townley, 'The Economic Organs of the United Nations', in *ibid.*, chapter 11, and C. W. Alexandrowicz, *The Law-Making Functions of the Specialised Agencies of the United Nations*, Sydney, 1973, chapter 9. See also www.worldbank.org/.

[16] See e.g. A. F. Lowenfeld, *International Economic Law*, 2nd edn, Oxford, 2008; J. H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, Cambridge, 2006; K. W. Dam, *The GATT, Law and International Economic Relations*, Chicago, 1970; J. H. Jackson, *The World Trading System*, 2nd edn, Cambridge, MA, 1997; T. Flory, 'Les Accords du Tokyo Round du GATT et la Réforme des Procédures de Règlement des Différends dans la Système Commercial Interétatique', 86 RGDIP, 1982, p. 235; A. H. Qureshi, *International Economic Law*, London, 1999, and I. Seidl-Hohenveldern, *International Economic Law*, 2nd edn, Dordrecht, 1992, p. 90.

offered a package approach to trade negotiations, and a wide variety of tariff reductions was achieved, as well as agreement reached on mitigating non-tariff barriers. The eighth such round, termed the Uruguay round, commenced in 1986 and concluded with the signing at Marrakesh on 15 April 1994 of a long and complex agreement covering a range of economic issues. It also provided for the establishment of the World Trade Organisation on 1 January 1995 as a permanent institution with its own secretariat. The organisation consists of a Ministerial Conference, with representatives of all members meeting at least once every two years; a General Council composed of representatives of all members meeting as appropriate and exercising the functions of the Conference between sessions;[17] Councils for Trade in Goods, Trade in Services and Trade Related Aspects of Intellectual Property Rights operating under the general guidance of the General Council; a Secretariat and a Director-General.[18] The organisation's main aims are to administer and implement the multilateral and plurilateral trade agreements together making up the WTO, to act as a forum for multilateral trade negotiations, to try and settle trade disputes and to oversee national trade policies. The GATT of 1947 continued until the end of 1995, when it was effectively subsumed, with changes, as GATT 1994 within the WTO system.[19]

Regional institutions

The proliferation of regional institutions, linking together geographically and ideologically related states, since the close of the Second World War, has been impressive. A number of factors can help explain this. The onset of the Cold War and the failure of the Security Council's enforcement procedures stimulated the growth of regional defence alliances (such as NATO and the Warsaw Pact) and bloc politics. The decolonisation process resulted in the independence of scores of states, most of which were eager to play a non-aligned role between East and West, and the rise of globalisation has meant that all states form part of one economic trading system and can no longer individually function effectively, thus precipating the evolution of regional economic arrangements.

[17] The General Council will also meet to discharge the responsibilities of the Dispute Settlement Body and the Trade Policy Review Body: see article IV(3) and (4) of the 1994 Agreement.

[18] See article IV of the Agreement.

[19] See further as to the WTO dispute settlement system, above, chapter 18, p. 1036.

Europe

It is in Europe that regionalism became most developed institutionally. The establishment of the European Economic Community (thereafter European Union), in particular, was intended to lay the basis for a resurgent Europe with meaningful economic and political integration.[20] It has developed to become a major regional organisation with significant supranational components. Consisting originally of three interlocking communities (the European Coal and Steel Community 1951, the European Atomic Energy Community 1957 and the European Economic Community 1957), the European Union aims at establishing a single unified market with common external tariffs and the elimination of internal tariffs and quotas, and it promotes the free movement of capital and labour. The Single European Act, 1986 and the Treaty on European Union, 1992 both introduced significant changes. The Treaty of Lisbon, signed in 2007 and currently awaiting ratification, is intended to streamline the governance of the Union. The membership of the Union has progressively increased and currently stands at twenty-seven. The institutions of the Union comprise primarily the European Parliament, the Council of Ministers, the Commission and the Court of Justice.[21]

The Council of Europe was created in 1949 with wide-ranging co-operative aims.[22] There are currently forty-seven member states. The Council comprises the Committee of Ministers, consisting of governmental representatives, and the Parliamentary Assembly, composed of members representing the Parliaments of the member states. The most important part of the work of the Council of Europe is the preparation and conclusion of conventions and protocols.[23] There are a very large

[20] D. Chalmers and A. Tomkins, *European Union Public Law*, Cambridge, 2007; P. Craig and G. De Burca, *EU Law: Text, Cases and Materials*, 4th edn, Oxford, 2007; T. C. Hartley, *The Foundations of European Community Law*, 6th edn, Oxford, 2007; J. Steiner, L. Woods and C. Twigg-Flesner, *EU Law*, 9th edn, Oxford, 2006; *Lasok's Law and Institutions of the European Communities* (eds. D. Lasok and K. P. E. Lasok), 7th edn, London, 2001, and D. Wyatt and A. Dashwood, *European Community Law*, 4th edn, London, 2000.

[21] Note also the Organisation for Economic Co-operation and Development established in 1960 and developed out of the European machinery created to administer the American Marshall Plan, which was aimed at reviving the European economies: see e.g. C. Archer, *Organising Europe*, London, 1994, chapter 3; *Bowett's International Institutions*, pp. 167 ff., and Miller, 'The OECD', YBWA, 1963, p. 80.

[22] See e.g. Archer, *Organising Europe*, chapter 4; A. H. Robertson, *The Council of Europe*, 2nd edn, London, 1961, and T. Ouchterlony, *The Council of Europe in the New Europe*, Edinburgh, 1991. See also above, chapter 7, p. 345, and www.coe.int.

[23] See articles 15 and 16 of the Statute of the Council of Europe.

number of these, including pre-eminently the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), but including also the European Social Charter (1961) and agreements dealing with cultural and educational questions and conventions covering patents, extradition, migration, state immunity, terrorism and others.

The Organisation for Security and Co-operation in Europe (OSCE)[24] was originally created in 1975 following the Helsinki Conference of European powers (plus the USA and Canada). The Helsinki Final Act was not a binding treaty but a political document, concerned with three areas or 'baskets', being security questions in Europe; co-operation in the fields of economics, science and technology; and co-operation in humanitarian fields. The Conference itself (at the time termed the CSCE) was a diplomatic conference with regular follow-up meetings to review the implementation of the Helsinki Final Act, but after the changes in Eastern Europe in the late 1980s the organisation began to develop. The Charter of Paris for a New Europe signed in 1990 provided for the first standing institutions. The OSCE is essentially a conflict prevention organisation, with an Office for Democratic Institutions and Human Rights, responsible for the promotion of human rights and democracy in the OSCE area. It also monitors elections. Overall responsibility for executive action is exercised by the Chairman-in-Office, who is assisted by the Troika (i.e. the present, preceding and succeeding Chairmen). The High Commissioner on National Minorities was appointed in 1992[25] and there exist a variety of Missions to assist in dispute settlement. The OSCE was also assigned a role in the Bosnia peace arrangements.[26] There are currently fifty-six participating states in the organisation.

The North Atlantic Treaty Organization (NATO)[27] was created in 1949 to counter possible threats from the USSR. It associated the USA and Canada with fourteen European powers for the protection, in essence,

[24] See e.g. *The CSCE* (ed. A. Bloed), Dordrecht, 1993; J. Maresca, *To Helsinki – The CSCE 1973–75*, Durham, 1987; *Essays on Human Rights in the Helsinki Process* (eds. A. Bloed and P. Van Dijk), Dordrecht, 1985; A. Bloed and P. Van Dijk, *The Human Dimension of the Helsinki Process*, Dordrecht, 1991, and D. McGoldrick, 'The Development of the Conference on Security and Co-operation in Europe – From Process to Institution' in *Legal Visions of the New Europe* (eds. B. S. Jackson and D. McGoldrick), London, 1993, p. 135. See also www.osce.org/ and above, chapters 7, p. 372, and 18, p. 1032.

[25] See further above, chapter 7, p. 376. [26] See further above, chapter 18, p. 1034.

[27] See e.g. *The NATO Handbook*, Brussels, 2002 and at www.nato.int/docu/ handbook/2001/index.htm; Archer, *Organising Europe*, chapter 9; *Bowett's International Institutions*, pp. 180 ff.; K. Myers, *NATO, The Next Thirty Years*, Boulder, 1980, and L. S. Kaplan and R. W. Clawson, *NATO After Thirty Years*, Wilmington, 1981.

of Western Europe (although Greece and Turkey are also involved). By the Treaty,[28] the parties agreed to consult where the territorial integrity, political independence or security of any of them has been threatened,[29] and accepted that an armed attack against one or more of them in Europe or North America should be considered an attack against all.[30]

The alliance (now comprising twenty-six states) consists of a Council, which is the supreme organ and on which all members are represented,[31] and a NATO parliamentary conference (the North Atlantic Assembly), which acts as an official consultative body. The ending of the Cold War brought about a variety of changes in the organisation. The Euro-Atlantic Partnership Council (EAPC) was established in 1997 (it currently has fifty members, among them NATO states and former members of the Warsaw Pact, including successor states of the USSR).[32] In 1994, the Partnership for Peace programme was inaugurated and this brings together EAPC and other OSCE states into a co-operative framework, which has the potential to provide the mechanism for enlarging the membership of NATO itself. There are currently thirty-four such partners. While the Partnership for Peace focuses upon practical, defence-related and military co-operation, the EAPC constitutes the forum for broad consultation on political and security issues. Countries participating in the Partnership for Peace sign a Framework Document, affirming the commitment to the preservation of democratic societies and the maintenance of the principles of international law, to fulfil in good faith the obligations of the UN Charter and the principles contained in the Universal Declaration of Human Rights and to respect existing borders.[33]

[28] 43 AJIL, 1949, Supp., p. 159.

[29] Article 4. Support to Turkey was requested and provided in early 2003 under article 4: see www.nato.int/docu/pr/2003/p030216e.htm.

[30] Article 5. This was invoked for the first time on 12 September 2001, when the Allies declared that the terrorist attack on the US was deemed to constitute an attack on all members of the alliance: see www.nato.int/docu/pr/2003/p030216e.htm.

[31] Article 9.

[32] This replaced the North Atlantic Co-operation Council established in 1991.

[33] See as to NATO's involvement in peacekeeping and peace-enforcement, above, chapter 22, p. 1279. Note also the Western European Union, described by the Treaty on European Union, 1992 as an integral part of the EU and as its defence component to strengthen the European pillar of the Atlantic alliance. It had a role in the Yugoslav crisis, both in enforcing the Security Council sanctions in co-operation with NATO and in forming part of the joint European Union/WEU administration of the city of Mostar in Bosnia in July 1994. It also conducted a police training mission in Albania in 1997 and demining operations in Croatia from 1997: see e.g. Archer, *Organising Europe*, chapter 10, and T. Taylor, *European Defence Co-operation*, London, 1984. See also www.weu.int/.

The Commonwealth of Independent States was established by an Agreement signed by Russia, Belarus and Ukraine in Minsk on 8 December 1991, to which eight other former Republics of the USSR adhered at Alma Ata on 21 December that year. Georgia joined in 1993, so that the organisation now comprises all the former Soviet Republics apart from the three Baltic States. The organisation is based on respect for the territorial integrity of member states and member states agreed to maintain and retain under joint command, a common military and strategic space, including joint control over nuclear weapons. It was also agreed to establish common co-ordinating institutions.[34] The CIS adopted a Charter in Minsk in January 1993.[35] Under this Charter, the Commonwealth is expressed to be based on the sovereign equality of its members, who are independent subjects of international law. It is expressly stated that the CIS is not a state nor does it possess supranational powers.[36] The supreme organ is the Council of Heads of State, while the Council of Heads of Government has a co-ordinating role.[37] Decisions of both Councils are to be achieved by common consent.[38] In 1993, the leaders of the CIS states, apart from Ukraine and Turkmenistan, signed a treaty to create an Economic Union, while in 1995, seven of the twelve member states signed an agreement for the Defence of the CIS External Borders. A large number of agreements have been signed between member states on a variety of subjects, including prevention of drug smuggling and terrorism, but many of these agreements have not been ratified.[39]

The American continent[40]

The Organisation of American States emerged after the Second World War and built upon the work already done by the Pan-American Union and the various inter-American Conferences since 1890. It consists of two basic treaties: the 1947 Inter-American Treaty of Reciprocal Assistance

[34] See articles 5, 6 and 7 of the Minsk Agreement, 31 ILM, 1992, pp. 143 ff.
[35] See 4 Finnish YIL, 1993, p. 263. [36] See article 1. [37] See articles 21 and 22.
[38] Article 23. There are a number of other councils linking various ministers, see articles 27, 28, 30 and 31, together with an Economic Court and a Commission on Human Rights, see articles 32 and 33.
[39] See www.cis.minsk.by/main.aspx?uid=74.
[40] See e.g. *Bowett's International Institutions*, chapter 7; A. V. W. Thomas and A. J. Thomas, *The Organization of American States*, Dallas, 1963; M. Ball, *The OAS in Transition*, Durham, 1969, and M. Wood, 'The Organization of American States', 33 YBWA, 1979, p. 148. See also www.oas.org/.

(the Rio Treaty), which is a collective self-defence system, and the 1948 Pact of Bogotá, which is the original Charter of the OAS and which was amended in 1967 by the Buenos Aires Protocol, in 1985 by the Cartagena de Indias Protocol and by the 1992 Washington Protocol and the 1993 Managua Protocol. There are currently thirty-five member states. The OAS is a collective security system, an attack on one being deemed an attack on all. The organisation consists of a General Assembly, the supreme organ, which is a plenary organ with wide terms of reference; meetings of consultation of Ministers of Foreign Affairs, which exercise broad powers; a Permanent Council which performs both secretarial supervision and political functions, subject to the authority of the aforementioned institutions, and a number of subsidiary organs. The organisation has adopted a Human Rights Convention[41] and is the most developed of the regional organisations outside Europe, but without any of the supranational powers possessed by the European Union.[42]

The Arab League[43]

The Arab League was created in 1944 and has broad aims. The Council of the League is the supreme organ and performs a useful conciliatory role and various subsidiary organs dealing with economic, cultural and social issues have been set up. Its headquarters are in Tunisia, having been moved there from Egypt after the Israel–Egypt Peace Treaty of 1979. There is also a permanent secretariat and a Secretary-General. The Council of the League has been involved in the peacekeeping operations in Kuwait in 1961, where an Inter-Arab Force was established to deter Iraqi threats, and in Lebanon in 1976 as an umbrella for the operations of the Syrian

[41] See above, chapter 7, p. 381.

[42] There exist also a number of other American organisations of limited competence: see e.g. *Bowett's International Institutions*, chapter 7. These include, for example, the Inter-American Bank (1959); the Andean Pact (1969); the Caribbean Community and Common Market or CARICOM (1973); the Latin American Integration Association (1980); the Southern Cone Common Market or MERCOSUR (1991) and the Association of Caribbean States (1994).

[43] See e.g. *Bowett's International Institutions*, p. 237, and R. W. MacDonald, *The League of Arab States*, Princeton, 1965. See also B. Boutros-Ghali, 'La Ligue des États Arabes', 137 HR, 1972, p. 1, and H. A. Hassouna, *The League of Arab States*, Dobbs Ferry, 1975. Note also the existence of the Organisation of Petroleum Exporting Countries, founded in 1960, which obtained the power to fix crude oil prices in 1973: see e.g. I. Seymour, *OPEC, Instrument of Change*, London, 1980, and I. Skeet, *OPEC: Twenty-five Years of Prices and Politics*, Cambridge, 1988. See also www.Arabji.com/ArabGovt/ArabLeague.htm.

troops.[44] It played no meaningful part in the Gulf wars and crises from 1980 to 2003.[45]

Africa[46]

The Organisation of African Unity was established in 1963 in Ethiopia and was replaced by the African Union in 2001. The Constitutive Act of the Union lists a series of objectives in article 3 and these include the achieving of greater unity between African countries; defending the sovereignty, territorial integrity and independence of its member states; the promotion of peace, security and stability on the continent and of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments; and the promotion of sustainable development. Article 4 of the Constitutive Act sets out the Principles of the Union and these include respect of borders existing on achievement of independence; establishment of a common defence policy for the African continent; peaceful resolution of conflicts among member states and the prohibition of the use of force or threat to use force among member states of the Union. Interestingly, in addition to the emphasis on territorial integrity, the Principles also provide for the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, and the right of member states to request intervention from the Union in order to restore peace and security.[47] Also included are respect for democratic principles, human rights, the rule of law and good governance, and condemnation and rejection of unconstitutional changes of governments. The organs of the Union include an Assembly, the supreme organ of the Union, composed of heads of state or government or their representatives, which sets the common policy of the Union;

[44] See e.g. *Bowett's International Institutions*, p. 238, and G. Feuer, 'Le Force Arabe de Securité au Liban', 22 AFDI, 1976, p. 51. See also above, chapter 18, p. 1031.

[45] Note also the existence of the Gulf Co-operation Council: see *Bowett's International Institutions*, p. 240.

[46] *Ibid.*, p. 243; Z. Cervenka, *The Organization of African Unity and Its Charter*, London, 1969, and *The Unfinished Quest for Unity*, London, 1977; B. Andemicael, *The OAU and the UN*, London, 1976; M. Wolfers, *Politics in the Organization of African Unity*, London, 1976; C. A. A. Packer and D. Rukare, 'The New African Union and Its Constitutive Act', 96 AJIL, 2002, p. 365, and K. D. Magliveras and G. J. Naldi, 'The African Union – A New Dawn for Africa?', 51 ICLQ, 2002, p. 415. See also above, chapter 18, p. 1026, and www.africa-union.org/.

[47] See e.g. B. Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention', 85 *International Review of the Red Cross*, 2003, p. 807.

an Executive Council, composed of foreign or other ministers, which co-ordinates and takes decisions on policies in areas of common interest to the member states, such as foreign trade, water resources and energy; the Pan-African Parliament and the Court of Justice, the jurisdiction of which comprises the application and interpretation of the Act and which is currently being merged with the African Court of Human Rights.[48]

Asia

The Association of South East Asian Nations (ASEAN) was created in 1967.[49] It possesses economic, political and cultural aims and groups together Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. In 1976 three agreements were signed: a Treaty of Amity and Co-operation, which reaffirmed the parties' commitment to peace and dealt with the peaceful settlement of disputes; the Declaration of ASEAN Concord, which called for increased political and economic co-ordination and co-operation; and the Agreement of Establishment of the Permanent Secretariat to co-ordinate the national secretariats established under the 1967 ASEAN Declaration. In 1987, the Protocol amending the Treaty of Amity was signed, under which countries outside the ASEAN region could accede to the treaty. A number of economic agreements have also been signed, ranging from the Manila Declaration of 1987 to the Framework Agreement on Enhancing ASEAN Economic Co-operation, 1992 and the decision to establish an ASEAN Free Trade Area within fifteen years utilising a Common Effective Preferential Tariff scheme. In 2003, ASEAN Concord II was signed, establishing the ASEAN Security Community, Economic Community and Socio-Cultural Community,[50] and on 20 November 2007 the ASEAN Charter was adopted.

The supreme policy-making body of ASEAN is the Summit, comprising the Heads of State or Government, with a Co-ordinating Council composed of Foreign Ministers.[51] A variety of community councils and sectorial ministerial bodies were also established.[52] An ASEAN Human

[48] As to the peaceful settlement mechanisms and as to other African organisations, see above, chapter 18, p. 1026.

[49] See e.g. *Bowett's International Institutions*, p. 228. See also T. W. Allen, *The ASEAN Report*, Washington, 2 vols., 1979, and *Understanding ASEAN* (ed. A. Broinowski), London, 1982. See also www.aseansec.org/.

[50] See 43 ILM, 2004, p. 18.

[51] See articles 7 and 8 of the Charter.

[52] See articles 9 and 10. There is also a Secretary-General and Secretariat and a Committee of Permanent Representatives: see articles 11 and 12.

Rights Body was proposed under conditions to be determined.[53] Decision-making is in principle to be by consultation and consensus.[54]

Some legal aspects of international organisations[55]

There is no doubt that the contribution to international law generally made by the increasing number and variety of international organisations is marked. In many fields, the practice of international organisations has had an important effect and one that is often not sufficiently appreciated. In addition, state practice within such organisations is an increasingly significant element within the general process of customary law formation. This is particularly true with regard to the United Nations, with its universality of membership and extensive field of activity and interest, although not all such practice will be capable of transmission into customary law, and particular care will have to be exercised with regard to the *opinio juris*, or binding criterion.[56]

As well as the impact of the practice of international organisations upon international law, it is worth noting the importance of international legal norms within the operations of such organisations. The norms in question guide the work and development of international institutions and may act to correct illegal acts.[57] International organisations have in the past been defined in international treaties simply as 'inter-governmental organisations' in order to demonstrate that the key characteristic of such groupings

[53] Article 14.

[54] Article 20. Where there is no consensus, it will be for the ASEAN Summit to decide how to proceed in a particular matter. Article 22 calls for the establishment of dispute settlement mechanisms.

[55] See e.g. Amerasinghe, *Principles*; Schermers and Blokker, *International Institutional Law*; *Bowett's International Institutions*, part 3; Klabbers, *Introduction*; A. Reinisch, *International Organizations Before National Courts*, Cambridge, 2000; I. Brownlie, *Principles of Public International Law*, 6th edn, Oxford, 2003, chapter 31, and Reuter, *International Institutions*, pp. 227–64. See also E. Lauterpacht, 'Development' and 'The Legal Effects of Illegal Acts of International Organizations' in *Cambridge Essays in International Law*, Cambridge, 1965, p. 98; K. Skubiszewski, 'Enactment of Law by International Organizations', 4 BYIL, 1965–6, p. 198; Whiteman, *Digest*, vol. XIII; R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, Oxford, 1963, and generally other sources cited in footnote 2 above.

[56] See above, chapter 3, p. 84.

[57] See e.g. the *IMCO* case, ICJ Reports, 1960, p. 150; 30 ILR, p. 426; the *Conditions of Admission of a State to the United Nations* case, ICJ Reports, 1948, p. 57; 15 AD, p. 333; and the *Certain Expenses of the United Nations* case, ICJ Reports, 1962, p. 151; 34 ILR, p. 281. See also E. Lauterpacht, 'Development', pp. 388–95.

is that their membership comprises states.[58] However, the International Law Commission in article 2 of its Draft Articles on the Responsibility of International Organisations refers to 'an organisation established by a treaty or other instrument governed by international law and possessing its own legal personality', while noting that international organisations 'may include as members, in addition to states, other entitites'.[59] Amerasinghe refers to organisations 'normally created by a treaty or convention to which states are parties and the members of the organisation so created are generally states' and points to basic characteristics such as establishment by international agreement among states, possession of a constitution, possession of organs separate from its members, establishment under international law, and either exclusive or predominant membership of states or governments.[60]

One may therefore distinguish public international organisations that are the subject of this chapter, from private or non-governmental organisations and from international public companies.[61] The former may have a wide-ranging, open or universal membership (such as the UN and the specialised agencies) or may have a limited or closed membership (such as the African Union or the Organisation for Economic Co-operation and Development). Organisations may have a wider or narrower range of functions, depending upon their constitution, with the UN as a good example of the former and the World Health Organisation as a good example of the latter. Whether a grouping will be regarded as an international organisation will depend essentially upon whether it in fact possesses some or all of the criteria noted above.

Personality[62]

The role of international organisations in the world order centres on their possession of international legal personality as distinct from, and

[58] See e.g. the Vienna Convention on the Representation of States in their Relations with International Organizations, 1975; the Vienna Convention on Succession of States in Respect of Treaties, 1978 and the Vienna Convention on the Law of Treaties between States and International Organizations, 1986.

[59] Report of the International Law Commission, 2003, A/58/10, pp. 38 ff.

[60] *Principles*, pp. 9 and 10.

[61] See above, chapter 5, p. 248.

[62] See e.g. H. Thirlway, 'The Law and Procedure of the International Court of Justice, 1960–1989 (Part Eight)', 67 BYIL, 1996, p. 1; Klabbers, *Introduction*, chapter 3; *Bowett's International Institutions*, chapter 15; Amerasinghe, *Principles*, chapter 3; Schermers and Blokker, *International Institutional Law*, chapter 11; C. W. Jenks, 'The Legal Personality of

in addition to, personality under domestic law. Once this is established, they become subjects of international law and thus capable of enforcing rights and duties upon the international plane as distinct from operating merely within the confines of separate municipal jurisdictions. Not all arrangements by which two or more states co-operate will necessarily establish separate legal personality. The International Court of Justice in *Nauru* v. *Australia*[63] noted that the arrangements under which Australia, New Zealand and the UK became the joint 'Administering Authority' for Nauru in the Trusteeship Agreement approved by the UN in 1947 did not establish a separate international legal personality distinct from that of the states.

The question of personality will in the first instance depend upon the terms of the instrument establishing the organisation. If states wish the organisation to be endowed specifically with international personality, this will appear in the constituent treaty and will be determinative of the issue.[64] But this actually occurs in only a minority of cases. However, personality on the international plane may be inferred from the powers or purposes of the organisation and its practice.[65] This is the more usual situation and one authoritatively discussed and settled (at least as far as the UN was concerned directly) by the International Court in the *Reparation for Injuries Suffered in the Service of the United Nations* case.[66] The Court held that the UN had international legal personality because this was indispensable in order to achieve the purposes and principles specified in the Charter. In other words, it was a necessary inference from the

International Organizations', 22 BYIL, 1945, p. 267; M. Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations', 44 BYIL, 1970, p. 111; M. Sørensen, 'Principes de Droit International Public', 101 HR, 1960, pp. 1, 127 ff.; H. Barberis, 'Nouvelles Questions Concernant la Personalité Juridique Internationale', 179 HR, 1983, p. 145; F. Seyersted, 'Objective International Personality of Intergovernmental Organizations', 34 *Nordisk Tidskrift for International Ret*, 1964, p. 1, and C. Ijalaye, *The Extension of Corporate Personality in International Law*, Dobbs Ferry, 1978. See also above, chapter 5, p. 195.

63 ICJ Reports, 1992, pp. 240, 258; 97 ILR, pp. 1, 25.

64 See e.g. article 6 of the European Coal and Steel Community Treaty, 1951, and article 210 of the EEC Treaty, 1957 (now article 281 of the EC Treaty, Consolidated Version). See also *Costa (Flaminio)* v. *ENEL* [1964] ECR 585; 93 ILR, p. 23.

65 Note also the approach championed by Seyersted that international organisations become *ipso facto* international legal persons where there exists at least one organ with a will distinct from that of the member states: see Seyersted, 'Objective International Personality', and Schermers and Blokker, *International Institutional Law*, p. 978.

66 ICJ Reports, 1949, p. 174; 16 AD, p. 318.

functions and rights the organisation was exercising and enjoying. The Court emphasised that it had to be:

> acknowledged that its [i.e. UN's] members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.[67]

The possession of international personality meant that the organisation was a subject of international law and capable of having international rights and duties and of enforcing them by bringing international claims.

In reaching this conclusion, the Court examined the United Nations Charter and subsequent relevant treaties and practice to determine the constitutional nature of the United Nations and the extent of its powers and duties. It noted the obligations of members towards the organisation, its ability to make international agreements and the provisions of the Charter contained in Articles 104 and 105, whereby the United Nations was to enjoy such legal capacity, privileges and immunities in the territory of each member state as were necessary for the fulfilment of its purposes.

The Court emphasised that:

> fifty states, representing the vast majority of the members of the international community, had the power in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognised by them alone.[68]

Accordingly, the Court derived the objective international legal personality of the UN from the intention of the members, either directly or implicitly. Such personality was objective in the sense that it could be maintained as against non-members as well, of course, as against members. Objective personality is not dependent upon prior recognition by the non-member concerned and would seem to flow rather from the nature and functions of the organisation itself. It may be that the number of states members of the organisation in question is relevant to the issue of objective personality, but it is not determinative.[69]

[67] ICJ Reports, 1949, p. 179; 16 AD, p. 322. [68] ICJ Reports, 1949, p. 185; 16 AD, p. 330.

[69] See the *Third US Restatement of Foreign Relations Law*, St Paul, 1987, vol. I, p. 141, noting that '[a]n international organisation with a substantial membership is a person in international law even in relation to states not members of the organisation. However, a state does not have to recognise the legal personality of an organisation of which it is not a member, which has few members, or which is regional in scope in a region to which the state does not belong.' Cf. Amerasinghe, *Principles*, p. 90. It should be noted that the

The attribution of international legal personality to an international organisation is therefore important in establishing that organisation as an entity operating directly upon the international stage rather than obliging the organisation to function internationally through its member states, who may number in the tens of dozens or more. The latter situation inevitably leads to considerable complication in the reaching of agreements as well as causing problems with regard to enforcing the responsibility or claims of such organisations internationally. The question of the effect of international personality upon the liability of member states for problems affecting the organisation will be referred to later in this chapter.[70] However, one needs to be careful not to confuse international with domestic legal personality. Many constituent instruments of international organisations expressly or impliedly provide that the organisation in question shall have personality in domestic law so as to enable it, for example, to contract or acquire or dispose of property or to institute legal proceedings in the local courts or to have the legal capacity necessary for the exercise of its functions.[71] Article 104 of the United Nations Charter itself provides that the UN 'shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes'. Where such provisions exist, it follows that member states of the organisation have accepted an obligation to recognise such legal personality within their legal systems. How that may be achieved will vary from state to state and will depend upon the domestic legal system.[72]

The issue also arises at this point as to whether states that are not parties to the treaty in question and thus not member states of the particular international organisation are obliged to recognise the personality of such organisation. This can be achieved either directly, by entering into an agreement with the organisation – a headquarters agreement permitting the establishment of the organisation within the jurisdiction is the obvious

question of objective personality is not essentially linked to recognition by non-member states as such. What will, however, be important will be patterns of dealing with such organisations by non-member states.

70 See below, p. 1314.

71 See e.g. articles IX(2) and VII(2) respectively of the Articles of Agreement of the International Monetary Fund and the International Bank for Reconstruction and Development. See also article 16 of the Constitution of the Food and Agriculture Organisation, article 6h of the Constitution of the World Health Organisation and article 12 of the Constitution of UNESCO.

72 See also e.g. article 282 of the EC Treaty (Consolidated Version) and Klabbers, *Introduction*, p. 49.

example[73] – or indirectly by virtue of the rules of private international law (or conflict of laws).

Of course, most international organisations need to operate within particular states and thus require that their personality be recognised not only within international law but also within particular domestic law in order to be able to make and defend claims and generally to perform legal acts in domestic law. This may be achieved in different ways. In many legal systems, a domestic court will determine the legal status and capacity of a legal person by reference to the applicable or proper law, which will in the case of international organisations be international law. Thus if the organisation had personality under international law, this would suffice to establish personality under domestic law.[74] Indeed, in states where treaties form part of domestic law upon ratification by parliament, then domestic legal personality would be a consequence of becoming a party to an international agreement establishing an international organisation explicitly endowed with legal personality, such as the UN, for example.[75]

However, in the UK, the approach has been rather different since the UK adopts a dualist approach to international treaties, so that in order for such agreements to operate within the domestic system, express legislative incorporation is required.[76] The International Organisations Act 1968 grants the legal capacity of a body corporate to any organisation declared by Order in Council to be an organisation of which the UK and one or more foreign states are members. The view taken by the House of Lords in the *Tin* case[77] was that the legal effect of the Order in Council of 1972 concerning the International Tin Council (ITC) was to create the ITC as a legal person separate and distinct from its members, since 'as

[73] See e.g. *Re Poncet* 15 AD, p. 346 (concerning Switzerland and the UN).

[74] See e.g. *International Tin Council* v. *Amalgamet Inc.* 524 NYS 2d 971 (1988); 80 ILR, p. 30. See also *UNRAA* v. *Daan* 16 AD, p. 337 and *Branno* v. *Ministry of War* 22 ILR, p. 756.

[75] See e.g. *UN* v. *B* 19 ILR, p. 490 and *International Tin Council* v. *Amalgamet Inc.* 524 NYS 2d 971 (1988). See also Amerasinghe, *Principles*, pp. 69 ff. As to the relationship between international law and domestic law generally, see above, chapter 4.

[76] See e.g. J. W. Bridge, 'The United Nations and English Law', 18 ICLQ, 1969, p. 689; G. Marston, 'The Origin of the Personality of International Organizations in United Kingdom Law', 40 ICLQ, 1991, p. 403, and F. A. Mann, 'International Organizations as National Corporations', 107 LQR, 1991, p. 357. See also R. Higgins, Report on the 'Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations toward Third States', *Annuaire de l'Institut de Droit International*, 1995 I, p. 249.

[77] *J. H. Rayner (Mincing Lane) Ltd* v. *Department of Trade and Industry* [1989] 3 WLR 969, 982 and 1004 ff.; 81 ILR, pp. 670, 678 and 703 ff.

an international legal persona [it] had no status under the laws of the United Kingdom'.[78] In other words, without such legislative action, an international organisation would have no legal existence in the UK. There is an exception to this strict approach and that is where the organisation has been granted legal personality in another country. The case of *Arab Monetary Fund* v. *Hashim (No. 3)*[79] concerned the attempt by the AMF to bring an action before the English courts to recover funds allegedly embezzled. The relevant constituent treaty of 1976 between a number of Arab states gave the AMF 'independent juridical personality' and a decree was adopted in Abu Dhabi giving the organisation independent legal status and the capacity to sue and be sued in United Arab Emirates law. There was, however, no Order in Council under the International Organisations Act 1968 giving the AMF legal personality within the UK. The Court of Appeal took the view that the decision of the House of Lords in the *Tin* case[80] meant that the ordinary conflict of laws rules allowing recognition of an entity created under foreign law could not be applied to an organisation established under international law, since this would apparently circumvent the principle that an international organisation with legal personality created outside the jurisdiction would not have capacity to sue in England without a relevant authorising Order in Council.[81]

The House of Lords, however, by a majority of four to one, expressed the opinion that the majority of the Court of Appeal had felt inhibited by observations made in the *Tin* cases and that the latter cases had not affected the principles that the recognition of a foreign state was a matter for the Crown and that if a foreign state is recognised by the Crown, the courts of the UK would recognise the corporate bodies created by that state. The House of Lords noted that the UK courts could indeed recognise an international organisation as a separate entity by comity provided that the entity was created by one or more of the member states.[82]

In other words, in the UK, an international organisation can be recognised as having personality by one of several methods: first, where Parliament has by legislation incorporated an international treaty

[78] [1989] 3 WLR 1008; 81 ILR, p. 708 (per Lord Oliver). But see Lord Templeman in *Arab Monetary Fund* v. *Hashim (No. 3)* [1991] 2 WLR 729, 738; 85 ILR, pp. 1, 11, who noted that no argument based on incorporation by one or more foreign states had been relevant or canvassed in the *Tin* case.

[79] [1991] 2 WLR 729; 85 ILR, p. 1.

[80] [1989] 3 WLR 969; 81 ILR, p. 670.

[81] [1990] All ER 769, 775 (Donaldson MR); 83 ILR, pp. 259–61 and 778 (Nourse LJ); 83 ILR, p. 264.

[82] [1991] 2 WLR 738–9; 85 ILR, pp. 12–13.

establishing such an organisation;[83] secondly, where the executive expressly recognises an international organisation;[84] thirdly, where an Order in Council under the International Organisations Act so provides; and fourthly, where the courts by virtue of comity recognise an international organisation that has personality in one or more of the member states.[85] It is an approach that is not without some difficulty, not least because of the implication that an international organisation not the subject of a UK Order in Council and not incorporated in the domestic law of member states may not be recognised as having personality in the UK, even though there exists an international treaty establishing such an international organisation with international personality. On the other hand, to argue that an international organisation has legal personality solely due to the fact that it has legal personality within the domestic law of another country which is thus to be applied in the UK due to conflict of law rules poses its own problems. However, the court in *Westland Helicopters Ltd* v. *AOI*[86] held that the law governing the status and capacities of such an organisation was international law.

To state that an international organisation has international personality does not dispose of the question of what such personality entails. While the attribution of international personality to an organisation endows it with a separate identity, distinct from its constituent elements, the consequences of such personality will vary according to the circumstances. Whereas all international legal persons will have some rights and duties (and by definition rights and duties distinct from those of the members of the organisation), they will not all have the same capacities.[87] The question of how such rights and duties may be enforced or maintained will also depend upon the circumstances. States are recognised as possessing the widest range of rights and duties, those of international organisations are clearly circumscribed in terms of express powers laid down in the constituent instruments or implied powers necessarily derived therefrom or otherwise evolved through practice.[88] The International Court

[83] See [1991] 2 WLR 738; 85 ILR, p. 12, giving the example of the Bretton Woods Agreements Act 1945.

[84] *Ibid.* [85] *Ibid.* [86] [1995] 2 WLR 126; 108 ILR, p. 564.

[87] The International Court in the *Reparation* case, ICJ Reports, 1949, pp. 174, 178; 16 AD, p. 330, stated that, 'The subjects of law in any legal system are not necessarily identical in nature or in the extent of their rights, and their nature depends upon the needs of the community.'

[88] The Court in the *Reparation* case took particular care to emphasise that possession of international personality was far from an ascription of statehood or recognition of equal rights and duties, ICJ Reports, 1949, pp. 174, 185; 16 AD, p. 330.

emphasised that the attribution of international personality to the UN, for example, was not the same thing as declaring the UN to be a state nor that its legal personality and rights and duties were the same as those of a state. By the same token it did not mean that the UN was a 'super-state'.[89] The Court declared that UN personality involved the competence to possess and maintain rights and the capacity to enforce them on the international stage.[90] Accordingly, whereas states would possess the totality of international rights and duties recognised by international law, 'the rights and duties of an entity such as the [UN] Organisation must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice'.[91] Precisely which powers and capacities are involved will in reality therefore depend upon a careful analysis of the organisation itself, including the relationship of such powers and capacities to the stated purposes and duties of that organisation.

The constituent instruments[92]

International organisations are expressly created by states by formal decision as laid down in their constituent instruments. The very nature, status and authority of such organisations will therefore depend primarily upon the terms of the constituent instruments or constitutions under which they are established. Such instruments have a dual provenance. They constitute multilateral treaties, since they are binding agreements entered into by states parties, and as such fall within the framework of the international law of treaties.[93] But such agreements are multilateral treaties possessing a special character since they are also methods of creation of new subjects of international law. This dual nature has an impact most clearly in the realm of interpretation of the basic documents of the organisation.[94] This was clearly brought out in the Advisory Opinion of

[89] *Ibid.*, p. 179; 16 AD, p. 322. See also the *WHO* case, ICJ Reports, 1980, pp. 73, 89; 62 ILR, pp. 450, 473.

[90] ICJ Reports, 1949, p. 179. [91] *Ibid.*, p. 180.

[92] See e.g. Amerasinghe, *Principles*, chapter 2; Schermers and Blokker, *International Institutional Law*, pp. 710 ff., and E. P. Hexner, 'Interpretation by International Organizations of their Basic Instruments', 53 AJIL, 1959, p. 341.

[93] As to which see above, chapter 16.

[94] See C. F. Amerasinghe, 'Interpretation of Texts in Open International Organizations', 65 BYIL, 1994, p. 175; M. N. Shaw, *Title to Territory in Africa: International Legal Issues*, Oxford, 1986, pp. 64–73; S. Rosenne, 'Is the Constitution of an International Organization an International Treaty?', 12 *Communicazioni e Studi*, 1966, p. 21, and G. Distefano, 'La Pratique Subséquente des États Parties à un Traité', AFDI, 1994, p. 41. See also

the International Court of Justice (requested by the World Health Organisation) in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case. The Court declared that:

> [t]he constituent instruments of international organisations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realising common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organisation created, the objectives which have been assigned to it by its founder, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.[95]

Accordingly, one needs to consider the special nature of the constituent instruments as forming not only multilateral agreements but also constitutional documents subject to constant practice, and thus interpretation, both of the institution itself and of member states and others in relation to it. In the first instance, it will usually be for the organs of the institution to interpret the relevant constituent instruments.[96] In some cases, the constituent instruments themselves will determine the organ with the power of interpretation and may provide the methods and mechanisms for resolving interpretation disputes.[97] Occasionally, a court or tribunal will be established with such a competence. For example, the International Tribunal for the Law of the Sea can interpret the Law of the Sea Convention and the European Court of Justice can interpret the EU treaties and instruments. In so far as the UN is concerned, the Security Council and General Assembly may request an advisory opinion from the International Court of Justice, as may other organs of the organisation and specialised agencies where authorised by the General Assembly with regard to a question within the scope of their activities.[98] The constituent instruments of

H. Lauterpacht, *The Development of International Law by the International Court*, London, 1958, pp. 267–81, and E. Lauterpacht, 'Development', pp. 414 ff.

95 ICJ Reports, 1996, pp. 66, 74–5; 110 ILR, pp. 1, 14–15.

96 See *Certain Expenses of the United Nations*, ICJ Reports, 1962, pp. 151, 168. See also Amerasinghe, *Principles*, pp. 25 ff.

97 The constitutions of the various international financial institutions, such as the International Monetary Fund and the World Bank, invariably provide for binding determination by the supreme plenary organ: see e.g. Amerasinghe, *Principles*, pp. 28 ff.

98 See article 96(1) and (2) of the Charter. See further above, chapter 19, p. 1108. Note that there is no provision in the Charter authorising the International Court to review decisions of the UN judicially, but see further above, chapter 22, p. 1268.

some organisations provide for binding final determination by the International Court using advisory proceedings, that is, organisations in such situations agree to accept the advisory opinion as binding.[99] In addition, article XIX, section 32, of the Convention on the Privileges and Immunities of Specialised Agencies, 1947, provides that differences between a specialised agency and a member arising out of the interpretation or the application of the convention are to be submitted to the International Court under the advisory procedure contained in article 96 of the Charter and article 65 of the Statute of the Court and the opinion thus obtained is to be treated as decisive by the parties.[100] In contentious cases, the International Court may need to interpret the constituent instruments of an international organisation, including the UN Charter itself, where this is relevant to the determination of the issue at hand.[101]

The fact that the constituent instruments of international organisations are invariably multilateral agreements means that the process of their interpretation will be governed by articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969.[102] However, such agreements are of a special nature since they also from the constitutions of international organisations[103] and this argues for a more flexible or purpose-orientated

[99] See e.g. article 37 of the International Labour Organisation Constitution. Article XIV of the UNESCO Constitution 1945 provides that, 'Any question or dispute concerning the interpretation of this Constitution shall be referred for determination to the International Court of Justice or to an arbitral tribunal, as the General Conference may determine.' See also Amerasinghe, *Principles*, p. 29.

[100] See also article VIII, section 30, of the Convention on the Privileges and Immunities of the United Nations, 1946, with regard to disputes between the UN and member states as to the interpretation or application of the Convention. Note in addition article VIII, sectioin 21(b) of the UN–US Headquarters Agreement, 1947.

[101] Note that by article 34 of the Statute of the International Court, only states may be parties to a contentious case before the Court.

[102] Note that by virtue of article 5 of the Vienna Convention on the Law of Treaties, 1969, this Convention applies to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation, without prejudice to any relevant rules of the organisation. See also the Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons*, ICJ Reports, 1996, pp. 66, 74, noting that, 'From a formal standpoint, the constituent instruments of international organisations are multilateral treaties, to which the well-established rules of treaty interpretation apply.' See as to the principles of treaty interpretation, above, chapter 16, p. 932.

[103] ICJ Reports, 1996, pp. 66, 74, referring to the institutional character of such organisations and emphasising that, 'the very nature of the organisation created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties'.

method of interpretation. Rather less attention than would be the case in the interpretation of normal treaties is paid to the intentions of the original framers and the *travaux préparatoires* (negotiating materials) and rather more to the principle of effectiveness in the light of the object and purposes of the agreement in question.[104] Because constitutions are 'living instruments' in constant use in order to carry out the purposes of the organisation in changing and developing circumstances, subsequent practice is of particular importance in the context of interpretation.[105] The International Court has relied upon the subsequent practice of international organisations in a number of cases, although usually to support an interpretation already reached by the Court.[106]

The powers of international institutions[107]

International organisations are unlike states that possess a general competence as subjects of international law.[108] They are governed by the principle of speciality, so that, as the International Court has noted, 'they are invested by the states which create them with powers, the limits of which are a function of the common interests whose promotion those states entrust to them'.[109] Such powers may be expressly laid down in the constituent

[104] See Amerasinghe, *Principles*, p. 59. See also the *Reparation* case, ICJ Reports, 1949, pp. 174, 180.

[105] See article 31(3)b of the Vienna Convention. See also E. Lauterpacht, 'Development', pp. 420 ff.

[106] See e.g. the *Competence of the General Assembly for the Admission of a State to the United Nations* case, ICJ Reports, 1950, pp. 4, 9; 17 ILR, pp. 326, 329; the *Namibia* case, ICJ Reports, 1971, pp. 17, 22; 49 ILR, pp. 2, 12, and the *IMCO* case, ICJ Reports, 1960, pp. 150, 167–8; 30 ILR, pp. 426, 439–41.

[107] See e.g. Sarooshi, *International Organizations*; Klabbers, *Introduction*, chapter 4; E. Lauterpacht, 'Development', pp. 423–74; Amerasinghe, *Principles*, p. 135; Rama-Montaldo, 'Legal Personality'; A. I. L. Campbell, 'The Limits of Powers of International Organizations', 32 ICLQ, 1983, p. 523; K. Skubiszewski, 'Implied Powers of International Organizations' in *International Law at a Time of Perplexity* (ed. Y. Dinstein), Dordrecht, 1989, p. 855, and Kirgis, *International Organizations*, chapter 3.

[108] See the Advisory Opinion of the International Court on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* brought by the World Health Organisation, ICJ Reports, 1996, pp. 66, 78–9.

[109] *Ibid*. The Court here cited the Permanent Court's Advisory Opinion in the *Jurisdiction of the European Commission of the Danube*, PCIJ, Series B, No. 14, p. 64, which noted that, 'As the European Commission is not a state, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise those functions to their full extent, in so far as the Statute does not impose restrictions upon it.'

instruments or may arise subsidiarily as implied powers,[110] being those deemed necessary for fulfilment of the functions of the particular organisation. The test of validity for such powers has been variously expressed. The International Court noted in the *Reparation* case that:[111]

> [u]nder international law the organization must be deemed to have those powers which, though not expressly provided in the charter, are conferred upon it by necessary implication as being essential to the performance of its duties.[112]

In the *Effect of Awards of Compensation Made by the UN Administrative Tribunal* case,[113] the Court held that the General Assembly could validly establish an administrative tribunal in the absence of an express power since the capacity to do this arose 'by necessary intendment' out of the Charter, while in the *Certain Expenses of the UN* case,[114] the Court declared that 'when the organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the organisation'. The tests posited therefore have ranged from powers arising by 'necessary implication as being essential to the performance' of constitutionally laid down duties, to those arising 'by necessary intendment' out of the constituent instrument, to those deemed 'appropriate for the fulfilment' of constitutionally authorised purposes of the organisation. There are clearly variations of emphasis in such formulations.[115] Nevertheless, although the functional test is determinative, it operates within the framework of those powers expressly conferred by the constitution of the organisation. Thus any attempt to infer a power that was inconsistent with an express power would fail, although there is clearly an area of ambiguity here.[116] In the *Legality of the Use by a State of Nuclear Weapons*

[110] See Schermers and Blokker, *International Institutional Law*, pp. 158 ff.

[111] ICJ Reports, 1949, pp. 174, 182; 16 AD, pp. 318, 326.

[112] This passage was cited in the *Legality of the Use by a State of Nuclear Weapons* case, ICJ Reports, 1996, pp. 66, 78–9. Compare also the approach adopted by the International Court in the *Reparation* case with that adopted by Judge Hackworth in his Dissenting Opinion in that case, ICJ Reports, 1949, pp. 196–8; 16 AD, pp. 318, 328. See also G. G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice: International Organizations and Tribunals', 29 BYIL, 1952, p. 1.

[113] ICJ Reports, 1954, pp. 47, 56–7; 21 ILR, pp. 310, 317–18.

[114] ICJ Reports, 1962, pp. 151, 168; 34 ILR, pp. 281, 297.

[115] See also the *Fédéchar* case, Case 8/55, European Court Reports, 1954–6, p. 299.

[116] See also e.g. the *International Status of South-West Africa* case, ICJ Reports, 1950, pp. 128, 136–8; 17 ILR, pp. 47, 53; the *Expenses* case, ICJ Reports, 1962, pp. 151, 167–8; 34 ILR, pp. 281, 296 and the *Namibia* case, ICJ Reports, 1971, pp. 16, 47–9; 49 ILR, pp. 2, 37.

case,[117] the Court noted that the World Health Organisation had under article 2 of its Constitution adopted in 1946 the competence 'to deal with the effects on health of the use of nuclear weapons, or any other hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in'.[118] However, the Court concluded that the question asked of it related not to the effects of the use of nuclear weapons on health, but to the legality of the use of such weapons in view of their health and environmental effects. Whatever those effects might be, the competence of the WHO to deal with them was not dependent upon the legality of the acts that caused them. Accordingly, the Court concluded that in the light of the constitution of the WHO as properly interpreted, the organisation had not been granted the competence to address the legality of the use of nuclear weapons and that therefore the competence to request an advisory opinion did not exist since the question posed was not one that could be considered as arising 'within the scope of . . . activities' of the WHO as required by article 96(2) of the UN Charter.[119]

So far as the International Court itself is concerned, it has held that it possesses 'an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character"'.[120]

Of great importance is the question of the capacity of international organisations to conclude international treaties.[121] This will primarily

[117] ICJ Reports, 1996, pp. 66, 78–9. [118] *Ibid.*, p. 76.

[119] Article 96(2) of the UN Charter provides that organs of the UN (apart from the Security Council and General Assembly) and specialised agencies which may at any time be so authorised by the General Assembly may request advisory opinions of the International Court on 'legal questions arising within the scope of their activities'.

[120] The *Nuclear Tests* case, ICJ Reports, 1974, pp. 253, 259; 57 ILR, p. 398. See the Appeals Chamber in the *Tadić (Jurisdiction)* case, 105 ILR, pp. 453, 463 ff. See also E. Lauterpacht, '"Partial" Judgments and the Inherent Jurisdiction of the International Court of Justice' in *Fifty Years of the International Court of Justice* (eds. V. Lowe and M. Fitzmaurice), Cambridge, 1996, pp. 465, 476 ff.

[121] See e.g. Klabbers, *Introduction*, chapter 13; Schermers and Blokker, *International Institutional Law*, pp. 1096 ff.; J. W. Schneider, *Treaty-Making Power of International Organizations*, Geneva, 1959, and C. Parry 'The Treaty-Making Power of the UN', 26 BYIL, 1949, p. 147. See also above, chapter 16, p. 953, with regard to the Convention on the Law of Treaties between States and International Organisations. See also *Yearbook of the ILC*, 1982, vol. II, part 2, pp. 9 ff.

depend upon the constituent instrument, since the existence of legal personality is on its own probably insufficient to ground the competence to enter into international agreements.[122] Article 6 of the Vienna Convention on the Law of Treaties between States and International Organisations, 1986 provides that '[t]he capacity of an international organisation to conclude treaties is governed by the rules of that organisation'. This is a wider formulation than reliance solely upon the constituent instrument and permits recourse to issues of implied powers, interpretation and subsequent practice. It was noted in the commentary of the International Law Commission that the phrase 'the rules of the organisation' meant, in addition to the constituent instruments,[123] relevant decisions and resolutions and the established practice of the organisation.[124] Accordingly, demonstration of treaty-making capacity will revolve around the competences of the organisation as demonstrated in each particular case by reference to the constituent instruments, evidenced implied powers and subsequent practice.

The applicable law[125]

International institutions are established by states by means of international treaties. Such instruments fall to be interpreted and applied within the framework of international law. Accordingly, as a general rule, the applicable or 'proper' or 'personal' law of international organisations is international law.[126] In addition, the organisation in question may well have entered into treaty relationships with particular states, for example,

[122] See e.g. Hungdah Chiu, *The Capacity of International Organizations to Conclude Treaties and the Special Legal Aspects of the Treaties So Concluded*, The Hague, 1966; *Agreements of International Organizations and the Vienna Convention on the Law of Treaties* (ed. K. Zemanek), Vienna, 1971; G. Nascimento e Silva, 'The 1986 Vienna Convention and the Treaty-Making Power of International Organizations', 29 German YIL, 1986, p. 68, and 'The 1969 and 1986 Conventions on the Law of Treaties: A Comparison' in Dinstein, *International Law at a Time of Perplexity*, p. 461.

[123] See e.g. article 43 and articles 75, 77, 79, 83 and 85 of the UN Charter concerning military assistance arrangements with the Security Council and Trusteeship Agreements respectively.

[124] *Yearbook of the ILC*, 1982, vol. II, part 2, p. 41.

[125] See e.g. Amerasinghe, *Principles*, pp. 20–2 and 227 ff.; F. A. Mann, 'International Corporations and National Law', 42 BYIL, 1967, p. 145; F. Seyersted, 'Applicable Law in Relations Between Intergovernmental Organizations and Private Parties', 122 HR, 1976 III, p. 427, and C. W. Jenks, *The Proper Law of International Organizations*, London, 1961.

[126] Jenks, *Proper Law*, p. 3, wrote that 'if a body has the character of an international body corporate the law governing its corporate life must necessarily be international in character'. See also the *Third US Restatement of Foreign Relations Law*, vol. I, pp. 133 ff.

in the case of a headquarters agreement, and these relationships will also be governed by international law. Those matters that will necessarily (in the absence of express provision to the contrary) be governed by international law will include questions as to the existence, constitution, status, membership and representation of the organisation.[127]

However, the applicable law in particular circumstances may be domestic law. Thus, where the organisation is purchasing or leasing land or entering into contracts for equipment or services, such activities will normally be subject to the appropriate national law. Tortious liability as between the organisation and a private individual will generally be subject to domestic law, but tortious activity may be governed by international law depending upon the circumstances, for example, where there has been damage to the property of an international organisation by the police or armed forces of a state. The internal law of the organisation will cover matters such as employment relations, the establishment and functioning of subsidiary organs and the management of administrative services.[128] The internal law of an organisation, which includes the constituent instruments and subsidiary regulations and norms and any relevant contractual arrangements, may in reality be seen as a specialised and particularised part of international law, since it is founded upon agreements that draw their validity and applicability from the principles of international law.

The responsibility of international institutions[129]

The establishment of an international organisation with international personality results in the formation of a new legal person, separate and distinct from that of the states creating it. This separate and distinct personality necessarily imports consequences as to international responsibility,

[127] See also Colman J in *Westland Helicopters Ltd* v. *AOI* [1995] 2 WLR 126, 144 ff., and Millett J in *In re International Tin Council* [1987] Ch. 419, 452, upheld by the Court of Appeal, [1989] Ch. 309, 330.

[128] See e.g. Amerasinghe, *Principles*, chapter 9. See also P. Cahier, 'Le Droit Interne des Organisations Internationales', 67 RGDIP, 1963, p. 563, and G. Balldore-Pallieri, 'Le Droit Interne des Organisations Internationales', 127 HR, 1969 II, p. 1.

[129] See e.g. Klabbers, *Introduction*, chapter 14; Amerasinghe, *Principles*, chapter 12; Schermers and Blokker, *International Institutional Law*, pp. 1166 ff.; *Bowett's International Institutions*, pp. 512 ff.; M. Hirsch, *The Responsibility of International Organizations Towards Third Parties: Some Basic Principles*, Dordrecht, 1995; P. Klein, *La Responsabilité des Organisations Internationales*, Brussels, 1998; C. Eagleton, 'International Organisation and the Law of Responsibility', 76 HR, 1950 I, p. 319; F. V. Garcia Amador, 'State Responsibility: Some New Problems', 94 HR, 1958, p. 410, and M. Perez Gonzalez, 'Les Organisations

both to and by the organisation. The International Court noted in the *Reparation* case, for example, that[130] 'when an infringement occurs, the organisation should be able to call upon the responsible state to remedy its default, and, in particular, to obtain from the state reparation for the damage that the default may have caused' and emphasised that there existed an 'undeniable right of the organization to demand that its members shall fulfil the obligations entered into by them in the interest of the good working of the organization'.[131] Responsibility is a necessary consequence of international personality and the resulting possession of international rights and duties. Such rights and duties may flow from treaties, such as headquarters agreements,[132] or from the principles of customary international law.[133] The precise nature of responsibility will depend upon the circumstances of the case and, no doubt, analogies drawn from the law of state responsibility with regard to the conditions under which responsibility will be imposed.[134] In brief, one can note the following. The basis of international responsibility is the breach of an international obligation[135] and such obligations will depend upon the situation. The Court noted in the *Reparation* case[136] that the obligations entered into by member states to enable the agents of the UN to perform their duties were obligations owed to the organisation. Thus, the organisation has, in the case of a breach of such obligations, 'the capacity to claim adequate reparation, and that in assessing this reparation it is authorised to include the damage suffered by the victim or by persons entitled through him'. Whereas

Internationales et le Droit de la Responsabilité', 92 RGDIP, 1988, p. 63. The International Law Commission is currently considering the question of responsibility of international organisations: see e.g. Report of the ILC, 2007, A/62/10, p. 178, and references to draft articles as currently proposed are to those contained in this document. See also above, chapter 14.

130 ICJ Reports, 1949, pp. 174, 183; 16 AD, pp. 318, 327.

131 ICJ Reports, 1949, p. 184; 16 AD, p. 328.

132 See e.g. the *WHO Regional Office* case, ICJ Reports, 1980, p. 73; 62 ILR, p. 450 and the *Case Concerning the Obligation to Arbitrate*, ICJ Reports, 1988, p. 12; 82 ILR, p. 225.

133 See the *WHO Regional Office* case, ICJ Reports, 1980, pp. 73, 90; 62 ILR, pp. 450, 474, referring to 'general rules of international law'.

134 See above, chapter 14. See also Report of the ILC, 2007, A/62/10, p. 178.

135 See e.g. the *Reparation* case, ICJ Reports, 1949, p. 180; 16 AD, p. 323. Article 3 of the ILC draft articles on responsibility of international organisations provides that, 'Every internationally wrongful act of an international organization entails the international responsibility of the international organization' and that, 'There is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (*a*) Is attributable to the international organization under international law; and (*b*) Constitutes a breach of an international obligation of that international organization.'

136 ICJ Reports, 1949, p. 184; 16 AD, p. 328.

the right of a state to assert a claim on behalf of a victim is predicated upon the link of nationality, in the case of an international organisation, the necessary link relates to the requirements of the organisation and therefore the fact that the victim was acting on behalf of the organisation in exercising one of the functions of that organisation. As the Court noted, 'the organization . . . possesses a right of functional protection in respect of its agents'.[137]

Just as a state can be held responsible for injury to an organisation, so can the organisation be held responsible for injury to a state, where the injury arises out of a breach by the organisation of an international obligation deriving from a treaty provision or principle of customary international law.[138] Again, analogies will be drawn from the general rules relating to state responsibility with regard to the conditions under which responsibility is imposed. For example, the conduct of an organ or an agent of an international organisation in the performance of the functions of that organ or agent (including officials and other persons or entities through whom the organisation acts) is considered as an act of the organisation, irrespective of the position actually held by the organ or agent and even if the conduct exceeds the authority of that organ or agent.[139] An international organisation which aids or assists a state or another international organisation in the commission of an internationally wrongful act will itself bear international responsibility where the organisation knew the circumstances of the wrongful act and the act would be internationally wrongful if committed by that organisation.[140] As in

[137] ICJ Reports, 1949, p. 184; 16 AD, p. 329. Note that the Court held that there was no rule of law which assigned priority either to the national state of the victim or the international organisation with regard to the bringing of an international claim, ICJ Reports, 1949, p. 185; 16 AD, p. 330.

[138] See e.g. the *WHO Regional Office* case, ICJ Reports, 1980, p. 73; 62 ILR, p. 450. Note that under articles 6 and 13 of the Outer Space Treaty, 1967, international organisations may be subject to the obligations of the treaty without being parties to it.

[139] See articles 4 and 6 of the ILC draft articles on responsibility of international organisations.

[140] Article 12 of the ILC draft articles on the responsibility of international organisations. Note that draft article 25 provides that a state which aids or assists an international organisation in the commission of an internationally wrongful act by the latter is internationally responsible in the same circumstances. But see here *Behrami* v. *France*, European Court of Human Rights, judgment of 2 May 2007, 133 ILR, p. 1, where the Court dismissed as inadmissible an application against a number of NATO states operating with the framework of KFOR (the international security force in Kosovo authorised by the Security Council under Chapter VII of the UN Charter) on the grounds that the actions complained against were 'directly attributable to the UN', whether to KFOR or to UNMIK (the international civil administration in Kosovo): see above, chapter 7, p. 350.

the case of states, international organisations may benefit from the precluding of responsibility in particular circumstances, such as consent by a state or an international organisation to the commission of the act or where the act constitutes a lawful measure of self-defence in conformity with international law.[141] An international organisation responsible for the internationally wrongful act is under an obligation to cease that act and to offer appropriate assurances and guarantees of non-repetition (if circumstances so require) and to make full reparation for the injury caused.[142]

The issue of responsibility has particularly arisen in the context of UN peacekeeping operations and liability for the activities of the members of such forces. In such circumstances, the UN has accepted responsibility and offered compensation for wrongful acts.[143] The crucial issue will be whether the wrongful acts in question are imputable to the UN and this has not been accepted where the offenders were under the jurisdiction of the national state, rather than under that of the UN. Much will depend upon the circumstances of the operation in question and the nature of the link between the offenders and the UN. It appears, for example, to have been accepted that in the Korean (1950) and Kuwait (1990) operations the relationship between the national forces and the UN was such as to preclude the latter's responsibility.[144] While responsibility will exist for internationally unlawful acts attributable to the institution in question, tortious liability may also arise for injurious consequences caused by lawful activities, for example environmental damage as a result of legitimate space activities.[145]

[141] Articles 17 and 18. Other examples of circumstances precluding wrongfulness include countermeasures, *force majeure*, distress and necessity: see articles 19–22. However, nothing may preclude the wrongful act of an international organisation which is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*): article 23 and see above, chapter 3, p. 123.

[142] Articles 33 and 34. Full reparation is to take the form of restitution (re-establishment of the situation existing before the wrongful act was committed), compensation and satisfaction, either singly or in combination: see articles 37 to 42.

[143] See e.g. B. Amrallah, 'The International Responsibility of the United Nations for Activities Carried Out by UN Peace-Keeping Forces', 23 *Revue Égyptienne de Droit International*, 1976, p. 57; D. W. Bowett, *UN Forces*, London, 1964, pp. 149 ff.; F. Seyersted, 'United Nations Forces: Some Legal Problems', 37 BYIL, 1961, p. 351. See also Amerasinghe, *Principles*, pp. 401 ff., and *M* v. *Organisation des Nations Unies et l'État Belge* 45 ILR, p. 446.

[144] See Amerasinghe, *Principles*, p. 403. See also *Behrami* v. *France*, above, note 140.

[145] As to remedies generally, see K. Wellens, *Remedies Against International Organizations*, Cambridge, 2002.

In the context of often unclear divisions of responsibility between the UN itself and states contributing troops for peacekeeping purposes, particularly serious issues have arisen with regard to allegations of sexual misconduct by UN peacekeepers. Because military members of national contingents are not subject to the criminal jurisdiction of the host state, the model Status of Forces Agreement between the UN and the state where the peacekeeping force was to be stationed envisaged that the Secretary-General would obtain formal assurances from the troop-contributing country concerned that it would exercise jurisdiction with respect to crimes that might be committed by its forces in the mission area. However, this has not been the practice. It has recently been recommended that peacekeeping operations should be accompanied by a memorandum of understanding which would include a provision to this effect.[146]

Liability of member states[147]

The relationship between the member states of an organisation and the organisation itself is often complex. The situation is further complicated upon a consideration of the position of third states (or organisations) prejudiced by the activities of the organisation. The starting point for any analysis is the issue of legal personality. An international organisation created by states that does not itself possess legal personality cannot be the bearer of rights or obligations separate and distinct from those of the member states. It therefore follows that such organisations cannot be interposed as between the injured third parties and the member states of that organisation. In such cases any liability for the debts or delicts attributable to the organisation causing harm to third parties would fall upon the member states.[148] Where, however, the organisation does possess legal personality, the situation is different. Separate personality implies liability for activities entered into. The question of the liability of member states to third parties may arise subsidiarily and poses some difficulty. Such a question falls to be decided by the rules of international law not

[146] See the UN Report on Sexual Exploitation and Abuse by UN Peacekeeping Personnel, A/59/710, 24 March 2005, para. 78. See also A/45/594, annex, para. 48.

[147] See e.g. Amerasinghe, *Principles*, chapter 13; Schermers and Blokker, *International Institutional Law*, pp. 990 ff.; Higgins, 'Legal Consequences'; H. Schermers, 'Liability of International Organizations', 1 *Leiden Journal of International Law*, 1988, p. 14; C. F. Amerasinghe, 'Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent', 85 AJIL, 1991, 259.

[148] See e.g. Higgins, 'Legal Consequences', p. 378, and Amerasinghe, *Principles*, p. 412.

least since it is consequential upon a determination of personality which is in the case of international organisations governed by international law.[149] The problem is also to be addressed in the context of the general principle of international law that treaties do not create obligations for third states without their consent (*pacta tertiis nec nocent nec prosunt*).[150] By virtue of this rule, member states would not be responsible for breaches of agreements between organisations and other parties.

The problems faced by the International Tin Council during 1985–6 are instructive in this context.[151] The ITC, created in 1956, conducted its activities in accordance with successive international tin agreements, which aimed to regulate the tin market by virtue of export controls and the establishment of buffer stocks of tin financed by member states. The Sixth International Tin Agreement of 1982 brought together twenty-three producer and consumer states and the EEC. In October 1985, the ITC announced that it had run out of funds and credit and the London Metal Exchange suspended trading in tin. The situation had arisen basically as a result of over-production of the metal and purchasing of tin by the ITC at prices above the market level.

Since the ITC member states refused to guarantee the debts of the organisation and since proposals to create a successor organisation to the ITC collapsed, serious questions were posed as to legal liabilities. The ITC was a corporate entity enjoying a measure of legal immunity in the UK as a result of the International Tin Council (Immunities and Privileges) Order 1972. It had immunity from the jurisdiction of the courts except in cases of enforcement of an arbitral award. The ITC Headquarters Agreement provided that contracts entered into with a person or company resident

[149] It is possible for states to create an international organisation under domestic law, for example, the Bank for International Settlements, but this is very rare: see e.g. M. Giovanoli, 'The Role of the Bank for International Settlements in International Monetary Co-operation and Its Tasks Relating to the European Currency Unit', 23 *The International Lawyer*, 1989, p. 841.

[150] See articles 34 and 35 of the Vienna Convention on the Law of Treaties, 1969 and articles 34 and 35 of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, 1986. See also C. Chinkin, *Third Parties in International Law*, Oxford, 1993. See also above, chapter 16, p. 928.

[151] See e.g. The Second Report from the Trade and Industry Committee, 1985–6, HC 305-I, 1986 and *The Times*, 13 March 1986, p. 21 and *ibid.*, 14 March 1986, p. 17. See also G. Wassermann, 'Tin and Other Commodities in Crisis', 20 *Journal of World Trade Law*, 1986, p. 232; E. Lauterpacht, 'Development', p. 412; I. Cheyne, 'The International Tin Council', 36 ICLQ, 1987, p. 931, *ibid.*, 38 ICLQ, 1989, p. 417 and *ibid.*, 39 ICLQ, 1990, p. 945, and R. Sadurska and C. M. Chinkin, 'The Collapse of the International Tin Council: A Case of State Responsibility?', 30 Va. JIL, 1990, p. 845.

in the UK were to contain an arbitration clause. It was also the case that where a specific agreement provided for a waiver of immunity by the organisation, the courts would have jurisdiction.[152] Accordingly, the immunity from suit of the ITC was by no means unlimited.

A variety of actions were commenced by the creditors, of which the most important was the direct action. Here, a number of banks and brokers proceeded directly against the Department of Trade and Industry of the British government and other members of the ITC on the argument that they were liable on contracts concluded by the ITC.[153] The issues were argued at length in the Court of Appeal and in the House of Lords.[154] The main submission[155] for present purposes was that the members of the ITC and the organisation were liable concurrently for the debts under both English and international law. It was argued that under international law members of an international organisation bear joint and several liability for its debts unless the constituent treaty expressly excludes such liability. Although there had been hints of such an approach earlier[156] and treaty practice had been far from consistent, Lord Templeman noted that 'no plausible evidence was produced of the existence of such a rule of international law'[157] and this, it is believed, correctly

[152] See e.g. *Standard Chartered Bank* v. *ITC* [1986] 3 All ER 257; 77 ILR, p. 8.

[153] See also the attempt to have the ITC wound up under Part XXI of the Companies Act 1985, *Re International Tin Council* [1988] 3 All ER 257, 361; 80 ILR, p. 181, and the attempt to appoint a receiver by way of equitable execution over the assets of the ITC following an arbitration award against the ITC (converted into a judgment) which it was argued would enable contributions or an indemnity to be claimed from the members, *Maclaine Watson* v. *International Tin Council* [1988] 3 WLR 1169; 80 ILR, p. 191.

[154] *Maclaine Watson* v. *Department of Trade and Industry* [1988] 3 WLR 1033 (Court of Appeal); 80 ILR, p. 49 and [1989] 3 All ER 523 (House of Lords) sub. nom. *J. H. Rayner Ltd* v. *Department of Trade and Industry*; 81 ILR, p. 671.

[155] One submission was that the relevant International Tin Council (Immunities and Privileges) Order 1972 did not incorporate the ITC under English law but conferred upon it the capacities of a body corporate and thus the ITC did not have legal personality. This was rejected by the House of Lords, [1989] 3 All ER 523, 527–8 and 548–9; 81 ILR, pp. 677, 703. Another submission was that the ITC was only authorised to enter into contracts as an agent for the members under the terms of the Sixth International Tin Agreement, 1982. This was also dismissed, on the basis that the terms of the Order clearly authorised the ITC to enter into contracts as a principal, [1989] 3 All ER 530 and 556–7; 81 ILR, pp. 681, 715.

[156] See e.g. *Westland Helicopters* v. *Arab Organization for Industrialisation* 23 ILM, 1984, 1071; 80 ILR, p. 600. See H. T. Adam, *Les Organismes Internationaux Specialisés*, Paris, 1965, vol. I, pp. 129–30, and Seidl-Hohenveldern, *Corporations*, pp. 119–20.

[157] [1989] 3 All ER 523, 529; 81 ILR, p. 680. This was the view adopted by a majority of the Court of Appeal: see Ralph Gibson LJ, [1988] 3 WLR 1033, 1149 and Kerr LJ, *ibid.*, 1088–9 (but cf. Nourse LJ, *ibid.*, 1129–31); 80 ILR, pp. 49, 170; 101–2; 147–9. It is fair to

represents the current state of international law.[158] The liability of a member state could arise, of course, either through an express provision[159] in the constituent instruments of the organisation providing for the liability of member states or where the organisation was in fact under the direct control of the state concerned or acted as its agent in law and in fact, or by virtue of unilateral undertakings or guarantee by the state in the particular circumstances.[160]

There may, however, be instances where the liability of member states is engaged. For example, in *Matthews* v. *UK*, the European Court of Human Rights stated that the European Convention on Human Rights did not exclude the transfer of competences to international organisations 'provided that Convention rights continue to be "secured". Member states' responsibility therefore continues even after such a transfer.'[161] Similarly, where the member state acts together with an international organisation in the commission of an unlawful act, then it too will be liable.[162]

The accountability of international institutions

The concept of accountability is broader than the principles of responsibility and liability for internationally wrongful acts and rests upon the notion that the lawful application of power imports accountability for its exercise. Such accountability will necessarily range across legal, political, administrative and financial forms and essentially create a

emphasise that the approach of the Court, in effect, was primarily focused upon domestic law and founded upon the perception that without the relevant Order in Council the ITC had no legal existence in the law of the UK. An international organisation had legal personality in the sphere of international law and it did not thereby automatically acquire legal personality within domestic legal systems. For that, at least in the case of the UK, specific legislation was required.

158 See e.g. the 1991 Partial Award on Liability of the ICC Tribunal in the *Westland Helicopters* case: see Higgins, 'Legal Consequences', p. 393. See also I. F. I. Shihata, 'Role of Law in Economic Development: The Legal Problems of International Public Ventures', 25 *Revue Égyptienne de Droit International*, 1969, pp. 119, 125; Schermers and Blokker, *International Institutional Law*, p. 992, and Amerasinghe, *Principles*, pp. 431 ff.

159 Or indeed a provision demonstrating such an intention.

160 See articles 7 and 8 of the Resolution of the Institut de Droit International, *Annuaire de l'Institut de Droit International*, 1995 I, pp. 465, 467.

161 Judgment of 18 February 1999, para. 32; 123 ILR, p. 13. However, see also *Bosphorus Airways* v. *Ireland*, Judgment of 30 June 2005 and *Behrami* v. *France*, Judgment of 2 May 2007; 133 ILR, p. 1.

162 See above, p. 1312.

regulatory and behavioural framework. In such a context, particular attention should be devoted to the principle of good governance, which concerns the benchmarks of good administration and transparent conduct and monitoring; the principle of good faith; the principle of constitutionality and institutional balance, including acting within the scope of functions; the principle of supervision and control with respect to subsidiary organs; the principle of stating reasons for decisions; the principle of procedural regularity to prevent *inter alia* abuse of discretionary powers and errors of fact or law; the principle of objectivity and impartiality, and the principle of due diligence.[163]

Privileges and immunities[164]

In order to carry out their functions more effectively, states and their representatives benefit from a variety of privileges and immunities. International organisations will also be entitled to the grant of privileges and immunities for their assets, properties and representatives. The two situations are not, of course, analogous in practice, since, for example, the basis of state immunities may be seen in terms of the sovereign equality of states and reciprocity, while this is not realistic with regard to organisations, both because they are not in a position of 'sovereign

[163] See e.g. A. Momirov, *Accountability of International Organizations in Post-Conflict Governance Missions*, The Hague, 2005, and K. Wellens, 'The Primary Model Rules of Accountability of International Organizations: The Principles and Rules Governing Their Conduct or the Yardsticks for Their Accountability', in *Proliferation of International Organizations* (eds. N. M. Blokker and H. G. Schermers), Leiden, 2001, p. 433. See also the Recommended Rules and Practices drafted by the Committee on the Accountability of International Organisations and adopted in 2004 at the Berlin Conference of the International Law Association.

[164] See e.g. Klabbers, *Introduction*, chapter 8; Reinisch, *International Organizations*, pp. 127 ff.; Amerasinghe, *Principles*, chapter 10; E. Gaillard and I. Pingel-Lenuzza, 'International Organizations and Immunity from Jurisdiction: To Restrict or To Bypass', 51 ICLQ, 2002, p. 1; M. Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns', 36 Va. JIL, 1995, p. 53; C. W. Jenks, *International Immunities*, London, 1961; J. F. Lalive, 'L'Immunité de Juridiction et d'Execution des Organisations Internationales', 84 HR, 1953 III, p. 205; C. Dominicé, 'Le Nature et l'Étendue de l'Immunité des Organisations' in *Festschrift Ignaz Seidl-Hohenveldern* (ed. K. H. Böckstiegel), Cologne, 1988, p. 11; Nguyen Quoc Dinh, 'Les Privilèges et Immunités des Organisations Internationales d'après les Jurisprudences Nationales Depuis 1945', AFDI, 1957, p. 55; D. B. Michaels, *International Privileges and Immunities*, The Hague, 1971; Kirgis, *International Organizations*, pp. 26 ff.; *Yearbook of the ILC*, 1967, vol. II, pp. 154 ff.; DUSPIL, 1978, pp. 90 ff. and *ibid*., 1979, pp. 189 ff., and Morgenstern, *Legal Problems*, pp. 5–10.

equality'[165] and because they are unable to grant (or withdraw) immunities as a reciprocal gesture. It is also the case that the immunities of states have been restricted in the light of the distinction between transactions *jure imperii* and *jure gestionis*,[166] while any such distinction in the case of international organisations would be inappropriate.[167] The true basis for the immunities accorded to international organisations is that they are necessitated by the effective exercise of their functions. This, of course, will raise the question as to how one is to measure the level of immunities in the light of such functional necessity.

As far as the UN itself is concerned, article 105 of the Charter notes that:

> (1) The Organization shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes.
> (2) Representatives of the members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.[168]

These general provisions have been supplemented by the General Convention on the Privileges and Immunities of the United Nations, 1946, and by the Convention on Privileges and Immunities of the Specialised Agencies, 1947.[169] These general conventions, building upon provisions in the relevant constituent instruments, have themselves been supplemented by bilateral agreements, particularly the growing number of headquarters and host agreements. The UN, for example, has concluded headquarters agreements with the United States for the UN Headquarters in New

[165] The reference, for example, in *Branno* v. *Ministry of War* 22 ILR, p. 756, to the 'sovereignty of NATO' is misleading.

[166] See above, chapter 13, p. 708.

[167] See R. Higgins, *Problems and Process*, Oxford, 1994, p. 93.

[168] Note that the provisions dealing with privileges and immunities of international financial institutions tend to be considerably more detailed: see e.g. article VII of the Articles of Agreement of the International Bank for Reconstruction and Development, article IX of the Articles of Agreement of the International Monetary Fund and articles 46 to 55 of the Constitution of the European Bank for Reconstruction and Development.

[169] This also contains separate draft annexes relating to each specialised agency. See also the Agreement on the Privileges and Immunities of the Organisation of American States, 1949; the General Agreement on the Privileges and Immunities of the Council of Europe, 1949 and the Protocol Concerning the Privileges and Immunities of the European Communities, 1965.

York and with Switzerland for the UN Office in Geneva in 1947.[170] Such agreements, for example, provide for the application of local laws within the headquarters area subject to the application of relevant staff administrative regulations; the immunity of the premises and property of the organisation from search, requisition and confiscation and other forms of interference by the host state; exemption from local taxes except for utility charges and freedom of communication.[171]

The International Court noted in the *Applicability of the Obligation to Arbitrate* case,[172] which concerned US anti-terrorism legislation necessitating the closure of the PLO Observer Mission to the UN in New York, that the US was obliged to respect the obligation contained in section 21 of the UN Headquarters Agreement to enter into arbitration where a dispute had arisen concerning the interpretation and application of the Agreement. This was despite the US view that it was not certain a dispute had arisen, since the existence of an international dispute was a matter for objective determination.[173] The Court emphasised in particular that the provisions of a treaty prevail over the domestic law of a state party to that treaty.[174]

It is clearly the functional approach rather than any representational argument that forms the theoretical basis for the recognition of privileges and immunities with respect to international organisations. This point has been made in cases before domestic courts, but it is important to note that this concept includes the need for the preservation of the independence of the institution as against the state in whose territory it is operating. In *Mendaro* v. *World Bank*,[175] for example, the US Court of Appeals held that the reason for the granting of immunities to international organisations was to enable them to pursue their functions more effectively and in particular to permit organisations to operate free from unilateral control by a member state over their activities within its territory. In *Iran–US Claims Tribunal* v.

[170] See also the agreements with Austria, 1979, regarding the UN Vienna Centre; with Japan, 1976, regarding the UN University, and with Kenya, 1975, regarding the UN Environment Programme. Note also the various Status of Forces Agreements concluded by the UN with, for example, Egypt in 1957, the Congo in 1961 and Cyprus in 1964, dealing with matters such as the legal status, facilities, privileges and immunities of the UN peacekeeping forces.

[171] Similar agreements may cover regional offices of international organisations: see e.g. the Agreement between the World Health Organisation and Egypt, 1951 concerning a regional office of the organisation in that state.

[172] ICJ Reports, 1988, p. 12; 82 ILR, p. 225.

[173] ICJ Reports, 1988, pp. 27–30; 82 ILR, p. 245.

[174] ICJ Reports, 1988, pp. 33–4; 82 ILR, p. 251.

[175] 717 F.2d 610, 615–17 (1983); 99 ILR, pp. 92, 97–9.

AS,[176] the Dutch Supreme Court pointed to the 'interest of the international organisation in having a guarantee that it will be able to perform its tasks independently and free from interferences under all circumstances' and noted that 'an international organisation is in principle not subject to the jurisdiction of the courts of the host state in respect of all disputes which are immediately connected with the performance of the tasks entrusted to the organisation in question'. The Italian Court of Cassation in *FAO* v. *INPDAI*[177] held that activities closely affecting the institutional purposes of the international organisation qualified for immunity, while the Employment Appeal Tribunal in *Mukuro* v. *European Bank for Reconstruction and Development*[178] stated that immunity from suit and legal process was justified on the ground that it was necessary for the fulfilment of the purposes of the bank in question, for the preservation of its independence and neutrality from control by or interference from the host state and for the effective and uninterrupted exercise of its multinational functions through its representatives. The Swiss Labour Court in *ZM* v. *Permanent Delegation of the League of Arab States to the UN* held that 'customary international law recognised that international organisations, whether universal or regional, enjoy absolute jurisdictional immunity . . . This privilege of international organisations arises from the purposes and functions assigned to them. They can only carry out their tasks if they are beyond the censure of the courts of member states or their headquarters.'[179]

The issue of the immunity of international organisations came before the European Court of Human Rights in *Waite and Kennedy* v. *Germany*, where the applicants complained that by granting immunity to an international organisation in an employment dispute, Germany had violated the Convention right of free access to a court under article 6(1). The European Court, however, declared that the attribution of privileges and immunities to international organisations was 'an essential means of ensuring the proper functioning of such organisations free from unilateral interference

[176] 94 ILR, pp. 321, 329. See also *Eckhardt* v. *Eurocontrol (No. 2)*, *ibid.*, pp. 331, 337–8, where the District Court of Maastricht held that since an international organisation had been created by treaty by states, such organisation was entitled to immunity from jurisdiction on the grounds of customary international law to the extent necessary for the operation of its public service.

[177] 87 ILR, pp. 1, 6–7. See also *Mininni* v. *Bari Institute*, *ibid.*, p. 28 and *Sindacato UIL* v. *Bari Institute*, *ibid.*, p. 37.

[178] [1994] ICR 897, 903. See also the *European Molecular Biology Laboratory Arbitration* 105 ILR, p. 1.

[179] 116 ILR, pp. 643, 647.

by individual governments' and that the requirements of article 6 would be satisfied where there existed reasonable alternative means to protect effectively the rights in question under the Convention and a satisfactory system of dispute settlement in the relevant international instruments.[180] It may be that such alternative dispute settlement requirements are not essential where the relevant international agreement providing for the immunities in question pre-dated the European Convention on Human Rights, but this should be regarded as controversial.[181]

Immunities may be granted to the representatives of states to the organisation, to the officials of the organisation and to the organisation itself. As far as the position of representatives of states to international organisations is concerned, article IV, section 11, of the UN General Convention, 1946 provides for the following privileges and immunities:

> (a) immunity from personal arrest or detention and from seizure of their personal baggage, and in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind;
> (b) inviolability for all papers and documents;
> (c) the right to use codes and to receive papers or correspondence by courier or in sealed bags;
> (d) exemption in respect of themselves and their spouses from immigration restrictions, alien registration or national service obligations in the state they are visiting or through which they are passing in the exercise of their functions;
> (e) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;
> (f) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys; and also
> (g) such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

[180] Judgment of 18 February 1999, paras. 63 and 67 ff.; 116 ILR, pp. 121, 134, and see *Beer and Regan* v. *Germany*, European Court of Human Rights, Judgment of 18 February 1999, paras. 53 ff. See also *Consortium X* v. *Swiss Federal Government*, Swiss Federal Supreme Court, 1st Civil Law Chamber, 2 July 2004 and *Entico Corporation* v. *UNESCO* [2008] EWHC 531 (Comm).

[181] See e.g. *Entico Corporation* v. *UNESCO* [2008] EWHC 531 (Comm).

Article IV, section 14 provides that such privileges and immunites are accorded

> in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.[182]

One particular issue that has arisen and appears to have received no definitive determination relates to the competence of the host state under customary international law to seek unilaterally to withdraw the immunities of a state representative to an international organisation where relevant international agreements are unclear.[183] The matter was the subject of an application to the International Court of Justice by the Commonwealth of Dominica against Switzerland in 2006, complaining that the latter state had terminated the appointment of a Head of Mission accredited by the applicant to the UN and specialised agencies (but not to Switzerland).[184] However, the application was subsequently withdrawn.[185]

The question of the privileges and immunities of representatives, however, is invariably addressed in headquarters agreements between

[182] Article IV, section 16 provides that the term 'representatives' is deemed to include 'all delegates, deputy delegates, advisers, technical experts and secretaries of delegations'. The question of the representation of states to international organisations is also dealt with in the 1975 Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character, which is closely modelled on the 1961 Vienna Convention on Diplomatic Relations, although it has been criticised by a number of host states for permitting more extensive privileges and immunities than is required in the light of functional necessity. See DUSPIL, 1975, pp. 38 ff. Article 30 of the Convention, in particular, provides that the head of mission and the members of the diplomatic staff of the mission shall enjoy immunity from the criminal jurisdiction of the host state and immunity from its civil and administrative jurisdiction, except in cases of real action relating to private immovable property situated in the host state (unless held on behalf of the sending state for the purposes of the mission); actions relating to succession and actions relating to any professional or commercial activity exercised by the person in question in the host state outside his official functions. See also above, chapter 13, p. 764.

[183] Note that some conventions permit this: see, for example, article VII, section 25 of the Convention on the Immunities of Specialised Agencies. See also Amerasinghe, *Principles*, pp. 338 ff.

[184] This application dated 26 April 2006 was precipitated by the case of *A* v. *B*, Swiss Federal Supreme Court, 1st Civil Law Chamber, 8 April 2004, no. 4C.140/2003.

[185] See ICJ, Order of 9 June 2006. The case was entitled 'case concerning the status vis-à-vis the host state of a diplomatic envoy to the United Nations'.

international organisations and host states. Article V, section 15 of the UN Headquarters Agreement, 1947, for example, states that representatives[186] are entitled in the territory of the US 'to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it'.[187]

Secondly, privileges and immunities are granted to the officials of the organisation. Article V, section 18 of the UN Convention provides that officials of the UN are immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity; exempt from taxation on the salaries and emoluments paid to them by the United Nations; immune from national service obligations; and immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration. They also have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question. In addition, the Secretary-General and all Assistant Secretaries-General are accorded in respect of themselves, their spouses and minor children, the privileges and immunities exemptions and facilities accorded to diplomatic envoys, in accordance with international law.[188] Further, section 20 provides that privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General has the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

Experts performing missions for the UN are also granted a range of privileges and immunities, such as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they are accorded immunity from personal arrest or detention and from seizure of their personal baggage; immunity from legal process in respect of words spoken or written and acts done by them in the course of the performance of their mission; inviolability for all papers and documents; for the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or

[186] These are defined in article V, section 15(1)–(4).
[187] See also *Third US Restatement of Foreign Relations Law*, pp. 518 ff.
[188] Section 19.

in sealed bags; and the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.[189]

The question of the immunities of persons on mission for the UN has come before the International Court in a couple of cases. The International Court delivered an advisory opinion concerning the applicability of provisions in the UN General Convention to special rapporteurs appointed by the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities.[190] As noted above, article VI, section 22, of the Convention provides that experts performing missions for the United Nations are to be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the periods of their missions. The International Court noted that such privileges and immunities could indeed be invoked against the state of nationality or of residence[191] and that special rapporteurs for the Sub-Commission were to be regarded as experts on missions within the meaning of section 22.[192] The privileges and immunities that would apply would be those that were necessary for the exercise of their functions, and in particular for the establishment of any contacts which may be useful for the preparation, the drafting and the presentation of their reports to the Sub-Commission.[193]

The issue was revisited in the *Immunity from Legal Process* advisory opinion of the International Court which concerned the question of the immunity from legal process in Malaysia of Mr Cumaraswamy, a Special Rapporteur of the UN Commission of Human Rights on the Independence of Judges and Lawyers.[194] The Court confirmed that article VI, section 22 applied to Mr Cumaraswamy who, as Special Rapporteur, had been entrusted with a mission by the UN and was therefore an expert

[189] Article VI, section 22. Section 23 provides that privileges and immunities are granted in the interests of the United Nations and not for the personal benefit of the individuals themselves and the Secretary-General has the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

[190] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, ICJ Reports, 1989, p. 177; 85 ILR, p. 300. This opinion was requested by the Economic and Social Council, its first request for an Advisory Opinion under article 96(2) of the UN Charter.

[191] In the absence of a reservation by the state concerned, ICJ Reports, 1989, pp. 195–6; 85 ILR, pp. 322–3.

[192] This applied even though the rapporteur concerned was not, or was no longer, a member of the Sub-Commission, since such a person is entrusted by the Sub-Commission with a research mission, ICJ Reports, 1989, pp. 196–7; 85 ILR, pp. 323–4.

[193] *Ibid.*

[194] ICJ Reports, 1999, p. 62; 121 ILR, p. 405.

within the terms of the section. The Court held that he was entitled to immunity with regard to the words spoken by him during the course of an interview that was published in a journal and that, in deciding whether an expert on mission was entitled to immunity in particular circumstances, the UN Secretary-General had a 'pivotal role'.[195] The Court concluded by stating that the government of Malaysia had an obligation under article 105 of the Charter and under the General Convention to inform its courts of the position taken by the Secretary-General. Failure to do so rendered the state liable under international law.[196]

Thirdly, privileges and immunities are granted to the organisation itself. The range of privileges and immunities usually extended includes immunity from jurisdiction; inviolability of premises and archives; currency and fiscal privileges and freedom of communications.[197] In the case of immunity from jurisdiction, article II, section 2 of the UN General Convention, 1946 provides that:

> The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.[198]

One question that has arisen is whether such immunity is absolute or, as is the case now with state immunity, a distinction between sovereign or public acts (*jure imperii*) on the one hand and private acts (*jure gestionis*) on the other can be drawn. However, the analogy with state immunity is inappropriate. International organisations do not exercise sovereign power nor is the theoretical basis of reciprocity arguable. International organisations are not states, but entities created in order to perform particular functions. In any event, relevant treaties do not make a distinction between sovereign or public acts and private acts in the case of international organisations and such a distinction cannot be inferred. Amerasinghe has, indeed, concluded that such a distinction is not justified and

[195] ICJ Reports, 1999, pp. 84 and 87.

[196] *Ibid.*, pp. 87–8. The Court also affirmed that questions of immunity were preliminary issues to be decided expeditiously *in limine litis*, *ibid.*, p. 88. This is the same position as immunity claims before domestic courts: see above, chapter 13, p. 700.

[197] In all cases, the relevant agreements need to be examined as particular privileges and immunities may vary.

[198] See also article III, section 4 of the Specialised Agencies Convention, 1947. See Amerasinghe, *Principles*, pp. 320 ff.

that the key to immunity for international organisations is whether the immunity is necessary for the fulfilment of the organisation's functions and purposes.[199] It should also be noted that international organisations benefit from immunity from execution or enforcement, which means that their property or other assets cannot be seized, while a waiver of immunity from jurisdiction, which must be express, does not encompass a waiver of immunity from execution which would have to be given separately and expressly.[200]

Immunity will also cover inviolability of premises and archives.[201] This is particularly important for the effective operation of international organisations. Article II, section 3 of the UN Convention, for example, provides that,

> The premises of the Untied Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action,

while section 4 provides that, 'The archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located.'[202] Similar provisions exist in all relevant agreements concerning international organisations. The inviolability of premises means that the authorities of a state cannot enter without the permission of the administrative head of the organisation even where a crime has been committed there or in order to arrest a person. Further, the host state is under

[199] *Principles*, p. 322. Note, however, that many international financial institutions, such as the International Bank for Reconstruction and Development, known as the World Bank (but not the International Monetary Fund), expressly qualify immunity and permit actions to be brought against them, particularly with regard to applications founded on loan agreements in the case of the World Bank: see article VII of the Articles of Agreement of the International Bank for Reconstruction and Development and *Lutcher SA* v. *Inter-American Development Bank* 382 F.2d 454 (1967) and *Mendaro* v. *World Bank* 717 F.2d 610 (1983); 92 ILR, p. 92. Note also article 6 of the Headquarters Agreement between the UK and the International Maritime Satellite Organisation, 1980. See also Amerasinghe, *Principles*, pp. 320 ff.

[200] See e.g. article II, section 2 of the UN Convention. See also Singer, 'Jurisdictional Immunity', pp. 72 ff.

[201] See Amerasinghe, *Principles*, pp. 330 ff.

[202] See also article II, section 5 of the Convention on the Privileges and Immunities of Specialised Agencies, 1947. Note that in *Shearson Lehman* v. *Maclaine Watson (No. 2)* [1988] 1 WLR 16; 77 ILR, p. 145, the House of Lords held that the inviolability of official documents could be lost as a result of communication to third parties.

a duty of due diligence with regard to the protection of the premises in question. However, the premises remain under the general jurisdiction of the host state, subject to the immunity described. Accordingly, a crime committed on the premises may be prosecuted in the local courts.[203]

Immunity also includes certain currency and fiscal privileges, such as exemption from direct taxation with regard to the assets, income and property of the organisation and from customs dues. Organisations may also be permitted to hold and transfer funds and other financial assets freely.[204] Freedom of official communications equal to that provided to foreign governments is also usually stipulated with regard to international organisations, including freedom from censorship, while the right to send and receive correspondence by courier and bag, on the same basis as diplomatic couriers and diplomatic bags, is also provided for.[205]

International agreements concerning privileges and immunities have been implemented into domestic law by specific legislation in a number of states where there is no automatic incorporation of ratified treaties, examples being the UK International Organisations Act 1968[206] and the US International Organisations Immunities Act 1945.[207] The usual pattern under such legislation is for the general empowering provisions contained in those Acts to be applied to named international organisations by specific secondary acts. In the case of the International Organisations Act 1968, for example, a wide variety of organisations have had privileges and immunities conferred upon them by Order in Council.[208] In the case of

[203] See Amerasinghe, *Principles*, pp. 330 ff.

[204] *Ibid.*, p. 335. See also article II, sections 5 and 7 of the UN Convention and article III, sections 7 and 9 of the Specialised Agencies Convention.

[205] See article III, sections 9 and 10 of the UN Convention and article IV, sections 11 and 12 of the Specialised Agencies Convention. See also Amerasinghe, *Principles*, pp. 335 ff.

[206] Replacing the International Organisations (Immunities and Privileges) Act 1950. The International Organisations Act 1981 *inter alia* extended the 1968 Act to commonwealth organisations and to international commodity organisations and permitted the extension of privileges and immunities to states' representatives attending conferences in the UK. See also the International Organisations Act 2005.

[207] See also *Legislative Texts and Treaty Provisions Concerning the Legal Status, Privileges and Immunities of International Organizations*, ST/LEG/SER.B/10 and 11.

[208] See e.g. the African Development Bank, SI 1983/142; Council of Europe, SI 1960/442; European Patent Organisation, SI 1978/179 and SI 1980/1096; International Maritime and Satellite Organisation, SI 1980/187; NATO, SI 1974/1257 and SI 1975/1209, and the UN, SI 1974/1261 and SI 1975/1209. An examination of Orders in Council would demonstrate the following privileges and immunities: immunity from suit and legal process; inviolability of official archives and premises; exemption or relief from taxes and rates, but not import taxes except where the goods or publications are imported or exported for official use; various reliefs with regard to car tax and VAT (value added tax) with regard to cars or

the US Act, the same process is normally conducted by means of Executive Orders.[209]

Dissolution[210]

The constitutions of some international organisations contain express provisions with regard to dissolution. Article VI(5) of the Articles of Agreement of the International Bank for Reconstruction and Development (the World Bank), for example, provides for dissolution by a vote of the majority of Governors exercising a majority of total voting, and detailed provisions are made for consequential matters. Payment of creditors and claims, for instance, will have precedence over asset distribution, while the distribution of assets will take place on a proportional basis to shareholding. Different organisations with such express provisions take different positions with regard to the type of majority required for dissolution. In the case of the European Bank for Reconstruction and Development, for example, a majority of two-thirds of the members and three-quarters of the total voting power is required. A simple majority vote is sufficient in the case of the International Monetary Fund, and a majority of member states coupled with a majority of votes is necessary in the case of the International Bank for Reconstruction and Development. Where an organisation has been established for a limited period, the constitution will invariably provide for dissolution upon the expiry of that period.[211] Where there are no specific provisions concerning dissolution,

goods destined for official use, and priority to be given to telecommunications to and from the UN Secretary-General, the heads of principal organs of the UN and the President of the International Court: see also the International Organisations Act 1968, Schedule I. See also sections 2–7 of the US International Organisations Immunities Act 1945.

209 See e.g. the Executive Order 12359 of 22 April 1980 designating the Multi-National Force and Observers as a public international organisation under s. 1 of the 1945 Act entitled to enjoy the privileges, exemptions and immunities conferred by that Act. See also Executive Order 12403 of 8 February 1983 with regard to the African Development Bank; Executive Order 12467 of 2 March 1984 with regard to the International Boundary and Water Commission, US and Mexico; Executive Order 12628 of 8 March 1988 with regard to the UN Industrial Development Organisation, and Executive Order 12647 of 2 August 1988 with regard to the Multilateral Investment Guarantee Agency. See further Cumulative DUSPIL 1981–8, Washington, 1993, vol. I, pp. 330 ff.

210 See e.g. Amerasinghe, *Principles*, chapter 15; Klabbers, *Introduction*, chapter 15, and Schermers and Blokker, *International Institutional Law*, pp. 1015 ff. See also C. W. Jenks, 'Some Constitutional Problems of International Organizations', 22 BYIL, 1945, p. 11, and *Bowett's International Institutions*, pp. 526 ff.

211 This applies particularly to commodity organisations: see e.g. the International Tin Agreement, 1981; the Natural Rubber Agreement, 1987 and the International Sugar Agreement, 1992.

it is likely that an organisation may be dissolved by the decision of its highest representative body.[212] The League of Nations, for example, was dissolved by a decision taken by the Assembly without the need for individual assent by each member[213] and a similar process was adopted with regard to other organisations.[214] It is unclear whether unanimity is needed or whether the degree of majority required under the constitution of the particular organisation for the determination of important questions[215] would suffice.[216] The actual process of liquidating the assets and dealing with the liabilities of dissolved organisations is invariably laid down by the organisation itself, either in the constitutional documents or by special measures adopted on dissolution.

Succession[217]

Succession between international organisations takes place when the functions and (usually) the rights and obligations are transferred from one organisation to another. This may occur by way of straightforward replacement,[218] or by absorption,[219] or by merger, or by effective secession of part of an organisation, or by simple transfer of certain functions from one organisation to another.[220] This is achieved by agreement and is dependent upon the constitutional competence of the successor organisation

[212] See Amerasinghe, *Principles*, p. 468, and Schermers and Blokker, *International Institutional Law*, p. 1024.

[213] In fact the decision was taken unanimously by the thirty-five members present, ten members being absent: see e.g. H. McKinnon Wood, 'Dissolution of the League of Nations', 23 BYIL, 1946, p. 317.

[214] See e.g. the dissolutions of the International Meteorological Organisation; the UN Relief and Rehabilitation Administration; the International Refugee Organisation; the International Commission for Air Navigation; the South East Asian Treaty Organisation and the Latin American Free Trade Association: see Schermers and Blokker, *International Institutional Law*, pp. 1024–5.

[215] E.g. the two-thirds majority required under article 18 of the UN Charter for the General Assembly's determination of important questions.

[216] Organisations may be dissolved where the same parties to the treaty establishing the organisations enter a new agreement or possibly by disuse or more controversially as a result of changed circumstances (*rebus sic stantibus*): see Schermers and Blokker, *International Institutional Law*, pp. 1021–8.

[217] See Amerasinghe, *Principles*, pp. 473 ff.; Schermers and Blokker, *International Institutional Law*, pp. 1015 ff.; H. Chiu, 'Succession in International Organizations', 14 ICLQ, 1965, p. 83, and P. R. Myers, *Succession between International Organizations*, London, 1993.

[218] Such as the replacement of the League of Nations by the United Nations.

[219] E.g. the absorption of the International Bureau of Education by UNESCO.

[220] See Amerasinghe, *Principles*, pp. 474 ff.

to perform the functions thus transferred of the former organisation. In certain circumstances, succession may proceed by way of implication in the absence of express provision.[221] The precise consequences of such succession will depend upon the agreement concerned between the parties in question.[222] In general, assets of the predecessor organisation will go to the successor organisation, as well as archives.[223] Whether the same rule applies to debts is unclear.[224]

Suggestions for further reading

J. E. Alvarez, *International Organizations as Law-Makers*, Oxford, 2005

C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd edn, Cambridge, 2005

Bowett's Law of International Institutions (eds. P. Sands and P. Klein), 5th edn, London, 2001

J. Klabbers, *An Introduction to International Institutional Law*, Cambridge, 2002

D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers*, Oxford, 2005

H. G. Schermers and N. M. Blokker, *International Institutional Law*, 3rd edn, The Hague, 1995

[221] The International Court in the *Status of South-West Africa* case, ICJ Reports, 1950, pp. 128, 134–7; 17 ILR, pp. 47, 51–5, held that the supervisory responsibilities of South Africa under the mandate to administer the territory of South West Africa/Namibia continued beyond the dissolution of the League of Nations and were in essence succeeded to by the UN. This was in the context of the fact that the mandate itself constituted an international status for the territory which therefore continued irrespective of the existence of the League and partly because the resolution of the Assembly of the League dissolving the League of Nations had declared that the supervisory functions of the League were ending, not the mandates themselves. It was emphasised that the obligation to submit to supervision did not disappear merely because the supervisory organ had ceased to exist as the UN performed similar, though not identical, supervisory functions. The Court concluded that the UN General Assembly was legally qualified to exercise these supervisory functions, in the light *inter alia* of articles 10 and 80 of the UN Charter. This was reaffirmed by the Court in the *Namibia* case, ICJ Reports, 1971, pp. 16, 37; 49 ILR, pp. 2, 26–34.

[222] See Schermers and Blokker, *International Institutional Law*, p. 1017 with regard to the relationship between the World Trade Organisation and the General Agreement on Tarrifs and Trade (GATT) arrangements.

[223] See e.g. *PAU* v. *American Security and Trust Company*, US District Court for the District of Columbia, 18 ILR, p. 441.

[224] See e.g. Klabbers, *Introduction*, pp. 329–30.

SOME USEFUL INTERNATIONAL LAW WEBSITES

See also web references in chapter footnotes

General sites (with links to relevant materials)

www.washlaw.edu/forint/forintmain.html The foreign and international law web of the Washburn University School of Law Library

www.asil.org/resource/home.htm Electronic resource guide of the American Society of International Law

www.llrx.com/international law.html Web journal research guide

www.lib.uchicago.edu/~llou/forintlaw.html LyonetteLouis-Jacques guide to international law research, University of Chicago

www.law.ecel.uwa.edu.au/intlaw/ University of Western Australia guide to international law resources

www2.spfo.unibo.it/spolfo/ILMAIN.htm University of Bologna research guide to international law

www.law.cam.ac.uk/RCIL/home.htm Lauterpacht Research Centre for International Law

www.worldlii.org/catalog/ World Law site

www.hg.org/govt.html Hieros Gamos law links

library.ukc.ac.uk/library/lawlinks/international.htm University of Kent law links

www.bibl.ulaval.ca/ress/droit/bouton8.html University of Laval, French Canadian site on international law

www.ridi.org/ French resource for international law generally

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