University of Delhi

LL.B. IV TERM

Paper – International Institutions Compilation of Reading Materials

LB 4032: International Institutions

Compiled by

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Rubric for Theory Exam Papers:

'All the theory papers, except for CLE subjects*, for LL.B. semester exams carry 100 marks each, for which the University of Delhi conducts an end semester descriptive exam of 3 hours duration. A typical theory question paper contains 8 questions printed both in English and Hindi languages. The student is required to answer 5 out of 8 questions. Each question carries equal marks, that is 20 marks each. Hence the maximum marks for each paper is 100. A student has to secure a minimum of 45 marks out of 100 to pass a paper.

Answers may be written either in English or in Hindi but the same medium should be used throughout the paper.'

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LB-4032 International Institutions
LL.B. IVth Term, IInd Year

Topic 1

A. Rise of International Organizations
B. Definition of International Organizations
C. Classifications
D. India and International Organizations

Suggested Readings:

1. Jan Klabbers, An Introduction to International Organizations Law (3rd edn, CUP 2015).
2. BS Chimni, 'International Organizations, 1945–Present' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (OUP 2017).
3. RP Anand, 'The Formation of International Organizations and India: A Historical Study' (2010) 23 Leiden Journal of International Law 5.
4. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986 (adopted 21 March 1986) UN Doc A/CONF.129/15, Article 2(1)(i).
5. ILC, 'Draft articles on the law of treaties between States and international organizations or between international organizations, with commentaries 1982' in *Yearbook of the International Law Commission*, vol II, part two (1982), Article 2(1)*(i)*.

Topic 2 (p

A. Legal Personality
B. Constituent Instrument
C. Powers and Implied Powers
D. Creation of Customary International Law

Suggested Readings:

1. Jan Klabbers, An Introduction to International Organizations Law (3rd edn, CUP 2015).
2. *Reparation for Injuries Suffered in the Service of the United Nations,* (Advisory Opinion) [1949] ICJ Rep 174.
3. *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151.
4. Kristina Daugirdas, *International Organizations and the Creation of Customary International Law,* European Journal of International Law (2019).

Topic 3

A. Responsibility of International Organizations

Suggested Readings:

1. C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, CUP 2009).
2. Jan Klabbers, An Introduction to International Organizations Law (3rd edn, CUP 2015).

Topic 4

A. Privileges and Immunities

Suggested Readings:

1. C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, CUP 2009).
2. Jan Klabbers, An Introduction to International Organizations Law (3rd edn, CUP 2015).
3. *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (Advisory Opinion) [1989] ICJ Rep 177.
4. *Difference relating to Immunity from legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62.

Topic 5

Structures, Powers and Functions of
A. United Nations
B. European Union

Suggested Readings:

1. Charter of the United Nations.
2. Treaty of European Union
3. Phillipe Sands QC and Pierre Klein, *Bowett: Law of International Institutions* (6th edn, Sweet & Maxwell 2015).
4. Ian Hurd, *International Organizations: Politics, Law, Practice* (Cambridge University Press, 2011).

Topic 6

International Legal Institutions
A. International Court of Justice
B. International Criminal Court

Suggested Readings:

1. The Statue of International Court of Justice
2. The Rome Statue of International Criminal Law
3. Ian Hurd, *International Organizations: Politics, Law, Practice* (Cambridge University Press, 2011).
4. Phillipe Sands QC and Pierre Klein, *Bowett: Law of International Institutions* (6th edn, Sweet & Maxwell 2015).

Suggested Books for the Course

1. Phillipe Sands QC and Pierre Klein, *Bowett: Law of International Institutions* (6th edn, Sweet & Maxwell 2015).
2. C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, CUP 2009).
3. Jan Klabbers, An Introduction to International Organizations Law (3rd edn, CUP 2015).
4. José E. Alvarez, *International Organizations as Law-makers* (OUP 2006).
5. Ian Hurd, *International Organizations: Politics, Law, Practice* (Cambridge University Press, 2011).

TOPIC I

♣ Jan Klabbers, An Introduction to International Organizations Law (1st edn, CUP 2002) 16-41.

♣ B S Chimni, 'International Organizations, 1945–Present' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), The Oxford Handbook of International Organizations (OUP 2017).

♣ R P Anand, 'The Formation of International Organizations and India: A Historical Study' (2010) 23 Leiden Journal of International Law 5.

♣ ILC, 'Draft articles on the law of treaties between States and international organizations or between international organizations, with commentaries 1982' in Yearbook of the International Law Commission, vol II, part two (1982), Article 2(1)(i).

♣ ILC, 'Articles on the Responsibility of International Organizations, with commentaries' in Yearbook of the International Law Commission, vol. II, part two (2011), Article 2(1)(a).

TOPIC I

- Jan Klabbers, *An Introduction to International Organizations Law* (1st edn, CUP 2002) 16-41.
- B S Chimni, 'International Organizations, 1945–Present' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (OUP 2017).
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- ILC, 'Draft articles on the law of treaties between States and international organizations or between international organizations, with commentaries 1982' in *Yearbook of the International Law Commission*, vol II, part two (1982), Article 2(1)*(i)*.
- ILC, 'Articles on the Responsibility of International Organizations, with commentaries' in *Yearbook of the International Law Commission,* vol. II, part two (2011), Article 2(1)*(a)*.

2

The rise of international organizations

Introduction

Traditionally, public international law has long been thought of as largely a law of co-existence:[1] rules of international law were created, either by custom or by bilateral treaty, for the purpose of delimiting spheres of influence between states, but not much else. For the better part, international law regulated the practical aspects of sovereign states living together on Planet Earth, dealing with such issues as the jurisdiction of states, access to each other's courts, delimitation of maritime zones, and other similar issues.

To the extent that cooperation took place at all, it was of the sort which follows naturally from this co-existential character of the law. Thus, if the spheres of jurisdiction of states have been strictly delimited, it follows that rules and procedures are required, for example, to make possible the extradition of criminals captured abroad, or the enforcement of contracts concluded with foreign partners.[2]

Although embryonic forms of international organization have been present throughout recorded history, for instance in the form of the so-called amphictyonic councils of ancient Greece, the late-medieval Hanseatic League[3] or such precursors as the Swiss Confederation and the United Provinces of the Netherlands,[4] it was not until the nineteenth century that

[1] As a theoretical concern, this conception owes much to the work of Wolfgang Friedmann, especially his *The Changing Structure of International Law* (New York, 1964).

[2] A useful introduction to the history of international law is Arthur Nussbaum, *A Concise History of the Law of Nations* (rev. edn, New York, 1954).

[3] Compare Gerard J. Mangone, *A Short History of International Organizations* (New York, 1954), p. 19. More on the Hanseatic league and how it compares to the sovereign state can be found in Hendrik Spruyt, *The Sovereign State and its Competitors* (Princeton, 1994).

[4] These are mentioned as forerunners in Sir Frederick Pollock, *League of Nations* (2nd edn, London, 1922), p. 4.

international organizations as we know them today were first established.[5] Moreover, it was not until the nineteenth century that the international system of states (at least within Europe) had become sufficiently stable to allow those states to seek forms of cooperation.[6]

After the watershed Westphalian Peace of 1648, international so-called 'congresses' had become a regular mode of diplomacy:[7] whenever a problem arose, a conference was convened to discuss it and, if at all possible, take steps towards a solution. After the defeat of Napoleon, a new development took place: it was thought convenient to organize those meetings on a more or less regular basis. Moreover, the Congress of Vienna (1815) and its aftermath launched some other novelties as well, the most remarkable of which was perhaps the creation of a supranational military force under the command of Wellington.[8]

In addition, the peace conferences of The Hague, organized in 1899 and 1907, had given the small states a taste for international activism: in particular the 1907 conference approached universal participation, with forty-four states being represented. Moreover, due in part to its near-universal participation, organizational experiments took place, one of them being that recommendations (so-called 'voeux') of the conference were passed by a majority vote, instead of unanimity.[9]

Finally, the nineteenth century saw the creation of such institutions as the Rhine Commission, in order to deal with issues of navigation, or issues of pollution, on a regular basis. Following the establishment of the Rhine Commission in 1815, in Europe a number of other river commissions were established – managing the Elbe (1821), the Douro (1835), the Po (1849) – and, after the end of the Crimean War, the European Commission for the Danube in 1856.[10]

At roughly the same time, organizations started to be established by private citizens, in order to deal with international issues. Thus, in 1840,

[5] For a brief overview of the development of the law of international organizations, see Jan Klabbers, 'The Life and Times of the Law of International Organizations' (2001) 70 Nordic JIL, 287–317.

[6] Compare Clive Archer, *International Organizations* (2dn edn, London, 1992), pp. 4–5.

[7] Mangone, *Short History*, p. 25. [8] *Ibid*., p. 40.

[9] See Inis L. Claude, Jr, *Swords into Plowshares: The Problems and Progress of International Organization* (4th edn, New York, 1984), pp. 28–34.

[10] Later there would also be an International Commission for the Danube, established by the 1919 Peace Treaties.

the World Anti-Slavery Convention was established, and in 1863 a Swiss philanthropist, Henry Dunant, created the Red Cross.

The rise of modern organizations

It became clear that in many areas, international cooperation was not only required, but also possible. True enough, states were sovereign and powerful, but, as the river commissions showed, they could sometimes sacrifice some of their sovereign prerogatives in order to facilitate the management of common problems.

The most obvious area in which international cooperation may be required is perhaps that of transport and communication, as indicated by the creation of those river commissions. Regulation of other modes of transport and communication quickly followed: in 1865 the International Telegraphic Union was established, followed in 1874 by the Universal Postal Union, and in 1890 by the International Union of Railway Freight Transportation.[11]

Still other areas did not lag that much behind: in 1903 the International Office of Public Health was created, and in the field of economics the establishment of the Metric Union (1875), the International Copyright Union (1886), the International Sugar Union (1902) and the International Institute for Agriculture (1905) may be mentioned as early forerunners of present-day international organizations.[12] Indeed, some of these are still in existence, albeit under a different name and on the basis of a different constituent treaty: there runs a direct connection, for example, from the early International Institute for Agriculture to today's FAO. Slowly but surely, more and more international organizations became established, so much so that public international law gradually transformed (or is said to be gradually transforming) from a law of co-existence to a law of co-operation. Many of the substantive fields of public international law are no longer geared merely to delimiting the spheres of influence of the various states, but are rather geared towards establishing more or less permanent mechanisms for cooperation. Around the turn of the twentieth century it

[11] Marxists might claim that these administrative unions were created out of necessity: the logic of ever-increasing international economic relations at the end of the nineteenth century (the internationalization of capital) brought with it the need to organize these relations. For such an argument in brief, see B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (New Delhi, 1993), pp. 234–5.

[12] Compare Mangone, *Short History*, ch. 3.

appeared indeed to be common knowledge that the organization of inter-state cooperation had become well accepted in international law. As the legendary Swiss international lawyer Max Huber could write in 1910, states concluded treaties for basically two reasons: one was the pursuit of self-interest, the other was the pursuit of common interests.[13]

The major breakthrough for international organization, however, would be the year 1919 and the Versailles Peace Settlement which followed the First World War.[14] On 8 January 1918, US president Woodrow Wilson made his famous 'fourteen points' speech, in which he called for the creation of a 'general association of nations . . . under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike'.[15]

Wilson's plea was carried on the waves of public opinion in many states[16] and would lead to the formation of the League of Nations. And not only that: the International Labour Organization was also established at the 1919 Peace Conference. Both proved to be influential in their own right: the League because of its comprehensive character and, perhaps, its dramatic failure as well; the ILO because of its unique representation structures and clever modes of regulation.[17]

The League of Nations was the first international organization which was designed not just to organize co-operation between states in areas which some have referred to as 'low politics', such as transport and communication, or the more mundane aspects of economic co-operation as exemplified by the Metric Union, but to have as its specific aims to guarantee peace and the establishment of a system of collective security, following which an

[13] Max Huber, *Die soziologischen Grundlagen des Völkerrechts* (Berlin, 1928, first published in 1910).

[14] For some, the First World War marks the beginning of the end of the era known as 'modernity': the devastations of the war invited a re-appraisal of the sovereign state, which in turn facilitated the establishment of international institutions. See, e.g., Stephen Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* (Chicago, 1990), esp. p. 152.

[15] Point XIV of the Fourteen Points. The text of the speech has been reproduced in Richard Hofstadter and Beatrice K. Hofstadter (eds.), *Great Issues in American History, Vol. III: From Reconstruction to the Present Day, 1864–1981* (rev. edn, New York, 1982), pp. 215–19. It has been argued that some elements of the League can be traced back to the 1815 Concert, which already envisaged regular meetings of government representatives on issues of war and peace. See Richard Langhorne, 'Establishing International Organisations: The Concert and the League' (1990) 1 *Diplomacy & Statecraft*, 1–18.

[16] Pollock, *League of Nations*, pp. 74–5 and 84–6, refers to activism in favour of international organization in many western states as well as in, e.g., China.

[17] See below, chapters 6 and 10, respectively.

attack against one of the member-states of the League would give the rest the right to come to the attacked state's rescue. As Wilson himself noted in 1919, the beauty of the League was that it was to have 'unlimited rights of discussion. I mean of discussion of anything that falls within the field of international relations – and that it is especially agreed that war or international misunderstandings or anything that may lead to friction or trouble is everybody's business, because it may affect the peace of the world.'[18] History, in all its cruelty, has made clear that Wilson's hopes would remain futile. True enough, the League became a place of unlimited discussion, and true enough, it paved the way for future developments: without the League, the United Nations would have looked different indeed. And even some practices developed in the UN were already tried and tested within the League, peace-keeping being a prominent example.[19] But the League failed in its own overriding purpose: preventing war.

Arguably, while drafting the Covenant, the politics of international law had temporarily been lost on the wave of good intentions.[20] The Covenant made no meaningful distinction between great powers and small powers (except in the composition of the Council[21]), and made it possible, moreover, for its members to withdraw easily from the League: the option was gratefully used by, among others, Japan and Germany.[22]

Moreover, in one of those great ironies of history, the United States Senate refused to grant approval to the American government to ratify, thus leaving the newborn organization not only without one of its spiritual and intellectual parents,[23] but also, and more importantly, without one

[18] Speech to a plenary session of the Peace Conference, reproduced in Hofstadter & Hofstadter (eds.), *Great Issues*, 219–23.

[19] On the League's peace-keeping mission to the Saar and Dutch foreign policy, a fine study in Dutch is Remco van Diepen, *Voor Volkenbond en vrede: Nederland en het streven naar een nieuwe wereldorde 1919–1946* (Amsterdam, 1999).

[20] As novelist George Orwell memorably put it, the 1930s turned out to be a decade starting off 'in the hangover of the "enlightened" post-war age', with 'the League of Nations flapping vague wings in the background', thus illustrating a general sentiment of discomfort. See George Orwell, *Collected Essays, Journalism and Letters, Volume I: An Age Like This 1920–1940* (1968; Harmondsworth, 1970), p. 585.

[21] Under Article 4 of the Covenant, the principal allied and associated powers had a permanent seat, but no extra voting prerogatives: decisions were to be taken by unanimity. For a discussion, see Bengt Broms, *The Doctrine of Equality of States as Applied in International Organizations* (Helsinki, 1959), pp. 138–45.

[22] The very first article (symbolically, surely) of the Covenant dealt in part with withdrawal from the League.

[23] The Covenant was largely based on a mixture of British and American plans. See Mangone, *Short History*, pp. 130–1; see also Robert Lansing, *The Peace Negotiations: A Personal Narrative* (Boston, MA, 1921), ch. 3.

of the two states that had emerged from the First World War as a global powerhouse.[24] To add insult to injury, the other powerhouse-to-be (the USSR) was not admitted until late in the League's existence, joining as it did in 1934 only to be expelled again in 1939 after invading Finland.

On the ruins of the Second World War the urge to organize was given a new impetus. As early as August 1941, American President Roosevelt and British Prime Minister Churchill had concluded the Atlantic Charter,[25] a declaration of principles which would serve as the basis, first, for a Declaration of the wartime allies, and later, after the State Department had overcome President Roosevelt's initial reluctance to commit himself to the creation of a post-war organization, for the Charter of the United Nations.[26]

In drafting the Charter, some of the lessons learned from the League's failure were kept in mind.[27] First, a notorious distinction was to be made between the major powers and ordinary states. The major powers were to become permanent members of a new institution, a Security Council, which would only be able to take decisions if the five major powers[28] were in agreement. Second, perhaps mostly of psychological interest, but interesting nonetheless, the Charter did not and does not contain a withdrawal clause. Admittedly, this may not make withdrawal legally impossible, but it does create something of a political and psychological barrier. Indeed, in the more than fifty years of its existence, no state has formally withdrawn from the United Nations.[29]

Also during the war, in 1944, the future of economic cooperation was mapped in Bretton Woods, where agreement was reached on the need to

[24] Historian Michael Howard tantalizingly suggests that democracy and international peace may be difficult to bring together, as democracies are reluctant to provide the armed forces necessary to maintain peace. See Michael Howard, *The Invention of Peace: Reflections on War and International Order* (London, 2000), esp. pp. 65–6.

[25] The Atlantic Charter has been said to pick up the legacy of Wilson. See Ian Clark, *Globalization and Fragmentation: International Relations in the Twentieth Century* (Oxford, 1997), p. 113.

[26] See Lloyd C. Gardner, *Architects of Illusion: Men and Ideas in American Foreign Policy 1941–1949* (Chicago, 1970), p. 35.

[27] Thus, intelligent observers such as Harold Nicolson noted with some regret that, technically, the Charter may well have marked an improvement over the Covenant, the latter being based on a view of human nature which would have rendered any Covenant unnecessary. The Charter, by contrast, could not be viewed as a liberal document: Harold Nicolson, *Comments 1944–1948* (London, 1948), p. 209.

[28] Article 23 of the UN Charter mentions the Republic of China (now the People's Republic of China), France, the USSR (now Russia), the United Kingdom and the United States.

[29] There is some uncertainty as regards Indonesia's attempt to withdraw in 1965. See below, chapter 6.

cooperate on monetary and trade issues, eventually leading to the creation of the International Monetary Fund and the General Agreement on Tariffs and Trade, among others.

The resurrection of the largest battlefield of the Second World War, Europe, also came accompanied by the rise of a number of organizations. The Council of Europe was a first attempt, born out of Churchill's avowed desire to create the United States of Europe, so that Europe could become an important power alongside the US and the UK.[30] To channel the American Marshall aid, the Organization for European Economic Co-operation was created (in 1960 transformed into the Organization for Economic Co-operation and Development), and a relatively small number of European states started a unique experiment when, in 1951, they created the supranational European Coal and Steel Community, some years later followed by the European Economic Community and the European Community for Atomic Energy, all three of which have now been subsumed into the European Union.[31] The northern and western states that remained outside would later create an alternative in the form of the European Free Trade Area, while the state-run economies of the east replied with the creation of the Council for Mutual Economic Assistance (usually referred to as Comecon).

The influence of the Cold War also made itself felt through military cooperation in Europe. Western Europe saw the creation of the Pact of Brussels (which later became the Western European Union) and the North Atlantic Treaty Organization;[32] Eastern Europe saw the creation of the Warsaw Pact, while east and west would meet, from the 1970s onwards, within the framework of the Conference on Security and Cooperation in Europe (CSCE), which in 1995 changed its name to reflect its increased organizational structure into Organization for Security and Co-operation in Europe (OSCE).[33]

[30] He famously advocated the creation of the United States of Europe, in a speech delivered in Zürich in 1946. The speech is reproduced in David Cannadine (ed.), *The Speeches of Winston Churchill* (London, 1990), pp. 310–14.

[31] The six founders were Belgium, France, Germany, Italy, Luxembourg and the Netherlands. Denmark, Ireland and the UK joined in 1973, Greece in 1981, Spain and Portugal in 1986, and Austria, Finland and Sweden in 1995.

[32] A proposed defence alliance between the Nordic states never got off the ground. See Gerard Aalders, 'The Failure of the Scandinavian Defence Union, 1948–1949' (1990) 15 *Scandinavian Journal of History*, 125–53.

[33] See, briefly, Miriam Sapiro, 'Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation' (1995) 89 AJIL, 631–7.

Moreover, elsewhere too organizations mushroomed. On the American continent, the early Pan-American Conference was recreated so as to become the Organization of American States. In addition, there are more localized organizations such as Caricom and Mercosur.

In Africa, the wave of independence of the 1950s and early 1960s made possible the establishment of the Organization of African Unity in 1963, with later such regional organizations as Ecocas (in central Africa) and Ecowas (western Africa) being added. In Asia, some states assembled in Asean, and, for their security, Australia and New Zealand joined the US in Anzus. A relaxed form of cooperation in the Pacific Rim area, moreover, is channelled through Asia-Pacific Economic Co-operation (APEC).

In short, there is not a part of the globe which is not covered by the work of some international organization or other; there is hardly a human activity which is not, to some extent, governed by the work of an international organization. Even academic research is at the heart of the work of some organizations, most notably perhaps the International Council for the Exploration of the Sea (ICES), originally set up as a scientist's club, having Fridtjof Nansen as one of its founders, but later 'internationalized'.[34]

Classifying international organizations

An academic textbook on international organizations is not complete without an attempt to classify the various organizations into different types, sorts, forms or categories. Perhaps the main reason for making such classifications resides in the academic psyche: all academic disciplines engage in classification for purposes of organizing knowledge, if nothing else, so legal academics should do the same.

As long as it remains clear that classification has the function of organizing knowledge, but no greater ambition, classification may be a useful exercise. As long as the aim is to show that organizations are not monolithic, built according to one and the same eternally valid blueprint, but are wide-ranging in variety, classifying them may even be illuminating. But the suggestion oozing from most classification attempts that there are also legal differences between the various categories is, by and large, unwarranted. In a very important sense, for the lawyer, each international organization

[34] See generally A. E. J. Went, *Seventy Years Agrowing: A History of the International Council for the Exploration of the Sea 1902–1972* (Copenhagen, 1972).

is unique, based as it is on its own constituent document and influenced as its development will be by peculiar political configurations. Thus, labels should never be substituted for analysis, as Brownlie has pointed out.[35]

Functions

A first point often made by scholars is that organizations may be classified in accordance with their stated functions. Thus, quite a few are active in the economic field; others are engaged in peace and security, or can be classified as military alliances. Yet others deal with issues of nutrition, public health, telecommunications or fisheries conservation, to name just a few possibilities. Here immediately a caveat should be made: whether or not we think of an organization as active in the economic sphere depends most of all on how we define economics. Some would not hesitate to include telecommunications, whereas other might be at pains to exclude it.

Moreover, there is the distinct possibility that even if we think that telecommunications is not, properly speaking, an economic issue, there is still a chance that an economically oriented organization can deal with the topic if it can be seen to have economic repercussions. Following a similar kind of reasoning, in particular the European Community has developed from a purely economic organization into one that also deals with other aspects of life, provided there is an economic side to those aspects.

A good example of that type of reasoning is to be found in the famous *Bosman* decision of the European Court of Justice.[36] In this case, the question at issue was whether the transfer system in football (i.e., soccer), according to which professional players could only switch clubs upon payment of a transfer fee from the new club to the old one, was in contravention of some of the basic principles of the EC Treaty, in particular the free movement of workers as guaranteed by Article 48 (nowadays Article 39) of the Treaty establishing the EC. The Court held that, indeed, the transfer system was not in conformity with Article 48, but in order to do so it first had to reach a finding as to whether professional football came within the scope of the Treaty to begin with. This was found to be the case because professional

[35] Brownlie, *Principles of Public International Law*, p. 131. This would seem to imply also that labelling the EU as being *sui generis* is of little help: at the end of the day, all organizations are *sui generis*.

[36] Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL and others* v. *Jean-Marc Bosman and others* [1995] ECR I-4921, paras. 73, 76.

football, whatever else it may be (hobby, entertainment, leisure activity), also constitutes an economic activity. Therefore, and to that extent, the EC rules apply to professional football, and, therefore, the Court could rule that the transfer system violated Article 48 TEC. The case indicates, if nothing else, that the boundaries between topics or issues may be very fuzzy indeed.

Membership

Other classifications point to the membership of organizations as being of distinctive value. Thus, some organizations aspire to universal or near-universal membership, inviting in principle all states to join. The United Nations is a typical example, in principle open to all states as long as they meet certain requirements. Hence, the UN is often referred to as an 'open' organization, as are (although their membership does not compare to that of the UN) such organizations as the World Health Organization (WHO) and the World Trade Organization (WTO).

Other organizations, however, may rest satisfied with a limited membership, and usually such limitations may derive from their overall purpose. Thus, many regional organizations, aiming to organize activities in a certain geographical region, are open only for states from that region. The European Union is only open for European states; no Asian state can join the Organization of African Unity, and the Organization of American States can only be joined by states from the Americas.

The limitation is not always based on considerations of geography, though. For instance, the Organization of Petroleum Exporting Countries (OPEC) is a limited organization, but its membership spans the globe, including states from the Middle East, Latin America and Africa. Here, the ties are economic. Similarly, the Organization for Economic Co-operation and Development (OECD) has also, in addition to a large number of west European member-states, members from the Americas, Asia and Oceania, and the North Atlantic Treaty Organization (NATO) does justice to the Atlanticism in its name by including members from western and southern Europe as well as the US and Canada, whereas the French-speaking countries are united in an organization devoted to *francophonie*.[37] Where membership is limited to states from a certain region, such organizations

[37] The organization is the Organisation Internationale de la Francophonie, headed by former UN Secretary-General Boutros Boutros-Ghali.

may be referred to as 'regional', but the more generic term used is often 'closed'.

Political v. functional

A distinction sometimes made which refers to notions of integration theory is that between political and functional organizations. Some integration theorists have held that the chances for international integration, or even mere co-operation, to occur are larger when the purpose of co-operation is limited to some technical task: a clearly circumscribed function. The underlying idea is that technical functions (such as, say, the regulation of telecommunications) do not involve great political sentiments; co-operation can thus take place unencumbered by unproductive debates and disagreements. As there can hardly be disagreement about the necessity and benefits of regulation, integration can proceed by focussing on substance, and through the work of engineers and other experts rather than politicians. On such views, it is no coincidence that organizations first arose in order to manage practical problems of transport and communication, and it is no coincidence that the levels of cooperation are more intense in such organizations than in organizations which are devoted to more 'political' tasks.

Unfortunately, while the distinction is one that makes intuitive sense, it is not a distinction which can easily be captured in comprehensive definitions and descriptions. If under 'politics' we would refer predominantly to issues of peace and security, then there is only one universal political organization at present: the UN, perhaps accompanied by several regional organizations such as the Organization for Security and Cooperation in Europe (OSCE). And if so, then the distinction might not be overly effective.

Moreover, there is but a fine line between what some would appreciate as political and what others would regard as rather functional, and much may depend on one's position. As the International Court of Justice acknowledged in the early 1970s, a state such as Iceland is disproportionately dependent on fisheries.[38] It would seem to follow that issues that will hardly deprive the Swiss or Austrians of their sleep, such as fisheries, might have serious political overtones for Iceland. Conversely, Iceland will not be overly interested in issues that may bother, say, the Ethiopians, such as cooperation with respect to shared waterways.

[38] See the *Fisheries jurisdiction case* (UK v. Iceland), jurisdiction, [1973] ICJ Reports 3, paras. 41–2.

Finally, there is the fundamental problem that arguments stressing the facility of technical cooperation are based on the untenable misconception that technical issues are, somehow, beyond politics. The better view is that even seemingly technical and 'non-political' issues such as the regulation of telecommunications have profound political aspects and consequences, for example, when it comes to the organization of the information society.[39]

Intergovernmental or supranational?

Finally, a distinction often made is that between intergovernmental and supranational organizations, but here as well we may wonder about the value of the distinction: does it really clarify things? As things stand, there is only one organization which is usually held to be supranational in character: the EC. Hence, any description of supranational organizations will inevitably be based on the EC.

In comparison with other organizations, the EC possesses a few features which, in combination, render it distinct from the rest. First, under the constituent treaties, decisions which will bind the member-states can be taken by majority vote.[40] Thus, it is entirely possible that a member-state will have to adopt a certain course of behaviour which it itself vehemently opposes. Second, the product of those decisions is EC law, which attains supremacy over conflicting domestic law, regardless of what the laws of the member-state stipulate and regardless of which one was enacted later.[41] Third, much of the law promulgated by the EC may be directly effective in the legal orders of the member-states.[42] Thus, much EC law may be invoked not just by one member-state against another, but also by a citizen of one of the member-states against his or her own government, or in relations with employers or other relations of a private nature. It is in this sense that people often say that the member-states have transferred parts of their sovereignty to the EC, and it is in this sense that the EC stands, in an almost literal way, above its member-states (hence the term 'supranational').

[39] For a brilliant analysis (though not focussing on international telecommunications), see James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge, MA, 1996).

[40] Compare, e.g., Arts. 251 (ex-Art. 189b) and 252 (ex-Art. 189c) TEC.

[41] Case 6/64, *Flaminio Costa* v. *ENEL* [1964] ECR 585.

[42] This follows in some circumstances literally from Art. 249 (ex-Art. 189) TEC, and has also been proclaimed by the European Court in landmark cases such as Case 26/62, *Van Gend & Loos* v. *Administratie der Nederlandse Belastingen* [1963] ECR 1.

Some would go further and claim that on occasion, the member-states are no longer allowed even to attempt to regulate behaviour:[43] the doctrine of pre-emption not only holds that member-state action can be overruled, but goes beyond this in saying that member-state action is no longer acceptable in some areas.[44]

By contrast, the general rule among international organizations is that binding law-making decisions, at least on issues of substantive policy, can usually only be taken by unanimity, or consensus; that such rules do not usually work directly in the domestic legal orders of the member-states; and most assuredly that the member-states are not pre-empted from legislating. Here then, the organization does not rise above its member, but remains between its members (intergovernmental).[45]

Why co-operate?

International organizations are, as outlined earlier, perhaps the most obvious and typical vehicles for interstate co-operation. It is difficult to think of any organization which is not intended to foster co-operation in some way, although obviously some organizations provide for larger degrees of co-operation than others. Thus, the EC, being 'supranational', establishes a very intensive form of co-operation; it has even been possible to argue that the EC has risen beyond mere co-operation, and is slowly but surely integrating, something which can loosely be defined as reaching such a level of co-operation that previously independent entities start to form a new one which they cannot undo at will.[46] As some people would have it, due to the state of European integration, the member-states alone are no longer in full control of their destinies and that of the EC; they are no longer 'Herren

[43] For a useful discussion in Dutch, see Jan H. Jans, 'Autonomie van de wetgever? Voorafgaande bemoeienis van Europese instellingen met nationale regelgeving', in Leonard Besselink *et al.*, *Europese Unie en nationale soevereiniteit* (Deventer, 1997), 51–113. An English version hereof is published as Jan H. Jans, 'National Legislative Autonomy? The Procedural Constraints of European Law' (1998/I) 25 LIEI, 25–58. See also Eugene D. Cross, 'Pre-emption of Member-State Law in the European Economic Community: A Framework for Analysis' (1992) 29 CMLRev, 447–72.

[44] For a critique, see Stephen Weatherill, 'Beyond Preemption? Shared Competence and Institutional Change in the European Community', in David O'Keeffe & Patrick Twomey (eds.), *Legal Issues of the Maastricht Treaty* (London, 1994), 13–33.

[45] See also below, chapters 10 and 11.

[46] This definition has been gleaned from J. K. de Vree, *Political Integration: The Formation of Theory and its Problems* (The Hague, 1972).

der Verträge': they are no longer masters of the treaty.[47] Indeed, much of the debate nowadays concentrates on the need or desirability of a constitution for the EC, which suggests that the integration process is considered as irreversible and as having found a life of its own.[48]

With other organizations, the degree of co-operation is considerably less intensive. Thus, the central provision of the NATO treaty has been held to be fairly non-committal:[49] under Article 5 NATO, member-states are obliged to do what they 'deem necessary' in the case where one of them comes under attack. Clearly, such an obligation leaves the member-states a rather wide margin of discretion to determine their actions, but, equally clearly, some form of co-operation does take place within NATO, if only in the form of joint military exercises and commands.

Throughout history, observers have had a hard time explaining co-operation. That holds true both in domestic societies and, perhaps *a fortiori*, when international relations are concerned. The question as to why actors will co-operate is one of the central questions of the social sciences, and is particularly prominent in international relations theory.

Arguably the most dominant strand of international relations theory, at least since the Second World War, is what is known as 'realism', or, nowadays, 'neo-realism'.[50] Realists and neo-realists start from the proposition that the world is a jungle, an anarchy, where it is a fight of man against man and state against state. In order to ensure survival, the state must guarantee at the very least that its competitors do not become more powerful, and preferably that it itself gains power.[51]

[47] Among the most prominent is Ulrich Everling, 'Sind die Mitgliedstaaten der Europäischen Gemeinschaft noch Herren der Verträge? Zum Verhältnis von Europäischem Gemeinschaftsrecht und Völkerrecht', in Rudolf Bernhardt *et al.* (eds.), *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler* (Berlin, 1983), 173–91; see also Ulrich Everling, 'Zur Stellung der Mitgliedstaaten der Europäischen Union als "Herren der Verträge" ', in Ulrich Beyerlin *et al.* (eds.), *Recht zwischen Umbruch und Bewahrung; Festschrift für Rudolf Bernhardt* (Berlin, 1995), 1161–76.

[48] On constitutionalization see, e.g., Paul Craig, 'Constitutions, Constitutionalism, and the European Union' (2001) 7 *European Law Journal*, 125–50; Oliver Gerstenberg, 'Denationalization and the Very Idea of Democratic Constitutionalism: The Case of the European Community' (2001) 14 *Ratio Juris*, 298–325; Trevor C. Hartley, 'The Constitutional Foundations of the European Union' (2001) 117 *Law Quarterly Review*, 225–46.

[49] See Michael J. Glennon, *Constitutional Diplomacy* (Princeton, 1990), p. 214.

[50] The starting point of modern realism (while not blind to its limitations) was, arguably, the publication of E. H. Carr, *The Twenty Years' Crisis 1919–1939* (1939; London, 1981).

[51] The seminal work is Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (2nd edn, New York, 1955).

In such a scheme, co-operation is almost by definition doomed either to remain temporary, or to be the result of submission or coercion. Military alliances, for instance, are not unknown to realists; indeed, they are presumably central tenets of realism.[52] International organizations, however, are harder to explain, in particular since these are perceived to be created for longer periods of time. One of the central propositions of realism is, after all, that states will pursue their own interests; as long as organizations can be seen to be helpful in that pursuit, realists will typically be able to explain their existence and functioning. But realists will have a hard time explaining forms of co-operation that apparently go against the national self-interest.

It is here that the efforts of other schools of thought come in. Typically, some authors claim that realists have too bleak an outlook on life. Life, so they argue, is a bit more than a war of all against all and the ensuing struggle for survival: social actors may also strive to co-operate in order to combat problems that would typically require a joint effort (this sort of thinking is sometimes referred to as functionalism or neo-functionalism, in particular if followed by the proposition that co-operation in one sector leads to co-operation in other sectors), and if push comes to shove, co-operation may even take place out of sheer altruism or some similar incentive.[53] Of course, here the main riddle is how to explain failures of co-operation, or the lack of co-operation in situations where it could theoretically have been expected. And moreover, as idealist thinking is based on a sunny view of human nature, it is intuitively perhaps more difficult to accept than the premises of realism.[54]

A more normative school of thought takes these views somewhat further, and defends the thesis that democracies are naturally inclined to co-operate or, at least, not to go to war with one another.[55] Based on the works

[52] Similarly Alexander Wendt, *Social Theory of International Politics* (Cambridge, 1999), pp. 299–302.

[53] Interestingly, Frost's adaptation of the value of recognition in international life, as a means of initiating the new into established practices, comes pretty close. See Mervyn Frost, *Ethics and International Relations: A Constitutive Theory* (Cambridge, 1996), pp. 153–5.

[54] Indeed, it is no coincidence that idealism is not known as realism, but usually goes under such labels as 'institutionalism'. More apposite, many idealists position themselves, and quite understandably so, as realists.

[55] For an empirical critique of the thesis that democracies do not fight each other, see Joanne Gowa, *Ballots and Bullets: The Elusive Democratic Peace* (Princeton, 1999). Also critical is Alexander Wendt, *Social Theory*, ch. 6, arguing that there is no direct relationship between a shared culture and either co-operation or conflict.

of Immanuel Kant, especially his short treatise *Zum ewigen Frieden*[56] – with greater or lesser degrees of accuracy – some advocates of the 'democratic peace' thesis might even go so far as to denounce all ties with non-democracies.[57]

More moderate voices, while still allowing for a distinction between different types of states based on their domestic political systems and ideologies, advocate far-reaching co-operation in various forms between like-minded states. Under this liberal theory, liberal states become embedded in a transnational society; a society, in other words, that comprises trans-boundary relationships between private actors. Co-operation in this 'world of liberal states' takes place not just within formal institutions,[58] but also, and perhaps more importantly, through informal mechanisms, ranging from occasional meetings of judges from various jurisdictions to regular meetings of civil servants.[59]

The main problem for theory appears to be how to reconcile observable patterns of co-operation with realist premises. For whatever realists may say, co-operation does take place more often than their theories would warrant; and whatever idealists may say, it is hard to believe that states will do anything for a reason which cannot in one way or another be traced back to self-interest.

A recent answer, which may help explain why dominant states help set up organizations rather than attempt to dominate by the exercise of naked power, focusses on bargains between dominant states and other states: the dominant state promises to limit the exercise of its power in return for participation by other states.[60]

A more general answer (not necessarily limited to organizations involving dominant states) rose to prominence, especially in US international

[56] Immanuel Kant, *Zum ewigen Frieden: Ein philosophischer Entwurf* (1795; Stuttgart, 1984).

[57] So, e.g., Fernando Tesón, *A Philosophy of International Law* (Boulder, CO, 1999).

[58] Indeed, as Falk astutely observed, the liberal approach does not require institutions or organizational structures; it insists, instead, on the inner orientation of states. See Richard A. Falk, *Human Rights Horizons* (New York, 2000), p. 18.

[59] The most explicit proponent of this approach is Anne-Marie Slaughter. See in particular her 'International Law in a World of Liberal States' (1995) 6 EJIL, 503–38, and her 'Governing the Global Economy through Government Networks', in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford, 2000), 177–205. Aspects of liberal theory are also sketched in Thomas M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford, 1999).

[60] See G. John Ikenberry, 'Institutions, Strategic Restraint, and the Persistence of American Postwar Order' (1998–9) 23 *International Security*, 43–78.

relations thinking during the 1970s and 1980s, and has achieved fame as 'regime theory'. Leaving differences between various authors aside,[61] one of the central propositions of regime theory was that states can and do co-operate on the basis of the realist premise of enlightened self-interest.[62] And this was made possible, so regime theory claimed, because co-operation can yield greater net results than going it alone. In other words: if co-operation makes the cake grow bigger, then an equal share of the cake as before will nonetheless result in a bigger piece. Thus, in most situations states would actually have an interest in co-operation, since co-operation generally was thought to result in a greater common good.

While it took some time to be formulated, realism's answer, in the form of a seminal article by Joseph Grieco, proved incisive.[63] Where regime theory went wrong, Grieco argued, was in claiming that the realist premise holds that states are interested in increasing their absolute gains. That was based on a misunderstanding. Instead, states are interested in an increase of their relative power positions; they are interested in an increase of their position vis-à-vis their main rivals.[64] They will prefer an absolute decrease which grants them a relative increase any time over the converse. They are not interested in a bigger piece as such, but in a bigger piece than their rivals.

Apart from this critique, regime theory suffered on some other points as well. Perhaps its main proposition was that states record their co-operation not just in formal, legal rules and procedures, but in informal rules and procedures as well. That was, of course, what was supposed to set regime theory aside from the legalistic study of patterns of co-operation traditionally associated with lawyers, yet it has proved less than successful: regime theorists have by and large come up with precious few examples of informal rules and procedures, which ironically meant that regime theory and international law turned out to have more in common than both might actually care to admit.[65]

[61] For an excellent overview, see Stephan Haggard & Beth A. Simmons, 'Theories of International Regimes' (1987) 41 *International Organization*, 491–517.

[62] One of the leading works is Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton, 1984).

[63] Joseph M. Grieco, 'Anarchy and the Limits of Cooperation' (1988) 42 *International Organization*, 485–508.

[64] The insight was already mentioned (albeit somewhat in passing) in one of the classics of realist theory. See Kenneth N. Waltz, *Man, the State, and War* (New York, 1959), p. 198.

[65] Thus, e.g., Anne-Marie Slaughter Burley, 'International Law and International Relations: A Dual Agenda' (1993) 87 AJIL, 205–39. See also Michael Byers, *Custom, Power, and the Power of Rules* (Cambridge, 1999).

Recent theorizing concentrates on the role of domestic forces in fostering international co-operation. According to what its main representative calls 'republican liberalism', co-operation takes place neither for the self-interest of states nor out of altruism, but rather because domestic forces wish to 'lock' their positions. Thus, a weak democracy might join a human rights treaty precisely as a means for ensuring that democracy will not be overturned; by the same token, governments may join organizations to strengthen their own positions.[66]

Finally, and difficult to capture in theoretical terms, states may engage in what looks like co-operation primarily to have a scapegoat for policy failure or, alternatively, as a means of suggesting that activities are taking place.[67] Thus, former US diplomat Robert Murphy recalls how Secretary of State John Foster Dulles saw the UN occasionally as something of a storage room for unsolved thorny problems.[68]

In addition to asking why co-operation takes place, we may also ask ourselves which roles organizations, once established, can and do play, and here a more constructivist school of thought has taken the lead. While for many realists and regime theorists alike, international organizations are mere arenas for power struggles between states, the central tenet of constructivism is rather that organizations are more than mere clearing houses for the opinions of their member-states: they take on a role and dynamics all their own.[69] Organizations may become actors on their own stage, so to speak.[70] Indeed, this has become one of the core propositions of the constructivist approach to international relations, which argues that

[66] See Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Post-war Europe' (2000) 54 *International Organization*, 217–52. For a more culturally inclined view (but also stressing domestic factors), see Erik Ringmar, 'Re-imagining Sweden: The Rhetorical Battle over EU Membership' (1998) 23 *Scandinavian Journal of History*, 45–63.

[67] See in a similar vein Martin Wight, 'Why is There No International Theory?' in Herbert Butterfield & Martin Wight (eds.), *Diplomatic Investigations: Essays in the Theory of International Politics* (London, 1966), 17–34, p. 23.

[68] Robert Murphy, *Diplomat among Warriors* (London, 1964), p. 443.

[69] For an excellent overview, see Michael N. Barnett & Martha Finnemore, 'The Politics, Power and Pathologies of International Organizations' (1999) 53 *International Organization*, 699–732. The so-called 'new institutionalism' also envisages an independent role for institutions. Compare Daniel Wincott, 'Political Theory, Law and European Union', in Jo Shaw & Gillian More (eds.), *New Legal Dynamics of European Union* (Oxford, 1995), 293–311.

[70] For an intelligent discussion of how the financial institutions have used poverty as an excuse for expanding their own activities, see Balakrishnan Rajagopal, 'From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions' (2000) 41 Harvard ILJ, 529–78.

existing rules and institutions help shape not just our behaviour, but also the very world we live in.[71]

Perhaps the most obvious example is the case of the European Community which, due to its (partly) supranational character, may well be able to take on dynamics of its own. The belief that similar considerations also hold with respect to more intergovernmental organizations has sometimes been posited, but not unconditionally. Still, it has been noted that organizational leadership and the capacity of organizations to 'learn' offer possibilities for enhanced co-operation.[72]

Either way, what emerges as one of the central problems faced by social scientists in explaining the role and impact of international organizations is the relation between the organization and its member-states: is the organization but a forum, convenient for compiling the aggregate wishes of the various member-states, or does the organization present itself as something which is distinct from its member-states? The same problem also haunts the science of law.

Legal theory and international organizations

Legal theorists ordinarily have little business in trying to explain why states co-operate: such belongs to the social sciences properly. Moreover, the legal theorist is generally ill equipped to perform such a task: whenever lawyers engage in political analysis, more often than not the results fail to persuade professional political scientists.

More properly, the task of the legal scholar is to explain the incidence of various legal rules relating to international organizations. This, in turn, calls for a background theory concerning the legal nature of international organizations, but no convincing theory has so far been developed, as far as I am aware.

[71] Its main representatives include John Gerard Ruggie, *Constructing the World Polity* (London, 1998); Alexander Wendt, *Social Theory*; and Friedrich Kratochwil, *Rules, Norms, and Decisions* (Cambridge, 1989). Institutionalists do not necessarily adopt the constructivist thesis in full, but do note that the 'centralization' and 'independence' offered by organizations make them attractive vehicles for international co-operation. See, e.g., Kenneth W. Abbott & Duncan Snidal, 'Why States Act through Formal International Organizations' (1998) 42 *Journal of Conflict Resolution*, 3–32.

[72] Thus, already, Ernst B. Haas in his classic study of the International Labour Organization, *Beyond the Nation-State* (Stanford, 1964).

Traditionally, theorists sought refuge in the concept of the state.[73] Thus, organizations were viewed as would-be states, with, in particular, the federal model being of attraction.[74] This line of thinking was dispelled though when the ICJ, trying to come to terms with the UN, pronounced that the UN was not the same as a state, let alone a superstate.[75]

Probably the best general study of the law of international organizations to date, Amerasinghe's textbook,[76] is, its outstanding qualities notwithstanding, illustrative of the theoretical confusion concerning the legal nature of international organizations, and more specifically of what appears to be the heart of the problem: the way the organization relates to its member-states.

At some points, Amerasinghe treats the member-states of an organization as if they are third parties vis-à-vis the organization, who in creating their organization have created a distinct legal entity, and have therewith for instance limited their individual liability for actions of the organization. Precisely because they are considered to be third parties in relation to their organizations, they can escape being held liable for the organization's acts.

Clearly, that is a respectable point of view, held by many international lawyers, and usually defended on the view that since states cannot be held bound by obligations they have not freely consented to,[77] it follows that obligations incurred by international organizations cannot as such bind their member-states. After all, that is precisely why they may have created their organization to begin with.

Elsewhere, though, Amerasinghe is forced to abandon this view, because, taken to the extreme, it would, for example, imply that documents which the organization sends to its member-states lose their privileged status. As long as those documents circulate on the organization's premises, they can be regarded as internal and privileged documents, but if they are sent to third parties (such as member-states) they will inevitably lose that status. Hence,

[73] For a good overview, indicating that often organizations were thought of as states writ large, see Daniele Archibugi, 'Models of International Organization in Perpetual Peace Projects' (1992) 18 *Review of International Studies*, 295–317.

[74] As noted by Michel Virally, *L'organisation mondiale* (Paris, 1972), pp. 19–24.

[75] *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, [1949] ICJ Reports 174, p. 179.

[76] C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge, 1996).

[77] This point of departure has found recognition, in, e.g., Arts. 34 and following of the 1969 Vienna Convention on the Law of Treaties.

on this point Amerasinghe stops treating member-states as third parties, and therewith renders himself vulnerable to the charge of incoherence.

Clearly, such problems call for theoretical explorations; equally clearly, though, so far few such explorations have been undertaken.[78] Instead, lawyers usually invoke a different concept to take the place of theory, and seek refuge in the notion of 'functional necessity'.[79]

Discarding the functional necessity theory

Functional necessity is based, conceptually, on the idea that international law does not automatically grant any substantive rights or obligations to international organizations. When it comes to states, the simple fact of statehood brings with it certain rights. Thus, heads of state can command universal respect, states will generally be immune from suit for their governmental activities (*acta jure imperii*), and states will, for example, have the right to accede to numerous treaties.

Similar considerations do not necessarily apply to international organizations. If any legal rights and obligations flow automatically from 'organizationhood' at all (and the classic *Reparation for Injuries* opinion of the International Court offers some support for this proposition[80]), they are limited to those of a more or less procedural character. Thus, organizations may have an inherent right to bring claims under international law, or they may have the inherent right to enter into treaty relations, but they are not automatically immune from suit. Indeed, it can even be wondered whether they are capable of exercising governmental activities to begin with.

And if organizationhood itself provides no, or at best limited, answers, then the answers must be sought elsewhere: it is here that the idea of functional necessity comes in. Many scholars maintain that organizations can reasonably claim such rights and privileges as would enable them to function effectively; their legal position at international law is geared to,

[78] Steyger, e.g., quite typically limits herself to providing an overview of the relationship between the EC and its member-states without exploring the theoretical possibilities. See Elies Steyger, *Europe and its Members: A Constitutional Approach* (Aldershot, 1995).

[79] Arguably first systematically elaborated by Michel Virally, 'La notion de fonction dans la théorie de l'organisation internationale', in Suzanne Bastid *et al.*, *Mélanges offerts à Charles Rousseau: la communauté internationale* (Paris, 1974), 277–300, although hints are already discernible in his *L'organisation mondiale*.

[80] This opinion will be discussed more appropriately in the next chapter.

literally, their functional requirements, the necessities which flow from their functions. Thus, organizations generally are considered to possess the types of legal immunities which are necessary for them to work without interference from their host state, or their member-states; at the same time, their prerogatives are limited to their functions.[81]

The functional necessity concept, its ingenuity notwithstanding, gives rise to some serious problems. First, it is biased in favour of international organizations, and therewith based on the view that international organizations are a good thing.[82] Thus, it is one thing to say that organizations shall be immune from suit to the extent necessary for their functioning, but why should third parties who have seen a deal gone sour, be victimized by the necessities of the organization? For if the organization is immune from suit, its creditors (for instance) cannot touch it.

The main problem here is the assumption that international organizations are, necessarily, a good thing, an assumption which often takes the place of argument, even before the ICJ: 'The stability and efficiency of the international organizations, of which the United Nations is the supreme example, are . . . of such paramount importance to world order, that the Court should not fail to assist a subsidiary body of the United Nations General Assembly in putting its operation upon a firm and secure foundation'.[83] But are international organizations really humankind's main hope for salvation, or does this depend on their aims and activities?[84] The presumption is perhaps best regarded as the outgrowth of historical developments, for, whatever their flaws, organizations are usually, as Broms reminds us, a step up from the type of co-operation exercised earlier. Respect for the individual consent of member-states replaced the situation where powerful states could simply impose their wishes on others.[85]

[81] See below, chapter 8.

[82] As Singh once put it, in terms characteristic of the sentiment, 'international organisations have a great role to play in the salvation of mankind'. See Nagendra Singh, *Termination of Membership of International Organisations* (London, 1958), p. vii.

[83] *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, advisory opinion, [1982] ICJ Reports 325, p. 347.

[84] It may be noted that western observers have on occasion tried to argue that Warsaw Pact and Comecon did not really constitute international organizations (usually because of their being dominated by a single member-state). This would allow the fiction that organizations are by definition beneficial to continue: we simply dismiss those we deem detrimental. For a rendition of such an argument, see Bryan Schwartz & Elliot Leven, 'International Organizations: What Makes Them Work?' (1992) 30 Can YIL, 165–94, p. 178.

[85] Broms, *Equality of States*, p. 152.

In part, also, the appeal of organizations to most students of their activities stems from their pivotal role in what has been referred to as the 'international project' of internationalists.[86] On this line of thinking, to be an international lawyer (or international political scientist, for that matter[87]) is to somehow be in favour of anything international, and it stands to reason that international organizations have benefited greatly from this sentiment in terms of the analysis of their functioning and activities.[88]

In the end, the question of the attraction of organizations answers itself: inasmuch as there can be (and are) undoubtedly many international organizations whose work can command general support, there is at least the hypothetical possibility that international organizations can be used for less than worthy purposes.[89] Where the organization becomes a cover for exploitation or invasion, there appears to be less and less reason to promote anything which would facilitate its functioning.

Moreover, even member-states of an organization are generally keen to keep their creation in check, as is witnessed by the popularity in the present-day European Union of notions such as subsidiarity, opting out and 'flexibility'. This very phenomenon runs counter to the idea that organizations should prosper and therefore their functional needs be honoured.

A second problem with the notion of functional necessity is that it is itself rather empty to begin with. For what is the functional necessity of any given organization? Who is to determine such issues? What yardstick is to be used? Thus, the notion itself warrants theoretical elaboration. Instead of providing a theory, it merely shifts any problems stemming from the lack of theory, and hides the absence thereof.

Indeed, close observation reveals a shifting in the notion of what constitutes functional necessity over time. The concept appears to have been considerably narrowed down from the early 1990s onwards, indicating that

[86] Anything international, moreover, has often been considered to carry with it an escape from politics, and has been deemed attractive for that reason alone. See David Kennedy, 'Receiving the International' (1994) 10 Conn JIL, 1–26.

[87] See, e.g., J. Martin Rochester, 'The Rise and Fall of International Organization as a Field of Study' (1986) 40 *International Organization*, 777–813.

[88] The argument is perhaps most pressingly formulated in David Kennedy, 'A New World Order: Yesterday, Today, and Tomorrow' (1994) 4 *Transnational Law and Contemporary Problems*, 1–47. See also Michael N. Barnett, 'Bringing in the New World Order: Liberalism, Legitimacy, and the United Nations' (1997) 49 *World Politics*, 526–51.

[89] Such a possible exception was Mussolini's plan, launched in the 1930s, to create a formal directorate of the four leading European powers at the time (i.e., France, Britain, Italy and Hitler's Germany). See Van Diepen, *Voor Volkenbond en vrede*, p. 143.

it is too flexible to be of much use as a theoretical device, indicating that its explanatory force is limited.[90]

Third, as a matter of theory, the idea of 'functional necessity' suffers from the drawback that organizations are rarely, if at all, created according to blueprints involving preconceived theoretical or quasi-theoretical notions. Instead, they are the result, invariably, of negotiations, and therewith of power struggles and struggles between competing ideas. And while surely 'functional necessity' may be among the ideas launched, its acceptance by negotiating partners is by no means guaranteed. Instead, they are likely to entertain different ideas on the functional necessities of any given organization at any given moment in time. And thus, as a unifying theme underlying the law of international organizations, the concept of 'functional necessity' simply will not do.

That is not to say that the functional necessity notion is completely useless. In good hands, it may facilitate the solution of practical problems. There can be little doubt that courts and tribunals at times resort to the notion in order to solve disputes before them, and the result may well be a fair one. In addition, it may occasionally constitute, as we shall see, a fair description *ex post facto*.

Organizations and their members

Instead of trying to offer the false security of the functional necessity theory with its limited explanatory potential, this book is written on the basis of the idea (theory is too big a word) that much of the law of international organizations is the result of the fundamental tension between the organization and its members.

In popular thinking, organizations are probably pretty much perceived as entities which somehow would stand (or at least would have to stand) above their members. This common position is well summarized by novelist George Orwell in the following quotation, written in 1946, just a few months after the creation of the UN:

> In order to have any efficiency whatever, a world organization must be able to override big states as well as small ones. It must have power to inspect and limit armaments, which means that its officials must have access to every square inch of every country. It must also have at its disposal an armed force

[90] See in particular chapter 8 below.

> bigger than any other armed force and responsible to the organization itself. The two or three great states that really matter have never even pretended to agree to any of these conditions, and they have so arranged the constitution of UNO that their own actions cannot even be discussed. In other words, UNO's usefulness as an instrument of world peace is nil. This was just as obvious before it began functioning as it is now. Yet only a few months ago millions of well-informed people believed that it was going to be a success.[91]

The interesting aspect is that Orwell does not stop after having proclaimed that organizations should stand above their members. Instead, he starts by describing an idealtype, then blames the member-states for not creating this idealtype, and finally blames the organization for not living up to the idealtype. In other words, unwittingly Orwell already captured the fundamental tension between international organizations and their member-states: organizations are, at one and the same time, independent of their members (or at least ought to be so), and fundamentally dependent on them.[92] And that idea as such is hardly novel; the French jurist Paul Reuter, without developing it to the fullest extent in his subsequent analysis, could already approach the field in much the same way in 1967.[93]

In short, many of the ambiguities that the law of international organizations appears to be so particularly rich in become understandable when examined against the background of the relationship between the organization and its members, and the idea behind this book is to explore that tension in relation to a variety of topics.[94]

Seemingly endless discussions on such staple topics as the implied powers doctrine, teleological interpretation of constituent documents, or whether the member-states retain a hold on the organization are indeed, quite literally, endless, for a common characteristic of such debates is that one can either occupy a position favouring the member-states or occupy a position favouring the organization without being able to say which is the better

[91] See George Orwell, *The Collected Essays, Journalism and Letters of George Orwell. Volume 4: In Front of Your Nose 1945–1950* (1968; Harmondsworth, 1970), pp. 152–3.

[92] The same tension informs influential politicians and statesmen. For an example, see Richard von Weiszäcker, 'All Depends on Member-States', in Georges Abi-Saab *et al.*, *Paix, développement, démocratie. Boutros Boutros-Ghali Amicorum Discipulorumque Liber* (Brussels, 1999), 827–37. Von Weiszäcker is a former President of Germany, and co-chaired one of the more serious working groups on UN reform in the first half of the 1990s.

[93] Paul Reuter, *Institutions internationales* (Paris, 1967), p. 204.

[94] Greater than the number of topics relating to organizations contained in Reuter's *Institutions internationales*, and probably less inclined to proclaim a given equilibrium as reflecting the law.

view, at least not without lapsing into the type of normative thinking which supposedly ought not to form a part of the law. Thus, as we shall see below, it is easy to advocate the implied powers doctrine with a view to the needs of the organization, but that is, in the end, merely subjecting a purported legal rule (i.e. the implied powers doctrine) to a political opinion (i.e. the needs of the organization must be taken into account). Yet without such a political opinion, the argument becomes merely one among various possible candidates. Without having the needs of the organization in view, advocacy of the implied powers doctrine simply falls flat, and has little to offer: its attraction resides precisely in its being hooked up with a normative proposition.

And if this is correct, then it follows that large branches of the law of international organizations are fundamentally uncertain: if we change our normative propositions, we find different legal rules to be hooked up with. If, instead of favouring the needs of the organization, we take the side of the members, then the implied powers doctrine loses its attraction and may easily be replaced by the doctrine of attributed powers.[95]

Part of the relation between the organization and its members, moreover, is coloured by the curious circumstance that, in some respects, the organization and its members may well be indistinguishable from each other. That holds true in the rather obvious sense that behind the organization there are always its members, but also in the less obvious sense of observers not being able to tell, at any given moment, whether an act is undertaken by an organization or by its members *en groupe*.[96] It is this curious circumstance which influences to a large extent many of the uncertainties characterizing the law when it comes to the external activities of organizations, from treaty-making to issues of liability. And as I shall explore in somewhat more depth in the closing chapter, this fading over into each other of organizations and their members also has some wider theoretical ramifications, in particular when it concerns the position of international organizations in international society.

[95] As chapter 4 below will demonstrate, things can be taken even further: in the end, there is fairly little which distinguishes the two seemingly opposed doctrines.

[96] Indeed, developments such as creating a European Union of doubtful legal quality or ostensible 'non-organizations' such as the OSCE tap into precisely this fundamental equivalence.

CHAPTER 5

INTERNATIONAL ORGANIZATIONS, 1945–PRESENT

B. S. CHIMNI

Modern international organizations (IOs) are essentially a twentieth-century phenomenon.[1] The League of Nations was the first real attempt at the 'institutionalization of international relations'.[2] But it is only since the Second World War that IOs have become an integral part of the landscape of international politics. From being peripheral actors, IOs have come to occupy a significant place in international relations.

The history of IOs in the post-1945 period can be told in a variety of ways. First, the history of IOs can assume the form of a general history of the evolution of IOs. This history can be a narrative of the creation and development of IOs in different functional areas: trade, environment, development, finance, health, human rights, migration, and counterterrorism. Second, the history of IOs can be told from a variety of theoretical standpoints viz., liberal, feminist, Marxist, and Third World. Each of these theoretical approaches has a different understanding of the evolution and role of IOs in the post-Second World War period. Third, the history of IOs can

[1] Inis L. Claude Jr, *Swords into Ploughshares: The Problems and Progress of International Organization*, 4th ed. (New York: Random House, 1971), 41.

[2] David Kennedy, "The Move to Institutions," *Cardozo Law Review* 8/5 (1987): 850.

take the form of the history of individual IOs. There can be both official and unofficial histories. The official histories are sanitized histories that tend to embrace a narrative of progress.[3] Fourth, the history of IOs can be of different phases of their existence. Each IO goes through distinct phases of development in response to both external and internal factors. In so far as external factors are concerned, general purposes organizations (e.g. United Nations) tend to respond more to the international political environment and international economic organizations (e.g. World Bank) to the state of global capitalism. The internal factors include changes in the culture of an organization and the quality of leadership. Fifth, the history of IOs can be of particular organs of IOs, especially that of the United Nations (UN), such as for example that of the UN Security Council (UNSC). Even in the instance of a single UN organ the history can be of different phases (e.g. pre- and post-Cold War phases). Sixth, the history of IOs can be told as that of certain broad trends in the world of IOs: the enhanced role of nongovernmental organizations (NGOs), the increasing number of international tribunals, growing regionalism, etc. Seventh, a history can be told of the emergence and development of the law of international organizations in the 1960s reflecting the need to clarify their legal status and growing complexity of their functioning.[4] Eighth, the history of IOs can be of specific themes such as 'democratic deficit' or the need for greater accountability and legal responsibility of IOs. This theme has acquired salience in recent years as a result of the growing importance of IOs in global governance. Ninth, the history of IOs can be told as a move towards constitutionalism as in the case of the European Union (EU) whose decisions are binding on member states.[5] Lastly, the history of IOs can be told as the slow process of the emergence of a world state.

The chapter primarily focuses on histories of post-1945 IOs told from different theoretical standpoints by political scientists and legal scholars. In the second section an attempt is made to narrate in a schematic manner the history of IOs by liberal and neo-liberal scholars of IOs or what may be termed mainstream international organization scholarship (MIOS). This history is followed in the third section by thumbnail sketches of third-world, left, and feminist histories of IOs. These histories—that is, mainstream and critical histories—need not be read as mutually exclusive histories. In many ways these capture different dimensions of the history of IOs. The fourth section contains some reflections on salient issues and themes that are the subject of current debates including the emergence of a nascent world

[3] A good example of official history is that of UNDP written by Craig Murphy, otherwise a critical scholar. Craig N. Murphy, *The United Nations Development Programme: A Better Way* (Cambridge: Cambridge University Press, 2006), 4.

[4] The first textbook on law of international institutions written by Derek Bowett was published in 1963. Jan Klabbers, "The Paradox of International Institutional Law," *International Organizations Law Review* 5 (2008) 3.

[5] Jan Klabbers, "International Institutions," in *The Cambridge Companion to International Law*, ed. James Crawford and Martti Koskenniemi (Cambridge: Cambridge University Press, 2012), 240.

state. Readers will excuse the indicative presentation of materials necessitated by constraints of space.

Mainstream History of IOs

The mainstream history of IOs is told by liberal and neo-liberal scholars in the form of a narrative of progress. In this view, as two critical scholars note, the contribution of increasing and expanding IOs has been positive as IOs 'help to resolve collective dilemmas and problems of interdependent choice, foster international co-operation, and bring about a more rationalized world that is organized around fundamental liberal values such as liberty, autonomy, markets, democracy, and non-violent conflict resolution'.[6] The history of the post-1945 period is usually divided into two phases: the Cold War and post-Cold War phases. While these phases reveal distinct features, there is as much continuity as change that mark the function of IOs in the two periods.

The Cold War Phase: 1945–89

The history of IOs in the Cold War phase is either told in ideological or functional terms. From an ideological perspective Robert Keohane writes that the IOs created after the Second World War 'had a significant security justification: to create economic prosperity and patterns of cooperation that would reinforce the position of the West in the struggle with the Soviet Union'.[7] These IOs 'were constructed on the basis of principles espoused by the United States, and American power was essential for their construction and maintenance'.[8] It can even be said that the UN system was used to fight communism by other means. Indeed, a separate history can be

[6] Michael Barnett and Martha Finnemore, *Rules For the World: International Organizations in Global Politics* (Ithaca: Cornell University Press, 2004), 157. In the same vein, Kams and Mingst write that "for liberals, international organizations play a number of key roles, including contributing to habits of cooperation and serving as arenas for negotiating and developing coalitions. They are a primary means for mitigating the danger of war, promoting the development of shared norms, and enhancing order." Margaret P. Karns and Karen A. Mingst, *International Organizations: The Politics and Processes of Global Governance* (New Delhi: Viva Books, 2005), 38. Broadly speaking, neo-liberal institutionalists like Robert O. Keohane and John Gerard Ruggie share these assumptions.

[7] Robert O. Keohane, "Twenty Years of Institutional Liberalism," *International Relations* 26/2 (2012): 127.

[8] Ibid.

written of how each of the UN bodies in this period was implicated in the Cold War. Thus, for example, by focusing on refugees fleeing the violation of civil and political rights, the Office of the UN High Commissioner for Refugees (UNHCR) helped embarrass former Soviet bloc countries.

The former Soviet Union adopted a cautious approach towards IOs, albeit playing a relatively more active role in IOs in the post-Stalin era.[9] The East–West ideological divide meant that certain organs of the UN, like the UNSC, were unable to function effectively in this period due to the use of the veto power by the Soviet Union. It was only after Mikhail Gorbachev came to power in 1985 that the Soviet Union sought greater engagement with the UN until its collapse in 1989.[10] The other communist great power, China, also limited its participation in IOs after the revolution. In the Maoist period its participation remained 'self-consciously parsimonious and largely symbolic'.[11] But the 1980s saw Beijing join practically all intergovernmental organizations (IGOs) in the UN system.[12] China has sought to use IOs to gain authority in the international community and project its views to the outside world.

The history of IOs in the Cold War phase is also narrated and assessed by MIOS in functional terms. The focus is on the multidimensional developments in and achievements of the UN system. But attention is also drawn to positive developments outside the UN system. The principal developments and achievements are stated by MIOS to be the following.

First, the post-war period saw the creation of new specialized agencies of the UN such as the Food and Agricultural Organization (FAO), the World Health Organization (WHO), the UN Educational, Scientific and Cultural Organization (UNESCO), and the International Atomic Energy Agency (IAEA) even as older organizations such as the International Labour Organization (ILO), the Universal Postal Union (UPU), and the World Meteorological Organization (WMO) were brought into a special relationship with the UN. The UN Economic and Social Council (ECOSOC) also established a number of functional organizations that included the Commission on Status of Women, the Population Commission (subsequently renamed Commission on Population and Development), and the Statistical Commission. A number of other commissions were created later. The ECOSOC also created regional commissions such as the Economic Commission for Europe, the Economic Commission for Latin America, and the Economic Commission for Africa. All these functional and regional commissions conduct studies and promote in other ways the specific

[9] Kazimierz Grzybowski, "International Organizations from a Soviet Point of View," *Law and Contemporary Problems* 29/4 (1964): 886ff.

[10] Jonathan Haslam, "The UN and the Soviet Union: New Thinking?," *International Affairs* 65/4 (1989): 677.

[11] Samuel S. Kim, "International Organizations in Chinese Foreign Policy," *ANNALS, AAPSS* 519 (1992): 171.

[12] Kim, "International Organizations in Chinese Foreign Policy," 171.

aims of each. These agencies, functional organizations, and commissions have contributed to the economic and social advancement of all peoples and nations.

Second, in the aftermath of the war the two powerful international financial institutions (IFIs), the International Monetary Fund (IMF) and the World Bank (WB), were established also as specialized agencies of the UN, although they possess almost complete functional autonomy. The IMF promotes international monetary cooperation, while the World Bank supports international development. The WB is in reality a family of institutions that includes the International Bank for Reconstruction and Development, the International Development Agency, International Finance Corporation, the Multilateral Investment Guarantee Agency, and the International Centre for Settlement of Investment Disputes (ICSID). The IMF and WB family are seen to have contributed in distinct ways to the reduction of global poverty and the promotion of sustainable development. An International Trade Organization was also to be created in 1947 but the US Congress refused to ratify its charter. In its place the General Agreement on Tariffs and Trade (GATT) was adopted that successfully promoted free trade in goods.

Third, this period saw the UN play a critical role in norm-creation in diverse areas of international life. For instance, the normative architecture of human rights was adopted in this period. A large number of international human rights instruments that are either general in scope (e.g. the International Covenant on Civil and Political Rights, 1966) or concerned with the rights of particular groups of individuals (e.g. refugees, stateless persons, women, and children) were negotiated. Additionally, a number of non-binding declarations were adopted, the most influential being the Universal Declaration of Human Rights (UDHR, 1948).

Fourth, the UN assisted in the decolonization process. In 1960 the UN General Assembly adopted a landmark Declaration on the Granting of Independence to Colonial Countries and Peoples. The resolution inter alia declared that 'the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation'. The decolonization process led to the expansion of the membership of the UN and its specialized agencies and provided them with greater legitimacy.

Fifth, the UN system helped initiate a dialogue between the developed and developing countries on establishing a new international economic order. A number of landmark resolutions such as the Declaration on Permanent Sovereignty over Natural Resources (1962), the Program and Declaration of Action on a New International Economic Order (1974), the Charter of Economic Rights and Duties of States (1974), and the UN Declaration on the Right to Development (1985) were adopted. In 1964 the first UN Conference on Trade and Development (UNCTAD) was convened and institutionalized. The UN Industrial Development Organization (UNIDO) and UN Development Programme (UNDP) were established in 1966.

While these measures may not have reduced the North–South divide, they did facilitate the articulation of the concerns of third-world countries.

Sixth, the UN system made important contributions in the world of ideas that include the concepts of peacekeeping and sustainable development. The UN Intellectual History Project has recently documented these contributions.[13] A UN Emergency Force was established in 1956 in the face of the Suez crisis, which was among the early peacekeeping operations. There have been dozens of peacekeeping operations undertaken since. The UN system also organized conferences that gave its ideas concrete shape. For instance, the UN Conference on the Human Environment was organized in Stockholm in 1972. It led to the creation of the UN Environment Programme. The UN Conference on the Law of the Sea was also convened in this period leading to the adoption of the UN Law of the Sea Convention in 1982.

Seventh, the Cold War phase saw the first wave of regionalism. It saw the creation of several regional organizations including the Arab League, the Association of Southeast Asian Nations, the European Economic Community, the Organization of African Unity which later metamorphosed into the African Union, the Organization of American States, and security organizations such as the North Atlantic Treaty Organization (NATO).

The Post-Cold War Phase

The end of the Cold War resulted in many changes in the world of IOs. Most of these are viewed as positive developments by MIOS. First, the end of the Cold War led to the enhanced role of some organs of the UN like the Security Council. Thus, for example, 'from 1946 to 1989 only 3.4 percent of Council resolutions were adopted under Chapter VII of the UN Charter. This number rose to roughly 38 percent between 1990 and 2008. By 2008, about 62 percent of all UNSC resolutions were adopted under Chapter VII authority.'[14] Likewise, in the period 1945–90 only two sanctions regimes (against Southern Rhodesia and South Africa) were authorized. After the end of the Cold War, a large number of sanctions regimes were adopted leading to the 1990s being dubbed 'the sanctions decade'. Many of the new sanctions are targeted against individuals, groups, or entities.[15] This phase has also seen the transformation of the concept of peacekeeping. As Doyle and Sambanis observe, 'today peacekeeping is the multidimensional

[13] See UN Intellectual History Project, http://www.unhistory.org/.

[14] Michael Zürn, Martin Binder, and Matthias Ecker-Ehrhardt, "International Authority and its Politicization," *International Theory* 4/1 (2012): 69–106, 94.

[15] The Consolidated UNSC Sanctions List is available at https://www.un.org/sc/suborg/en/sanctions/un-sc-consolidated-list.

management of a complex peace operation, usually in the post-civil war context, designed to provide interim security and assist parties to make those institutional, material, and ideational transformations that are essential to make a peace sustainable'.[16]

Second, in this phase certain key IOs were established, the most significant of which was the creation of the World Trade Organization (WTO) in 1995. The WTO not only regulates international trade in goods but also international trade in services. Further, it enforces a global regime on intellectual property rights. The WTO is a powerful institution for it has a compulsory dispute settlement system that is backed by a system of retaliatory measures. It is seen as contributing in a significant way to the promotion of free and fair trade.

Third, IOs and their organs have engaged in increased law-making.[17] Thus, for example, the UNSC exercised a form of legislative power to establish criminal tribunals for former Yugoslavia and Rwanda acting under Chapter VII of the UN Charter.[18] UNSC Res. 1373 (2001) adopted in the wake of September 11 imposed a number of legal obligations on member states in combating terrorism. While these obligations were drawn from existing antiterrorism conventions, they became binding not because a state had become party to them but under the terms of the resolution.

Fourth, the post-Cold War phase has seen the greater judicialization of international relations.[19] Besides the International Court of Justice, the principal judicial organ of the UN, a number of other international tribunals have been created. On one count there are 'twelve international courts and arbitral bodies, nine regional bodies, and four hybrid criminal courts involving a mix of domestic and international judges'.[20] The prominent tribunals are the WTO Appellate Body and the International Criminal Court (ICC). The former promote the peaceful settlement of trade disputes while the ICC brings to justice individuals who have committed war crimes or crimes against humanity.

[16] Michael W. Doyle and Nicholas Sambanis, "Peacekeeping Operations," in *The Oxford Handbook on the United Nations*, ed. Thomas G. Weiss and Sam Daws (New York: Oxford University Press, 2007), 323–49.

[17] José Alvarez, *International Organizations as Law-Makers* (New York: Oxford University Press, 2005), 217.

[18] See UNSC Res. 827 (1993) and UNSC Res. 955 (1994) respectively. See generally, Daphna Shraga and Ralph Zacklin, "The International Criminal Tribunal for the Former Yugoslavia," *European Journal of International Law* 5 (1994): 360–80; Ramses Wessels, and Jan Wouters, "The Phenomenon of Multilevel Regulation: Interactions between Global, EU and National Regulatory Spheres," *International Organizations Law Review* 4 (2007): 169–201, 176.

[19] "In contrast to the mid-1980s, when only a handful of standing international courts were in place, twenty-five such courts have been identified … by the Project on International Court and Tribunals." Gregory Shaffer and Tom Ginsburg, "The Empirical turn in International Legal Scholarship," *American Journal of International Law* 106/1 (2012): 16.

[20] Ibid., 16, n. 70.

Fifth, recent decades have seen the increased role of NGOs in IOs. In 1948 a mere forty-one NGOs had ECOSOC consultative status. That number has gone up to 3,000 today.[21] The grant of 'consultative status has enabled NGOs to make significant contributions to international policy making'.[22] Even in the absence of consultative status, NGOs can participate in UN conferences through a process of registration. For example, it is estimated that 1,400 NGOs registered at the UN Conference on Environment and Development in Rio de Janeiro of which less than half had consultative status.[23]

Sixth, the role of the private sector in the UN system has grown in recent decades.[24] Christer Jonsson has observed that 'UN attitudes toward the business community have shifted dramatically … businesses are now seen as partners rather than threats'.[25] This development is viewed by MIOS as a benign development that uses the energy and resources of the private sector to meet the development goals of the UN system. Indeed, IOs see 'PPPs [public–private partnerships] solve the problems of scarce resources and eroding legitimacy'.[26]

Seventh, the post-Cold War phase has witnessed a second wave of regionalism attributed to 'global economic changes, the transformation of the Soviet Union and Eastern Europe, uncertainty over the outcome of the Uruguay Round of world trade negotiations, the European Union's deepening and enlargement, fear that a set of trade blocs was emerging, and new attitudes toward international cooperation'.[27] The functions of regional organizations vary greatly. Some organizations are devoted to greater economic cooperation (e.g. the North American Free Trade Agreement) and others to both economic and political cooperation. The second wave of regionalism has yet to abate. In fact today a 'region' has become an 'imagined community' delinked from geographical or cultural proximity. The impact of the regionalization of IOs is far from clear. Some see regional organizations as complementing the work of global IOs while others see these as reflecting local trends that may not dovetail with that of universal IOs.

Eighth, the UN has continued its work of organizing conferences on important issues facing mankind. For instance, in the area of environmental governance the UN organized the Conference on Environment and Development (1992), the World Summit on Sustainable Development (2002), and the Rio+10 Conference (2012). These conferences resulted in the creation of the Global Environment Facility in 1991 and the Commission on Sustainable Development (1992) that has since been replaced by the UN High-Level Political Forum on Sustainable Development (2013).

[21] Paul Wapner, "Civil Society," in *The Oxford Handbook on the United Nations*, ed. Thomas G. Weiss and Sam Daws (New York: Oxford University Press, 2007), 258.

[22] Ibid., 258. [23] Wapner, "Civil Society," 258.

[24] See Craig N. Murphy, "Private Sector," in *The Oxford Handbook on the United Nations*, ed. Thomas G. Weiss and Sam Daws (New York: Oxford University Press, 2007), 264–75.

[25] Christer Jönsson, "The John Holmes Memorial Lecture: International Organizations at the Moving Public–Private Borderline," *Global Governance* 19 (2013): 2.

[26] Ibid., 10. [27] Karns and Mingst, *International Organizations*, 151–2.

Ninth, the post-Cold War period has seen the emergence of 'international forums' such as the Group of 20 (G20) which brings together advanced and emerging economies to promote international economic cooperation. The leaders of the G20 first met in 2008 in the wake of the global financial crisis. The G20 continues to meet once a year to discuss challenges facing the international community. The creation of the G20 has meant that the ECOSOC no longer plays a central role in the coordination of international economic cooperation. However, in order to strengthen the latter's role, certain organizational changes were brought about in 2007 including the creation of a High Level Political Forum, Annual Ministerial Review, and a Development Cooperation Forum.

Finally, the post-Cold War phase has seen the reframing of the principle of sovereignty in the UN system. This reframing has assumed several forms. On the one hand, new concepts such as the 'responsibility to protect' have found their way into UN discourse, and on the other hand, the UN has come to assume the form of a surrogate state through establishing 'transitional' (or international) administrations as in the case of Kosovo and East Timor. A transitional administration has been defined as an exercise in state-building 'by assuming some or all of the powers of the state on a temporary basis'.[28] While 'transitional administrations' have been part of the history of the twentieth century (e.g. the mandate system under the League of Nations), it has now sought to be given new life and meaning. These developments around reconceiving sovereignty are seen as promoting human rights and responsible government.

Decline of Liberal Internationalism?

But despite the growing network and role of IOs in the post-Cold War period, some mainstream scholars see it as a phase that has witnessed a decline in liberal internationalism. According to Keohane, in view of 'the rise of China, India and other emerging economies, structures of power and interest have become more diverse' leading to reduced coherence of IOs and also the increasing difficulties 'to construct strong new institutions'.[29] Likewise, Jorge Castaneda writes that 'the possible accession of Brazil, China, India, and South Africa to the inner sanctum of the world's leading institutions threatens to undermine those institutions' principles and practices' because they are not sufficiently committed to a liberal international order.[30]

[28] Simon Chesterman, *You, The People: The United Nations, Transitional Administration and State-Building* (Oxford: Oxford University Press, 2004), 5.

[29] Keohane, "Institutional Liberalism," 134–5.

[30] Jorge G. Castaneda, "Not Ready for Prime Time: Why Including Emerging Powers at the Helm Would Hurt Global Governance," *Foreign Affairs,* September/October (2010): 112. He also observes (at 122) that "granting emerging powers a greater role on the world stage would probably weaken the trend towards a stronger multilateral system and an international legal regime that upholds democracy, human rights, nuclear nonproliferation, and environmental protection."

What Keohane and Castaneda appear to be lamenting is the loss of pre-eminence of Western states, in particular the United States, in the functioning of IOs. Indeed, arguably what they view as the lack of coherence is actually a liberating pluralism in the working of IOs. It is interesting that Keohane fails to acknowledge that the emerging powers are not opposed to the liberal international order, and thus that the coherence of IOs is far from being threatened. Indeed, rather than seeking to replace the liberal international order, emerging powers such as Brazil, China, and India want 'more authority and leadership within it'.[31] China, for instance, has greatly enhanced its engagement in and with IOs in the past decade.[32] This has brought it great benefits as for instance from its membership in WTO.[33] In other words, while the emerging powers would like important changes in particular regimes and to restructure IOs to their advantage, the idea is not to establish an alternative order. There is at least at present 'no competing logic to liberal internationalism'.[34] But Keohane and Castaneda are not alone in expressing concern about the decline of the liberal internationalism. Donald Puchala for instance expresses the same lament.[35] But unlike Keohane and Castaneda he traces the decline of liberal internationalism to 'a transatlantic rift over values that is threatening the group identity of the West, an essential element of Western hegemony'.[36] From the perspective of the Global South it can be confidently said that Puchala exaggerates the threat that the transatlantic rift poses to liberal internationalism; in key international economic organizations (IEOs) the United States and Europe are united in their approach to developing countries.

Critical Histories

The critical history of IOs is based on the view that 'institutions are not, as some liberals would have us believe, neutral arenas for the solution of common problems but

[31] John G. Ikenberry, "The Future of the Liberal World Order: Internationalism after America," *Foreign Affairs* May/June (2011): 57.

[32] "The past decades witnessed a transformation of four stages in China's attitude toward international organizations. First, firmly opposing international organizations; second, holding reserved caution about international organizations; third, joining international organizations actively; fourth, taking the leadership in many international organizations and initiating new forums and organizations": Zhihai Xie, "The Rise of China and its Growing Role in International Organizations," *ICCS Journal of Modern Chinese Studies* 4/1 (2011): 85.

[33] Ikenberry, "The Future of the Liberal World Order," 62.

[34] Ibid., 63.

[35] Donald J. Puchala, "World Hegemony and the United Nations," *International Studies Review* 7 (2005): 581.

[36] Ibid., 582.

rather sites of power, even of dominance'.[37] This section briefly narrates three alternative stories about the role of IOs in the post-1945 period: third-world, Marxist, and feminist histories of IOs.

Third-World Approach to IO History

In recent years, third-world scholarship on IOs has offered a critical history of their evolution and development from the standpoint of the lived experiences of third-world peoples. This view has principally been articulated in the last two decades by a second generation of third-world scholars in the field of international law, going by the name of Third World Approaches to International Law (TWAIL).[38] TWAIL calls for the decolonization of the history of IOs and offers a counter-narrative to the MIOS history of IOs in the post-1945 period.

First, TWAIL notes that Asian and African states had a marginal role to play in the shaping of post-Second World War institutions, including the UN system. The UN and its specialized agencies were established at a time when Asian and African states were colonies. The same was true of the early norm-creation activity. Indeed, the UDHR, a charter for freedom and dignity, spoke of the protection of human rights in non-self-governing territories or trust territories and thereby 'lent support to colonization and its discriminatory system'.[39]

Second, TWAIL points out that many post-1945 IOs reveal a profound continuity with their predecessors in the colonial era. In other words, a number of IOs have their roots in colonial ideas, categories, and practices. Thus, for instance, Antony Anghie has demonstrated how the IFIs perform the same function as the Mandate System of the League of Nations: producing knowledge about backward peoples in order to guide them to becoming developed (formerly 'civilized') states through following certain economic and social policies.[40] The concept of 'transitional' administration (e.g. in Kosovo, Iraq, and East Timor) also has a family resemblance with the colonial Mandate System.

[37] Andrew Hurrell, "Power, Institutions, and the Production of Inequality," in *Power in Global Governance*, ed. Michael Barnett and Raymond Duvall (Cambridge: Cambridge University Press, 2005), 56.

[38] The second generation of TWAIL scholars are sometimes called TWAIL II. For the difference between TWAIL I and TWAIL II see Antony Angie and B.S. Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflict," in *The Methods of International Law*, ed. Steven R. Ratner and Anne-Marie Slaughter (Washington, D.C.: American Society of International Law, 2004), 185–211; B.S. Chimni, "Towards a Radical Third World Approach to Contemporary International Law," *ICCLP Review* 5/2 (2002): 16–30.

[39] Emmanuelle Jouannet, *The Liberal-Welfare Law of Nations* (Cambridge: Cambridge University Press, 2012), 208.

[40] Antony Anghie, "Time Present and Time Past: Globalization, International Financial Institutions, and the Third World," *New York University Journal of International Law and Politics* 32 (2000): 243–90.

Third, TWAIL sees the history of IOs in the post-1945 period as facilitating a neocolonial project under US hegemony. The key organs or organizations in this respect have been the UNSC, GATT/WTO, IMF, and World Bank. These IOs have compelled third-world states to cede economic and political sovereignty to them.[41] The IFIs in particular have used the tool of conditionalities to make countries of the Global South follow neo-liberal economic policies to the advantage of corporate actors in the Global North.[42]

Fourth, TWAIL notes that MIOS neglects the history of the struggle of third-world nations and peoples against hegemonic states and organizations. There is thus little discussion of the efforts that led to the creation of new IOs like UNCTAD or UNIDO or of debates on how to strengthen ECOSOC in pursuing the development agenda. A third-world history would also certainly record the contribution of the non-aligned movement to the creation, strengthening, and democratization of IOs in addressing common problems facing humankind.[43] Instead, it has been said by one mainstream scholar that a role of the UN 'is to serve as a political-ideological sink for counter-hegemonic ideas and projects by ushering them into history's dustbin'.[44]

Fifth, TWAIL points out that the response to the attempts of third-world countries to reform the UN, especially its key body, the UNSC, and IFIs, has been excruciatingly slow. To take the case of reform in IFIs there has been, in the wake of the global financial crisis, a decision to allocate additional quotas and votes to countries like China and India.[45] But the United States will continue to have a percentage of votes that allows it to exercise a veto over critical decisions in the IMF and the World Bank.

Sixth, TWAIL notes with apprehension that the Western regional security organization NATO has unlawfully used force against third-world countries. The illegal use of force against former Yugoslavia (1999) and Afghanistan (2001–) are two instances.[46]

Seventh, TWAIL is concerned that international tribunals are often biased against third-world countries. For instance, the investment jurisprudence that has been produced by ICSID has been pro-investor, neglecting the environmental and

[41] B. S. Chimni, "International Institutions Today: An Imperial Global State in the Making," *European Journal of International Law* 15/1 (2004): 1–39.

[42] B. S. Chimni, "International Financial Institutions and International Law: A Third World Perspective," in *International Financial Institutions and International Law*, ed. Daniel D. Bradlow and David Hunter (The Netherlands: Wolters Kluwer, 2010), 31–63.

[43] Changavalli Siva Rama Murthy, "Non Aligned Movement Countries as Drivers of Change in International Organizations," *Comparativ* 23 (2013): 118–36.

[44] Puchala, "World Hegemony and the United Nations," 581.

[45] Chimni, "International Financial Institutions," 55 ff.

[46] See, for example, G 77 "Ministerial Declaration" adopted in September 1999 which "rejected the so-called right of humanitarian intervention, which had no basis in the UN Charter or in international law," http://www.g77.org/doc/Decl1999.html.

human rights concerns of third-world peoples.[47] In the case of the ICC, TWAIL is concerned that it is only indicting leaders of the Third World. It has overlooked the gross violations of human rights and humanitarian laws by Western leaders during the intervention in former Yugoslavia and wars against Iraq and Afghanistan.

Eighth, while recognizing the historical significance of greater civil society participation in deliberations of IOs, TWAIL concurs with the observation that 'well-organized and well-funded NGOs tend to be overrepresented whereas marginalized groups from developing countries tend to be highly underrepresented'.[48] This has negative connotations for the pursuit of the interests of poor and marginal groups in the developing world.

Ninth, TWAIL is sceptical of the benefits that come from IOs embracing public–private partnerships (PPPs). Take for instance two PPPs in the health sector, the Global Alliance for Vaccines and Immunization (GAVI) and the Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund).[49] Though these PPPs promote health services, 'they also illustrate a gradual downgrading of traditional IGOs'.[50] It is the Bill & Melinda Gates Foundation that 'has emerged as a major player in global health governance'.[51] In short, by increasing PPPs IOs 'run the risk of pursuing the agenda of private actors rather than that of their member states'.[52] The UN Global Compact initiative of Kofi Annan presented as an attempt to enhance Corporate Social Responsibility is also seen as 'bluewashing' the image of transnational corporations.

Tenth, TWAIL expresses concern that debates on the future role of IOs and the creation of a world state draws only on Western intellectual traditions. The usual reference is to Immanuel Kant and his classic work *Perpetual Peace* or in recent times to the work of David Held or Alexander Wendt. The writings of thinkers from the Global South, such as the work of Sri Aurobindo on human unity, are mostly neglected.[53]

Marxist History of IOs

The Marxist approach to the history of IOs shares common ground with TWAIL but sees it as tied in a more fundamental way to the forces of global capitalism. The approach that is most popular among left-inclined academics is that of Robert Cox.

[47] See generally, M. Sornarajah, *The International Law on Foreign Investment*, 3rd ed. (Cambridge: Cambridge University Press, 2010); UNCTAD, *Trade and Development Report, 2014* (New York: UN, 2014).

[48] Jönsson, "The John Holmes Memorial Lecture," 6.

[49] On GAVI see http://www.gavi.org/ and on the Global Fund see http://www.theglobalfund.org/en/.

[50] Jönsson, "The John Holmes Memorial Lecture," 12. [51] Ibid. [52] Ibid., 14.

[53] B. S. Chimni, "Retrieving 'Other' Visions of the Future: Sri Aurobindo and the Ideal of Human Unity," in *Decolonizing International Relations*, ed. Branwen Gruffydd Jones (Lanham: Rowman and Littlefield, 2006), 197–219.

He has used the work of the Italian Marxist Antonio Gramsci to advance the view that IOs support structures of capitalist hegemony:

> international organization functions as the process through which the institutions of hegemony and its ideology are developed. Among the features of an international organization which expresses its hegemonic role are the following: (1) they embody the rules which facilitate the expansion of hegemonic world orders; (2) they are themselves the product of the hegemonic world order; (3) they ideologically legitimate the norms of the world order; (4) they co-opt elites from peripheral countries; and (5) they absorb counter-hegemonic forces.[54]

In short, Cox argues that IOs are 'structures that provide the conditions for capitalism'.[55] The Marxist political theorist Nicos Poulantzas more specifically spoke of the class powers of IOs. In his view, IOs 'express and crystallize class powers'.[56] In the Marxist view, the global social forces that shape the agenda of contemporary IOs constitute an emerging transnational capitalist class (TCC). This class is defined by a set of common interests of the transnational fractions of the national capitalist classes in both the First and Third Worlds that gain from the accelerated globalization process.[57] As Ikenberry puts it in relation to emerging powers, 'internationalist-oriented elites in Brazil, China, India and elsewhere are growing in influence within their societies, creating an expanding global constituency for an open and rule-based international order'.[58] The TCC seeks to redefine the tasks of IOs, in particular IEOs, to push for a world economy in which goods, capital, and services can move unhindered across borders. In other words, IEOs are to facilitate the creation of a unified global economic space where uniform global standards apply as for instance in the domain of international property rights. In fact the prescription and enforcement of international property rights by the WTO is an example of the influence of the TCC over the normative agenda and working of IEOs. But there is no determinist logic at work. In the Marxist view, the function of IOs is not merely to advance the interests of one or other fraction of the global capitalist classes or of individual advanced capitalist states but to ensure the stability of the global capitalist system. This often requires that IOs serve the interests of subaltern groups and classes. Yet

[54] Robert W. Cox, "Gramsci, Hegemony, and International Relations: An Essay in Method," in *Gramsci, Historical Materialism and International Relations*, ed. Stephen Gill (Cambridge: Cambridge University Press, 1993), 62.

[55] "Interview with Robert W. Cox," *Globalisation, Societies and Education* 1/1 (2003): 22.

[56] Nicos Poulantzas, *Classes in Contemporary Capitalism* (London: Verso, 1978), 70. The Marxist perspective partly explains the reluctance of the former Soviet Union to engage with IOs. It looked at IOs through a class lens: "The social character of a particular international organization is determined by the class nature of the participating States and, ultimately, by the nature of their economic system and by relations among them formed on the basis of that system." G. I. Tunkin (ed.), *International Law: A Textbook* (Moscow: Progress Publishers, 1986), 186.

[57] On TCC see Leslie Sklair, *Globalization: Capitalism and Its Alternatives* (Oxford: Oxford University Press, 2002), 98; and William Robinson and Jerry Harris, "Towards a Global Ruling Class? Globalization and the Transnational Capitalist Class," *Science and Society* 64 (2000): 11–54.

[58] Ikenberry, "The Future of the Liberal World Order," 63.

broadly speaking, the history of each IO can be told as that of coming to terms with different phases of global capitalism. For instance, the World Bank has gone through different phases in the post-1945 period:

> Four distinct periods mark the history of the World Bank: the 'reluctant Banker' period of 1944–68; the Bank's 'rise to power' in the period of 1968–80 during which the calls for 'poverty alleviation' and meeting 'basic needs' for the 'absolute poor' reflected a new rhetorical turn in development; the 'debt and adjustment' period of 1980–89; and the 'green neoliberal' period from 1989 to the present.[59]

Each of these periods can be viewed as a response to the state of global capitalism. Thus, for instance, the second phase (i.e. 1968–80) represented an attempt to come to grips with the decolonization process and the demands of the developing world for addressing the concerns of its poor. The policy responses were, however, shaped by the neocolonial vision of the capitalist classes and states in the industrialized world.

Against this backdrop, the Marxist approach points to the limits of the possible reform of IOs and offers a possible explanation for the historical failure to bring about their serious reform. IOs crucial to sustaining the global capitalist system cannot be radically restructured to greatly benefit subaltern states and groups in the international system. For that the nature of global capitalism would have to undergo major transformation.

Feminist History of IOs

In recent times, feminist scholarship in the fields of international relations, international law, and international organization, has narrated the history of IOs from the standpoint of the life-world and interests of women. The feminist critique of IOs is both at the level of representation and participation and the gendered nature of categories and concepts that inform their work. Indeed, feminists underline the dialectical and dynamic relationship between the two. Thus, for instance, international law scholars Hilary Charlesworth and Christine Chinkin have documented 'the absence of women at senior levels in international institutions' and argued 'that the invisibility of women at the decision-making levels has affected the treatment not only of "women's" issues, but also the way all international concerns are understood'.[60] The under-representation of women in the UN is symbolized by the fact that there has been no woman Secretary-General as yet. While there have been conscious efforts made within the UN system to correct the situation, 'the advancement of women

[59] Michael Goldman, *Imperial Nature: The World Bank and Struggles for Social Justice in the Age of Globalization* (New Delhi: Orient Longman, 2006), 50.

[60] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000), 171.

has been glacial'.[61] As Charlesworth and Chinkin point out, 'equitable distribution of positions according to nationality continues to have a far greater priority than equitable distribution according to gender', raising 'issues of human rights'.[62] They have also noted that 'the general silence about women in discussions of UN reform has made the issue of sex and gender appear irrelevant to the process'.[63] Feminist scholars have recommended that women's participation should be enhanced in the UN and that international institutions and international power structures that keep out women be challenged.[64] Feminist scholars have also raised a range of questions with regard to the historical record of IEOs so far as the welfare of women is concerned. The key questions include:

> What is the role of the World Bank, the IMF, and the WTO in perpetuating gendered economic regimes? How does the international trade regime help construct gender in different countries and different economic sectors? How do transnational corporations, another set of regime agents, participate in gender constructions? What kinds of gender and other status hierarchies operate within international organizations and transnational corporations? To what extent do status hierarchies in these organizations correlate with gender hegemonies reproduced through global economic institutions? Why has the feminist movement had so little success in changing neo-liberal rhetoric and in breaking through organizational glass ceilings? Are institutional strategies in the organizations of economic governance more prone to cooptation than in other organizations?[65]

In the view of some feminist scholars, IEOs do perpetuate 'gendered economic regimes'.[66] In sum, the feminist history of IOs insists that gender justice be made central to any vision of the reform of UN system.[67]

Without contesting the active need to pursue the goal of gender justice, some feminist scholars have challenged overly pessimistic conclusions. In their view, since the declaration by the UN of International Women's Year and subsequently a Decade for Women (1976–85), 'considerations of gender have entered the mainstream of policy-making to a degree previously unimagined'.[68] Thus, for instance, the importance of women's participation in peace-building has been recognized in UNSC Resolution 1325 on Women, Peace and Security and affirmed by later resolutions.[69] The resolution called for the inclusion of a 'gender perspective' in post-conflict settlements, 'including the special needs of women and girls during repatriation and resettlement and for

[61] Ibid., 183. [62] Ibid., 185, 189. [63] Ibid., 197. [64] Ibid., 198.

[65] Elisabeth Prügl, "International Institutions and Feminist Politics," *Brown Journal of World Affairs* 10/2 (2004): 69–84, 81.

[66] Ibid. [67] Charlesworth and Chinkin, *The Boundaries of International Law*, 199.

[68] Gülay Caglar, Elisabeth Prügl, and Susanne Zwingel, "Introducing Feminist Strategies in International Governance," in *Feminist Strategies in International Governance*, ed. Gülay Caglar, Elisabeth Prügl (London: Routledge, 2013), 1–18, 1.

[69] The relevant UN Security Council Resolutions are UNSC Res. 1325 UN SCOR, 4213th mtg, UN Doc. S/RES/1325 (31 October 2000); UNSC Res. 1820 UN SCOR, 5916th mtg, UN Doc. S/RES/1820 (19 June 2008); UNSC Res. 1888 UN SCOR, 6195th mtg, UN Doc. S/RES/1888 (30 September 2009); and SC Res. 1889 UN SCOR, 6196th mtg, UN Doc. S/RES/1889 (5 October 2009).

rehabilitation, reintegration and post-conflict reconstruction'. In 2010, UN Women, the UN Entity for Gender Equality and the Empowerment of Women, was established and came into operation on 1 January 2011.[70] It is therefore said that there have been 'remarkable changes in gender regimes since the mid-twentieth century'.[71] Indeed, the Harvard scholar Janet Halley has used the term 'governance feminism' to describe the phenomenon of women coming to share power in the process of global governance.[72]

Emerging Themes

The critical histories of IOs raise a number of questions concerning the 'democratic deficit' that characterizes their functioning and ways of not only making them more representative but also more accountable for their acts of omission and commission. Indeed, there is 'a new level of public contestation of international institutions'.[73] In fact an important segment of the anti-globalization protests have IOs as their target, in particular the IFIs and the WTO. There is growing public consciousness in the developing world of the loss of policy space to IOs. However, not all students of IOs accept the view that domestic democracy is diminished. For example, Keohane, Macedo, and Moravcsik have argued that participation in multilateral institutions 'can enhance the quality of domestic democracy'.[74] In this view even when IOs are 'captured by special interests, or operate in a nontransparent and unaccountable fashion'[75] it is good to remember that 'compared to most democratic states multilateral institutions are weak' and 'enjoy relatively little autonomy'.[76] They conclude that multilateral institutions generate a 'net positive impact'.[77] On the other hand, third-world, left, and feminist critics perceive IOs as unresponsive to the concerns of the poor world or of women and are therefore suffering from a legitimacy crisis. They argue for greater accountability and responsibility of international institutions.

[70] See UN Women, http://www.unwomen.org/en/about-us/about-un-women. UN Women incorporates four existing parts of the UN system dealing with women and has been styled as the new UN "gender architecture." Hilary Charlesworth and Christine Chinkin, "The New United Nations 'Gender Architecture': A Room with a View?," in *Max Planck Yearbook of United Nations Law*, ed. A. von Bogdandy, A. Peters, and R. Wolfrum (2013), vol. 17, 1–60, 3–4.

[71] See Charlesworth and Chinkin, "The New United Nations 'Gender Architecture': A Room with a View?"

[72] Janet Halley, Prabha Kotiswaran, and Hila Shamir, "From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism," *Harvard Journal of Law & Gender* 29 (2006): 335–423.

[73] Zürn, Binder, and Ecker-Ehrhardt, "International Authority," 78.

[74] Robert O. Keohane, Stephen Macedo, and Andrew Moravcsik, "Democracy-Enhancing Multilateralism," *International Organization* 63 (2009): 2.

[75] Ibid., 22–3. [76] Ibid., 23. [77] Ibid., 27.

The broad area of accountability of IOs has been sought to be addressed by liberal legal scholars by bringing to bear on them the principles of what has been called global administrative law (GAL). Indeed, GAL has been described as 'the most notable attempt' to establish accountability of IOs.[78] GAL has been defined as:

> comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.[79]

The problem with the GAL initiative, welcome as it is, is that it is confined to the procedural dimensions of the functioning of IOs. It does not concern itself with the substantive rules that IOs preside over and whose revision is more fundamental to the interest of subaltern states and groups.[80] However, the extensive GAL literature does identify situations and instances in the functioning of IOs where there is a lack of effective participation and accountability. It also advances principles and best practices that can help improve the accountability of IOs.[81]

A final theme that is beginning to receive some attention is whether IOs can be considered as the building blocks of a world state. Alexander Wendt has argued from a philosophical/teleological perspective that a world state is inevitable, albeit he has not considered the forms it may assume.[82] It is unlikely that a world state will emerge in the near future as a single consolidated entity. But arguably a fragmented but functional world state is already in the process of evolving comprising a network of IOs operating in diverse fields of international life backed by the monopoly of the Global North over the legitimate use of force.[83] The emergence of a nascent world state is also reflected in the fact that international law is slowly being transformed into internal law.[84] In sum, while IOs are a derivate subject of international relations they are collectively assuming a primary character. If the future world state is democratic, federal, and just there would be less reason to complain. But at present the emerging world state has an imperial character.

[78] Klabbers, "International Institutions," 238.

[79] Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, "The Emergence of Global Administrative Law," *Law and Contemporary Problems* 68 (2005): 17.

[80] B. S. Chimni, "Co-option and Resistance: Two Faces of Global Administrative Law," *New York University Journal of International Law and Politics* 37 (2005): 799–829.

[81] See website of the Global Administrative Law Project at http://www.iilj.org/gal/.

[82] Alexander Wendt, "Why a World State is Inevitable," *European Journal of International Relations* 9/4 (2003): 491–542.

[83] B. S. Chimni, "International Institutions Today."

[84] Anne-Marie Slaughter and William Burke-White, "The Future of International Law Is Domestic (or, The European Way of Law)," *Harvard International Law Journal* 47/2 (2006): 327–52.

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The Formation of International Organizations and India: A Historical Study

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Abstract
As the clash of aspirations increased among European countries, a European 'civil war' started in 1914, which engulfed the whole world. With all the terrible destruction and loss of life, it was felt that an international organization must be established to avert war in future. At the Paris Peace Conference in 1919, the British government succeeded in gaining separate representation for its dominions, including India. This created a rather anomalous situation, since a dependency of a foreign power, a colony which could not control its internal affairs, was accepted as a sovereign state by an international treaty. Europe had hardly recovered from the First World War in the late 1920s when it drifted towards a second holocaust in 1939. India became a founding member of the United Nations in 1945, even though it was still under British rule, participating in the historic founding conference. But Indian national public opinion was neither very hopeful nor enthusiastic about the conference on the new international organization. Not only India, which was not even independent at that time, but Asian countries as such played a very small and insignificant role in the formulation of the UN Charter.

Key words
British India; founding of international organizations

1. International law: product of European states and applicable only among them

Although international law is presumed to be applicable among all states, east or west, north or south, big or small, it is only a recent phenomenon, not older than the United Nations itself. Before the Second World War, international law was supposed to be not only a product of the European states and based on their customs and treaties, but applicable only among them – that is, European states or states of European origin. It was only in 1856 that an extra-European country, Turkey, was admitted into the family of civilized states and later, at the beginning of the twentieth century, that Japan forcefully entered the so-called exclusive European club after defeating China and Russia.[1]

As one of the foremost authorities on modern international law, Oppenheim, points out, 'There were numerous states outside the international community' and 'international law was not as such regarded as containing rules concerning relations

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1 R. Anand, 'Family of "Civilized" States and Japan: A Story of Humiliation, Assimilation, Defiance and Confrontation', in R. Anand (ed.), *Studies in International Law and History* (2004), 51.

with such states, although it was accepted that those relations should be regulated by the principles of morality'.[2]

As late as the First World War, we are told, 'the position of such states as Persia, Siam, China, Abyssinia, and the like was to some extent anomalous'. Although there was considerable international intercourse between these states and states of Western civilization – treaties had been concluded, full diplomatic relations had been established; China, Japan, Persia, and Siam had even taken part in the Hague Peace Conferences in 1899 and 1907 – since they belonged to 'ancient but different civilizations there was a question how far relations with their governments could usefully be based upon the rules of international society'.[3]

The result of the non-recognition of Asian and African states was that practically no conduct towards their peoples, or aggression on their territories, could be questioned according to the European law of nations. As John Stuart Mill, the great British empire builder, said in 1867,

> To suppose that the same international customs, and the same rules of international morality, can obtain between one civilized nation and another and between civilized nations and barbarians is grave error, and one which no statesman can fall into . . . To characterize any conduct whatever towards a barbarous people as a violation of the law of nations, only shows that he who so speaks has never considered the subject.[4]

Thus it was pointed out that 'the conquest of Algeria by France was not . . . a violation of international law. It was an act of discipline which the bystander was entitled to exercise in the absence of police.'[5]

2. The clash of aspirations among European states leads to conflicts and wars

As the clash of aspirations between European countries increased, peace came more and more to depend on the so-called balance of power and an uneasy equilibrium of forces. The scramble for colonies as protected overseas markets not only led to repeated clashes in Asian and African regions, but also contributed to the forging of conflicting alliance systems.

Such a situation could not last for ever. Change is beyond any law and is the law of life. The intense rivalry between European states over the extension of their rule and colonization in extra-European areas led to terrible tensions and an arms race supported by military–industrial complexes in Europe. Two Hague peace conferences, organized under the auspices of the tsar of Russia, to call a halt to the arms race did not help much. As the clash of aspirations between European countries increased, a European 'civil war' started in 1914, which engulfed the whole world and was called the First World War.

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2 L. Oppenheim, *International Law* (1905), 58.
3 Ibid., at 89.
4 Quoted in B. Roling, *International Law in an Expanded World* (1960), 29.
5 J. Lorimer, *The Institutes of International Law: A Treatise of the Jural Relations of Separated Communities* (1883), 161; see also ibid., Vol. II, 28, for a defence of war against China and Japan to compel them to open their ports for European trade.

With all the terrible destruction and loss of life, which left Europe in ruins, it was believed that an international organization must be established to avert war in future. At the Paris Peace Conference in 1919, US President Woodrow Wilson was in the forefront of statesmen who suggested the establishment of a League of Nations to avoid war in future.

3. The Hague peace conferences

It may be recalled that the two Hague conferences called to avert war had very limited success. Mutual suspicion between European states was so strong and pervasive that nobody could think in terms of reductions of armaments or peaceful settlement of disputes.[6] A Permanent Court of International Arbitration was established for the peaceful settlement of international disputes (which was in truth neither permanent nor a court, but only a list of names from which the parties, if they decided to settle their dispute through arbitration, could choose their arbitrators). The Second Hague Peace Conference, called in 1907, did not add much and had to be satisfied with the same Permanent Court of Arbitration. War continued to haunt Europe. The preoccupation of European international law with war may be gauged from the fact that of the 14 documents signed at the Second Hague Peace Conference in 1907, only two dealt with peaceful relations among states. The other 12 dealt with the problems of war.[7]

At the First Hague Peace Conference in 1899, only 26 states were represented, including two from the Americas – the United States and Brazil –and five from Asia – China, Japan, Persia, Siam, and Turkey, which were taking part in a major international conference for the first time. With the participation of other South American states, the number was increased to 44 at the Second Hague Conference in 1907. India was lost as 'British India', and Africa was unrepresented because it was outside the 'charmed circle'.

4. 'British India' and the League of Nations

Whatever their international legal status earlier, with the establishment of British rule in India some 500-odd Indian princely states were all merged into the British Empire and lost their identity. They were only a part of the British Empire under international law, but the subordination of India was complete and absolute. The India Office in London conducted India's external relations, and systematic attempts were made by the British authorities to prevent India from any responsible participation in world affairs.

The First World War, however, changed this position. For its own reasons – obviously to get more than due representation and voting strength – the British

6 G. Best, 'Peace Conferences and the Century of Total War: The 1899 Hague Conference and What Came After', (1999) 75 *International Affairs* 619.

7 G. Tunkin, 'International Law and Peace', in *International Law in a Changing World by Thirteen Experts* (1963), 75.

government wanted to achieve separate representation for its dominions, including India, at the 1919 Paris Peace Conference, and, over the objection of several other participants, it succeeded. India, like the other British dominions – Australia, Canada, New Zealand and South Africa – gained representation in its own right at the conference and its plenipotentiaries actively participated in its deliberations. This created a rather anomalous situation, since a dependency of a foreign power, a colony which could not control its internal affairs, was accepted as a sovereign state by an international treaty. Indian plenipotentiaries, holding full power on behalf of India, took part in the discussions and signed the peace treaties, along with the representatives of other sovereign states, on the basis of 'legal equality'. India thus acquired a right to become an original member of the League of Nations (since the Covenant of the League of Nations was part of the Peace Treaty), and, for the first time in the modern period, came into direct and formal contact with the outside world.[8]

4.1. India's anomalous position under international law

It is indeed doubtful that 'international law contains any objective criteria of international personality'.[9] But it is generally believed that 'the very act or practice of entering into international agreements is sometimes the only test that can be applied to determine whether an entity has such a personality'.[10] Although Lord McNair asserts that the 'criterion is really international recognition',[11] according to Schwarzenberger 'an intermediate state on the road from dependence to independence may also lead to a stage of limited international personality'.[12] In fact, he states that 'international personality may be accorded provisionally or definitely, conditionally or unconditionally, completely or incompletely, and expressly or by implication. The scope of the international personality granted is a matter of intent.'[13] Normally, when states lose their international personality, they are referred to as vassal states. The Indian princely states, under the paramountcy of the British crown, provided the best example of vassal states.[14]

But India's position from 1919 to 1947, when it was declared to be and recognized as an independent state, was 'that of an anomalous international person'.[15] As Oppenheim explained,

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8 India's position changed only after the First World War, when its tremendous contribution to the war effort led it to become a member of the British Imperial Conference in 1917, something earlier strongly opposed by the white British dominions. D. Verma, *India and the League of Nations* (1968), 1–9. It may also be mentioned that India had already become a member of such international organizations as the Universal Postal Union in 1876, the Conference of the International Union for the Publication of Tariff Customs in 1890, and the International Telegraph Conference in 1912. Ibid., at 10.

9 O. Lissitzyn, 'Efforts to Codify or Restate the Law of Treaties', (1962) 62 *Columbia Law Review* 1166, at 1183–4.

10 Ibid.

11 A. McNair, *The Law of Treaties: British Practice and Opinions* (1938), 67, 75–6.

12 G. Schwarzenberger, *A Manual of International Law* (1967), I, 61.

13 Ibid., at 70.

14 T. Poulose, 'India as an Anomalous International Person (1919–1947)', (1970) 44 *British Yearbook of International Law* 201, at 202.

15 Ibid., at 204.

> The position of India as subject of international law was for a time anomalous. She became a member of the League of Nations; she was invited to the San Francisco Conference of the United Nations . . . She exercised the treaty-making power in her own right. However, so long as the control of her internal and external relations rested ultimately with the British Government and Parliament, she could not be regarded as a sovereign state and a normal subject of international law. In 1947, she became a fully self-governing Dominion and independent state.[16]

But after 1919 India began to function as a separate entity in its external relations. As far as membership of the League was concerned, at the peace conference President Wilson proposed that 'only self-governing states shall be admitted to membership of the league; colonies enjoying full power of self-government may be admitted'; he said that although he had great admiration for India, 'the impression of the whole world is that she is not self-governed, that the greater part is governed by the laws of Westminster, and lesser part is governed by the Princes whose power is recognized and supported by the British government'.[17] But in response the British government representative, Lord Robert Cecil, assured the conference that 'the British Government is trying just as rapidly as possible to advance India into a self-governing colony; and anything to happen which would exclude India would be unfortunate'.[18] In any case, it was pointed out that since India had signed the peace treaty (which also included the Covenant of the League of Nations), India could become a member of the League independently of any condition which might be laid down concerning subsequent membership.[19] Ultimately Britain succeeded, and India was included among the original members of the League,[20] although Miller called it 'an anomaly among anomalies'.[21] Out of 31 original members of the League, India was the only state which was not self-governing.[22]

It is significant to note that it was India, and not 'British India', which was admitted to the League of Nations. It may be recalled that India was divided into two parts – British India and 562 princely states, which were under the suzerainty of the British crown. But at the peace conference it was felt that it was 'India', and not 'British India', without the princely states, which should become member of the League; otherwise the Indian states would remain out of the orbit of the League – except to the extent that they could be regarded as represented through the British government. They could not be eligible for separate membership as they were precluded from foreign relations. Thus at the Paris Peace Conference and in the Covenant of the League of Nations, India was accepted and recognized as a composite state. However, this gave the princes an opportunity to be represented on the Indian delegation and every year the Indian delegation included one of the ruling princes as India's delegate. In fact,

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16 L. Oppenheim, *International Law*, ed. H. Lauterpacht (1955), 209, n. 4.
17 Quoted in Verma, *supra* note 8, at 16.
18 D. Miller, *The Drafting of the Covenant* (1928), I, at 164–5.
19 Ibid., at 166.
20 Miller, *supra* note 18, II, at 261; see also Verma, *supra* note 8, at 1–44, for an exhaustive discussion of the whole controversy about India's membership of the League of Nations.
21 Miller, *supra* note 18, at 493; Verma *supra* note 8, at 20.
22 Verma, *supra* note 8, at 21.

at the Paris Peace Conference, it was a prince, the maharaja of Bikaner, who signed the Treaty of Versailles as one of the plenipotentiaries to act on behalf of India.[23]

4.2. Indian national opinion against the League of Nations

Membership of the League of Nations was not something which Indians liked or appreciated. India was seething with political unrest after the First World War and the Indian nationalist movement, seeking India's independence, was gaining momentum. Nationalist opinion in India felt that the British were merely trying to 'hoodwink and camouflage' world opinion regarding the real state of affairs in India. As an Indian member of the Legislative Assembly of India, M. Asaf Ali, said,

> We became a member of the League of Nations at a time when the victorious powers were trying to rob the vanquished powers of their colonial possessions. That could not be done easily . . . because unfortunately at that time, President Wilson . . . was thinking in higher terms and the victorious wanted to pacify him. They could not justify swallowing . . . practically half of Africa without showing some reasonable position as far as they themselves were concerned in their relationship to India. It was just before then that we received in India a message from His Majesty King George that we had the beginning of *swaraj* (self-rule) in India. This message was flashed across the world, and it was under those circumstances, to pacify the powers of the world, that India was made an original member of the League. All these facts were made to present a wholly camouflaged state of affairs to the world, and this is how we became a member of the League of Nations.[24]

4.3. Opposition by the United States

But in addition to Indian national opinion, the membership of India and other British dominions of the League of Nations was strongly resented in the United States. Thus the *Majority Report of the Committee on Foreign Relations* of the US Senate stated,

> Great Britain now has under the name of the British Empire one vote in the Council of the League. She has four additional votes in the Assembly of the League for her self-governing dominions and colonies which are most properly members of the League and signatories to the treaty. She also has the vote of India, which is neither a self-governing Dominion nor a Colony but merely a part of the Empire and which apparently was simply put as a signatory and member of the League by the peace Conference because Great Britain desired it.[25]

It was stressed in the US Congress that a League vote for India was absolutely and completely a second vote for Britain, since India was

> absolutely and exclusively under British control. When other British colonies signed the preliminary Covenant they signed through native statesmen. When India signed, she signed through 'The Right Honorable Edwin Montagu, Member of the British Parliament, and the King's Secretary of State for India.' . . . The Maharaja of Bikaner, who signed below, was only a rubber-stamp, because these native princes are specifically barred from peace-making authority.[26]

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23 Ibid., at 239–41.
24 *Legislative Assembly Debates in India* (1936), I, at 895–6; also quoted in Verma, *supra* note 8, at 25.
25 Quoted in Poulose, *supra* note 14, at 207; see also T. Poulose, *Succession in International Law: A Study of India, Pakistan, Ceylon, and Burma* (1974), 23 ff.
26 Quoted in Poulose, *supra* note 14, at 207.

Senator James A. Reed from Missouri, who opposed the United States joining the League, argued that the United Kingdom, by including the dominions and India in the League, would have six votes, as against a single vote for the United States and other members, which was totally unreasonable. Referring specifically to India, he said,

> India would have a vote in the League. Is that the vote of an independent democracy? Eleven hundred Britishers constitute the governing class in India, where there are 290,000,000 people. I wonder if that Government . . . is entitled to a representation as an independent people. Does he doubt that those 1,100 Britishers, all of them officers of the Crown, will fail to do the bidding of the Imperial Government of the Empire?[27]

Senator Norris ridiculed the British claim, pressed at the peace conference, that India was democratically governed. Referring to the Jallianwala massacre at Amritsar, he said,

> India furnished more than a million men upon various battle fronts on behalf of England's cause, and when the soldiers of India went home, imbued with a spirit of liberty, believing in proclamations of self-determination that were made by England and her Allies, believing thereby that she had fought to make the world more free and that in the end she might share the freedom; when those soldiers went home and undertook to demand it in a peaceable assembly, they were shot down in cold blood by British machine guns.[28]

President Wilson, in a speech at CheyenneWyo Ming, referred to India's vote:

> The only other vote given to the British Empire is given to that hitherto voiceless mass of humanity that lives in the region of romance and pity that we know as India. I am willing that India should stand up in the Councils of the world and say something.[29]

But that was just not possible. Even after India's admission into the League of Nations, Britain completely controlled its external relations. From the constitutional point of view, India was still 'an integral part of the British Empire'.[30] A. B. Keith observed,

> The justification for League membership was autonomy, it could fairly be predicated of the Great Dominions; of India it had no present truth, and it could hardly be said that its early fulfillment was possible. In these circumstances it would have been wiser candidly to admit that India could not be given then a place in the League, while leaving it open for her when autonomous to be accorded distinct membership . . . As it is, in the League India's position is frankly anomalous, for her policy is determined and is to remain determined indefinitely by the British Government.[31]

While the dominions enjoyed freedom of action with respect to policy matters affecting them in the League as well as in other international organizations, India did not have much say on major policy matters or political questions affecting it or the British Empire.[32] Some Indian nationalist leaders, including the Indian National

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27 *US Congressional Record*, Vol. 59, 2354, quoted in Verma, *supra* note 8, at 26–7.
28 *US Congressional Record*, Vol. 59, 3569.
29 Quoted in Poulose, *supra* note 14, at 207.
30 L. Sundram, *India in World Politics* (1944), 27.
31 A. Keith, *Constitutional History of India, 1600–1935* (1936), 473.
32 P. Noel-Baker, *The Present Judicial Status of the British Dominions in International Law* (1929), 13–14.

Congress, urging the application of the Wilsonian principle of self-determination, appealed to the United States to reject the Versailles Treaty. A respected Indian national leader, Lala Lajpat Rai, asked the American public to reject the Covenant because the League of Nations was a '"fraud" and was meant for the "perpetuation of imperialism"'.[33]

5. India's achievement of international status?

It is interesting to note that although India had not been formally recognized as an independent state by any other member of the family of 'civilized' countries, was not a self-governing member of the British Commonwealth of Nations, and was committed to the First World War by the unilateral declaration of the British government, several British publicists argued that India had achieved an international status because of its membership of the League of Nations. Thus Professor A. B. Keith said that membership of the League gave India 'quasi-independence in her international relations' and that therefore India had a definite measure of international status.[34] W. E. Hall had no doubt that the British self-governing dominions and India had acquired something of an international personality through the League, 'but how much is not so evident'.[35] Oppenheim felt that India stood in a special position. By virtue of its membership of the League, India, he said, 'certainly possesses a position in international law'. 'It is *sui generis*', he maintained, writing in 1928, 'and defies classification'.[36]

With its newly acquired status India participated in the Washington Conference on Naval Armament in 1921, and its delegate, Srinivas Sastri, on 6 February 1922 signed the Washington treaty, which was separately ratified by the British emperor on India's behalf. Further, as a member of the League, India was automatically admitted to the International Labour Organization, the Permanent Court of International Justice, the Committee of Intellectual Co-operation in Paris, the International Institute of Agriculture, and several other League or semi-League organizations. India was represented on its own at almost every international conference after 1920. India also signed numerous multilateral treaties, including the Kellogg-Briand Pact of 1928.[37] Although India was still a colony and part of the British Empire, it started participating, albeit through representatives selected by the British government in India, in international conferences and signing treaties as a member of the international community. This was surely helpful to some extent. As the Report of the Indian delegation to the Ninth Session of the Assembly of the League (1928) pointed out,

> Nothing that we have said should be taken as supporting the view that the advantages which India already derives from the League are negligible. These advantages have

33 See also Verma, *supra* note 8, at 27–9, for more discussion on India's membership and reaction in the US Senate.
34 A. Keith, *Sovereignty of the British Dominion* (1929), 327, quoted in Verma, *supra* note 8, at 29.
35 W. E. Hall, *A Treatise on International Law* (1924), 35
36 L. Oppenheim, *International Law, A Treatise* (1928), I, 195.
37 For numerous other conferences India attended and treaties that it signed, see Verma, *supra* note 8, at 33–6.

always, on the contrary, been considerable and they are becoming more so. They include in particular a degree of international status which India would not now enjoy, nor be able to obtain, if her separate signature to the Treaty of Versailles had not made her an original member of the League.[38]

6. The demand for self-governing status

India's membership of the League and its participation in international affairs prompted several Indian statesmen to demand a self-governing status like that of other British dominions. A. B. Keith said that 'by securing admission of India to the League, the British Government bound itself to the task of creating a self-governing India'.[39] Pointing to India's anomalous position, Phiroz Sethna, an Indian member of the Council of State in India, said in 1930, 'India cannot take her rightful place in international affairs unless she has her rightful place as a nation here in India. Until that is done Indians will regard their representation in the League of Nations as a mockery.'[40]

Following the repeated wartime declarations of Allied leaders, especially President Wilson, that the war was being fought to safeguard democracy and the principle of self-determination, some Indian political leaders were excited and hopeful during the First World War about India's independent status in the post-war settlement.[41] But India's enthusiasm abated when the people saw the imperialistic attitude of the British Government. It was an alien bureaucratic, autocratic government that obtained membership, and not the self-governing India which the Indian leaders had imagined. As long as India was ruled by the British, it mattered little what happened in the outside world. Indians were mainly interested in their freedom. When the United States refused to join the League, they were convinced there was something radically wrong with the League.

There was strong criticism and resentment of the manner in which India was represented. India's representatives at the League and other international conferences were nominated by the Secretary of State for India, or by the British government, or, at most, by the British Viceroy in India.[42] The so-called 'representatives of India', it was pointed out by Indians, had 'always been the nominated tools and mouthpieces, megaphones and microphones of the British Government', and this was considered to be a 'shameful and disgraceful position with which no self-respecting Indian could be happy'. Indian delegations, it was demanded, should not be represented, or at least not always led, by Englishmen. India, it was said by Indian nationalist leaders, 'must be represented by the people, by members elected by the Central legislature. If we are not in a position to do this there is no use of India taking part in the League

38 Quoted in ibid., at 36.
39 A. Keith, *A Constitutional History of India* (1933), 468.
40 Quoted in Verma, *supra* note 8, at 39.
41 Bal Gangadhar Tilak even wrote a letter to Georges Clemenceau, the president of the Peace Conference, outlining India's prospective role as a leading Asian power in post-war world affairs. Ibid., at 270.
42 *India and the United Nations: Report of a Study Group Set up by the Indian Council of World Affairs, Prepared for the Carnegie Endowment for International Peace* (1957), 4.

of Nations.'[43] A typical comment on the issue of India's representation in the League was,

> India may be an original member of the League of Nations, but all the world knows that this means an additional voice and vote for the British Foreign Office. The people of India have no say in the matter and their so-called representatives are nominated by the British government.[44]

To many Indians the League of Nations was nothing more than an instrument of imperialism, a 'society for the exploitation of the east and protection of the west'. Instances of Britain's conduct in Egypt and outrages in China and Iraq, and in some of its colonies, were sufficient to prove the utter helplessness of the colonized, oppressed peoples under the rule of the League. The League appeared to Indians as a sort of balance of power or alliances between European states for the maintenance of the status quo. Although the League talked of honour and justice between nations, as Jawaharlal Nehru said,

> [I]t does not enquire whether existing relationships are based on justice and honour . . . The dependencies of an imperialist power are domestic matters for it. So that, as far as the League is concerned, it looks forward to a perpetual dominance by these powers over their empires.[45]

The League had not accepted the principle of self-determination outside Europe. The mandate system of the League in India's view was nothing more than 'colonialism' and 'oppression' of the territories taken from Germany and Turkey and given to the imperialist powers, where conditions had further deteriorated. A leading newspaper in India said,

> The League's Mandates can be otherwise described as the control of the European powers over the weaker nationalities in Asia and Africa and from our experience of such control in Egypt, India and elsewhere it can only be said that incessant strife, racial bitterness and intrigues . . . are the almost inevitable concomitants of the League of Nations.[46]

The League was said to be mainly an organization of the white peoples and it worked primarily for the European countries and their problems. While the League took prompt action in the Graeco-Bulgarian dispute, it ignored Asians altogether. 'Whites must not fight Whites – this is the business of the League to see', said an Indian newspaper on 24 March 1927:

> But the importance of the League is nowhere [more] marked than when Asiatic nations have appealed for protection against white imperialism. The bombardment of defenseless Nanking by British and American warships has not been challenged by the League.[47]

The East, it was thought, was deliberately ignored. 'It was not surprising', said an Indian political journal, 'that the League had in no way interfered to prevent war in

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43 Several Indian leaders quoted in Verma, *supra* note 8, at 270 ff.
44 *India and the United Nations, supra* note 42, at 4.
45 J. Nehru, *Glimpses of World History* (1942), 682; see also *India and the United Nations, supra* note 42, at 5.
46 *Anandabazar Patrika* (Calcutta), 23 June 1921, also quoted in *India and the United Nations, supra* note 42, at 7.
47 *Anandabazar Patrika* (Calcutta), quoted in *India and the United Nations, supra* note 42, at 8.

Syria or put a stop to recent British aggression in China for the sufferers there were Asiatics and not Europeans'.[48] The failure of the Disarmament Conference and the League's utter inability to protect China and Abyssinia from the aggression of Japan and Italy respectively caused feelings of disappointment and revulsion among the Indian people, and there were demands for India's withdrawal from the League, and even the liquidation of the League.[49]

Although in theory India's membership of the League was based on the principle of sovereign equality of states, it was really meant to help the British gain more weight in the League. The fact that India and the British dominions – Australia, Canada, New Zealand, and South Africa – which appeared for the first time as members of the international community, did not figure in their proper alphabetical place among other signatories, but were grouped together under the rubric of the 'British Empire', clearly showed that they were not regarded as independent sovereign states. Article 1 of the Covenant, permitting 'any fully self-governing State, Dominion or Colony', to become a member of the League, was evidently designed to take account of their special status.[50] India by and large spoke at Geneva in 'her master's voice'. Britain did not want India to contest a non-permanent seat on the Council of the League. The practice of giving an Indian prince representation, first at the peace conference and later in the annual sessions of the League Assembly, aroused the suspicion of the Indian people and, it was felt, was meant to emphasize the political disunity of the country, using the princes against the rising tide of Indian nationalism. India's financial contribution was by far the largest of any of the non-permanent members of the Council, not because India was a rich country but despite the poverty of its vast population. On the other hand, very few Indians had been appointed to the League secretariat.[51]

7. The failure of the League of Nations

The primary purpose of the League was to preserve peace, something it could not do. From the beginning it was hampered by the absence of the United States. Symptoms of weakness soon appeared, and were accentuated towards the end of the first decade of the League's existence. Only seven Asian and African countries, some of them mere European colonies – China, Japan, Siam, Persia, British India, Liberia, and South Africa – were included among the original 45 members of the League, and five – Afghanistan, Egypt, Ethiopia, Iraq, and Turkey – subsequently joined it. Although the League gave the first opportunity to such countries as Afghanistan, Egypt, Iraq, and India to appear on the modern international stage, its centre of gravity remained western Europe.

48 *Modern Review* (1927), XLI, 2, at 255.
49 Indian Delegation Report, 1935, *Gazette of India*, 21 March 1936, at 225; see also *India and the United Nations*, *supra* note 42, at 10–11.
50 E. Carr, *International Relations between the Two World Wars (1919–1939)* (1950), 254.
51 Verma, *supra* note 8, at 277–8.

8. The Second World War and the freedom movement in India

Europe had hardly recovered from the First World War when in the late 1920s it drifted towards the second holocaust in 1939. If quarrelling and fighting Asians could not withstand the pressure of aggressive European states in the eighteenth and nineteenth centuries, Europe could not remain unaffected by the continued bickering and wars among European states. Asian peoples were also not expected to be subdued when they came to know and understand Europeans and their weaknesses from close quarters. Several Indians, like other Asians, had gone to Europe and had been educated in their universities. They realized that the injustices which had been committed against Asians were being continued. Under the leadership of European-educated dynamic Indian leaders, there had started a strong freedom movement in India. All the atrocities committed by British rulers could not contain this movement and suppress the new demands for independence and self-rule.

When Britain declared war on Germany on 3 September 1939, India was automatically involved. Britain was naturally anxious to utilize India's abundant resources for the prosecution of the war. But the Indian political leaders, while sympathetic to the cause of democracy and freedom for which the Allied powers said they were fighting, made it clear that India and its people should not, and could not, be expected to join up and help in any war until they were granted self-rule and independence. In fact they complained that Indian troops had earlier been

> sent abroad for imperialist purposes and often to conquer or suppress other peoples with whom we had no quarrel whatever, and with whose efforts to regain their freedom we sympathized. Indian troops had been used as mercenaries for this purpose in Burma, China, Iran, and the Middle East, and parts of Africa. They had become symbols of British imperialism in all these countries and antagonized their peoples against India.[52]

Indians did not want Indian resources to be used for 'maintaining [British] imperialist domination', and did not want the British government to 'impose war on India' as they had done in 1914.[53]

But while the Indian nationalist leaders refused to co-operate with the British in their war efforts, the Indian princes stood solidly behind the government, which had no difficulty in securing sufficient recruits without resorting to compulsion. Britain's efforts were greatly enhanced by the manpower and material resources of India. The Indian states supplied more than 375,000 recruits for the fighting forces of India, provided men for technical work, and important materials, such as steel, blankets, webbing, cloth, and rubber products.[54]

It is important to note that, before the entry of the United States into the war, the British colonial empire 'cracked up with amazing rapidity'. The Indians sometimes wondered if this outwardly proud structure 'was just a house of cards with no

52 J. Nehru, *The Discovery of India* (1946), 429.
53 Ibid., at 430–2.
54 For details of the participation of Indian troops see R. Majumdar, H. Raychaudhuri, and K. Datta, *An Advanced History of India* (1999), 949 ff.

foundations or inner strength'.[55] Although Japan was not particularly liked in India, especially because of its aggression against China, as Nehru said,

> [T]here was a feeling of satisfaction at the collapse of old-established European colonial powers before the armed strength of an Asian power. The racial, Oriental Asiatic feeling was evident on the British side also. Defeat and disaster were bitter enough, but the fact that an Oriental and Asiatic power had triumphed over them added to the bitterness and humiliation. An Englishman occupying a high position said that he would have preferred it if the *Prince of Wales* and *Repulse* had been sunk by the Germans instead of by the yellow Japanese.[56]

9. India and the making of the UN Charter

India became a founding member of the United Nations in 1945, even though it was still under British rule. In fact its membership flowed from its membership of the League of Nations, and because India was a signatory to the Declaration of the wartime coalition of the 'United Nations' of 1 January 1942, in Washington, DC.[57] India was invited to the United Nations Conference on International Organization (UNCIO) in 1945 and participated in the historic conference, but only as a British colony, 'British India'. Except for Byelorussia and Ukraine, admitted on the initiative of Russia, although they were only members of the then Soviet Union, India was the only non-sovereign state in the United Nations.

Indian public opinion was not very hopeful or enthusiastic about the new conference on international organization during the war years because of their bitter experience in the past. The Atlantic Charter,[58] the declaration of four freedoms, and other Allied wartime declarations regarding the war and peace, such as the Teheran Declaration of 1943,[59] were all regarded with scepticism. When the draft proposals for the establishment of a new international organization under the title of the United Nations, known as the Dumbarton Oaks Proposals (DOP), were issued by the United States, the Soviet Union, the United Kingdom, and China, on 9 October 1944,[60] they were not received with much hope. It was pointed out that the 'territorial ambitions of the big powers were responsible for most of the conflicts in the world and that the DOP made no attempt to reconcile the conflicting interests of different states in various fields'. It might, therefore, be just 'another futile attempt for the achievement of the world peace'.[61] By the time the San Francisco Conference was convened, the questions of the transfer of power in India and the proposed partition of India drew so much attention in the country that discussions and comments on the proposed international organization were meagre. Such opinions as were expressed were not very optimistic. Thus it was said that 'imperialists were crying and

55 Nehru, *supra* note 52, at 457.
56 Ibid., at 476–7.
57 See L. Goodrich and E. Hambro, *Charter of the United Nations: Commentary and Documents* (1946), 306.
58 Ibid., at 305.
59 Ibid., at 307.
60 Ibid., at 308 ff.
61 *India and the United Nations*, *supra* note 42, at 22–3; see also M. Rajan, 'India and the Making of the UN Charter', (1973) 12 *International Studies* 430, at 431–2.

clamouring for dominating the weaker nations for all time to come', and 'measures were being adopted to suppress the voice of the enslaved nations of the world'. The conference, therefore, 'cannot produce much hope in the minds of Indians, still in bondage'.[62]

Indian national opinion was very critical of the selection process of the Indian delegation by the Viceroy-in-Council to the San Francisco Conference, especially because the British and US delegations included representatives of the major political parties in their countries. The selected Indian delegates were Sir A. R. Mudaliar (leader), Sir Feroz Khan Noon, and Sir V. T. Krishnamachari (representing the princely states), all supposed to be mere spokesmen of the British government.[63] The most prominent Indian national leader, Mahatma Gandhi, said that there were two essential conditions for peace as far as India was concerned, namely that India should be free from foreign control and that the peace should be just. 'If these foregoing essentials of peace are accepted', he said,

> it follows that the camouflage of Indian representation through Indians nominated by British imperialism will be worse than no representation. Either India at San Francisco is represented by an elected representative, or represented not at all.[64]

Supporting Gandhi's views, the *Hindustan Times* in the same issue commented editorially, 'Rather than be a mere appendage to the British Government, we feel India should stand aloof from all international organizations till she can enter them as a free and sovereign state.' The paper pungently remarked in another editorial that 'the Government would rather keep up their pretence and allow one of the most important [members] of the United Nations to have the most unrepresentative of delegations'. It added, 'It will be a hoax on San Francisco.'[65] Some other Indian national leaders from other parties were equally critical.[66]

Indian nationalist elements took the fight against the unrepresentative character of the Indian delegation to the United States. In an advertisement in Washington newspapers, the National Committee for India's Freedom said that the members of the delegation represented only their 'British employers' and that 'their masquerade in San Francisco as India's representatives becomes a bitter mockery and a brazen affront to the intelligence of authentic delegates'.[67] Mrs Vijayalakshmi Pandit, a respected Indian political leader and sister of Jawaharlal Nehru, said in a press conference two days after the UNCIO opened that 'the so-called Indian representatives' did not have 'the slightest representative capacity'.[68]

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62 *India and the United Nations, supra* note 42, at 24.

63 It was not easy for the British government to select members of the Indian delegation because of serious criticism coming from Indian national leaders. See another article by Professor M. S. Rajan, 'India and the Making of the UN Charter – II (from British Sources)', (1999) 36 *International Studies* 3. The articles complement each other.

64 *Hindustan Times*, 7 March 1945.

65 9 March 1945, quoted in Rajan, *supra* note 63, at 434.

66 T. Bahadur Sapru, H. Kunzru, Right Hon. V. S. Srinivasa Sastri, C. Rajagopalachari, quoted in ibid.

67 *The Hindu*, 13 April 1945, quoted in Rajan, *supra* note 63, at 435.

68 One year later she led the Indian delegation to the UN General Assembly, and was elected president of the General Assembly's eighth session in 1953. Ibid.

10. The London Conference

As a preliminary to the San Francisco Conference, the Indian delegation, along with other members of the British Commonwealth – Australia, Canada, New Zealand, South Africa, and the United Kingdom – participated in a conference in London on 4–13 April 1945, to exchange ideas and consult each other on the draft proposals for the establishment of the world organization. Speaking for the Indian delegation, Sir Feroz Khan Noon, obviously referring to the criticism of the unrepresentative character of the delegation, pointed out that 'We are here to represent India and not His Majesty's Government', that the government had not given any instructions to them but they had 'instructions from our government', and that India had quietly grown into a dominion without the British government actually knowing it.[69]

Discussing the role of the small versus the great powers in the proposed world organization, the leader of the Indian delegation, Sir A. R. Mudaliar, agreed with the Canadian contention that in the DOP, the five great powers had safeguarded their position at the expense of the smaller powers. From the point of view of India, he said, the draft provision regarding the nature of representation of states other than the Big Five was one of the most important:

> India felt that the present position was almost intolerable. China had been classified as a Great Power at the instigation of the United States. It only required a moment's comparison to realize the anomaly of this situation. On the test suggested by Australia and New Zealand, of past and potential contributions to the war effort, India deserved better representation.[70]

Mudaliar also pointed out that in the previous 25 years India had not once been elected to the Council of the League of Nations. In the future, however, it was likely that a great deal would be expected of India, militarily and economically, by the new world organization. Therefore the position put forward in the DOP was not, he thought, 'one which his countrymen could accept'. It was not a question of prestige, he said, 'it was merely an extension of the logical decision reached in regard to the Great Powers, namely, that power and responsibility should count'.[71]

The Indian delegation, while supporting the 'Yalta formula' and the right of veto of some great powers, found it, however, 'particularly unpalatable' that such rights were given to China and France. It agreed that it was consistent for a permanent member to exercise its veto in a dispute to which it was not a party, and it was also desirable that the veto should be applicable in some other matters also.[72]

The Indian delegation also took a lot of interest in the future of the League of Nations mandates. Mudaliar reiterated Indian opposition to the restoration of colonies to their original colonizers, because such a policy would 'encourage the belief which was held in Eastern countries that the object of the struggle [i.e. the Second World War] was to bring about the re-establishment of colonial rule by the European powers'. He suggested that these colonial territories be put under

69 British Commonwealth Meeting, 4 April 1945, quoted in ibid., at 437.
70 Quoted in Rajan, *supra* note 61, at 438–9.
71 Quoted in ibid., at 438–9.
72 Quoted in ibid., at 140.

international trusteeship with a view to removing 'a fundamental cause of future wars'.[73]

11. The San Francisco Conference

The London Conference was considered as a 'useful rehearsal' for Commonwealth delegations before going on to the San Francisco Conference. The Indian delegation was one of the smallest at San Francisco and, according to the *Indian Report*, there was a great deal of stress on its members and pressure to attend committees which met simultaneously.

In his preliminary remarks the leader of the Indian delegation referred to the part played by India in the First and Second World Wars. While commending the four sponsoring powers for their contribution to victory in the Second World War, Mudaliar added,

> We talk of the Great Powers and of small powers; we talk of the special responsibility of the Great Powers, and the special privileges of the Great Powers also. I should therefore like to put in its appropriate perspective what India has done in this war. Two and a half million sons of India . . . drawn on a voluntary basis, are today fighting in the different parts of the world.

He pointed out that, next to the armed forces of the sponsoring powers, the Indian army was the largest in the field. Further, none of the great powers standing alone could have withstood the aggressor states. He reminded the great powers of the great contribution of the smaller countries.[74]

The Indian delegation sponsored four amendments to the DOP relating to (i) human rights, (ii) penalizing a member if it failed in its financial obligations, (iii) criteria for the selection of the non-permanent members of the Security Council, and (iv) the inclusion of observers in the Security Council. The Indian delegation was quite concerned about the selection of states to sit on the Security Council which, it argued, should be based, *inter alia*, on population, industrial potential, willingness and ability to contribute to international security arrangements, and past performance. It supported the Yalta formula regarding the veto, but suggested that the provision should be open to revision after ten years. Since the big powers were determined to have the Charter as they wanted, India and other smaller countries hardly mattered. In the end, as Mudaliar said, 'We realize as earnestly as anyone else in this conference that it is vital to bring into existence an organization, however defective, on which the hopes, the aspirations of the people of the world depend.'[75]

It may be mentioned that not only India, which was not even independent at that time, but Asian countries as such played a very small and insignificant role in the formulation of the UN Charter.[76] In the UNCIO, there were only six of them, and two of these – India and the Philippines – were not yet independent. The Indian

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73 Ibid., at 441.
74 *Report of the Conference of the United Nations in San Francisco, 3 August 1945*, quoted in ibid., at 443–5.
75 Quoted in Rajan, *supra* note 61, at 449; see also ibid., at 40.
76 A. Lall, 'The Asian Nations and the United Nations', in N. Padelford and L. Goodrich (eds.), *The United Nations in the Balance* (1965), 365.

delegation did not even have the support of nationalist India. They realized their limitations and the marginal role that they, or any other small state, could play. In spite of all these handicaps, they participated as well as they could without compromising Indian nationalist opinion.[77] An Indian newspaper correspondent, reporting the UNCIO from San Francisco, summed up the Indian delegation's role as follows:

> India has been a good little boy among the 45 [delegations], never saying an important thing likely to offend Britain and the other Big Four, meek and content to stand and wait, because that, too, is service. She has lost an opportunity which will never come again.[78]

With most of the nationalist leaders in prison, and the interests of the people and press being focused on achieving independence, this was bound to be the case.

77 Rajan, *supra* note 63, at 455. Professor Rajan does not agree with Arthur Lall that India's role in the UNCIO 'was disappointingly and disproportionately small'.

78 *The Hindu*, 27 June 1945; also quoted in ibid., at 456.

sion" could also be used in connection with acts whereby an organization expresses its consent to be bound by a treaty. Nevertheless, the Commission stressed that the wording so adopted was provisional and put the expression "by any agreed means" in brackets to indicate its intention to review the adequacy of such an expression at a later stage.[47]

(14) Having adopted article 11 and article 2, subparagraph 1 (*b bis*), which establish an "act of formal confirmation" for international organizations as equivalent to ratification for States, the Commission could, in second reading, see no reason which would justify maintaining the first reading text rather than reverting to a text which could now more closely follow that of the corresponding definition in the Vienna Convention.

(15) *Subparagraph 1* (e) defines the terms "negotiating State" and "negotiating organization". It follows the corresponding provision of the Vienna Convention, but takes into account article 1 of the present draft. Since the term "treaty" refers here to a category of conventional acts different from that covered by the same term in the Vienna Convention, the wording need not allow for the fact that international organizations sometimes play a special role in the negotiation of treaties between States by participating through their organs in the preparation, and in some cases even the establishment, of the text of certain treaties.

(16) *Subparagraph 1* (f), also follows the corresponding provision of the Vienna Convention, taking into account article 1 of the present draft.

(17) Except for the addition of the words "or an international organization", the definition given in *subparagraph 1* (g) follows exactly the wording of the Vienna Convention. It therefore leaves aside certain problems peculiar to international organizations. But in this case the words "to be bound by the treaty" must be understood in their strictest sense—that is to say, as meaning to be bound *by the treaty itself* as a legal instrument and not merely "to be bound by the rules of the treaty". For it can happen that an organization will be bound by legal rules contained in a treaty without being a party to the treaty, either because the rules have a customary character in relation to the organization, or because the organization has committed itself by way of a unilateral declaration (assuming that to be possible),[48] or because the organization has concluded with the parties to treaty X a collateral treaty whereby it undertakes to comply with the rules contained in treaty X without, however, becoming a party to that treaty. Furthermore, it should be understood that the relatively simple definition given above cannot be used in the case of international organizations which, at the time of the drawing-up of a treaty, lend their technical assistance in the preparation of the text of the treaty, but are never intended to become parties to it.

(18) The definition given in *subparagraph 1* (h) merely extends to third organizations the Vienna Convention's definition of third States.

(19) *Subparagraph 1* (i) gives the term "international organization" a definition identical with that in the Vienna Convention. This definition should be understood in the sense given to it in practice: that is to say, as meaning an organization composed mainly of States and, in exceptional cases, one or two international organizations[49] and having in some cases associate members which are not yet States or which may be other international organizations. Some special situations have been mentioned in this connection, such as that of the United Nations within ITU, EEC within GATT or other international bodies, or even the United Nations acting on behalf of Namibia, through the Council for Namibia, within WHO after Namibia became an associate member of WHO.[50]

(20) It should, however, be emphasized that the adoption of the same definition of the term "international organization" as that used in the Vienna Convention has far more significant consequences in the present draft than in that Convention.

(21) In the present draft, this very elastic definition is not meant to prejudge the regime that may govern, within each organization, entities (subsidiary or connected organs) which enjoy some degree of autonomy within the organization under the rules in force in it. Likewise, no attempt has been made to prejudge the amount of legal capacity which an entity requires in order to be regarded as an international organization within the meaning of the present draft. The fact is that the main purpose of the present draft is to regulate, not the status of international organizations, but the regime of treaties to which one or more international organizations are parties. The present draft articles are intended to apply to such treaties irrespective of the status of the organizations concerned.

(22) Attention should be drawn to a further very important consequence of the definition proposed. The present draft articles are intended to apply to treaties to which international organizations are parties, whether the purpose of those organizations is relatively general or relatively specific, whether they are universal or regional in character, and whether admission to them is relatively open or restricted; the draft articles are intended to apply to the treaties of all international organizations.

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[47] *Yearbook ... 1974*, vol. II (Part One), p. 295, document A/9610/Rev.1, chap. IV, sect. B, para. (4) of the commentary to article 2.

[48] See the examples given on p. 16 above, para. 60.

[49] This line of analysis may be compared with that adopted in paragraph 2 of article 9 below, regarding the adoption of the text of a treaty at international conferences. See also the commentary to article 5 below.

[50] In connection with situations in which an organization is called upon to act specifically on behalf of a territory, see the secretariat study on "Possibilities of participation by the United Nations in international agreements on behalf of a territory", *Yearbook ... 1974*, vol. II (Part Two), p. 8, document A/CN.4/281.

(23) Yet the Commission has wondered whether the concept of international organization should not be defined by something other than the "intergovernmental" nature of the organization. In connection with the second reading of the article, several Governments also suggested that this should be the case.[51] After having further discussed this question, the Commission has decided to keep its earlier definition, taken from the Vienna Convention, because it is adequate for the purposes of the draft articles; either an international organization has the capacity to conclude *at least* one treaty, in which case the rules in the draft articles will be applicable to it, or, despite its title, it does not have that capacity, in which case it is pointless to state explicitly that the draft articles do not apply to it.

(24) *Subparagraph 1* (j) is a new provision by comparison with the Vienna Convention. In the light of a number of references which appear in the present draft articles to the rules of an international organization, it was thought useful to provide a definition for the term "rules of the organization". Reference was made in particular to the definition that had recently been given in the Convention on the Representation of States. The Commission accordingly adopted the present subparagraph, which reproduces verbatim the definition given in that Convention.

(25) However, a question which occupied the Commission for some considerable time was that of the terms referring to the organization's own law, or that body of law which is known as "the internal law" of a State and which the Commission has called "the rules" of an international organization. The Commission has, finally, left its definition unchanged. There would have been problems in referring to the "internal law" of an organization, for while it has an internal aspect, this law also has in other respects an international aspect. The definition itself would have been incomplete without a reference to "the constituent instruments ... of the organization"; it also had to mention the precepts established by the organization itself, but the terminology used to denote such precepts varies from organization to organization. Hence, while the precepts might have been designated by a general formula through the use of some abstract theoretical expression, the Commission, opting for a descriptive approach, has employed the words "decisions" and "resolutions"; the adverbial phrase "in particular" shows that the adoption of a "decision" or of a "resolution" is only one example of the kind of formal act that can give rise to "rules of the organization". The effect of the adjective "relevant" is to underline the fact that it is not all "decisions" or "resolutions" which give rise to rules, but only those which are *of relevance* in that respect. Lastly, reference is made to *established practice*. This point once again evoked comment from Governments and international organizations.[52] It is true that most international organizations have, after a number of years, a body of practice which forms an integral part of their rules.[53] However, the reference in question is in no way intended to suggest that practice has the same standing in all organizations; on the contrary, each organization has its own characteristics in that respect. Similarly, by referring to "established" practice, the Commission seeks only to rule out uncertain or disputed practice; it is not its wish to freeze practice at a particular moment in an organization's history. Organizations stressed this point at the United Nations Conference on the Law of Treaties (1969) and the United Nations Conference on the Representation of States in Their Relations with International Organizations (1975).[54]

(26) *Article 2, paragraph 2,* extends to international organizations the provisions of article 2, paragraph 2, of the Vienna Convention, adjusted in the light of the adoption of the term "rules of the organization" as explained above.

Article 3. International agreements not within the scope of the present articles

The fact that the present articles do not apply:

(i) to international agreements to which one or more States, one or more international organizations and one or more subjects of international law other than States or organizations are parties; or

(ii) to international agreements to which one or more international organizations and one or more subjects of international law other than States or organizations are parties; or

(iii) to international agreements not in written form between one or more States and one or more international organizations, or between international organizations;

shall not affect:

(*a*) the legal force of such agreements;

(*b*) the application to them of any of the rules set forth in the present articles to which they would be subject under international law independently of the present articles;

(*c*) the application of the present articles to the relations between States and international organizations or to the relations of organizations as between themselves, when those relations are governed by international agreements to which other subjects of international law are also parties.

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[51] See "Topical summary..." (A/CN.4/L.311), para. 171; and *Yearbook ... 1981*, vol. II (Part Two), pp. 188-189, annex II, sect. A.10, subsect. IV.1.

[52] See, for example, *Yearbook ... 1981*, vol. II (Part Two), p. 189, annex II, sect A.10, subsect. IV.2.

[53] This was the view taken by the International Court of Justice with regard to the effect of abstentions by permanent members of the Security Council in voting in that body, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, p. 22, para. 22.

[54] See *Yearbook ... 1972*, vol. II, pp. 106 and 107, document A/CN.4/258, para. 51.

may be understood as covering by analogy also the case where a valid consent to the commission of the act of the State is given by an international organization.

Article 2. Use of terms

For the purposes of the present draft articles:

(*a*) "international organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities;

(*b*) "rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization;

(*c*) "organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization;

(*d*) "agent of an international organization" means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.

Commentary

(1) The definition of "international organization" given in article 2, subparagraph (*a*), is considered as appropriate for the purposes of the present draft articles and is not intended as a definition for all purposes. It outlines certain common characteristics of the international organizations to which the following articles apply. The same characteristics may be relevant for purposes other than the international responsibility of international organizations.

(2) The fact that an international organization does not possess one or more of the characteristics set forth in article 2, subparagraph (*a*), and thus is not within the definition for the purposes of the present articles, does not imply that certain principles and rules stated in the following articles do not apply also to that organization.

(3) Starting with the 1969 Vienna Convention,[57] several codification conventions have succinctly defined the term "international organization" as "intergovernmental organization".[58] In each case, the definition was given only for the purposes of the relevant convention and not for all purposes. The text of some of these codification conventions added some further elements to the definition: for instance, the 1986 Vienna Convention only applies to those intergovernmental organizations that have the capacity to conclude treaties.[59] No additional element would be required in the case of international responsibility apart from possessing an obligation under international law. However, the adoption of a different definition is preferable for several reasons. First, it is questionable whether by defining an international organization as an intergovernmental organization one provides much information: it is not even clear whether the term "intergovernmental organization" refers to the constituent instrument or to actual membership. Second, the term "intergovernmental" is in any case inappropriate to a certain extent, because several important international organizations have been established with the participation also of State organs other than Governments. Third, an increasing number of international organizations include among their members entities other than States as well as States; the term "intergovernmental organization" might be thought to exclude these organizations, although with regard to international responsibility it is difficult to see why one should reach solutions that differ from those applying to organizations of which only States are members.

(4) Most international organizations are established by treaties. Thus, a reference in the definition to treaties as constituent instruments reflects prevailing practice. However, forms of international cooperation are sometimes established without a treaty. In certain cases, for instance with regard to the Nordic Council of Ministers, a treaty was subsequently concluded.[60] In order to cover organizations established by States on the international plane without a treaty, article 2 refers, as an alternative to treaties, to any "other instrument governed by international law". This wording is intended to include instruments such as resolutions adopted by an international organization or by a conference of States. Examples of international organizations that have been so established include the Pan American Institute of Geography and History[61] and the Organization of the Petroleum Exporting Countries.[62]

(5) The reference to "a treaty or other instrument governed by international law" is not intended to exclude entities other than States from being regarded as members of an international organization. This is unproblematic with regard to international organizations which, so long as they have a treaty-making capacity, may well be a party to a constituent treaty. The situation is likely to be different with regard to entities other than States and international

[57] The relevant provision is article 2, paragraph (1) (*i*).

[58] See article 1, paragraph 1 (1), of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character; article 2, paragraph 1 (*n*), of the 1978 Vienna Convention; and article 2, paragraph 1 (*i*), of the 1986 Vienna Convention.

[59] See article 6 of the Convention. As the Commission noted with regard to the draft articles on treaties concluded between States and international organizations or between two or more international organizations (paragraph (22) of the commentary to article 2), "Either an international organization has the capacity to conclude *at least* one treaty, in which case the rules in the draft articles will be applicable to it, or, despite its title, it does not have that capacity, in which case it is pointless to state explicitly that the draft articles do not apply to it" (*Yearbook ... 1981*, vol. II (Part Two), p. 124).

[60] 1962 Agreement concerning co-operation (Finland, Denmark, Iceland, Norway and Sweden), amended in 1971.

[61] See A. J. Peaslee (ed.), *International Governmental Organizations—Constitutional Documents*, 3rd rev. ed., Parts Three and Four, The Hague, Martinus Nijhoff, 1979, pp. 389–403.

[62] See P. J. G. Kapteyn *et al.* (eds.), *International Organization and Integration—Annotated Basic Documents and Descriptive Directory of International Organizations and Arrangements*, 2nd rev. ed., The Hague, Martinus Nijhoff, 1984, II.K.3.2.a.

organizations. However, even if the entity other than a State does not possess treaty-making capacity or cannot take part in the adoption of the constituent instrument, it may be accepted as a member of the organization if the rules of that organization so provide.

(6) The definition in article 2 does not cover organizations that are established through instruments governed by municipal law, unless a treaty or another instrument governed by international law has been subsequently adopted and has entered into force.[63] Thus the definition does not include organizations such as the International Union for Conservation of Nature (IUCN), although over 70 States are among its members,[64] or the Institut du monde arabe, which was established as a foundation under French law by 20 States.[65]

(7) Article 2 also requires the international organization to possess "international legal personality". The acquisition of legal personality under international law does not depend on the inclusion in the constituent instrument of a provision such as Article 104 of the Charter of the United Nations, which reads as follows:

> The Organization 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.

The purpose of this type of provision in the constituent instrument is to impose on the member States an obligation to recognize the organization's legal personality under their internal laws. A similar obligation is imposed on the host State when a similar text is included in the headquarters agreement.[66]

(8) The acquisition by an international organization of legal personality under international law is appraised in different ways. According to one view, the mere existence for an organization of an obligation under international law implies that the organization possesses legal personality. According to another view, further elements are required. While the International Court of Justice has not identified particular prerequisites, its *dicta* on the legal personality of international organizations do not appear to set stringent requirements for this purpose. In its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the Court stated that

> [i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.[67]

In its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the Court noted that

> [t]he Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence.[68]

While it may be held that, when making both these statements, the Court had an international organization of the type of the World Health Organization (WHO) in mind, the wording is quite general and appears to take a liberal view of the acquisition by international organizations of legal personality under international law.

(9) In the passages quoted in the previous paragraph, and more explicitly in its advisory opinion on *Reparation for Injuries*,[69] the Court appeared to favour the view that when legal personality of an organization exists, it is an "objective" personality. Thus, it would not be necessary to enquire whether the legal personality of an organization has been recognized by an injured State before considering whether the organization may be held internationally responsible according to the present articles.

(10) The legal personality of an organization, which is a precondition of the international responsibility of that organization, needs to be "distinct from that of its member States".[70] This element is reflected in the requirement in article 2, subparagraph (*a*), that the international legal personality should be the organization's "own", a term that the Commission considers as synonymous with the phrase "distinct from that of its member States". The existence for the organization of a distinct legal personality does not exclude the possibility of a certain conduct being attributed both to the organization and to one or more of its members or to all its members.

(11) The second sentence of article 2, subparagraph (*a*), seeks first of all to emphasize the role that States play in practice with regard to all the international organizations which are covered by the present articles. This key role was expressed by the International Court of Justice, albeit incidentally, in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, in the following sentence:

> International organizations are governed by the "principle of speciality", that is to say, 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.[71]

Many international organizations have only States as members. In other organizations, which have a different

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[63] This was the case of the Nordic Council of Ministers (see footnote 60 above).

[64] See www.iucn.org.

[65] A description of the status of this organization may be found in a reply by the Minister for Foreign Affairs of France to a parliamentary question, AFDI, vol. 37 (1991), pp. 1024–1025.

[66] Thus, in its judgment No. 149 of 18 March 1999 in *Istituto Universitario Europeo* v. *Piette*, the Italian Court of Cassation found that "[t]he provision in an international agreement of the obligation to recognize legal personality to an organization and the implementation by law of that provision only mean that the organization acquires legal personality under the municipal law of the contracting States" (*Giustizia civile*, vol. 49 (1999), p. 1313).

[67] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, *Advisory Opinion*, *I.C.J. Reports 1980*, p. 73, at pp. 89–90, para. 37.

[68] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, *Advisory Opinion*, *I.C.J. Reports 1996*, p. 66, at p. 78, para. 25.

[69] *Reparation for injuries suffered in the service of the United Nations*, *Advisory Opinion: I.C.J. Reports 1949*, p. 174, at p. 185.

[70] This wording was used by G. G. Fitzmaurice in the definition of the term "international organization" that he proposed in his first report on the law of treaties (*Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 108) and by the Institute of International Law in its 1995 Lisbon resolution on "The legal consequences for member states of the non-fulfilment by international organizations of their obligations toward third parties" (Institute of International Law, *Yearbook*, vol. 66, Part II, Session of Lisbon (1995), p. 445; available from www.idi-iil.org, "Resolutions").

[71] See footnote 68 above.

membership, the presence of States among the members is essential for the organization to be considered in the present articles.[72] This requirement is intended to be conveyed by the words "in addition to States".

(12) The fact that subparagraph (*a*) considers that an international organization "may include as members, in addition to States, other members" does not imply that a plurality of States as members is required. Thus an international organization may be established by a State and another international organization. Examples may be provided by the Special Court for Sierra Leone[73] and the Special Tribunal for Lebanon.[74]

(13) The presence of States as members may take the form of participation as members by individual State organs or agencies. Thus, for instance, the Arab States Broadcasting Union, which was established by a treaty, lists "broadcasting organizations" as its full members.[75]

(14) The reference in the second sentence of article 2, subparagraph (*a*), to entities other than States—such as international organizations,[76] territories[77] or private entities[78]—as additional members of an organization points to a significant trend in practice, in which international organizations increasingly tend to have a mixed membership in order to make cooperation more effective in certain areas.

(15) International organizations within the scope of the present articles are significantly varied in their functions, type and size of membership and resources. However, since the principles and rules set forth in the articles are of a general character, they are intended to apply to all these international organizations, subject to special rules of international law that may relate to one or more international organizations. In the application of these principles and rules, the specific, factual or legal circumstances pertaining to the international organization concerned should be taken into account, where appropriate. It is clear, for example, that most technical organizations are unlikely to be ever in the position of coercing a State, or that the impact of a certain countermeasure is likely to vary greatly according to the specific character of the targeted organization.

(16) The definition of "rules of the organization" in subparagraph (*b*) is to a large extent based on the definition of the same term that is included in the 1986 Vienna Convention.[79] Apart from a few minor stylistic changes, the definition in subparagraph (*b*) differs from the one contained in that codification convention only because it refers, together with "decisions" and "resolutions", to "other acts of the organization". This addition is intended to cover more comprehensively the great variety of acts that international organizations adopt. The words "in particular" have nevertheless been retained, since the rules of the organization may also include such instruments as agreements concluded by the organization with third parties and judicial or arbitral decisions binding the organization. For the purpose of attribution of conduct, decisions, resolutions and other acts of the organization are relevant, whether they are regarded as binding or not, insofar as they give functions to organs or agents in accordance with the constituent instruments of the organization. The latter instruments are referred to in the plural, following the wording of the Vienna Convention, although a given organization may well possess a single constituent instrument.

(17) One important feature of the definition of "rules of the organization" in subparagraph (*b*) is that it gives considerable weight to practice. The influence that practice may have in shaping the rules of the organization was described in a comment by the North Atlantic Treaty Organization (NATO), which noted that NATO was an organization where "the fundamental internal rule governing the functioning of the organization—that of consensus decision-making—is to be found neither in the treaties establishing NATO nor in any formal rules and is, rather, the result of the practice of the organization".[80]

(18) The definition seeks to strike a balance between the rules enshrined in the constituent instruments and formally accepted by the members of the organization, on the one hand, and the need for the organization to develop as an institution, on the other hand. As the International Court of Justice said in its advisory opinion on *Reparation for Injuries*:

> Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.[81]

(19) The definition of "rules of the organization" is not intended to imply that all the rules pertaining to a given international organization are placed at the same level.

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[72] Thus, the definition in article 2 does not cover international organizations whose membership only comprises international organizations. An example of this type of organization is the Joint Vienna Institute, which was established on the basis of an agreement between five international organizations. See www.jvi.org.

[73] Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (Freetown, on 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137.

[74] Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, annexed to Security Council resolution 1757 (2007) of 30 May 2007.

[75] See article 4 of the Convention of the Arab States Broadcasting Union.

[76] For instance, the European Community has become a member of the Food and Agriculture Organization of the United Nations (FAO), whose Constitution was amended in 1991 in order to allow the admission of regional economic integration organizations.

[77] For instance, article 3 (*d*)–(*e*) of the Convention of the World Meteorological Organization (WMO) entitles entities other than States, referred to as "territories" or "groups of territories", to become members.

[78] One example is the World Tourism Organization, which includes States as "full members", "territories or groups of territories" as "associate members" and "international bodies, both intergovernmental and non-governmental" as "affiliate members". See the Statutes of the World Tourism Organization.

[79] Article 2, paragraph 1 (*j*) states that "'rules of the organization' means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization".

[80] A/CN.4/637 and Add.1 (under the section entitled "Draft article 63 … North Atlantic Treaty Organization").

[81] *Reparation for injuries suffered in the service of the United Nations* (see footnote 69 above), p. 180.

TOPIC II

- *Reparation for Injuries Suffered in the Service of the United Nations,* (Advisory Opinion) [1949] ICJ Rep 174.
- *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151.

INTERNATIONAL COURT OF JUSTICE

1949.
April 11th.
General List.
No. 4.

YEAR 1949.

April 11th, 1949.

REPARATION FOR INJURIES SUFFERED IN THE SERVICE OF THE UNITED NATIONS

Injuries suffered by agents of United Nations in course of performance of duties.—Damage to United Nations.—Damage to agents.—Capacity of United Nations to bring claims for reparation due in respect of both.—International personality of United Nations.—Capacity as necessary implication arising from Charter and activities of United Nations.—Functional protection of agents.—Claim against a Member of the United Nations.—Claim against a non-member.—Reconciliation of claim by national State and claim by United Nations.—Claim by United Nations against agent's national State.

ADVISORY OPINION.

Present: *President* BASDEVANT; *Vice-President* GUERRERO; *Judges* ALVAREZ, FABELA, HACKWORTH, WINIARSKI, ZORIČIĆ, DE VISSCHER, Sir Arnold MCNAIR, KLAESTAD, BADAWI PASHA, KRYLOV, READ, HSU MO, AZEVEDO.

THE COURT,

composed as above,

gives the following advisory opinion :

On December 3rd, 1948, the General Assembly of the United Nations adopted the following Resolution :

> "Whereas the series of tragic events which have lately befallen agents of the United Nations engaged in the performance of their duties raises, with greater urgency than ever, the question of the arrangements to be made by the United Nations with a view to ensuring to its agents the fullest measure of protection in the future and ensuring that reparation be made for the injuries suffered ; and
>
> Whereas it is highly desirable that the Secretary-General should be able to act without question as efficaciously as possible with a view to obtaining any reparation due ; *therefore*
>
> The General Assembly
>
> Decides to submit the following legal questions to the International Court of Justice for an advisory opinion :
>
> 'I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (*a*) to the United Nations, (*b*) to the victim or to persons entitled through him ?
>
> II. In the event of an affirmative reply on point I (*b*), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national ?'
>
> Instructs the Secretary-General, after the Court has given its opinion, to prepare proposals in the light of that opinion, and to submit them to the General Assembly at its next regular session."

In a letter of December 4th, 1948, filed in the Registry on December 7th, the Secretary-General of the United Nations forwarded to the Court a certified true copy of the Resolution of the General Assembly. On December 10th, in accordance with paragraph 1 of Article 66 of the Statute, the Registrar gave notice of the Request to all States entitled to appear before the Court. On December 11th, by means of a special and direct communication as provided in paragraph 2 of Article 66, he informed these States that, in an Order made on the same date, the Court had

stated that it was prepared to receive written statements on the questions before February 14th, 1949, and to hear oral statements on March 7th, 1949.

Written statements were received from the following States: India, China, United States of America, United Kingdom of Great Britain and Northern Ireland, and France. These statements were communicated to all States entitled to appear before the Court and to the Secretary-General of the United Nations. In the meantime, the Secretary-General of the United Nations, having regard to Article 65 of the Statute (paragraph 2 of which provides that every question submitted for an opinion shall be accompanied by all documents likely to throw light upon it), had sent to the Registrar the documents which are enumerated in the list annexed to this Opinion.

Furthermore, the Secretary-General of the United Nations and the Governments of the French Republic, of the United Kingdom and of the Kingdom of Belgium informed the Court that they had designated representatives to present oral statements.

In the course of public sittings held on March 7th, 8th and 9th, 1949, the Court heard the oral statements presented

on behalf of the Secretary-General of the United Nations by Mr. Ivan Kerno, Assistant Secretary-General in charge of the Legal Department as his Representative, and by Mr. A. H. Feller, Principal Director of that Department, as Counsel;

on behalf of the Government of the Kingdom of Belgium, by M. Georges Kaeckenbeeck, D.C.L., Minister Plenipotentiary of His Majesty the King of the Belgians, Head of the Division for Peace Conferences and International Organization at the Ministry for Foreign Affairs, Member of the Permanent Court of Arbitration;

on behalf of the Government of the French Republic, by M. Charles Chaumont, Professor of Public International Law at the Faculty of Law, Nancy; Legal Adviser to the Ministry for Foreign Affairs;

on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland by Mr. G. G. Fitzmaurice, Second Legal Adviser to the Foreign Office.

* * *

The first question asked of the Court is as follows:

> "In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against

the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (*a*) to the United Nations, (*b*) to the victim or to persons entitled through him ?"

It will be useful to make the following preliminary observations :

(*a*) The Organization of the United Nations will be referred to usually, but not invariably, as "the Organization".

(*b*) Questions I (*a*) and I (*b*) refer to "an international claim against the responsible *de jure* or *de facto* government". The Court understands that these questions are directed to claims against a State, and will, therefore, in this opinion, use the expression "State" or "defendant State".

(*c*) The Court understands the word "agent" in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts.

(*d*) As this question assumes an injury suffered in such circumstances as to involve a State's responsibility, it must be supposed, for the purpose of this Opinion, that the damage results from a failure by the State to perform obligations of which the purpose is to protect the agents of the Organization in the performance of their duties.

(*e*) The position of a defendant State which is not a member of the Organization is dealt with later, and for the present the Court will assume that the defendant State is a Member of the Organization.

* * *

The questions asked of the Court relate to the "capacity to bring an international claim" ; accordingly, we must begin by defining what is meant by that capacity, and consider the characteristics of the Organization, so as to determine whether, in general, these characteristics do, or do not, include for the Organization a right to present an international claim.

Competence to bring an international claim is, for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims. Among these methods may be mentioned protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal or to the Court in so far as this may be authorized by the Statute.

This capacity certainly belongs to the State ; a State can bring an international claim against another State. Such a claim takes the form of a claim between two political entities, equal in law, similar

in form, and both the direct subjects of international law. It is dealt with by means of negotiation, and cannot, in the present state of the law as to international jurisdiction, be submitted to a tribunal, except with the consent of the States concerned.

When the Organization brings a claim against one of its Members, this claim will be presented in the same manner, and regulated by the same procedure. It may, when necessary, be supported by the political means at the disposal of the Organization. In these ways the Organization would find a method for securing the observance of its rights by the Member against which it has a claim.

But, in the international sphere, has the Organization such a nature as involves the capacity to bring an international claim ? In order to answer this question, the Court must first enquire whether the Charter has given the Organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect. In other words, does the Organization possess international personality ? This is no doubt a doctrinal expression, which has sometimes given rise to controversy. But it will be used here to mean that if the Organization is recognized as having that personality, it is an entity capable of availing itself of obligations incumbent upon its Members.

To answer this question, which is not settled by the actual terms of the Charter, we must consider what characteristics it was intended thereby to give to the Organization.

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable.

The Charter has not been content to make the Organization created by it merely a centre "for harmonizing the actions of nations in the attainment of these common ends" (Article 1, para. 4). It has equipped that centre with organs, and has given it special tasks. It has defined the position of the Members in relation to the Organization by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5), and to accept and carry out the decisions of the Security Council ; by authorizing the General Assembly to make recommendations to the Members ;

by giving the Organization legal capacity and privileges and immunities in the territory of each of its Members; and by providing for the conclusion of agreements between the Organization and its Members. Practice—in particular the conclusion of conventions to which the Organization is a party—has confirmed this character of the Organization, which occupies a position in certain respects in detachment from its Members, and which is under a duty to remind them, if need be, of certain obligations. It must be added that the Organization is a political body, charged with political tasks of an important character, and covering a wide field namely, the maintenance of international peace and security, the development of friendly relations among nations, and the achievement of international co-operation in the solution of problems of an economic, social, cultural or humanitarian character (Article 1); and in dealing with its Members it employs political means. The "Convention on the Privileges and Immunities of the United Nations" of 1946 creates rights and duties between each of the signatories and the Organization (see, in particular, Section 35). It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.

In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its 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.

Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is "a super-State", whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.

The next question is whether the sum of the international rights of the Organization comprises the right to bring the kind of international claim described in the Request for this Opinion. That is a claim against a State to obtain reparation in respect of the

damage caused by the injury of an agent of the Organization in the course of the performance of his duties. Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice. The functions of the Organization are of such a character that they could not be effectively discharged if they involved the concurrent action, on the international plane, of fifty-eight or more Foreign Offices, and the Court concludes that the Members have endowed the Organization with capacity to bring international claims when necessitated by the discharge of its functions.

What is the position as regards the claims mentioned in the request for an opinion? Question I is divided into two points, which must be considered in turn.

* * *

Question I (*a*) is as follows:

> "In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (*a*) to the United Nations.... ?"

The question is concerned solely with the reparation of damage caused to the Organization when one of its agents suffers injury at the same time. It cannot be doubted that the Organization has the capacity to bring an international claim against one of its Members which has caused injury to it by a breach of its international obligations towards it. The damage specified in Question I (*a*) means exclusively damage caused to the interests of the Organization itself, to its administrative machine, to its property and assets, and to the interests of which it is the guardian. It is clear that the Organization has the capacity to bring a claim for this damage. As the claim is based on the breach of an international obligation on the part of the Member held responsible by the Organization, the Member cannot contend that this obligation is governed by municipal law, and the Organization is justified in giving its claim the character of an international claim.

When the Organization has sustained damage resulting from a breach by a Member of its international obligations, it is impossible to see how it can obtain reparation unless it possesses capacity to bring an international claim. It cannot be supposed that in such an event all the Members of the Organization, save the defendant

State, must combine to bring a claim against the defendant for the damage suffered by the Organization.

The Court is not called upon to determine the precise extent of the reparation which the Organization would be entitled to recover. It may, however, be said that the measure of the reparation should depend upon the amount of the damage which the Organization has suffered as the result of the wrongful act or omission of the defendant State and should be calculated in accordance with the rules of international law. Amongst other things, this damage would include the reimbursement of any reasonable compensation which the Organization had to pay to its agent or to persons entitled through him. Again, the death or disablement of one of its agents engaged upon a distant mission might involve very considerable expenditure in replacing him. These are mere illustrations, and the Court cannot pretend to forecast all the kinds of damage which the Organization itself might sustain.

* * *

Question I (*b*) is as follows:

> ...."has the United Nations, as an Organization, the capacity to bring an international claim .... in respect of the damage caused .... (*b*) to the victim or to persons entitled through him?"

In dealing with the question of law which arises out of Question I (*b*), it is unnecessary to repeat the considerations which led to an affirmative answer being given to Question I (*a*). It can now be assumed that the Organization has the capacity to bring a claim on the international plane, to negotiate, to conclude a special agreement and to prosecute a claim before an international tribunal. The only legal question which remains to be considered is whether, in the course of bringing an international claim of this kind, the Organization can recover "the reparation due in respect of the damage caused .... to the victim....".

The traditional rule that diplomatic protection is exercised by the national State does not involve the giving of a negative answer to Question I (*b*).

In the first place, this rule applies to claims brought by a State. But here we have the different and new case of a claim that would be brought by the Organization.

In the second place, even in inter-State relations, there are important exceptions to the rule, for there are cases in which protection may be exercised by a State on behalf of persons not having its nationality.

In the third place, the rule rests on two bases. The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party

to whom an international obligation is due can bring a claim in respect of its breach. This is precisely what happens when the Organization, in bringing a claim for damage suffered by its agent, does so by invoking the breach of an obligation towards itself. Thus, the rule of the nationality of claims affords no reason against recognizing that the Organization has the right to bring a claim for the damage referred to in Question I (*b*). On the contrary, the principle underlying this rule leads to the recognition of this capacity as belonging to the Organization, when the Organization invokes, as the ground of its claim, a breach of an obligation towards itself.

Nor does the analogy of the traditional rule of diplomatic protection of nationals abroad justify in itself an affirmative reply. It is not possible, by a strained use of the concept of allegiance, to assimilate the legal bond which exists, under Article 100 of the Charter, between the Organization on the one hand, and the Secretary-General and the staff on the other, to the bond of nationality existing between a State and its nationals.

The Court is here faced with a new situation. The questions to which it gives rise can only be solved by realizing that the situation is dominated by the provisions of the Charter considered in the light of the principles of international law.

The question lies within the limits already established; that is to say it presupposes that the injury for which the reparation is demanded arises from a breach of an obligation designed to help an agent of the Organization in the performance of his duties. It is not a case in which the wrongful act or omission would merely constitute a breach of the general obligations of a State concerning the position of aliens; claims made under this head would be within the competence of the national State and not, as a general rule, within that of the Organization.

The Charter does not expressly confer upon the Organization the capacity to include, in its claim for reparation, damage caused to the victim or to persons entitled through him. The Court must therefore begin by enquiring whether the provisions of the Charter concerning the functions of the Organization, and the part played by its agents in the performance of those functions, imply for the Organization power to afford its agents the limited protection that would consist in the bringing of a claim on their behalf for reparation for damage suffered in such circumstances. Under 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. This principle of law was applied by the Permanent Court of International Justice to the International Labour Organization in its Advisory Opinion No. 13 of July 23rd,

1926 (Series B., No. 13, p. 18), and must be applied to the United Nations.

Having regard to its purposes and functions already referred to, the Organization may find it necessary, and has in fact found it necessary, to entrust its agents with important missions to be performed in disturbed parts of the world. Many missions, from their very nature, involve the agents in unusual dangers to which ordinary persons are not exposed. For the same reason, the injuries suffered by its agents in these circumstances will sometimes have occurred in such a manner that their national State would not be justified in bringing a claim for reparation on the ground of diplomatic protection, or, at any rate, would not feel disposed to do so. Both to ensure the efficient and independent performance of these missions and to afford effective support to its agents, the Organization must provide them with adequate protection.

This need of protection for the agents of the Organization, as a condition of the performance of its functions, has already been realized, and the Preamble to the Resolution of December 3rd, 1948 (*supra*, p. 175), shows that this was the unanimous view of the General Assembly.

For this purpose, the Members of the Organization have entered into certain undertakings, some of which are in the Charter and others in complementary agreements. The content of these undertakings need not be described here; but the Court must stress the importance of the duty to render to the Organization "every assistance" which is accepted by the Members in Article 2, paragraph 5, of the Charter. It must be noted that the effective working of the Organization—the accomplishment of its task, and the independence and effectiveness of the work of its agents—require that these undertakings should be strictly observed. For that purpose, it is necessary that, when an infringement occurs, the Organization 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 to its agent.

In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular, he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter. And lastly, it is essential that—

whether the agent belongs to a powerful or to a weak State; to one more affected or less affected by the complications of international life; to one in sympathy or not in sympathy with the mission of the agent—he should know that in the performance of his duties he is under the protection of the Organization. This assurance is even more necessary when the agent is stateless.

Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.

The obligations entered into by States to enable the agents of the Organization to perform their duties are undertaken not in the interest of the agents, but in that of the Organization. When it claims redress for a breach of these obligations, the Organization is invoking its own right, the right that the obligations due to it should be respected. On this ground, it asks for reparation of the injury suffered, for "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form"; as was stated by the Permanent Court in its Judgment No. 8 of July 26th, 1927 (Series A., No. 9, p. 21). In claiming reparation based on the injury suffered by its agent, the Organization does not represent the agent, but is asserting its own right, the right to secure respect for undertakings entered into towards the Organization.

Having regard to the foregoing considerations, and to the 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, the Court is of the opinion that, in the case of a breach of these obligations, the Organization has the capacity to claim adequate reparation, and that in assessing this reparation it is authorized to include the damage suffered by the victim or by persons entitled through him.

* * *

The question remains whether the Organization has "the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (*a*) to the United Nations, (*b*) to the victim or to persons entitled through him" when the defendant State is not a member of the Organization.

In considering this aspect of Question I (*a*) and (*b*), it is necessary to keep in mind the reasons which have led the Court to give an affirmative answer to it when the defendant State is a Member of the Organization. It has now been established that the Organization has capacity to bring claims on the international

plane, and that it possesses a right of functional protection in respect of its agents. Here again the Court is authorized to assume that the damage suffered involves the responsibility of a State, and it is not called upon to express an opinion upon the various ways in which that responsibility might be engaged. Accordingly the question is whether the Organization has capacity to bring a claim against the defendant State to recover reparation in respect of that damage or whether, on the contrary, the defendant State, not being a member, is justified in raising the objection that the Organization lacks the capacity to bring an international claim. On this point, the Court's opinion is 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 recognized by them alone, together with capacity to bring international claims.

Accordingly, the Court arrives at the conclusion that an affirmative answer should be given to Question I (*a*) and (*b*) whether or not the defendant State is a Member of the United Nations.

* * *

Question II is as follows:

> "In the event of an affirmative reply on point I (*b*), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?"

The affirmative reply given by the Court on point I (*b*) obliges it now to examine Question II. When the victim has a nationality, cases can clearly occur in which the injury suffered by him may engage the interest both of his national State and of the Organization. In such an event, competition between the State's right of diplomatic protection and the Organization's right of functional protection might arise, and this is the only case with which the Court is invited to deal.

In such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim.

The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense, and as between the Organization and its Members it draws attention to their duty to render "every assistance" provided by Article 2, paragraph 5, of the Charter.

Although the bases of the two claims are different, that does not mean that the defendant State can be compelled to pay the reparation due in respect of the damage twice over. International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case.

The risk of competition between the Organization and the national State can be reduced or eliminated either by a general convention or by agreements entered into in each particular case. There is no doubt that in due course a practice will be developed, and it is worthy of note that already certain States whose nationals have been injured in the performance of missions undertaken for the Organization have shown a reasonable and co-operative disposition to find a practical solution.

* * *

The question of reconciling action by the Organization with the rights of a national State may arise in another way ; that is to say, when the agent bears the nationality of the defendant State.

The ordinary practice whereby a State does not exercise protection on behalf of one of its nationals against a State which regards him as its own national, does not constitute a precedent which is relevant here. The action of the Organization is in fact based not upon the nationality of the victim but upon his status as agent of the Organization. Therefore it does not matter whether or not the State to which the claim is addressed regards him as its own national, because the question of nationality is not pertinent to the admissibility of the claim.

In law, therefore, it does not seem that the fact of the possession of the nationality of the defendant State by the agent constitutes any obstacle to a claim brought by the Organization for a breach of obligations towards it occurring in relation to the performance of his mission by that agent.

FOR THESE REASONS,

The Court is of opinion

On Question I (a) :

(i) unanimously,

That, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a Member State, the United Nations as an Organization has the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused to the United Nations.

(ii) unanimously,

That, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State which is not a member, the United Nations as an Organization has the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused to the United Nations.

On Question I (b) :

(i) by eleven votes against four,

That, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a Member State, the United Nations as an Organization has the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused to the victim or to persons entitled through him.

(ii) by eleven votes against four,

That, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State which is not a member, the United Nations as an Organization has the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused to the victim or to persons entitled through him.

On Question II :

By ten votes against five,

When the United Nations as an Organization is bringing a claim for reparation of damage caused to its agent, it can only do so by basing its claim upon a breach of obligations due to itself ; respect for this rule will usually prevent a conflict between the action of the United Nations and such rights as the agent's national State may possess, and thus bring about a reconciliation between their claims ; moreover, this reconciliation must depend upon considerations applicable to each particular case, and upon agreements to be made between the Organization and individual States, either generally or in each case.

Done in English and French, the English text being authoritative, at the Peace Palace, The Hague, this eleventh day of April, one thousand nine hundred and forty-nine, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(*Signed*) BASDEVANT,

President.

(*Signed*) E. HAMBRO,

Registrar.

Judge WINIARSKI states with regret that he is unable to concur in the reply given by the Court to Question I (*b*). In general, he shares the views expressed in Judge Hackworth's dissenting opinion.

Judges ALVAREZ and AZEVEDO, whilst concurring in the Opinion of the Court, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the Opinion statements of their individual opinion.

Judges HACKWORTH, BADAWI PASHA and KRYLOV, declaring that they are unable to concur in the Opinion of the Court, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the Opinion statements of their dissenting opinion.

(*Initialled*) J. B.

(*Initialled*) E. H.

INTERNATIONAL COURT OF JUSTICE

1962
20 July
General List
No. 49

YEAR 1962

20 July 1962

CERTAIN EXPENSES OF THE UNITED NATIONS

(ARTICLE 17, PARAGRAPH 2, OF THE CHARTER)

Resolution 1731 (XVI) of General Assembly requesting advisory opinion.—Objections to giving opinion based on proceedings in General Assembly.—Interpretation of meaning of "expenses of the Organization".—Article 17, paragraphs 1 and 2, of Charter.—Lack of justification for limiting terms "budget" and "expenses".—Article 17 in context of Charter.—Respective functions of Security Council and General Assembly.—Article 11, paragraph 2, in relation to budgetary powers of General Assembly.—Role of General Assembly in maintenance of international peace and security.—Agreements under Article 43.—Expenses incurred for purposes of United Nations.—Obligations incurred by Secretary-General acting under authority of Security Council or General Assembly.—Nature of operations of UNEF and ONUC.—Financing of UNEF and ONUC based on Article 17, paragraph 2.—Implementation by Secretary-General of Security Council resolutions.—Expenditures for UNEF and ONUC and Article 17, paragraph 2, of Charter.

ADVISORY OPINION

Present: *President* WINIARSKI; *Vice-President* ALFARO; *Judges* BASDEVANT, BADAWI, MORENO QUINTANA, WELLINGTON KOO, SPIROPOULOS, Sir Percy SPENDER, Sir Gerald FITZMAURICE, KORETSKY, TANAKA, BUSTAMANTE Y RIVERO, JESSUP, MORELLI; *Registrar* GARNIER-COIGNET.

Concerning the question whether certain expenditures authorized by the General Assembly "constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations",

THE COURT,

composed as above,

gives the following Advisory Opinion:

The request which laid the matter before the Court was formulated in a letter dated 21 December 1961 from the Acting Secretary-General of the United Nations to the President of the Court, received in the Registry on 27 December. In that letter the Acting Secretary-General informed the President of the Court that the General Assembly, by a resolution adopted on 20 December 1961, had decided to request the International Court of Justice to give an advisory opinion on the following question:

> "Do the expenditures authorized in General Assembly resolutions 1583 (XV) and 1590 (XV) of 20 December 1960, 1595 (XV) of 3 April 1961, 1619 (XV) of 21 April 1961 and 1633 (XVI) of 30 October 1961 relating to the United Nations operations in the Congo undertaken in pursuance of the Security Council resolutions of 14 July, 22 July and 9 August 1960, and 21 February and 24 November 1961, and General Assembly resolutions 1474 (ES-IV) of 20 September 1960 and 1599 (XV), 1600 (XV) and 1601 (XV) of 15 April 1961, and the expenditures authorized in General Assembly resolutions 1122 (XI) of 26 November 1956, 1089 (XI) of 21 December 1956, 1090 (XI) of 27 February 1957, 1151 (XII) of 22 November 1957, 1204 (XII) of 13 December 1957, 1337 (XIII) of 13 December 1958, 1441 (XIV) of 5 December 1959 and 1575 (XV) of 20 December 1960 relating to the operations of the United Nations Emergency Force undertaken in pursuance of General Assembly resolutions 997 (ES-I) of 2 November 1956, 998 (ES-I) and 999 (ES-I) of 4 November 1956, 1000 (ES-I) of 5 November 1956, 1001 (ES-I) of 7 November 1956, 1121 (XI) of 24 November 1956 and 1263 (XIII) of 14 November 1958, constitue 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations?"

In the Acting Secretary-General's letter was enclosed a certified copy of the aforementioned resolution of the General Assembly. At the same time the Acting Secretary-General announced that he would transmit to the Court, in accordance with Article 65 of the Statute, all documents likely to throw light upon the question.

Resolution 1731 (XVI) by which the General Assembly decided to request an advisory opinion from the Court reads as follows:

> "*The General Assembly,*
>
> *Recognizing* its need for authoritative legal guidance as to obligations of Member States under the Charter of the United Nations

in the matter of financing the United Nations operations in the Congo and in the Middle East,

1. *Decides* to submit the following question to the International Court of Justice for an advisory opinion:

"Do the expenditures authorized in General Assembly resolutions 1583 (XV) and 1590 (XV) of 20 December 1960, 1595 (XV) of 3 April 1961, 1619 (XV) of 21 April 1961 and 1633 (XVI) of 30 October 1961 relating to the United Nations operations in the Congo undertaken in pursuance of the Security Council resolutions of 14 July, 22 July and 9 August 1960, and 21 February and 24 November 1961, and General Assembly resolutions 1474 (ES-IV) of 20 September 1960 and 1599 (XV), 1600 (XV) and 1601 (XV) of 15 April 1961, and the expenditures authorized in General Assembly resolutions 1122 (XI) of 26 November 1956, 1089 (XI) of 21 December 1956, 1090 (XI) of 27 February 1957, 1151 (XII) of 22 November 1957, 1204 (XII) of 13 December 1957, 1337 (XIII) of 13 December 1958, 1441 (XIV) of 5 December 1959 and 1575 (XV) of 20 December 1960 relating to the operations of the United Nations Emergency Force undertaken in pursuance of General Assembly resolutions 997 (ES-I) of 2 November 1956, 998 (ES-I) and 999 (ES-I) of 4 November 1956, 1000 (ES-I) of 5 November 1956, 1001 (ES-I) of 7 November 1956, 1121 (XI) of 24 November 1956 and 1263 (XIII) of 14 November 1958, constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations?"

2. *Requests* the Secretary-General, in accordance with Article 65 of the Statute of the International Court of Justice, to transmit the present resolution to the Court, accompanied by all documents likely to throw light upon the question."

* * *

On 27 December 1961, the day the letter from the Acting Secretary-General of the United Nations reached the Registry, the President, in pursuance of Article 66, paragraph 2, of the Statute, considered that the States Members of the United Nations were likely to be able to furnish information on the question and made an Order fixing 20 February 1962 as the time-limit within which the Court would be prepared to receive written statements from them and the Registrar sent to them the special and direct communication provided for in that Article, recalling that resolution 1731 (XVI) and those referred to in the question submitted for opinion were already in their possession.

The notice to all States entitled to appear before the Court of the letter from the Acting Secretary-General and of the resolution therein enclosed, prescribed by Article 66, paragraph 1, of the Statute, was given by letter of 4 January 1962.

The following Members of the United Nations submitted statements, notes or letters setting forth their views: Australia, Bulgaria,

Byelorussian Soviet Socialist Republic, Canada, Czechoslovakia, Denmark, France, Ireland, Italy, Japan, Netherlands, Portugal, Romania, South Africa, Spain, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Upper Volta. Copies of these communications were transmitted to all Members of the United Nations and to the Acting Secretary-General of the United Nations.

Mexico, the Philippines and Poland referred in letters to the views expressed on their behalf during the session of the General Assembly.

The Acting Secretary-General of the United Nations, in pursuance of Article 65, paragraph 2, of the Statute, transmitted to the Court a dossier of documents likely to throw light upon the question, together with an Introductory Note and a note by the Controller on the budgetary and financial practices of the United Nations; these documents reached the Registry on 21 February and 1 March 1962.

The Members of the United Nations were informed on 23 March 1962 that the oral proceedings in this case would open towards the beginning of May. On 16 April 1962 they were notified that 14 May had been fixed as the opening date. Hearings were held from 14 to 19 May and on 21 May, the Court being addressed by the following:

for Canada:	M. Marcel Cadieux, Deputy Under-Secretary and Legal Adviser for the Department of External Affairs;
for the Netherlands:	Professor W. Riphagen, Legal Adviser to the Ministry of Foreign Affairs;
for Italy:	M. Riccardo Monaco, Professor at the University of Rome, Head of Department for Contentious Diplomatic Questions, Ministry of Foreign Affairs;
for the United Kingdom of Great Britain and Northern Ireland:	The Rt. Hon. Sir Reginald Manningham-Buller, Q.C., Attorney-General;
for Norway:	Mr. Jens Evensen, Director-General, Ministry of Foreign Affairs;
for Australia:	Sir Kenneth Bailey, Solicitor-General;
for Ireland:	Mr. Aindrias O' Caoimh, S.C., Attorney-General;
for the Union of Soviet Socialist Republics:	Professor G. I. Tunkin, Director of the Juridical-Treaty Department of the Ministry of Foreign Affairs;
for the United States of America:	The Honorable Abram Chayes, Legal Adviser, Department of State.

* * *

Before proceeding to give its opinion on the question put to it, the Court considers it necessary to make the following preliminary remarks:

The power of the Court to give an advisory opinion is derived from Article 65 of the Statute. The power granted is of a discretionary character. In exercising its discretion, the International Court of Justice, like the Permanent Court of International Justice, has always been guided by the principle which the Permanent Court stated in the case concerning the *Status of Eastern Carelia* on 23 July 1923: "The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court" (P.C.I.J., Series B, No. 5, p. 29). Therefore, and in accordance with Article 65 of its Statute, the Court can give an advisory opinion only on a legal question. If a question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested. But even if the question is a legal one, which the Court is undoubtedly competent to answer, it may nonetheless decline to do so. As this Court said in its Opinion of 30 March 1950, the permissive character of Article 65 "gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), I.C.J. Reports 1950*, p. 72). But, as the Court also said in the same Opinion, "the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused" (*ibid.*, p. 71). Still more emphatically, in its Opinion of 23 October 1956, the Court said that only "compelling reasons" should lead it to refuse to give a requested advisory opinion (*Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the Unesco, I.C.J. Reports 1956*, p. 86).

The Court finds no "compelling reason" why it should not give the advisory opinion which the General Assembly requested by its resolution 1731 (XVI). It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision.

In the preamble to the resolution requesting this opinion, the General Assembly expressed its recognition of "its need for authori-

tative legal guidance". In its search for such guidance it has put to the Court a legal question—a question of the interpretation of Article 17, paragraph 2, of the Charter of the United Nations. In its Opinion of 28 May 1948, the Court made it clear that as "the principal judicial organ of the United Nations", it was entitled to exercise in regard to an article of the Charter, "a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers" (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), I.C.J. Reports 1947-1948*, p. 61).

The Court, therefore, having been asked to give an advisory opinion upon a concrete legal question, will proceed to give its opinion.

* * *

The question on which the Court is asked to give its opinion is whether certain expenditures which were authorized by the General Assembly to cover the costs of the United Nations operations in the Congo (hereinafter referred to as ONUC) and of the operations of the United Nations Emergency Force in the Middle East (hereinafter referred to as UNEF), "constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations".

Before entering upon the detailed aspects of this question, the Court will examine the view that it should take into consideration the circumstance that at the 1086th Plenary Meeting of the General Assembly on 20 December 1961, an amendment was proposed, by the representative of France, to the draft resolution requesting the advisory opinion, and that this amendment was rejected. The amendment would have asked the Court to give an opinion on the question whether the expenditures relating to the indicated operations were "decided on in conformity with the provisions of the Charter"; if that question were answered in the affirmative, the Court would have been asked to proceed to answer the question which the resolution as adopted actually poses.

If the amendment had been adopted, the Court would have been asked to consider whether the resolutions *authorizing the expenditures* were decided on in conformity with the Charter; the French amendment did not propose to ask the Court whether the resolutions *in pursuance of which the operations in the Middle East and in the Congo were undertaken,* were adopted in conformity with the Charter.

The Court does not find it necessary to expound the extent to which the proceedings of the General Assembly, antecedent to the adoption of a resolution, should be taken into account in interpreting that resolution, but it makes the following comments on the argument based upon the rejection of the French amendment.

The rejection of the French amendment does not constitute a directive to the Court to exclude from its consideration the question whether certain expenditures were "decided on in conformity with the Charter", if the Court finds such consideration appropriate. It is not to be assumed that the General Assembly would thus seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion. Nor can the Court agree that the rejection of the French amendment has any bearing upon the question whether the General Assembly sought to preclude the Court from interpreting Article 17 in the light of other articles of the Charter, that is, in the whole context of the treaty. If any deduction is to be made from the debates on this point, the opposite conclusion would be drawn from the clear statements of sponsoring delegations that they took it for granted the Court would consider the Charter as a whole.

* * *

Turning to the question which has been posed, the Court observes that it involves an interpretation of Article 17, paragraph 2, of the Charter. On the previous occasions when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable in general to the interpretation of treaties, since it has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics. In interpreting Article 4 of the Charter, the Court was led to consider "the structure of the Charter" and "the relations established by it between the General Assembly and the Security Council"; a comparable problem confronts the Court in the instant matter. The Court sustained its interpretation of Article 4 by considering the manner in which the organs concerned "have consistently interpreted the text" in their practice (*Competence of the General Assembly for the Admission of a State to the United Nations, I.C.J. Reports 1950*, pp. 8-9).

The text of Article 17 is in part as follows:

> "1. The General Assembly shall consider and approve the budget of the Organization.
>
> 2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly."

Although the Court will examine Article 17 in itself and in its relation to the rest of the Charter, it should be noted that at least three separate questions might arise in the interpretation of paragraph 2 of this Article. One question is that of identifying what are "the expenses of the Organization"; a second question might

concern apportionment by the General Assembly; while a third question might involve the interpretation of the phrase "shall be borne by the Members". It is the second and third questions which directly involve "the financial obligations of the Members", but it is only the first question which is posed by the request for the advisory opinion. The question put to the Court has to do with a moment logically anterior to apportionment, just as a question of apportionment would be anterior to a question of Members' obligation to pay.

It is true that, as already noted, the preamble of the resolution containing the request refers to the General Assembly's "need for authoritative legal guidance as to obligations of Member States", but it is to be assumed that in the understanding of the General Assembly, it would find such guidance in the advisory opinion which the Court would give on the question whether certain identified expenditures "constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter". If the Court finds that the indicated expenditures are such "expenses", it is not called upon to consider the manner in which, or the scale by which, they may be apportioned. The amount of what are unquestionably "expenses of the Organization within the meaning of Article 17, paragraph 2" is not in its entirety apportioned by the General Assembly and paid for by the contributions of Member States, since the Organization has other sources of income. A Member State, accordingly, is under no obligation to pay more than the amount apportioned to it; the expenses of the Organization and the total amount in money of the obligations of the Member States may not, in practice, necessarily be identical.

The text of Article 17, paragraph 2, refers to "the expenses of the Organization" without any further explicit definition of such expenses. It would be possible to begin with a general proposition to the effect that the "expenses" of any organization are the amounts paid out to defray the costs of carrying out its purposes, in this case, the political, economic, social, humanitarian and other purposes of the United Nations. The next step would be to examine, as the Court will, whether the resolutions authorizing the operations here in question were intended to carry out the purposes of the United Nations and whether the expenditures were incurred in furthering these operations. Or, it might simply be said that the "expenses" of an organization are those which are provided for in its budget. But the Court has not been asked to give an abstract definition of the words "expenses of the Organization". It has been asked to answer a specific question related to certain identified expenditures which have actually been made, but the Court would not adequately discharge the obligation incumbent on it unless it examined in some detail various problems raised by the question which the General Assembly has asked.

II

It is perhaps the simple identification of "expenses" with the items included in a budget, which has led certain arguments to link the interpretation of the word "expenses" in paragraph 2 of Article 17, with the word "budget" in paragraph 1 of that Article; in both cases, it is contended, the qualifying adjective "regular" or "administrative" should be understood to be implied. Since no such qualification is expressed in the text of the Charter, it could be read in, only if such qualification must necessarily be implied from the provisions of the Charter considered as a whole, or from some particular provision thereof which makes it unavoidable to do so in order to give effect to the Charter.

In the first place, concerning the word "budget" in paragraph 1 of Article 17, it is clear that the existence of the distinction between "administrative budgets" and "operational budgets" was not absent from the minds of the drafters of the Charter, nor from the consciousness of the Organization even in the early days of its history. In drafting Article 17, the drafters found it suitable to provide in paragraph 1 that "The General Assembly shall consider and approve *the budget* of the Organization". But in dealing with the function of the General Assembly in relation to the specialized agencies, they provided in paragraph 3 that the General Assembly "shall examine the *administrative budgets* of such specialized agencies". If it had been intended that paragraph 1 should be limited to the administrative budget of the United Nations organization itself, the word "administrative" would have been inserted in paragraph 1 as it was in paragraph 3. Moreover, had it been contemplated that the Organization would also have had another budget, different from the one which was to be approved by the General Assembly, the Charter would have included some reference to such other budget and to the organ which was to approve it.

Similarly, at its first session, the General Assembly in drawing up and approving the Constitution of the International Refugee Organization, provided that the budget of that Organization was to be divided under the headings "administrative", "operational" and "large-scale resettlement"; but no such distinctions were introduced into the Financial Regulations of the United Nations which were adopted by unanimous vote in 1950, and which, in this respect, remain unchanged. These regulations speak only of "the budget" and do not provide any distinction between "administrative" and "operational".

In subsequent sessions of the General Assembly, including the sixteenth, there have been numerous references to the idea of distinguishing an "operational" budget; some speakers have advocated such a distinction as a useful book-keeping device; some considered it in connection with the possibility of differing scales of assessment or apportionment; others believed it should mark a differentiation of activities to be financed by voluntary contribu-

tions. But these discussions have not resulted in the adoption of two separate budgets based upon such a distinction.

Actually, the practice of the Organization is entirely consistent with the plain meaning of the text. The budget of the Organization has from the outset included items which would not fall within any of the definitions of "administrative budget" which have been advanced in this connection. Thus, for example, prior to the establishment of, and now in addition to, the "Expanded Programme of Technical Assistance" and the "Special Fund", both of which are nourished by voluntary contributions, the annual budget of the Organization contains provision for funds for technical assistance; in the budget for the financial year 1962, the sum of $6,400,000 is included for the technical programmes of economic development, social activities, human rights activities, public administration and narcotic drugs control. Although during the Fifth Committee discussions there was a suggestion that all technical assistance costs should be excluded from the regular budget, the items under these heads were all adopted on second reading in the Fifth Committee without a dissenting vote. The "operational" nature of such activities so budgeted is indicated by the explanations in the budget estimates, e.g. the requests "for the continuation of the operational programme in the field of economic development contemplated in General Assembly resolutions 200 (III) of 4 December 1948 and 304 (IV) of 16 November 1949"; and "for the continuation of the operational programme in the field of advisory social welfare services as contemplated in General Assembly resolution 418 (V) of 1 December 1950".

It is a consistent practice of the General Assembly to include in the annual budget resolutions, provision for expenses relating to the maintenance of international peace and security. Annually, since 1947, the General Assembly has made anticipatory provision for "unforeseen and extraordinary expenses" arising in relation to the "maintenance of peace and security". In a Note submitted to the Court by the Controller on the budgetary and financial practices of the United Nations, "extraordinary expenses" are defined as "obligations and expenditures arising as a result of the approval by a council, commission or other competent United Nations body of new programmes and activities not contemplated when the budget appropriations were approved".

The annual resolution designed to provide for extraordinary expenses authorizes the Secretary-General to enter into commitments to meet such expenses with the prior concurrence of the Advisory Committee on Administrative and Budgetary Questions, except that such concurrence is not necessary if the Secretary-

General certifies that such commitments relate to the subjects mentioned and the amount does not exceed $2 million. At its fifteenth and sixteenth sessions, the General Assembly resolved "that if, as a result of a decision of the Security Council, commitments relating to the maintenance of peace and security should arise in an estimated total exceeding $10 million" before the General Assembly was due to meet again, a special session should be convened by the Secretary-General to consider the matter. The Secretary-General is regularly authorized to draw on the Working Capital Fund for such expenses but is required to submit supplementary budget estimates to cover amounts so advanced. These annual resolutions on unforeseen and extraordinary expenses were adopted without a dissenting vote in every year from 1947 through 1959, except for 1952, 1953 and 1954, when the adverse votes are attributable to the fact that the resolution included the specification of a controversial item—United Nations Korean war decorations.

It is notable that the 1961 Report of the Working Group of Fifteen on the Examination of the Administrative and Budgetary Procedures of the United Nations, while revealing wide differences of opinion on a variety of propositions, records that the following statement was adopted without opposition:

> "22. *Investigations and observation operations undertaken by the Organization to prevent possible aggression should be financed as part of the regular budget of the United Nations.*"

In the light of what has been stated, the Court concludes that there is no justification for reading into the text of Article 17, paragraph 1, any limiting or qualifying word before the word "budget"

* * *

Turning to paragraph 2 of Article 17, the Court observes that, on its face, the term "expenses of the Organization" means all the expenses and not just certain types of expenses which might be referred to as "regular expenses". An examination of other parts of the Charter shows the variety of expenses which must inevitably be included within the "expenses of the Organization" just as much as the salaries of staff or the maintenance of buildings.

For example, the text of Chapters IX and X of the Charter with reference to international economic and social cooperation, especially the wording of those articles which specify the functions and powers of the Economic and Social Council, anticipated the numerous and varied circumstances under which expenses of the Organi-

zation could be incurred and which have indeed eventuated in practice.

Furthermore, by Article 98 of the Charter, the Secretary-General is obligated to perform such functions as are entrusted to him by the General Assembly, the Security Council, the Economic and Social Council, and the Trusteeship Council. Whether or not expenses incurred in his discharge of this obligation become "expenses of the Organization" cannot depend on whether they be administrative or some other kind of expenses.

The Court does not perceive any basis for challenging the legality of the settled practice of including such expenses as these in the budgetary amounts which the General Assembly apportions among the Members in accordance with the authority which is given to it by Article 17, paragraph 2.

* * *

Passing from the text of Article 17 to its place in the general structure and scheme of the Charter, the Court will consider whether in that broad context one finds any basis for implying a limitation upon the budgetary authority of the General Assembly which in turn might limit the meaning of "expenses" in paragraph 2 of that Article.

The general purposes of Article 17 are the vesting of control over the finances of the Organization, and the levying of apportioned amounts of the expenses of the Organization in order to enable it to carry out the functions of the Organization as a whole acting through its principal organs and such subsidiary organs as may be established under the authority of Article 22 or Article 29.

Article 17 is the only article in the Charter which refers to budgetary authority or to the power to apportion expenses, or otherwise to raise revenue, except for Articles 33 and 35, paragraph 3, of the Statute of the Court which have no bearing on the point here under discussion. Nevertheless, it has been argued before the Court that one type of expenses, namely those resulting from operations for the maintenance of international peace and security, are not "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter, inasmuch as they fall to be dealt with exclusively by the Security Council, and more especially through agreements negotiated in accordance with Article 43 of the Charter.

The argument rests in part upon the view that when the maintenance of international peace and security is involved, it is only the Security Council which is authorized to decide on any action relative thereto. It is argued further that since the General Assembly's power is limited to discussing, considering, studying and recommending, it cannot impose an obligation to pay the expenses which result from the implementation of its recommendations. This

argument leads to an examination of the respective functions of the General Assembly and of the Security Council under the Charter, particularly with respect to the maintenance of international peace and security.

Article 24 of the Charter provides:

> "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security..."

The responsibility conferred is "primary", not exclusive. This primary responsibility is conferred upon the Security Council, as stated in Article 24, "in order to ensure prompt and effective action". To this end, it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII. It is only the Security Council which can require enforcement by coercive action against an aggressor.

The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security. Article 14 authorizes the General Assembly to "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations". The word "measures" implies some kind of action, and the only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so. Thus while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory. Article 18 deals with "*decisions*" of the General Assembly "on important questions". These "decisions" do indeed include certain recommendations, but others have dispositive force and effect. Among these latter decisions, Article 18 includes suspension of rights and privileges of membership, expulsion of Members, "and budgetary questions". In connection with the suspension of rights and privileges of membership and expulsion from membership under Articles 5 and 6, it is the Security Council which has only the power to recommend and it is the General Assembly which decides and whose decision determines status; but there is a close collaboration between the two organs. Moreover, these powers of decision of the General Assembly under Arti-

cles 5 and 6 are specifically related to preventive or enforcement measures.

By Article 17, paragraph 1, the General Assembly is given the power not only to "consider" the budget of the Organization, but also to "approve" it. The decision to "approve" the budget has a close connection with paragraph 2 of Article 17, since thereunder the General Assembly is also given the power to apportion the expenses among the Members and the exercise of the power of apportionment creates the obligation, specifically stated in Article 17, paragraph 2, of each Member to bear that part of the expenses which is apportioned to it by the General Assembly. When those expenses include expenditures for the maintenance of peace and security, which are not otherwise provided for, it is the General Assembly which has the authority to apportion the latter amounts among the Members. The provisions of the Charter which distribute functions and powers to the Security Council and to the General Assembly give no support to the view that such distribution excludes from the powers of the General Assembly the power to provide for the financing of measures designed to maintain peace and security.

The argument supporting a limitation on the budgetary authority of the General Assembly with respect to the maintenance of international peace and security relies especially on the reference to "action" in the last sentence of Article 11, paragraph 2. This paragraph reads as follows:

> "The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a State which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such question to the State or States concerned or to the Security Council, or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion."

The Court considers that the kind of action referred to in Article 11, paragraph 2, is coercive or enforcement action. This paragraph, which applies not merely to general questions relating to peace and security, but also to specific cases brought before the General Assembly by a State under Article 35, in its first sentence empowers the General Assembly, by means of recommendations to States or to the Security Council, or to both, to organize peacekeeping operations, at the request, or with the consent, of the States concerned. This power of the General Assembly is a special power which in no way derogates from its general powers under Article 10

or Article 14, except as limited by the last sentence of Article 11, paragraph 2. This last sentence says that when "action" is necessary the General Assembly shall refer the question to the Security Council. The word "action" must mean such action as is solely within the province of the Security Council. It cannot refer to recommendations which the Security Council might make, as for instance under Article 38, because the General Assembly under Article 11 has a comparable power. The "action" which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter, namely "Action with respect to threats to the peace, breaches of the peace, and acts of aggression". If the word "action" in Article 11, paragraph 2, were interpreted to mean that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly may make recommendations on questions brought before it by States or by the Security Council. Accordingly, the last sentence of Article 11, paragraph 2, has no application where the necessary action is not enforcement action.

The practice of the Organization throughout its history bears out the foregoing elucidation of the term "action" in the last sentence of Article 11, paragraph 2. Whether the General Assembly proceeds under Article 11 or under Article 14, the implementation of its recommendations for setting up commissions or other bodies involves organizational activity—action—in connection with the maintenance of international peace and security. Such implementation is a normal feature of the functioning of the United Nations. Such committees, commissions or other bodies or individuals, constitute, in some cases, subsidiary organs established under the authority of Article 22 of the Charter. The functions of the General Assembly for which it may establish such subsidiary organs include, for example, investigation, observation and supervision, but the way in which such subsidiary organs are utilized depends on the consent of the State or States concerned.

The Court accordingly finds that the argument which seeks, by reference to Article 11, paragraph 2, to limit the budgetary authority of the General Assembly in respect of the maintenance of international peace and security, is unfounded.

* * *

It has further been argued before the Court that Article 43 of the Charter constitutes a particular rule, a *lex specialis*, which derogates

from the general rule in Article 17, whenever an expenditure for the maintenance of international peace and security is involved. Article 43 provides that Members shall negotiate agreements with the Security Council on its initiative, stipulating what "armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security", the Member State will make available to the Security Council on its call. According to paragraph 2 of the Article:

> "Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided."

The argument is that such agreements were intended to include specifications concerning the allocation of costs of such enforcement actions as might be taken by direction of the Security Council, and that it is only the Security Council which has the authority to arrange for meeting such costs.

With reference to this argument, the Court will state at the outset that, for reasons fully expounded later in this Opinion, the operations known as UNEF and ONUC were not *enforcement* actions within the compass of Chapter VII of the Charter and that therefore Article 43 could not have any applicability to the cases with which the Court is here concerned. However, even if Article 43 were applicable, the Court could not accept this interpretation of its text for the following reasons.

There is nothing in the text of Article 43 which would limit the discretion of the Security Council in negotiating such agreements. It cannot be assumed that in every such agreement the Security Council would insist, or that any Member State would be bound to agree, that such State would bear the entire cost of the "assistance" which it would make available including, for example, transport of forces to the point of operation, complete logistical maintenance in the field, supplies, arms and ammunition, etc. If, during negotiations under the terms of Article 43, a Member State would be entitled (as it would be) to insist, and the Security Council would be entitled (as it would be) to agree, that some part of the expense should be borne by the Organization, then such expense would form part of the expenses of the Organization and would fall to be apportioned by the General Assembly under Article 17. It is difficult to see how it could have been contemplated that all potential expenses could be envisaged in such agreements concluded perhaps long in advance. Indeed, the difficulty or impossibility of anticipating the entire financial impact of enforcement measures on Member States is brought out by the terms of Article 50 which provides that a State, whether a Member of the United Nations or not, "which finds itself confronted with special economic problems arising from the carrying out of those [preventive or enforcement] measures, shall have

the right to consult the Security Council with regard to a solution of those problems". Presumably in such a case the Security Council might determine that the overburdened State was entitled to some financial assistance; such financial assistance, if afforded by the Organization, as it might be, would clearly constitute part of the "expenses of the Organization". The economic problems could not have been covered in advance by a negotiated agreement since they would be unknown until after the event and in the case of non-Member States, which are also included in Article 50, no agreement at all would have been negotiated under Article 43.

Moreover, an argument which insists that all measures taken for the maintenance of international peace and security must be financed through agreements concluded under Article 43, would seem to exclude the possibility that the Security Council might act under some other Article of the Charter. The Court cannot accept so limited a view of the powers of the Security Council under the Charter. It cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded.

Articles of Chapter VII of the Charter speak of "situations" as well as disputes, and it must lie within the power of the Security Council to police a situation even though it does not resort to enforcement action against a State. The costs of actions which the Security Council is authorized to take constitute "expenses of the Organization within the meaning of Article 17, paragraph 2".

* * *

The Court has considered the general problem of the interpretation of Article 17, paragraph 2, in the light of the general structure of the Charter and of the respective functions assigned by the Charter to the General Assembly and to the Security Council, with a view to determining the meaning of the phrase "the expenses of the Organization". The Court does not find it necessary to go further in giving a more detailed definition of such expenses. The Court will, therefore, proceed to examine the expenditures enumerated in the request for the advisory opinion. In determining whether the actual expenditures authorized constitute "expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter", the Court agrees that such expenditures must be tested by their relationship to the purposes of the United Nations in the sense that if an expenditure were made for a purpose which is not one of the purposes of the United Nations, it could not be considered an "expense of the Organization".

The purposes of the United Nations are set forth in Article 1 of the Charter. The first two purposes as stated in paragraphs 1

and 2, may be summarily described as pointing to the goal of international peace and security and friendly relations. The third purpose is the achievement of economic, social, cultural and humanitarian goals and respect for human rights. The fourth and last purpose is: "To be a center for harmonizing the actions of nations in the attainment of these common ends."

The primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition. These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action. But when the Organization 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 Organization.

If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent.

In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an *advisory* opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute "expenses of the Organization".

The Financial Regulations and Rules of the United Nations, adopted by the General Assembly, provide:

> "Regulation 4.1: The appropriations voted by the General Assembly shall constitute an authorization to the Secretary-

> General to incur obligations and make payments for the purposes for which the appropriations were voted and up to the amounts so voted."

Thus, for example, when the General Assembly in resolution 1619 (XV) included a paragraph reading:

> "3. *Decides* to appropriate an amount of $100 million for the operations of the United Nations in the Congo from 1 January to 31 October 1961",

this constituted an authorization to the Secretary-General to incur certain obligations of the United Nations just as clearly as when in resolution 1590 (XV) the General Assembly used this language:

> "3. *Authorizes* the Secretary-General ... to incur commitments in 1961 for the United Nations operations in the Congo up to the total of $24 million..."

On the previous occasion when the Court was called upon to consider Article 17 of the Charter, the Court found that an award of the Administrative Tribunal of the United Nations created an obligation of the Organization and with relation thereto the Court said that:

> "the function of approving the budget does not mean that the General Assembly has an absolute power to approve or disapprove the expenditure proposed to it; for some part of that expenditure arises out of obligations already incurred by the Organization, and to this extent the General Assembly has no alternative but to honour these engagements". (*Effects of awards of compensation made by the United Nations Administrative Tribunal, I.C.J. Reports 1954*, p. 59.)

Similarly, obligations of the Organization may be incurred by the Secretary-General, acting on the authority of the Security Council or of the General Assembly, and the General Assembly "has no alternative but to honour these engagements".

The obligation is one thing: the way in which the obligation is met—that is from what source the funds are secured—is another. The General Assembly may follow any one of several alternatives: it may apportion the cost of the item according to the ordinary scale of assessment; it may apportion the cost according to some special scale of assessment; it may utilize funds which are voluntarily contributed to the Organization; or it may find some other method or combination of methods for providing the necessary funds. In this context, it is of no legal significance whether, as a matter of book-keeping or accounting, the General Assembly chooses to have the item in question included under one of the standard established sections of the "regular" budget or whether it is separately listed in some special account or fund. The significant fact is that the item is an expense of the Organization and under

Article 17, paragraph 2, the General Assembly therefore has authority to apportion it.

The reasoning which has just been developed, applied to the resolutions mentioned in the request for the advisory opinion, might suffice as a basis for the opinion of the Court. The Court finds it appropriate, however, to take into consideration other arguments which have been advanced.

* * *

The expenditures enumerated in the request for an advisory opinion may conveniently be examined first with reference to UNEF and then to ONUC. In each case, attention will be paid first to the operations and then to the financing of the operations.

In considering the operations in the Middle East, the Court must analyze the functions of UNEF as set forth in resolutions of the General Assembly. Resolution 998 (ES-I) of 4 November 1956 requested the Secretary-General to submit a plan "for the setting up, with the consent of the nations concerned, of an emergency international United Nations Force to secure and supervise the cessation of hostilities in accordance with all the terms of" the General Assembly's previous resolution 997 (ES-I) of 2 November 1956. The verb "secure" as applied to such matters as halting the movement of military forces and arms into the area and the conclusion of a cease-fire, might suggest measures of enforcement, were it not that the Force was to be set up "with the consent of the nations concerned".

In his first report on the plan for an emergency international Force the Secretary-General used the language of resolution 998 (ES-I) in submitting his proposals. The same terms are used in General Assembly resolution 1000 (ES-I) of 5 November in which operative paragraph 1 reads:

> "*Establishes* a United Nations Command for an emergency international Force to secure and supervise the cessation of hostilities in accordance with all the terms of General Assembly resolution 997 (ES-I) of 2 November 1956."

This resolution was adopted without a dissenting vote. In his second and final report on the plan for an emergency international Force of 6 November, te Secretary-General, in paragraphs 9 and 10, stated:

> "While the General Assembly is enabled to *establish* the Force with the consent of those parties which contribute units to the Force, it could not request the Force to be *stationed* or *operate* on the territory of a given country without the consent of the Govern-

ment of that country. This does not exclude the possibility that the Security Council could use such a Force within the wider margins provided under Chapter VII of the United Nations Charter. I would not for the present consider it necessary to elaborate this point further, since no use of the Force under Chapter VII, with the rights in relation to Member States that this would entail, has been envisaged.

10. The point just made permits the conclusion that the setting up of the Force should not be guided by the needs which would have existed had the measure been considered as part of an enforcement action directed against a Member country. There is an obvious difference between establishing the Force in order to secure the cessation of hostilities, with a withdrawal of forces, and establishing such a Force with a view to enforcing a withdrawal of forces."

Paragraph 12 of the Report is particularly important because in resolution 1001 (ES-I) the General Assembly, again without a dissenting vote, "*Concurs* in the definition of the functions of the Force as stated in paragraph 12 of the Secretary-General's report". Paragraph 12 reads in part as follows:

"the functions of the United Nations Force would be, when a cease-fire is being established, to enter Egyptian territory with the consent of the Egyptian Government, in order to help maintain quiet during and after the withdrawal of non-Egyptian troops, and to secure compliance with the other terms established in the resolution of 2 November 1956. The Force obviously should have no rights other than those necessary for the execution of its functions, in co-operation with local authorities. It would be more than an observers' corps, but in no way a military force temporarily controlling the territory in which it is stationed; nor, moreover, should the Force have military functions exceeding those necessary to secure peaceful conditions on the assumption that the parties to the conflict take all necessary steps for compliance with the recommendations of the General Assembly."

It is not possible to find in this description of the functions of UNEF, as outlined by the Secretary-General and concurred in by the General Assembly without a dissenting vote, any evidence that the Force was to be used for purposes of enforcement. Nor can such evidence be found in the subsequent operations of the Force, operations which did not exceed the scope of the functions ascribed to it.

It could not therefore have been patent on the face of the resolution that the establishment of UNEF was in effect "enforcement action" under Chapter VII which, in accordance with the Charter, could be authorized only by the Security Council.

On the other hand, it is apparent that the operations were undertaken to fulfil a prime purpose of the United Nations, that is, to

promote and to maintain a peaceful settlement of the situation. This being true, the Secretary-General properly exercised the authority given him to incur financial obligations of the Organization and expenses resulting form such obligations must be considered "expenses of the Organization within the meaning of Article 17, paragraph 2".

Apropos what has already been said about the meaning of the word "action" in Article 11 of the Charter, attention may be called to the fact that resolution 997 (ES-I), which is chronologically the first of the resolutions concerning the operations in the Middle East mentioned in the request for the advisory opinion, provides in paragraph 5:

> "*Requests* the Secretary-General to observe and report promptly on the compliance with the present resolution to the Security Council *and* to the General Assembly, for such further *action as they may deem appropriate in accordance with the Charter.*"

The italicized words reveal an understanding that either of the two organs might take "action" in the premises. Actually, as one knows, the "action" was taken by the General Assembly in adopting two days later without a dissenting vote, resolution 998 (ES-I) and, also without a dissenting vote, within another three days, resolutions 1000 (ES-I) and 1001 (ES-I), all providing for UNEF.

The Court notes that these "actions" may be considered "measures" recommended under Article 14, rather than "action" recommended under Article 11. The powers of the General Assembly stated in Article 14 are not made subject to the provisions of Article 11, but only of Article 12. Furthermore, as the Court has already noted, the word "measures" implies some kind of action. So far as concerns the nature of the situations in the Middle East in 1956, they could be described as "likely to impair ... friendly relations among nations", just as well as they could be considered to involve "the maintenance of international peace and security". Since the resolutions of the General Assembly in question do not mention upon which article they are based, and since the language used in most of them might imply reference to either Article 14 or Article 11, it cannot be excluded that they were based upon the former rather than the latter article.

* * *

The financing of UNEF presented perplexing problems and the debates on these problems have even led to the view that the General Assembly never, either directly or indirectly, regarded the

expenses of UNEF as "expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter". With this interpretation the Court cannot agree. In paragraph 15 of his second and final report on the plan for an emergency international Force of 6 November 1956, the Secretary-General said that this problem required further study. Provisionally, certain costs might be absorbed by a nation providing a unit, "while all other costs should be financed outside the normal budget of the United Nations". Since it was "obviously impossible to make any estimate of the costs without a knowledge of the size of the corps and the length of its assignment", the "only practical course ... would be for the General Assembly to vote a general authorization for the cost of the Force on the basis of general principles such as those here suggested".

Paragraph 5 of resolution 1001 (ES-I) of 7 November 1956 states that the General Assembly "*Approves provisionally* the basic rule concerning the financing of the Force laid down in paragraph 15 of the Secretary-General's report".

In an oral statement to the plenary meeting of the General Assembly on 26 November 1956, the Secretary-General said:

> "... I wish to make it equally clear that while funds received and payments made with respect to the Force are to be considered as coming outside the regular budget of the Organization, the operation is essentially a United Nations responsibility, and the Special Account to be established must, therefore, be construed as coming within the meaning of Article 17 of the Charter".

At this same meeting, after hearing this statement, the General Assembly in resolution 1122 (XI) noted that it had "*provisionally approved* the recommendations made by the Secretary-General concerning the financing of the Force". It then authorized the Secretary-General "to establish a United Nations Emergency Force Special Account to which funds received by the United Nations, outside the regular budget, for the purpose of meeting the expenses of the Force shall be credited and from which payments for this purpose shall be made". The resolution then provided that the initial amount in the Special Account should be $10 million and authorized the Secretary-General "pending the receipt of funds for the Special Account, to advance from the Working Capital Fund such sums as the Special Account may require to meet any expenses chargeable to it". The establishment of a Special Account does not necessarily mean that the funds in it are not to be derived from contributions of Members as apportioned by the General Assembly.

The next of the resolutions of the General Assembly to be considered is 1089 (XI) of 21 December 1956, which reflects the uncertainties and the conflicting views about financing UNEF. The divergencies are duly noted and there is ample reservation concerning possible future action, but operative paragraph 1 follows the recommendation of the Secretary-General "that the expenses relating to the Force should be apportioned in the same manner as the expenses of the Organization". The language of this paragraph is clearly drawn from Article 17:

> "1. *Decides* that the expenses of the United Nations Emergency Force, other than for such pay, equipment, supplies and services as may be furnished without charge by Governments of Member States, shall be borne by the United Nations and shall be apportioned among the Member States, to the extent of $10 million, in accordance with the scale of assessments adopted by the General Assembly for contributions to the annual budget of the Organization for the financial year 1957;"

This resolution, which was adopted by the requisite two-thirds majority, must have rested upon the conclusion that the expenses of UNEF were "expenses of the Organization" since otherwise the General Assembly would have had no authority to decide that they "shall be borne by the United Nations" or to apportion them among the Members. It is further significant that paragraph 3 of this resolution, which established a study committee, charges this committee with the task of examining "the question of the *apportionment* of the expenses of the Force in excess of $10 million ... and the principle or the formulation of *scales of contributions different from the scale of contributions* by Member States to the ordinary budget for 1957". The italicized words show that it was not contemplated that the Committee would consider any method of meeting these expenses except through some form of apportionment although it was understood that a different *scale* might be suggested.

The report of this study committee again records differences of opinion but the draft resolution which it recommended authorized further expenditures and authorized the Secretary-General to advance funds from the Working Capital Fund and to borrow from other funds if necessary; it was adopted as resolution 1090 (XI) by the requisite two-thirds majority on 27 February 1957. In paragraph 4 of that resolution, the General Assembly decided that it would at its twelfth session "consider the basis for financing any costs of the Force in excess of $10 million not covered by voluntary contributions".

Resolution 1151 (XII) of 22 November 1957, while contemplating the receipt of more voluntary contributions, decided in paragraph 4 that the expenses authorized "shall be borne by the Members of the United Nations in accordance with the scales of assessments

adopted by the General Assembly for the financial years 1957 and 1958 respectively".

Almost a year later, on 14 November 1958, in resolution 1263 (XIII) the General Assembly, while "*Noting with satisfaction* the effective way in which the Force continues to carry out its function", requested the Fifth Committee "to recommend such action as may be necessary to finance this continuing operation of the United Nations Emergency Force".

After further study, the provision contained in paragraph 4 of the resolution of 22 November 1957 was adopted in paragraph 4 of resolution 1337 (XIII) of 13 December 1958. Paragraph 5 of that resolution requested "the Secretary-General to consult with the Governments of Member States with respect to their views concerning the manner of financing the Force in the future, and to submit a report together with the replies to the General Assembly at its fourteenth session". Thereafter a new plan was worked out for the utilization of any voluntary contributions, but resolution 1441 (XIV) of 5 December 1959, in paragraph 2: "*Decides* to assess the amount of $20 million against all Members of the United Nations on the basis of the regular scale of assessments" subject to the use of credits drawn from voluntary contributions. Resolution 1575 (XV) of 20 December 1960 is practically identical.

The Court concludes that, from year to year, the expenses of UNEF have been treated by the General Assembly as expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter.

* * *

The operations in the Congo were initially authorized by the Security Council in the resolution of 14 July 1960 which was adopted without a dissenting vote. The resolution, in the light of the appeal from the Government of the Congo, the report of the Secretary-General and the debate in the Security Council, was clearly adopted with a view to maintaining international peace and security. However, it is argued that that resolution has been implemented, in violation of provisions of the Charter inasmuch as under the Charter it is the Security Council that determines which States are to participate in carrying out decisions involving the maintenance of international peace and security, whereas in the case of the Congo the Secretary-General himself determined which States were to participate with their armed forces or otherwise.

By paragraph 2 of the resolution of 14 July 1960 the Security Council "*Decides* to authorize the Secretary-General to take the necessary steps, in consultation with the Government of the Republic of the Congo, to provide the Government with such military assistance as may be necessary". Paragraph 3 requested the

Secretary-General "to report to the Security Council as appropriate". The Secretary-General made his first report on 18 July and in it informed the Security Council which States he had asked to contribute forces or matériel, which ones had complied, the size of the units which had already arrived in the Congo (a total of some 3,500 troops), and some detail about further units expected.

On 22 July the Security Council by unanimous vote adopted a further resolution in which the preamble states that it had considered this report of the Secretary-General and appreciated "the work of the Secretary-General and the support so readily and so speedily given to him by all Member States invited by him to give assistance". In operative paragraph 3, the Security Council "*Commends* the Secretary-General for the prompt action he has taken to carry out resolution S/4387 of the Security Council, and for his first report".

On 9 August the Security Council adopted a further resolution without a dissenting vote in which it took note of the second report and of an oral statement of the Secretary-General and in operative paragraph 1: "*Confirms* the authority given to the Secretary-General by the Security Council resolutions of 14 July and 22 July 1960 and requests him to continue to carry out the responsibility placed on him thereby". This emphatic ratification is further supported by operative paragraphs 5 and 6 by which all Member States were called upon "to afford mutual assistance" and the Secretary-General was requested "to implement this resolution and to report further to the Council as appropriate".

The Security Council resolutions of 14 July, 22 July and 9 August 1960 were noted by the General Assembly in its resolution 1474 (ES-IV) of 20 September, adopted without a dissenting vote, in which it "fully supports" these resolutions. Again without a dissenting vote, on 21 February 1961 the Security Council reaffirmed its three previous resolutions "and the General Assembly resolution 1474 (ES-IV) of 20 September 1960" and reminded "all States of their obligations under these resolutions".

Again without a dissenting vote on 24 November 1961 the Security Council, once more recalling the previous resolutions, reaffirmed "the policies and purposes of the United Nations with respect to the Congo (Leopoldville) as set out" in those resolutions. Operative paragraphs 4 and 5 of this resolution renew the authority to the Secretary-General to continue the activities in the Congo.

In the light of such a record of reiterated consideration, confirmation, approval and ratification by the Security Council and by the General Assembly of the actions of the Secretary-General in

implementing the resolution of 14 July 1960, it is impossible to reach the conclusion that the operations in question usurped or impinged upon the prerogatives conferred by the Charter on the Security Council. The Charter does not forbid the Security Council to act through instruments of its own choice: under Article 29 it "may establish such subsidiary organs as it deems necessary for the performance of its functions"; under Article 98 it may entrust "other functions" to the Secretary-General.

It is not necessary for the Court to express an opinion as to which article or articles of the Charter were the basis for the resolutions of the Security Council, but it can be said that the operations of ONUC did not include a use of armed force against a State which the Security Council, under Article 39, determined to have committed an act of aggression or to have breached the peace. The armed forces which were utilized in the Congo were not authorized to take military action against any State. The operation did not involve "preventive or enforcement measures" against any State under Chapter VII and therefore did not constitute "action" as that term is used in Article 11.

For the reasons stated, financial obligations which, in accordance with the clear and reiterated authority of both the Security Council and the General Assembly, the Secretary-General incurred on behalf of the United Nations, constitute obligations of the Organization for which the General Assembly was entitled to make provision under the authority of Article 17.

* * *

In relation to ONUC, the first action concerning the financing of the operation was taken by the General Assembly on 20 December 1960, after the Security Council had adopted its resolutions of 14 July, 22 July and 9 August, and the General Assembly had adopted its supporting resolution of 20 September. This resolution 1583 (XV) of 20 December referred to the report of the Secretary-General on the estimated cost of the Congo operations from 14 July to 31 December 1960, and to the recommendations of the Advisory Committee on Administrative and Budgetary Questions. It decided to establish an *ad hoc* account for the expenses of the United Nations in the Congo. It also took note of certain waivers of cost claims and then decided to apportion the sum of $48.5 million among the Member States "on the basis of the regular scale of assessment" subject to certain exceptions. It made this decision because in the preamble it had already recognized:

> "that the expenses involved in the United Nations operations in the Congo for 1960 constitute 'expenses of the Organization' within

the meaning of Article 17, paragraph 2, of the Charter of the United Nations and that the assessment thereof against Member States creates binding legal obligations on such States to pay their assessed shares".

By its further resolution 1590 (XV) of the same day, the General Assembly authorized the Secretary-General "to incur commitments in 1961 for the United Nations operations in the Congo up to the total of $24 million for the period from 1 January to 31 March 1961". On 3 April 1961, the General Assembly authorized the Secretary-General to continue until 21 April "to incur commitments for the United Nations operations in the Congo at a level not to exceed $8 million per month".

Importance has been attached to the statement included in the preamble of General Assembly resolution 1619 (XV) of 21 April 1961 which reads:

> "*Bearing in mind* that the extraordinary expenses for the United Nations operations in the Congo are essentially different in nature from the expenses of the Organization under the regular budget and that therefore a procedure different from that applied in the case of the regular budget is required for meeting these extraordinary expenses."

However, the same resolution in operative paragraph 4:

> "*Decides further* to apportion as expenses of the Organization the amount of $100 million among the Member States in accordance with the scale of assessment for the regular budget subject to the provisions of paragraph 8 below [paragraph 8 makes certain adjustments for Member States assessed at the lowest rates or who receive certain designated technical assistance], pending the establishment of a different scale of assessment to defray the extraordinary expenses of the Organization resulting from these operations."

Although it is not mentioned in the resolution requesting the advisory opinion, because it was adopted at the same meeting of the General Assembly, it may be noted that the further resolution 1732 (XVI) of 20 December 1961 contains an identical paragraph in the preamble and a comparable operative paragraph 4 on apportioning $80 million.

The conclusion to be drawn from these paragraphs is that the General Assembly has twice decided that even though certain expenses are "extraordinary" and "essentially different" from those under the "regular budget", they are none the less "expenses of the Organization" to be apportioned in accordance with the power granted to the General Assembly by Article 17, paragraph 2. This conclusion is strengthened by the concluding clause of paragraph 4 of the two resolutions just cited which states that the decision therein to use the scale of assessment already adopted for the

regular budget is made "pending the establishment of a *different scale of assessment* to defray the extraordinary expenses". The only alternative—and that means the "different procedure"—contemplated was another *scale* of assessment and not some method other than assessment. "Apportionment" and "assessment" are terms which relate only to the General Assembly's authority under Article 17.

* * *

At the outset of this opinion, the Court pointed out that the text of Article 17, paragraph 2, of the Charter could lead to the simple conclusion that "the expenses of the Organization" are the amounts paid out to defray the costs of carrying out the purposes of the Organization. It was further indicated that the Court would examine the resolutions authorizing the expenditures referred to in the request for the advisory opinion in order to ascertain whether they were incurred with that end in view. The Court has made such an examination and finds that they were so incurred. The Court has also analyzed the principal arguments which have been advanced against the conclusion that the expenditures in question should be considered as "expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter of the United Nations", and has found that these arguments are unfounded. Consequently, the Court arrives at the conclusion that the question submitted to it in General Assembly resolution 1731 (XVI) must be answered in the affirmative.

For these reasons,

THE COURT IS OF OPINION,

by nine votes to five,

that the expenditures authorized in General Assembly resolutions 1583 (XV) and 1590 (XV) of 20 December 1960, 1595 (XV) of 3 April 1961, 1619 (XV) of 21 April 1961 and 1633 (XVI) of 30 October 1961 relating to the United Nations operations in the Congo undertaken in pursuance of the Security Council resolutions of 14 July, 22 July and 9 August 1960 and 21 February and 24 November 1961, and General Assembly resolutions 1474 (ES-IV) of 20 September 1960 and 1599 (XV), 1600 (XV) and 1601 (XV) of 15 April 1961, and the expenditures authorized in General Assembly resolutions 1122 (XI) of 26 November 1956, 1089 (XI) of 21 December 1956, 1090 (XI) of 27 February 1957, 1151 (XII) of 22 November 1957, 1204 (XII) of 13 December 1957, 1337 (XIII) of 13 December 1958, 1441 (XIV) of 5 December 1959 and 1575 (XV) of 20 December 1960 relating to the operations of the United Nations Emergency

Force undertaken in pursuance of General Assembly resolutions 997 (ES-I) of 2 November 1956, 998 (ES-I) and 999 (ES-I) of 4 November 1956, 1000 (ES-I) of 5 November 1956, 1001 (ES-I) of 7 November 1956, 1121 (XI) of 24 November 1956 and 1263 (XIII) of 14 November 1958, constitute "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter of the United Nations.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twentieth day of July, one thousand nine hundred and sixty-two, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) B. WINIARSKI,
President.

(Signed) GARNIER-COIGNET,
Registrar.

Judge SPIROPOULOS makes the following declaration:

While accepting the Court's conclusion, I cannot agree with all the views put forward in the Advisory Opinion. In particular, I consider that the affirmative reply to the request for an opinion is justified by the argument that the resolutions of the General Assembly authorizing the financing of the United Nations operations in the Congo and the Middele East, being resolutions designed to meet expenditure concerned with the fulfilment of the purposes of the United Nations, which were adopted by two-thirds of the Members of the General Assembly present and voting, create obligations for the Members of the United Nations.

I express no opinion as to the conformity with the Charter of the resolutions relating to the United Nations operations in the Congo and the Middle East, for the following reasons:

The French delegation had proposed to the General Assembly the acceptance of an amendment to the text, finally adopted by it, according to which amendment the question put to the Court would have become: "Were the expenditures authorized, etc. ... decided on in conformity with the provisions of the Charter and, if so, do they constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations?"

On 20 December 1961, in the course of the meeting of the General Assembly, this amendment was accompanied by a statement by the

French delegation justifying the submission of the French amendment and which, among other things, said:

> "In the opinion of the French delegation, the question put to the Court does not enable the latter to give a clear-cut opinion on the juridical basis for the financial obligations of Member States. The Court cannot, in fact, appraise the scope of those resolutions without determining what obligations they may create for Member States under the Charter.
>
> It is for this reason that the French delegation is submitting to the Assembly an amendment [A/L. 378] the adoption of which would enable the Court to determine whether or not the Assembly resolutions concerning the financial implications of the United Nations operations in the Congo and the Middle East are in conformity with the Charter. Only thus, if the matter is referred to the Court, will it be done in such a way as to take into account the scope and nature of the problems raised in the proposal to request an opinion."

The French amendment was rejected.

The rejection of the French amendment by the General Assembly seems to me to show the desire of the Assembly that the conformity or non-conformity of the decisions of the Assembly and of the Security Council concerning the United Nations operations in the Congo and the Middle East should not be examined by the Court. It seems natural, indeed, that the General Assembly should not have wished that the Court should pronounce on the validity of resolutions which have been applied for several years. In these circumstances, I have felt bound to refrain from pronouncing on the conformity with the Charter of the resolutions relating to the United Nations operations in the Congo and the Middle East.

Judges Sir Percy SPENDER, Sir Gerald FITZMAURICE and MORELLI append to the Opinion of the Court statements of their Separate Opinions.

President WINIARSKI and Judges BASDEVANT, MORENO QUINTANA, KORETSKY and BUSTAMANTE Y RIVERO append to the Opinion of the Court statements of their Dissenting Opinions.

(Initialled) B. W.
(Initialled) G.-C.

TOPIC – III

Responsibility of International Organizations

- ILC Draft articles on the responsibility of international organizations 2011

  (Commentaries of the ILC Articles also to be referred)
  https://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf

- *Al Jedda v. The United Kingdom*, App. No. 27021/08, European Court of Human Rights, 7 July 2011.

  Full text of the Case:
  https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-105612%22]}

Draft articles on the responsibility of international organizations

2011

Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, para. 87). The report will appear in *Yearbook of the International Law Commission*, *2011*, vol. II, Part Two.

Responsibility of international organizations

Part One
Introduction

Article 1
Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an internationally wrongful act.

2. The present draft articles also apply to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization.

Article 2
Use of terms

For the purposes of the present draft articles,

(a) "international organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities;

(b) "rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization;

(c) "organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization;

(d) "agent of an international organization" means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.

Part Two
The internationally wrongful act of an international organization

Chapter I
General principles

Article 3
Responsibility of an international organization for its internationally wrongful acts

Every internationally wrongful act of an international organization entails the international responsibility of that organization.

Article 4
Elements of an internationally wrongful act of an international organization

There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) is attributable to that organization under international law; and

(b) constitutes a breach of an international obligation of that organization.

Article 5
Characterization of an act of an international organization as internationally wrongful

The characterization of an act of an international organization as internationally wrongful is governed by international law.

Chapter II
Attribution of conduct to an international organization

Article 6
Conduct of organs or agents of an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

2. The rules of the organization apply in the determination of the functions of its organs and agents.

Article 7
Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

Article 8
Excess of authority or contravention of instructions

The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.

Article 9
Conduct acknowledged and adopted by an international organization as its own

Conduct which is not attributable to an international organization under articles 6 to 8 shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

Chapter III
Breach of an international obligation

Article 10
Existence of a breach of an international obligation

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.

2. Paragraph 1 includes the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization.

Article 11
International obligation in force for an international organization

An act of an international organization does not constitute a breach of an international obligation unless the organization is bound by the obligation in question at the time the act occurs.

Article 12
Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with that obligation.

3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 13
Breach consisting of a composite act

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Chapter IV
Responsibility of an international organization in connection with the act of a State or another international organization

Article 14
Aid or assistance in the commission of an internationally wrongful act

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that organization.

Article 15
Direction and control exercised over the commission of an internationally wrongful act

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

(a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that organization.

Article 16
Coercion of a State or another international organization

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and

(b) the coercing international organization does so with knowledge of the circumstances of the act.

Article 17
Circumvention of international obligations through decisions and authorizations addressed to members

1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.

2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed.

Article 18
Responsibility of an international organization member of another international organization

Without prejudice to draft articles 14 to 17, the international responsibility of an international organization that is a member of another international organization also arises in relation to an act of the latter under the conditions set out in draft articles 61 and 62 for States that are members of an international organization.

Article 19
Effect of this Chapter

This Chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

Chapter V
Circumstances precluding wrongfulness

Article 20
Consent

Valid consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of

that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent.

Article 21
Self-defence

The wrongfulness of an act of an international organization is precluded if and to the extent that the act constitutes a lawful measure of self-defence under international law.

Article 22
Countermeasures

1. Subject to paragraphs 2 and 3, the wrongfulness of an act of an international organization not in conformity with an international obligation towards a State or another international organization is precluded if and to the extent that the act constitutes a countermeasure taken in accordance with the substantive and procedural conditions required by international law, including those set forth in Chapter II of Part Four for countermeasures taken against another international organization.

2. Subject to paragraph 3, an international organization may not take countermeasures against a responsible member State or international organization unless:

(a) the conditions referred to in paragraph 1 are met;

(b) the countermeasures are not inconsistent with the rules of the organization; and

(c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation.

3. Countermeasures may not be taken by an international organization against a member State or international organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules.

Article 23
Force majeure

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the act is due to *force majeure*, that is, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(a) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(b) the organization has assumed the risk of that situation occurring.

Article 24
Distress

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the author of the

act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(a) the situation of distress is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(b) the act in question is likely to create a comparable or greater peril.

Article 25
Necessity

1. Necessity may not be invoked by an international organization as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that organization unless the act:

(a) is the only means for the organization to safeguard against a grave and imminent peril an essential interest of its member States or of the international community as a whole, when the organization has, in accordance with international law, the function to protect the interest in question; and

(b) does not seriously impair an essential interest of the State or States towards which the international obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by an international organization as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the organization has contributed to the situation of necessity.

Article 26
Compliance with peremptory norms

Nothing in this Chapter precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27
Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this Chapter is without prejudice to:

(a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) the question of compensation for any material loss caused by the act in question.

Part Three
Content of the international responsibility of an international organization

Chapter I
General principles

Article 28
Legal consequences of an internationally wrongful act

The international responsibility of an international organization which is entailed by an internationally wrongful act in accordance with the provisions of Part Two involves legal consequences as set out in this Part.

Article 29
Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible international organization to perform the obligation breached.

Article 30
Cessation and non-repetition

The international organization responsible for the internationally wrongful act is under an obligation:

(a) to cease that act, if it is continuing;

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31
Reparation

1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.

Article 32
Relevance of the rules of the organization

1. The responsible international organization may not rely on its rules as justification for failure to comply with its obligations under this Part.

2. Paragraph 1 is without prejudice to the applicability of the rules of an international organization to the relations between the organization and its member States and organizations.

Article 33
Scope of international obligations set out in this Part

1. The obligations of the responsible international organization set out in this Part may be owed to one or more States, to one or more other organizations, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization.

Chapter II
Reparation for injury

Article 34
Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter.

Article 35
Restitution

An international organization responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36
Compensation

1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37
Satisfaction

1. The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization.

Article 38
Interest

1. Interest on any principal sum due under this Chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39
Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or international organization or of any person or entity in relation to whom reparation is sought.

Article 40
Ensuring the fulfilment of the obligation to make reparation

1. The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this Chapter.

2. The members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations under this Chapter.

Chapter III
Serious breaches of obligations under peremptory norms of general international law

Article 41
Application of this Chapter

1. This Chapter applies to the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible international organization to fulfil the obligation.

Article 42
Particular consequences of a serious breach of an obligation under this Chapter

1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 41.

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 41, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law.

Part Four
The implementation of the international responsibility of an international organization

Chapter I
Invocation of the responsibility of an international organization

Article 43
Invocation of responsibility by an injured State or international organization

A State or an international organization is entitled as an injured State or an injured international organization to invoke the responsibility of another international organization if the obligation breached is owed to:

(a) that State or the former international organization individually;

(b) a group of States or international organizations including that State or the former international organization, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State or that international organization; or

(ii) is of such a character as radically to change the position of all the other States and international organizations to which the obligation is owed with respect to the further performance of the obligation.

Article 44
Notice of claim by an injured State or international organization

1. An injured State or international organization which invokes the responsibility of another international organization shall give notice of its claim to that organization.

2. The injured State or international organization may specify in particular:

(a) the conduct that the responsible international organization should take in order to cease the wrongful act, if it is continuing;

(b) what form reparation should take in accordance with the provisions of Part Three.

Article 45
Admissibility of claims

1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to the nationality of claims.

2. When the rule of exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy has not been exhausted.

Article 46
Loss of the right to invoke responsibility

The responsibility of an international organization may not be invoked if:

(a) the injured State or international organization has validly waived the claim;

(b) the injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 47
Plurality of injured States or international organizations

Where several States or international organizations are injured by the same internationally wrongful act of an international organization, each injured State or international organization may separately invoke the responsibility of the international organization for the internationally wrongful act.

Article 48
Responsibility of an international organization and one or more States or international organizations

1. Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.

2. Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.

3. Paragraphs 1 and 2:

(a) do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;

(b) are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

Article 49
Invocation of responsibility by a State or an international organization other than an injured State or international organization

1. A State or an international organization other than an injured State or international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group.

2. A State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.

3. An international organization other than an injured international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole and safeguarding the interest of the international community as a whole underlying the obligation breached is within the functions of the international organization invoking responsibility.

4. A State or an international organization entitled to invoke responsibility under paragraphs 1 to 3 may claim from the responsible international organization:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with draft article 30; and

(b) performance of the obligation of reparation in accordance with Part Three, in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.

5. The requirements for the invocation of responsibility by an injured State or international organization under draft articles 44, 45, paragraph 2, and 46 apply to an invocation of responsibility by a State or international organization entitled to do so under paragraphs 1 to 4.

Article 50
Scope of this Chapter

This Chapter is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization.

Chapter II
Countermeasures

Article 51
Object and limits of countermeasures

1. An injured State or an injured international organization may only take countermeasures against an international organization which is responsible for an internationally wrongful act in order to induce that organization to comply with its obligations under Part Three.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State or international organization taking the measures towards the responsible international organization.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

4. Countermeasures shall, as far as possible, be taken in such a way as to limit their effects on the exercise by the responsible international organization of its functions.

Article 52
Conditions for taking countermeasures by members of an international organization

1. Subject to paragraph 2, an injured State or international organization which is a member of a responsible international organization may not take countermeasures against that organization unless:

(a) the conditions referred to in article 51 are met;

(b) the countermeasures are not inconsistent with the rules of the organization; and

(c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible international organization concerning cessation of the breach and reparation.

2. Countermeasures may not be taken by an injured State or international organization which is a member of a responsible international organization against that organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules.

Article 53
Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) obligations for the protection of human rights;

(c) obligations of a humanitarian character prohibiting reprisals;

(d) other obligations under peremptory norms of general international law.

2. An injured State or international organization taking countermeasures is not relieved from fulfilling its obligations:

(a) under any dispute settlement procedure applicable between it and the responsible international organization;

(b) to respect any inviolability of organs or agents of the responsible international organization and of the premises, archives and documents of that organization.

Article 54
Proportionality of countermeasures

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 55
Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State or international organization shall:

(a) call upon the responsible international organization, in accordance with draft article 44, to fulfil its obligations under Part Three;

(b) notify the responsible international organization of any decision to take countermeasures and offer to negotiate with that organization.

2. Notwithstanding paragraph 1 (b), the injured State or international organization may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) the internationally wrongful act has ceased; and

(b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible international organization fails to implement the dispute settlement procedures in good faith.

Article 56
Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible international organization has complied with its obligations under Part Three in relation to the internationally wrongful act.

Article 57
Measures taken by States or international organizations other than an injured State or organization

This Chapter does not prejudice the right of any State or international organization, entitled under article 49, paragraphs 1 to 3, to invoke the responsibility of another international organization, to take lawful measures against that organization to ensure cessation of the breach and reparation in the interest of the injured State or organization or of the beneficiaries of the obligation breached.

Part Five
Responsibility of a State in connection with the conduct of an international organization

Article 58
Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

1. A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) the State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.

Article 59
Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

1. A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) the State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this draft article.

Article 60
Coercion of an international organization by a State

A State which coerces an international organization to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced international organization; and

(b) the coercing State does so with knowledge of the circumstances of the act.

Article 61
Circumvention of international obligations of a State member of an international organization

1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

Article 62
Responsibility of a State member of an international organization for an internationally wrongful act of that organization

1. A State member of an international organization is responsible for an internationally wrongful act of that organization if:

(a) it has accepted responsibility for that act towards the injured party; or

(b) it has led the injured party to rely on its responsibility.

2. Any international responsibility of a State under paragraph 1 is presumed to be subsidiary.

Article 63
Effect of this Part

This Part is without prejudice to the international responsibility of the international organization which commits the act in question, or of any State or other international organization.

Part Six
General Provisions

Article 64
Lex specialis

These draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.

Article 65
Questions of international responsibility not regulated by these draft articles

The applicable rules of international law continue to govern questions concerning the responsibility of an international organization or a State for an internationally wrongful act to the extent that they are not regulated by these draft articles.

Article 66
Individual responsibility

These draft articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State.

Article 67
Charter of the United Nations

These draft articles are without prejudice to the Charter of the United Nations.

6.10 *Al-Jedda v United Kingdom*, App. No. 27021/08, European Court of Human Rights, 7 July 2011

Aurel Sari

Relevance of the case

The judgment delivered by the Grand Chamber of the European Court of Human Rights (ECtHR) in the *Al-Jedda* case in 2011 touches on a broad range of questions concerning the application of the European Convention on Human Rights (ECHR) to multinational military operations and the Convention's relationship with other rules of public international law. Many of these questions, such as the relationship between the Convention and international humanitarian law, have been the subject of detailed attention in the literature.[1] The focus of the present chapter is on the judgment's contribution to the law of international responsibility, in particular the rules governing the attribution of wrongful conduct in the context of military operations conducted jointly by states and international organizations. The relevance of the *Al-Jedda* case in this context is twofold. First, it highlights the continued confusion surrounding the relationship between jurisdiction as a threshold requirement for the applicability of the ECHR and attribution as an element of international responsibility for a breach of the Convention, as well as the difficulties entailed by allocating responsibility between states and international organizations involved in the conduct of peace-support operations more generally. Second, the decision marks an evolution in the European Court's approach to the attribution of wrongful conduct compared to its earlier decision in the joined cases of *Behrami* and *Saramati*.[2] In particular, the European Court now appears to accept that the relevant test governing the attribution of wrongful conduct is that of 'effective control'.

I. Facts of the case

The *Al-Jedda* case arose out of the detention of the applicant, Mr Hilal Abdul-Razzaq Ali Al-Jedda, by British armed forces operating as part of the Multinational Force in Iraq (MNF).

[1] See J. Pejic, 'The European Court of Human Rights' *Al-Jedda* Judgment: The Oversight of International Humanitarian Law', (2011) 93 *International Review of the Red Cross* 837; H. Krieger, 'After *Al-Jedda*: Detention, Derogation, and an Enduring Dilemma', (2011) 50 *Military Law and the Law of War Review* 419; M. Kashgar, 'The ECtHR's Judgment in *Al-Jedda* and its Implications for International Humanitarian Law', (2011) 24 *Humanitäres Völkerrecht* 229. For more general comments, see F. Messineo, 'Things Could Only Get Better: *Al-Jedda* beyond *Behrami*', (2011) 50 *Military Law and the Law of War Review* 321; M. Milanović, 'Al-Skeini and Al-Jedda in Strasbourg', (2012) 23 *European Journal of International Law* 121; M. Zgonec-Rozej, '*Al-Jedda v. United Kingdom*—Application No. 27021/08', (2012) 106 *American Journal of International Law* 830.

[2] cf. *Behrami and Behrami v France and Saramati v France, Germany, and Norway*, App. Nos 71412/01 and 78166/01 (2007) 45 EHRR SE10.

On 20 March 2003, a coalition led by the United States of America and the United Kingdom invaded Iraq with the aim of removing Saddam Hussein from power. Following the end of major combat operations, the United Kingdom became an occupying power and jointly exercised the powers of government in Iraq with other members of the coalition under the law of belligerent occupation.[3] The legal framework governing the presence and activities of British forces in Iraq changed with the adoption of Security Council Resolution 1511 on 16 October 2003.[4] The resolution authorized the establishment of 'a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq'.[5] It further urged all member states of the UN to contribute assistance, including military forces, to the multinational force 'under this United Nations mandate'.[6] On 8 June 2004, the Security Council adopted Resolution 1546 to extend the mandate of the MNF after the end of the occupation at the request of the Iraqi authorities.

The claimant held dual Iraqi-British citizenship and had lived in the United Kingdom since 1972. In September 2004, he travelled to Iraq where he was detained by coalition forces and later held in a British-run detention facility in Basrah. His detention was justified and upheld at periodic reviews on the basis that it was necessary for imperative reasons of security in Iraq. He was eventually released in December 2007, having been deprived of his British citizenship.

II. The legal question

On 8 June 2005, Al-Jedda brought judicial review proceedings before the English courts against the Secretary of State to challenge his detention. The Secretary of State accepted that Al-Jedda fell within the jurisdiction of the United Kingdom for the purposes of art. 1 of the ECHR and thus benefitted from the right to liberty and security of person guaranteed in art. 5 of the Convention. Whilst the Secretary of State conceded that Al-Jedda's detention could not be justified with reference to any of the exceptions enumerated in art. 5 and as such prima facie breached his right to liberty, he argued that Security Council Resolutions 1511 and 1546, applied in conjunction with art. 103 of the UN Charter,[7] rendered his detention lawful. These submissions were upheld by the lower courts.[8]

On the claimant's appeal to the House of Lords, the Secretary of State introduced a new argument. Relying on the recently decided *Behrami* case, he submitted that the conduct of British forces participating in the MNF had to be attributed to the UN

[3] See Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council, 8 May 2003, S/2003/538.

[4] cf. C. Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge, Cambridge University Press 2008), pp. 363–81.

[5] cf. Operative para. 13. [6] cf. Operative para. 14.

[7] Article 103 of the UN Charter reads as follows: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

[8] See *R. (Al-Jedda) v Secretary of State for Defence* [2005] EWHC 1809 (Administrative Court); *R. (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327 (Court of Appeal).

rather than to the United Kingdom. The majority of the House of Lords rejected this claim, but found that the Security Council resolutions authorizing the presence and activities of British forces in Iraq displaced art. 5 of the Convention to the extent that a conflict arose between them.[9] Consequently, the House of Lords affirmed that Al-Jedda's detention did not entail a violation of art. 5 of the ECHR.

The parties revisited these points in their submissions before the ECtHR. The Government contended that the legal position of the British MNF contingent was essentially identical with that of national contingents forming part of Kosovo Force (KFOR), so that the *Behrami* case applied.[10] In detaining the applicant, British forces were not exercising the sovereign authority of the United Kingdom but the international authority conferred upon the MNF by the relevant Security Council resolutions. The Government submitted that as a result Al-Jedda did not fall within its jurisdiction and his detention could not be attributed to the United Kingdom. Endorsing the majority view of the House of Lords, the claimant replied by suggesting that the legal circumstances of the MNF differed from that of KFOR in material respects.[11] His legal position was clearly distinguishable from that of the applicants in *Behrami*, with the effect that his detention had to be attributed to the United Kingdom and not to the UN.[12]

The question confronting the ECtHR therefore was this: did the applicant fall within the jurisdiction of the United Kingdom and was the conduct of British troops attributable to the United Kingdom or to the UN?

III. Excerpts

1. Article 1 of the Convention reads as follows: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.' As provided by this Article, the engagement undertaken by a Contracting State is confined to 'securing' ('*reconnaître*' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction' (see *Soering v. the United Kingdom*, 7 July 1989, § 89, Series A no. 161; *Banković,* cited above, § 66). 'Jurisdiction' under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004-VII).

2. The Court notes that, before the Divisional Court and the Court of Appeal in the first set of domestic proceedings brought by the applicant, the Government

[9] *R. (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58 (House of Lords). For a commentary on the House of Lords decision, see A. Orakhelashvili, '*R (On the Application of Al-Jedda) (FC) v. Secretary of State for Defence*' (2008) 102 *American Journal of International Law* 337; A. Sari, 'The *Al-Jedda* Case before the House of Lords', (2009) 13 *Journal of International Peacekeeping* 181; F. Messineo, 'The House of Lords in *Al-Jedda* and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights', (2009) 56 *Netherlands International Law Review* 35.

[10] cf. *Al-Jedda* (n. 9), paras 64–8.

[11] cf. *Al-Jedda* (n. 9), paras 69–72.

[12] cf. *Al-Jedda* (n. 9), para. 73.

accepted that he fell within United Kingdom jurisdiction under Article 1 of the Convention during his detention in a British-run military prison in Basrah, South East Iraq. It was only before the House of Lords that the Government argued, for the first time, that the applicant did not fall within United Kingdom jurisdiction because his detention was attributable to the United Nations rather than to the United Kingdom. The majority of the House of Lords rejected the Government's argument and held that the internment was attributable to British forces (see paragraphs 16–18 above).

3. When examining whether the applicant's detention was attributable to the United Kingdom or, as the Government submit, the United Nations, it is necessary to examine the particular facts of the case. These include the terms of the United Nations Security Council Resolutions which formed the framework for the security regime in Iraq during the period in question. In performing this exercise, the Court is mindful of the fact that it is not its role to seek to define authoritatively the meaning of provisions of the United Nations Charter and other international instruments. It must, nevertheless, examine whether there was a plausible basis in such instruments for the matters impugned before it (see *Behrami and Saramati*, cited above, § 122). The principles underlying the Convention cannot be interpreted and applied in a vacuum and the Court must take into account relevant rules of international law (ibid.). It relies for guidance in this exercise on the statement of the International Court of Justice in § 114 of its advisory opinion '*Legal consequences for States of the continued presence of South Africa in Namibia*' (see paragraph 49 above), indicating that a Security Council resolution should be interpreted in the light not only of the language used but also the context in which it was adopted.

4. The Court takes as its starting point that, on 20 March 2003, the United Kingdom together with the United States of America and their coalition partners, through their armed forces, entered Iraq with the aim of displacing the Ba'ath regime then in power. At the time of the invasion, there was no United Nations Security Council resolution providing for the allocation of roles in Iraq in the event that the existing regime was displaced. […]

5. The first Security Council resolution after the invasion was Resolution 1483, adopted on 22 May 2003 (see paragraph 29 above). […] Resolution 1483 did not assign any security role to the United Nations. The Government does not contend that, at this stage in the invasion and occupation, the acts of its armed forces were in any way attributable to the United Nations.

6. In Resolution 1511, adopted on 16 October 2003, the United Nations Security Council, again acting under Chapter VII, underscored the temporary nature of the exercise by the Coalition Provisional Authority of the authorities and responsibilities set out in Resolution 1483, which would cease as soon as an internationally recognised, representative Iraqi government could be sworn in. In paragraphs 13 and 14, the Security Council authorised 'a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq' and urged Member States 'to contribute assistance under this United Nations mandate, including military forces, to the multinational force referred to in paragraph 13' (see paragraph 31 above). The United States, on behalf of the multinational force, was requested periodically to report on the efforts and progress of the

force. The Security Council also resolved that the United Nations, acting through the Secretary General, his Special Representative, and the United Nations Assistance Mission in Iraq, should strengthen its role in Iraq, including by providing humanitarian relief, promoting the economic reconstruction of and conditions for sustainable development in Iraq, and advancing efforts to restore and establish national and local institutions for representative government.

7. The Court does not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or—more importantly, for the purposes of this case—ceased to be attributable to the troop-contributing nations. The Multi-National Force had been present in Iraq since the invasion and had been recognised already in Resolution 1483, which welcomed the willingness of Member States to contribute personnel. The unified command structure over the force, established from the start of the invasion by the United States and United Kingdom, was not changed as a result of Resolution 1511. Moreover, the United States and the United Kingdom, through the Coalition Provisional Authority which they had established at the start of the occupation, continued to exercise the powers of government in Iraq. Although the United States was requested to report periodically to the Security Council about the activities of the Multi-National Force, the United Nations did not, thereby, assume any degree of control over either the force or any other of the executive functions of the Coalition Provisional Authority.

8. The final resolution of relevance to the present issue was no. 1546 (see paragraph 35 above). It was adopted on 8 June 2004, twenty days before the transfer of power from the Coalition Provisional Authority to Interim Government and some four months before the applicant was taken into detention. Annexed to the resolution was a letter from the Prime Minister of the Interim Government of Iraq, seeking from the Security Council a new resolution on the Multi-National Force mandate. There was also annexed a letter from the United States Secretary of State to the President of the United Nations Security Council, confirming that 'the Multi-National Force [under unified command] is prepared to continue to contribute to the maintenance of security in Iraq' and informing the President of the Security Council of the goals of the Multi-National Force and the steps which its Commander intended to take to achieve those goals. It does not appear from the terms of this letter that the Secretary of State considered that the United Nations controlled the deployment or conduct of the Multi-National Force. In Resolution 1546 the Security Council, acting under Chapter VII, reaffirmed the authorisation for the Multi-National Force established under Resolution 1511. There is no indication in Resolution 1546 that the Security Council intended to assume any greater degree of control or command over the Multi-National Force than it had exercised previously.

[…]

9. In the light of the foregoing, the Court agrees with the majority of the House of Lords that the United Nations' role as regards security in Iraq in 2004 was quite different from its role as regards security in Kosovo in 1999. The comparison is relevant, since in the decision in *Behrami and Saramati* (cited above) the Court concluded, *inter alia,* that Mr Saramati's detention was attributable to the United Nations and

not to any of the respondent States. It is to be recalled that the international security presence in Kosovo was established by United Nations Security Council Resolution 1244 (10 June 1999) in which, 'determined to resolve the grave humanitarian situation in Kosovo', the Security Council 'decide[d] on the deployment in Kosovo, under United Nations auspices, of international civil and security presences'. The Security Council therefore authorised 'Member States and relevant international organizations to establish the international security presence in Kosovo' and directed that there should be 'substantial North Atlantic Treaty Organization participation' in the force, which 'must be deployed under unified command and control'. In addition, United Nations Security Council Resolution 1244 authorised the Secretary General of the United Nations to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo. The United Nations, through a Special Representative appointed by the Secretary General in consultation with the Security Council, was to control the implementation of the international civil presence and coordinate closely with the international security presence (see *Behrami and Saramati,* cited above, §§ 3, 4 and 41). On 12 June 1999, two days after the Resolution was adopted, the first elements of the NATO-led Kosovo Force (KFOR) entered Kosovo.

10. It would appear from the opinion of Lord Bingham in the first set of proceedings brought by the applicant that it was common ground between the parties before the House of Lords that the test to be applied in order to establish attribution was that set out by the International Law Commission, in Article 5 of its draft Articles on the Responsibility of International Organisations and in its commentary thereon, namely that the conduct of an organ of a State placed at the disposal of an international organisation should be attributable under international law to that organisation if the organisation exercises effective control over that conduct (see paragraphs 18 and 56 above). For the reasons set out above, the Court considers that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations.

11. The internment took place within a detention facility in Basrah City, controlled exclusively by British forces, and the applicant was therefore within the authority and control of the United Kingdom throughout (see paragraph 10 above; see also *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 136 and *Al-Saadoon and Mufdhi v. the United Kingdom* (dec.), no. 61498/08, § 88, ECHR 2010 …; see also the judgment of the United States Supreme Court in *Munaf v. Geren,* paragraph 54 above). The decision to hold the applicant in internment was made by the British officer in command of the detention facility. Although the decision to continue holding the applicant in internment was, at various points, reviewed by committees including Iraqi officials and non-United Kingdom representatives from the Multi-National Force, the Court does not consider that the existence of these reviews operated to prevent the detention from being attributable to the United Kingdom.

12. In conclusion, the Court agrees with the majority of the House of Lords that the internment of the applicant was attributable to the United Kingdom and that during his internment the applicant fell within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention.

IV. Commentary

The ECtHR dealt with the parties' submissions in two steps. Citing its earlier decision in *Ilaşcu*, the Court made it clear at the outset that the exercise of jurisdiction within the meaning of art. 1 of the ECHR is a necessary pre-condition for a potential finding of international responsibility.[13] This is so because jurisdiction operates as a threshold criterion for the applicability of the ECHR: a state party owes no obligations under the Convention to anyone outside its jurisdiction and in such circumstances the question whether its international responsibility is engaged for a possible breach of the Convention does not arise at all. However, the Government denied that Al-Jedda fell within its jurisdiction because the troops detaining him acted in an international rather than a national capacity. In a second step, the Court therefore investigated whether Al-Jedda's detention should be attributed to the United Kingdom or to the UN. However, at this point of the Court's reasoning a finding on attribution turns into a precondition for a finding on jurisdiction. Whether or not the United Kingdom exercised jurisdiction over Al-Jedda within the meaning of art. 1 of the ECHR now suddenly depends on the question whether the control exercised by British forces over him was to be attributed to the United Kingdom or not. This reversal of preliminary considerations emerges clearly from the concluding observations of the Court, which suggest that the Court considered the applicant to fall within the United Kingdom's jurisdiction precisely *because* his detention was to be attributed to the United Kingdom.[14]

As a result of this reversal, the clear conceptual distinction between jurisdiction as a primary matter of substantive law and attribution as a secondary matter of responsibility—the Court's initial starting point—collapses almost completely. The Court could have avoided this outcome with relative ease. In an extra-territorial setting, the requirement of jurisdiction pursuant to art. 1 of the Convention is satisfied whenever a state party exercises effective physical control over an individual.[15] The legal basis for the exercise of such control[16] or indeed the absence of any valid legal basis,[17] has no bearing on this requirement. Consequently, whether or not Al-Jedda was detained on the basis of national or international competences is irrelevant for the purposes of establishing that his detention crossed the jurisdictional threshold under art. 1.[18] Moreover, whatever international functions British forces assumed as part of the MNF, they did not thereby lose their legal character and identity as British soldiers and thus their character as agents and organs

[13] *Ilaşcu v Moldova and Russia*, App. No. 48787/99, 8 July 2004 (2004) 40 EHRR 46.

[14] cf. *Al-Jedda* (n. 9), para. 86.

[15] cf. *Al-Skeini v United Kingdom*, App. No. 55721/07, 7 July 2011 (2011) 53 EHRR 18, paras 131–40.

[16] cf. *M. & Co. v Germany*, App. No. 13258/87, 9 February 1990 (1990) 64 Eur. Comm. H.R. Dec. & Rep. 138; *Bosphorus v Ireland*, App. No. 45036/98, 30 June 2005 (2006) 42 EHRR 1, para. 153; *Nada v Switzerland,* App. No. 10593/08, 12 September 2012 (2013) 56 EHRR 18, para. 168.

[17] cf. *Loizidou v Turkey*, Preliminary Objections, App No 15318/89, 23 March 1995 (1995) ECHR 10, para. 62.

[18] Thus in *Bosphorus* (n. 16), the European Court affirmed Ireland's jurisdiction regardless of the fact that the wrongful act in question was adopted by the Irish authorities pursuant to European Community law (paras 135–8).

of the United Kingdom.[19] It follows, therefore, that Al-Jedda did fall within the jurisdiction of the United Kingdom for the purposes of art. 1 of the ECHR and that the United Kingdom was bound to guarantee to him the rights and freedoms recognized by the Convention.[20] Whether or not the United Kingdom failed to comply with this obligation is a separate question which depends, amongst other matters, on whether the conduct of British forces should be attributed to the United Kingdom or not.

In determining whether the applicant's detention was to be attributed to the United Kingdom or to the UN, the ECtHR followed the logic of its earlier reasoning in *Behrami*. In that case, the Court famously attributed the acts of KFOR to the UN on the basis that the Security Council retained ultimate authority and control over the military operation in Kosovo.[21] This reasoning has attracted widespread criticism in the literature, as the Court seemed to confuse the legality of the delegation of Security Council powers under the UN Charter with the attribution of internationally wrongful conduct.[22] Although both questions entail a test of control, the law of international responsibility imposes a test of 'effective control',[23] for the purposes of attributing wrongful conduct, while the delegation of Security Council powers is subject to the more relaxed standard of 'overall authority and control' under the institutional law of the UN.[24]

By confusing these two bodies of law, the ECtHR has manoeuvred itself into something of a tight spot. To comply with the internal law of the UN, the Security Council will at all times retain at least 'ultimate authority and control' over any mandates it issues under Chapter VII of the UN Charter. Consequently, if this test is used as a basis for attribution, it follows that wrongful acts carried out by national contingents participating in Security Council mandated operations, such as the MNF in Iraq, will always have to be attributed to the UN rather than to their respective sending states. Coupled with the reversal of preliminaries in *Al-Jedda*, whereby a finding of attribution has become a precondition for a finding of jurisdiction and therefore the applicability of the Convention, this means that, in principle, the ECHR will never apply to state parties contributing troops to Security Council mandated

[19] *Attorney-General v Nissan* [1970] AC 179, at 198 and 222. cf. F. Messineo, '"Gentlement at Home, Hoodlums Elsewhere?" The Extra-territorial Exercise of Power by British Forces in Iraq and the European Convention on Human Rights', (2012) 71 *Cambridge Law Journal* 15, 15–16.

[20] In favour of a broad approach to jurisdiction see M. Andenas and E. Bjorge, 'Human Rights and Acts by Troops Abroad: Rights and Jurisdictional Restrictions', (2012) 18 *European Public Law* 473, at 492.

[21] cf. *Behrami* (n. 2), paras 128–44.

[22] For example K.M. Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test', (2008) 19 *European Journal of International Law* 509; A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases', (2008) 8 *Human Rights Law Review* 151; H. Krieger, 'A Credibility Gap: The *Behrami* and *Saramati* Decision of the European Court of Human Rights', (2009) 13 *Journal of International Peacekeeping* 159; M. Milanović and T. Papić, 'As Bad as It Gets: The European Court of Human Rights's *Behrami* and *Saramati* Decision and General International Law', (2009) 58 *International and Comparative Law Quarterly* 267.

[23] cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*), [2007] ICJ Rep 15, para. 406.

[24] On the delegation of Chapter VII powers, see D. Sarooshi, *The United Nations and the Development of Collective Security* (Oxford, Oxford University Press 1999).

operations. This outcome is hardly correct as a matter of law or desirable as a matter of policy.[25]

The *Al-Jedda* case presented the ECtHR with an opportunity to address the unhappy implications of its decision in *Behrami*. The Court could have done so on a principled basis and formally overturn *Behrami* in response to its overwhelmingly negative reception. Instead, it decided to follow the House of Lords in distinguishing *Al-Jedda* from *Behrami* on the facts. Although there are obvious differences between KFOR and the MNF, the material facts are identical and point to the conclusion that the Security Council retained overall authority and control over both operations.[26] By overemphasizing the differences and neglecting the similarities between KFOR and the MNF,[27] the Court managed to arrive at the right conclusion: it declared that the acts of British forces participating in the MNF could not be attributed to the UN and that Al-Jedda therefore fell within the United Kingdom's jurisdiction.[28] However, it arrived at this conclusion at the cost of preserving, if not deepening, the conceptual confusion in its case-law.[29] Although *Behrami* therefore remains a valid, albeit unconvincing precedent, it is interesting to note that the Court concluded its analysis in *Al-Jedda* by declaring that the Security Council had 'neither effective control nor ultimate authority and control' over the acts of British forces.[30] The simultaneous reference to the misplaced 'ultimate authority and control' standard and to the correct 'effective control' test is puzzling.[31] At best, it may be understood as an implicit acknowledgement that *Behrami* was wrongly decided.[32] At worst, it may be a sign that the Court continues to view *Behrami* as a good authority.

In any event, the Court's reasoning raises a broader question whether the effective control test is the sole or even the most appropriate principle of attribution during international military operations. The effective control test focuses on factual subordination at the expense of legal and institutional relationships.[33] By adopting this

[25] cf. E. Katselli, 'International Peace and Security, Human Rights and the Courts: A Critical Reappraisal', (2011) 16 *International Journal of Human Rights* 257, at 259–60.

[26] See Lord Rodger's powerful dissent on this point in *Al-Jedda* (n. 9), paras 58–105. See also Messineo (n. 9) at 43–7.

[27] For example the Court emphasized that KFOR was created by Security Council Resolution 1244, whereas the MNF was a pre-existing force. Ignoring for the moment the fact that the MNF was established by Resolution 1511, it is difficult to see the significance of this factor. But see M.I. Papa, 'Le autorizzazioni del Consiglio di sicurezza davanti alla Corte europea dei diritti umani: dalla decisione sui casi *Behrami* e *Saramati* alla sentenza Al-Jedda', (2012) 6 *Diritti umani e diritto internazionale* 229, 252–3.

[28] Some commentators have suggested that in declining to attribute Al-Jedda's detention to the UN, the Court accepted the possibility of dual or multiple attribution of wrongful conduct: for example M.C. Lopez, 'Towards Dual or Multiple Attribution: The Strasbourg Court and the Liability of Contracting Parties' Troops Contributed to the United Nations', (2013) 10 *International Organizations Law Review* 193, 214–15; Papa (n. 27), p. 254–5. Whatever the Court did, it did implicitly.

[29] cf. M. Milanović, 'Al-Skeini and Al-Jedda in Strasbourg', (2012) 23 *European Journal of International Law* 121, 136; see also *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB), para. 178.

[30] cf. *Al Jedda* (n. 9), para. 86.

[31] cf. V. Zambrano, 'State Responsibility for Human Rights Violations: The Ultimate Control Test and the Interpretation of UN Security Council Resolutions', (2013) *European Human Rights Law Review* 180, at 184.

[32] cf. M. Szydło, 'Extra-Territorial Application of the European Convention on Human Rights after *Al-Skeini* and *Al-Jedda*', (2012) 12 *International Criminal Law Review* 271.

[33] cf. A. Sari, 'UN Peacekeeping Operations and Article 7 ARIO: The Missing Link', (2012) 9 *International Organizations Law Review* 77, 80.

perspective, the Court failed to seriously engage with the Government's argument concerning the legal identity of its forces operating as part of the MNF. Should the fact that national contingents act in an international capacity have any bearing on the attribution of their conduct? There are some indicators in domestic jurisprudence[34] and Convention case-law[35] suggesting that it should. Nor is the effective control test free from difficulties. Different actors involved in a peace-support operation may exercise effective control over different aspects of a national contingent's activities. Attributing wrongful conduct to only one actor may be artificial in the face of multiple levels of control.[36] The Government called attention to this when it pointed out that Al-Jedda's continued detention was decided and authorized jointly by the Government of Iraq and the Commander of the MNF.[37] It is worth noting in this respect that it is unclear whether a relationship of factual dependency must be established with reference to physical factors alone or whether normative factors may also serve as evidence of factual subordination, although practice does not appear to be settled.[38]

While it would be too much to expect the ECtHR to resolve these open questions of the law of international responsibility, one may expect it to demonstrate a more coherent attitude to a subject so pivotal to its judicial mandate. While *Al-Jedda* thus marks an evolution in Court's jurisprudence, its contribution to greater clarity is modest.

[34] For example *N. K. v Austria* (1979) 77 ILR 470, 472; *Kunduz Case*, 26 K 5534/10, ILDC 1858 (DE 2012), 9 February 2012, para. 78.

[35] For example *Ilse Hess v United Kingdom* (*Admissibility*), App. No. 6231/73, 28 May 1975, ECommHR (1975) 2 DR 125.

[36] cf. C. Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct', (2009) 10 *Melbourne Journal of International Law* 346. See also Papa (n. 27), at 255.

[37] *Al-Jedda* (n. 9), para. 67.

[38] cf. *Nuhanović v Netherlands*, LJN:BR5388, 5 July 2011, ILDC 1742 (NL 2011), para. 5.18.

TOPIC – IV

Immunities and Privileges of International Organizations

- *Difference relating to Immunity from legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62.

- *Stichting Mothers of Srebrenica and Others against the Netherlands,* Application no. 65542/12, European Court of Human Rights, 11 June 2013

- *Jam et al. v. International Finance Corporation,* US Supreme Court, No. 17–1011, 27 February 2019,

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

DIFFERENCE RELATING TO IMMUNITY FROM LEGAL PROCESS OF A SPECIAL RAPPORTEUR OF THE COMMISSION ON HUMAN RIGHTS

ADVISORY OPINION OF 29 APRIL 1999

1999

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

DIFFÉREND RELATIF À L'IMMUNITÉ DE JURIDICTION D'UN RAPPORTEUR SPÉCIAL DE LA COMMISSION DES DROITS DE L'HOMME

AVIS CONSULTATIF DU 29 AVRIL 1999

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DIFFERENCE RELATING TO IMMUNITY FROM LEGAL PROCESS OF A SPECIAL RAPPORTEUR OF THE COMMISSION ON HUMAN RIGHTS

Article 96, paragraph 2, of the Charter and Article 65, paragraph 1, of the Statute — Resolution 89 (I) of the General Assembly authorizing the Economic and Social Council to request advisory opinions — Article VIII, Section 30, of the Convention on the Privileges and Immunities of the United Nations — Existence of a "difference" between the United Nations and one of its Members — Opinion "accepted as decisive by the parties" — Advisory nature of the Court's function and particular treaty provisions — "Legal question" — Question arising "within the scope of [the] activity" of the body requesting it.

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ADVISORY OPINION

Present: *President* SCHWEBEL; *Vice-President* WEERAMANTRY; *Judges* ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK; *Registrar* VALENCIA-OSPINA.

Concerning the difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights,

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The question on which the Court has been requested to give an advisory opinion is set forth in decision 1998/297 adopted by the United Nations Economic and Social Council (hereinafter called the "Council") on 5 August 1998. By a letter dated 7 August 1998, filed in the Registry on 10 August 1998, the Secretary-General of the United Nations officially communicated to the Registrar the Council's decision to submit the question to the Court for an advisory opinion. Decision 1998/297, certified copies of the English and French texts of which were enclosed with the letter, reads as follows:

> "*The Economic and Social Council,*
>
> *Having considered* the note by the Secretary-General on the privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers[1],
>
> *Considering* that a difference has arisen between the United Nations and the Government of Malaysia, within the meaning of Section 30 of the Convention on the Privileges and Immunities of the United Nations, with respect to the immunity from legal process of Dato' Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers,
>
> *Recalling* General Assembly resolution 89 (I) of 11 December 1946,
>
> 1. *Requests* on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly

[1] E/1998/94.

resolution 89 (I), an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General[1], and on the legal obligations of Malaysia in this case;

2. *Calls upon* the Government of Malaysia to ensure that all judgements and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the International Court of Justice, which shall be accepted as decisive by the parties.

[1] E/1998/94."

Also enclosed with the letter were certified copies of the English and French texts of the note by the Secretary-General dated 28 July 1998 and entitled "Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers" and of the addendum to that note (E/1998/94/Add.1), dated 3 August 1998.

2. By letters dated 10 August 1998, the Registrar, pursuant to Article 66, paragraph 1, of the Statute of the Court, gave notice of the request for an advisory opinion to all States entitled to appear before the Court. A copy of the bilingual printed version of the request, prepared by the Registry, was subsequently sent to those States.

3. By an Order dated 10 August 1998, the senior judge, acting as President of the Court under Article 13, paragraph 3, of the Rules of Court, decided that the United Nations and the States which are parties to the Convention on the Privileges and Immunities of the United Nations adopted by the United Nations General Assembly on 13 February 1946 (hereinafter called the "General Convention") were likely to be able to furnish information on the question in accordance with Article 66, paragraph 2, of the Statute. By the same Order, the senior judge, considering that, in fixing time-limits for the proceedings, it was "necessary to bear in mind that the request for an advisory opinion was expressly made 'on a priority basis'", fixed 7 October 1998 as the time-limit within which written statements on the question might be submitted to the Court, in accordance with Article 66, paragraph 2, of the Statute, and 6 November 1998 as the time-limit for written comments on written statements, in accordance with Article 66, paragraph 4, of the Statute.

On 10 August 1998, the Registrar sent to the United Nations and to the States parties to the General Convention the special and direct communication provided for in Article 66, paragraph 2, of the Statute.

4. By a letter dated 22 September 1998, the Legal Counsel of the United Nations communicated to the President of the Court a certified copy of the amended French version of the note by the Secretary-General which had been enclosed with the request. Consequently, a corrigendum to the printed French version of the request for an advisory opinion was communicated to all States entitled to appear before the Court.

5. The Secretary-General communicated to the Court, pursuant to

Article 65, paragraph 2, of the Statute, a dossier of documents likely to throw light upon the question; these documents were received in the Registry in instalments from 5 October 1998 onwards.

6. Within the time-limit fixed by the Order of 10 August 1998, written statements were filed by the Secretary-General of the United Nations and by Costa Rica, Germany, Italy, Malaysia, Sweden, the United Kingdom and the United States of America; the filing of a written statement by Greece on 12 October 1998 was authorized. A related letter was also received from Luxembourg on 29 October 1998. Written comments on the statements were submitted, within the prescribed time-limit, by the Secretary-General of the United Nations and by Costa Rica, Malaysia, and the United States of America. Upon receipt of those statements and comments, the Registrar communicated them to all States having taken part in the written proceedings.

The Registrar also communicated to those States the text of the introductory note to the dossier of documents submitted by the Secretary-General. In addition, the President of the Court granted Malaysia's request for a copy of the whole dossier; on the instructions of the President, the Deputy-Registrar also communicated a copy of that dossier to the other States having taken part in the written proceedings, and the Secretary-General was so informed.

7. The Court decided to hold hearings, opening on 7 December 1998, at which oral statements might be submitted to the Court by the United Nations and the States parties to the General Convention.

8. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and comments submitted to the Court accessible to the public, with effect from the opening of the oral proceedings.

9. In the course of public sittings held on 7 and 8 December 1998, the Court heard oral statements in the following order by:

for the United Nations:	Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel,
	Mr. Ralph Zacklin, Assistant Secretary-General for Legal Affairs;
for Costa Rica:	H.E. Mr. José de J. Conejo, Ambassador of Costa Rica to the Netherlands,
	Mr. Charles N. Brower, White & Case LLP;
for Italy:	Mr. Umberto Leanza, Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs;
for Malaysia:	Dato' Heliliah bt Mohd Yusof, Solicitor General of Malaysia,
	Sir Elihu Lauterpacht, C.B.E., Q.C., Honorary Professor of International Law, University of Cambridge.

The Court having decided to authorize a second round of oral statements, the United Nations, Costa Rica and Malaysia availed themselves of this option; at a public hearing held on 10 December 1998, Mr. Hans Corell, H.E. Mr. José de J. Conejo, Mr. Charles N. Brower, Dato' Heliliah bt Mohd Yusof and Sir Elihu Lauterpacht were successively heard.

Members of the Court put questions to the Secretary-General's representative, who replied both orally and in writing. Copies of the written replies were communicated to all the States having taken part in the oral proceedings; Malaysia submitted written comments on these replies.

* * *

10. In its decision 1998/297, the Council asked the Court to take into account, for purposes of the advisory opinion requested, the "circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General" (E/1998/94). Those paragraphs read as follows:

> "1. In its resolution 22 A (I) of 13 February 1946, the General Assembly adopted, pursuant to Article 105 (3) of the Charter of the United Nations, the Convention on the Privileges and Immunities of the United Nations (the Convention). Since then, 137 Member States have become parties to the Convention, and its provisions have been incorporated by reference into many hundreds of agreements relating to the headquarters or seats of the United Nations and its organs, and to activities carried out by the Organization in nearly every country of the world.
>
> 2. That Convention is, *inter alia*, designed to protect various categories of persons, including 'Experts on Mission for the United Nations', from all types of interference by national authorities. In particular, Section 22 *(b)* of Article VI of the Convention provides:
>
> > '*Section 22*: Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including time spent on journeys in connection with their missions. In particular they shall be accorded:
> >
> > . . . . . .
> >
> > *(b)* in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.'
>
> 3. In its Advisory Opinion of 14 December 1989, on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (the so-called '*Mazilu* case'), the International Court of Justice held that a Special Rapporteur of the Subcommission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights was an

'expert on mission' within the meaning of Article VI of the Convention.

4. The Commission on Human Rights, by its resolution 1994/41 of 4 March 1994, endorsed by the Economic and Social Council in its decision 1994/251 of 22 July 1994, appointed Dato' Param Cumaraswamy, a Malaysian jurist, as the Commission's Special Rapporteur on the Independence of Judges and Lawyers. His mandate consists of tasks including, *inter alia*, to inquire into substantial allegations concerning, and to identify and record attacks on, the independence of the judiciary, lawyers and court officials. Mr. Cumaraswamy has submitted four reports to the Commission on the execution of his mandate: E/CN.4/1995/39, E/CN.4/1996/37, E/CN.4/1997/32 and E/CN.4/1998/39. After the third report containing a section on the litigation pending against him in the Malaysian civil courts, the Commission at its fifty-fourth session, in April 1997, renewed his mandate for an additional three years.

5. In November 1995 the Special Rapporteur gave an interview to *International Commercial Litigation*, a magazine published in the United Kingdom of Great Britain and Northern Ireland but circulated also in Malaysia, in which he commented on certain litigations that had been carried out in Malaysian courts. As a result of an article published on the basis of that interview, two commercial companies in Malaysia asserted that the said article contained defamatory words that had 'brought them into public scandal, odium and contempt'. Each company filed a suit against him for damages amounting to M$30 million (approximately US$12 million each), 'including exemplary damages for slander'.

6. Acting on behalf of the Secretary-General, the Legal Counsel considered the circumstances of the interview and of the controverted passages of the article and determined that Dato' Param Cumaraswamy was interviewed in his official capacity as Special Rapporteur on the Independence of Judges and Lawyers, that the article clearly referred to his United Nations capacity and to the Special Rapporteur's United Nations global mandate to investigate allegations concerning the independence of the judiciary and that the quoted passages related to such allegations. On 15 January 1997, the Legal Counsel, in a note verbale addressed to the Permanent Representative of Malaysia to the United Nations, therefore 'requested the competent Malaysian authorities to promptly advise the Malaysian courts of the Special Rapporteur's immunity from legal process' with respect to that particular complaint. On 20 January 1997, the Special Rapporteur filed an application in the High Court of Kuala Lumpur (the trial court in which the said suit had been filed) to set aside and/or strike out the plaintiffs' writ, on the ground that the

words that were the subject of the suits had been spoken by him in the course of performing his mission for the United Nations as Special Rapporteur on the Independence of Judges and Lawyers. The Secretary-General issued a note on 7 March 1997 confirming that 'the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission' and that the Secretary-General 'therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto'. The Special Rapporteur filed this note in support of his above-mentioned application.

7. After a draft of a certificate that the Minister for Foreign Affairs proposed to file with the trial court had been discussed with representatives of the Office of Legal Affairs, who had indicated that the draft set out the immunities of the Special Rapporteur incompletely and inadequately, the Minister nevertheless on 12 March 1997 filed the certificate in the form originally proposed: in particular the final sentence of that certificate in effect invited the trial court to determine at its own discretion whether the immunity applied, by stating that this was the case '*only* in respect of words spoken or written and acts done by him in the course of the performance of his mission' (emphasis added). In spite of the representations that had been made by the Office of Legal Affairs, the certificate failed to refer in any way to the note that the Secretary-General had issued a few days earlier and that had in the meantime been filed with the court, nor did it indicate that in this respect, i.e. in deciding whether particular words or acts of an expert fell within the scope of his mission, the determination could exclusively be made by the Secretary-General, and that such determination had conclusive effect and therefore had to be accepted as such by the court. In spite of repeated requests by the Legal Counsel, the Minister for Foreign Affairs refused to amend his certificate or to supplement it in the manner urged by the United Nations.

8. On 28 June 1997, the competent judge of the Malaysian High Court for Kuala Lumpur concluded that she was 'unable to hold that the Defendant is absolutely protected by the immunity he claims', in part because she considered that the Secretary-General's note was merely 'an opinion' with scant probative value and no binding force upon the court and that the Minister for Foreign Affairs' certificate 'would appear to be no more than a bland statement as to a state of fact pertaining to the Defendant's status and mandate as a Special Rapporteur and appears to have room for interpretation'. The Court ordered that the Special Rapporteur's motion be dismissed with costs, that costs be taxed and paid forthwith by him and that he file and serve his defence within 14 days. On 8 July, the Court of Appeal dismissed Mr. Cumaraswamy's motion for a stay of execution.

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9. On 30 June and 7 July 1997, the Legal Counsel thereupon sent notes verbales to the Permanent Representative of Malaysia, and also held meetings with him and his Deputy. In the latter note, the Legal Counsel, *inter alia*, called on the Malaysian Government to intervene in the current proceedings so that the burden of any further defence, including any expenses and taxed costs resulting therefrom, be assumed by the Government; to hold Mr. Cumaraswamy harmless in respect of the expenses he had already incurred or that were being taxed to him in respect of the proceedings so far; and, so as to prevent the accumulation of additional expenses and costs and the further need to submit a defence until the matter of his immunity was definitively resolved between the United Nations and the Government, to support a motion to have the High Court proceedings stayed until such resolution. The Legal Counsel referred to the provisions for the settlement of differences arising out of the interpretation and application of the 1946 Convention that might arise between the Organization and a Member State, which are set out in Section 30 of the Convention, and indicated that if the Government decided that it cannot or does not wish to protect and to hold harmless the Special Rapporteur in the indicated manner, a difference within the meaning of those provisions might be considered to have arisen between the Organization and the Government of Malaysia.

10. Section 30 of the Convention provides as follows:

> '*Section 30:* All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.'

11. On 10 July yet another lawsuit was filed against the Special Rapporteur by one of the lawyers mentioned in the magazine article referred to in paragraph 5 above, based on precisely the same passages of the interview and claiming damages in an amount of M$60 million (US$24 million). On 11 July, the Secretary-General issued a note corresponding to the one of 7 March 1997 (see para. 6 above) and also communicated a note verbale with essentially the same text to the Permanent Representative of Malaysia with the request that it be presented formally to the competent Malaysian court by the Government.

12. On 23 October and 21 November 1997, new plaintiffs filed

a third and fourth lawsuit against the Special Rapporteur for M$100 million (US$40 million) and M$60 million (US$24 million) respectively. On 27 October and 22 November 1997, the Secretary-General issued identical certificates of the Special Rapporteur's immunity.

13. On 7 November 1997, the Secretary-General advised the Prime Minister of Malaysia that a difference might have arisen between the United Nations and the Government of Malaysia and about the possibility of resorting to the International Court of Justice pursuant to Section 30 of the Convention. Nonetheless on 19 February 1998, the Federal Court of Malaysia denied Mr. Cumaraswamy's application for leave to appeal stating that he is neither a sovereign nor a full-fledged diplomat but merely 'an unpaid, part-time provider of information'.

14. The Secretary-General then appointed a Special Envoy, Maître Yves Fortier of Canada, who, on 26 and 27 February 1998, undertook an official visit to Kuala Lumpur to reach an agreement with the Government of Malaysia on a joint submission to the International Court of Justice. Following that visit, on 13 March 1998 the Minister for Foreign Affairs of Malaysia informed the Secretary-General's Special Envoy of his Government's desire to reach an out-of-court settlement. In an effort to reach such a settlement, the Office of Legal Affairs proposed the terms of such a settlement on 23 March 1998 and a draft settlement agreement on 26 May 1998. Although the Government of Malaysia succeeded in staying proceedings in the four lawsuits until September 1998, no final settlement agreement was concluded. During this period, the Government of Malaysia insisted that, in order to negotiate a settlement, Maître Fortier must return to Kuala Lumpur. While Maître Fortier preferred to undertake the trip only once a preliminary agreement between the parties had been reached, nonetheless, based on the Prime Minister of Malaysia's request that Maître Fortier return as soon as possible, the Secretary-General requested his Special Envoy to do so.

15. Maître Fortier undertook a second official visit to Kuala Lumpur, from 25 to 28 July 1998, during which he concluded that the Government of Malaysia was not going to participate either in settling this matter or in preparing a joint submission to the current session of the Economic and Social Council. The Secretary-General's Special Envoy therefore advised that the matter should be referred to the Council to request an advisory opinion from the International Court of Justice. The United Nations had exhausted all efforts to reach either a negotiated settlement or a joint submission through the Council to the International Court of Justice. In this connection, the Government of Malaysia has acknowledged the Organization's right to refer the matter to the Council to request an advisory opinion in accordance with Section 30 of the Convention,

advised the Secretary-General's Special Envoy that the United Nations should proceed to do so, and indicated that, while it will make its own presentations to the International Court of Justice, it does not oppose the submission of the matter to that Court through the Council."

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11. The dossier of documents submitted to the Court by the Secretary-General (see paragraph 5 above) contains the following additional information that bears on an understanding of the request to the Court.

12. The article published in the November 1995 issue of *International Commercial Litigation*, which is referred to in paragraph 5 of the foregoing note by the Secretary-General, was written by David Samuels and entitled "Malaysian Justice on Trial". The article gave a critical appraisal of the Malaysian judicial system in relation to a number of court decisions. Various Malaysian lawyers were interviewed; as quoted in the article, they expressed their concern that, as a result of these decisions, foreign investors and manufacturers might lose the confidence they had always had in the integrity of the Malaysian judicial system.

13. It was in this context that Mr. Cumaraswamy, who was referred to in the article more than once in his capacity as the United Nations Special Rapporteur on the Independence of Judges and Lawyers, was asked to give his comments. With regard to a specific case (the *Ayer Molek* case), he said that it looked like "a very obvious, perhaps even glaring example of judge-choosing", although he stressed that he had not finished his investigation.

Mr. Cumaraswamy is also quoted as having said:

> "Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice."

He added: "But I do not want any of the people involved to think I have made up my mind." He also said:

> "It would be unfair to name any names, but there is some concern about this among foreign businessmen based in Malaysia, particularly those who have litigation pending."

14. On 18 December 1995, two commercial firms and their legal counsel addressed letters to Mr. Cumaraswamy in which they maintained that they were defamed by Mr. Cumaraswamy's statements in the article, since it was clear, they claimed, that they were being accused of corruption in the *Ayer Molek* case. They informed Mr. Cumaraswamy that they had "no choice but to issue defamation proceedings against him" and added

"It is important that all steps are taken for the purpose of mitigating the continuing damage being done to [our] business and commercial reputations which is worldwide, as quickly and effectively as possible."

15. On 28 December 1995, in view of the foregoing letters, the Secretariat of the United Nations issued a Note Verbale to the Permanent Mission of Malaysia in Geneva, requesting that the competent Malaysian authorities be advised, and that they in turn advise the Malaysian courts, of the Special Rapporteur's immunity from legal process. This was the first in a series of similar communications, containing the same finding, sent by or on behalf of the Secretary-General — some of which were sent once court proceedings had been initiated (see paragraphs 6 *et seq.* of the note by the Secretary-General, reproduced in paragraph 10 above).

16. On 12 December 1996, the two commercial firms issued a writ of summons and statement of claim against Mr. Cumaraswamy in the High Court of Kuala Lumpur. They claimed damages, including exemplary damages, for slander and libel, and requested an injunction to restrain Mr. Cumaraswamy from further defaming the plaintiffs.

17. As stated in the note of the Secretary-General, quoted in paragraph 10 above, three further lawsuits flowing from Mr. Cumaraswamy's statements to *International Commercial Litigation* were brought against him.

The Government of Malaysia did not transmit to its courts the texts containing the Secretary-General's finding that Mr. Cumaraswamy was entitled to immunity from legal process.

The High Court of Kuala Lumpur did not pass upon Mr. Cumaraswamy's immunity *in limine litis*, but held that it had jurisdiction to hear the case before it on the merits, including making a determination of whether Mr. Cumaraswamy was entitled to any immunity. This decision was upheld by both the Court of Appeal and the Federal Court of Malaysia.

18. As indicated in paragraph 4 of the above note by the Secretary-General, the Special Rapporteur made regular reports to the Commission on Human Rights (hereinafter called the "Commission").

In his first report (E/CN.4/1995/39), dated 6 February 1995, Mr. Cumaraswamy did not refer to contacts with the media. In resolution 1995/36 of 3 March 1995, the Commission welcomed this report and took note of the methods of work described therein in paragraphs 63 to 93.

In his second report (E/CN.4/1996/37), dated 1 March 1996, the Special Rapporteur referred to the *Ayer Molek* case and to a critical press statement made by the Bar Council of Malaysia on 21 August 1995. The

report also included the following quotation from a press statement issued by Mr. Cumaraswamy on 23 August 1995:

> "Complaints are rife that certain highly placed personalities in Malaysia including those in business and corporate sectors are manipulating the Malaysian system of justice and thereby undermining the due administration of independent and impartial justice by the courts.
>
> Under the mandate entrusted to me by the United Nations Commission on Human Rights, I am duty bound to investigate these complaints and report to the same Commission, if possible at its fifty-second session next year. To facilitate my inquiries I will seek the cooperation of all those involved in the administration of justice, including the Government which, under my mandate, is requested to extend its cooperation and assistance."

In resolution 1996/34 of 19 April 1996, the Commission took note of this report and of the Special Rapporteur's working methods.

In his third report (E/CN.4/1997/32), dated 18 February 1997, the Special Rapporteur informed the Commission of the article in *International Commercial Litigation* and the lawsuits that had been initiated against him, the author, the publisher, and others. He also referred to the notifications of the Legal Counsel of the United Nations to the Malaysian authorities. In resolution 1997/23 of 11 April 1997, the Commission took note of the report and the working methods of the Special Rapporteur, and extended his mandate for another three years.

In his fourth report (E/CN.4/1998/39), dated 12 February 1998, the Special Rapporteur reported on further developments with regard to the lawsuits initiated against him. In its resolution 1998/35 of 17 April 1998, the Commission similarly took note of this report and of the working methods reflected therein.

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19. As indicated above (see paragraph 1), the note by the Secretary-General was accompanied by an addendum (E/1998/94/Add.1) which reads as follows:

> "In paragraph 14 of the note by the Secretary-General on the privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers (E/1998/94), it is reported that the 'Government of Malaysia succeeded in staying proceedings in the four lawsuits until September 1998'. In this connection, the Secretary-General has been informed that on 1 August 1998, Dato' Param Cumaraswamy was served with a Notice of Taxation and Bill of Costs dated 28 July 1998 and signed by the Deputy Registrar of the Federal Court notifying him that the

bill of costs of the Federal Court application would be assessed on 18 September 1998. The amount claimed is M$310,000 (US$77,500). On the same day, Dato' Param Cumaraswamy was also served with a Notice dated 29 July 1998 and signed by the Registrar of the Court of Appeal notifying him that the Plaintiff's bill of costs would be assessed on 4 September 1998. The amount claimed in that bill is M$550,000 (US$137,500)."

* *

20. The Council considered the note by the Secretary-General (E/1998/94) at the forty-seventh and forty-eighth meetings of its substantive session of 1998, held on 31 July 1998. At that time, the Observer for Malaysia disputed certain statements in paragraphs 7, 14 and 15 of the note. The note concluded with a paragraph 21 containing the Secretary-General's proposal for two questions to be submitted to the Court for an advisory opinion:

"21. . . .

'Considering the difference that has arisen between the United Nations and the Government of Malaysia with respect to the immunity from legal process of Mr. Dato' Param Cumaraswamy, the United Nations Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, in respect of certain words spoken by him:

1. Subject only to Section 30 of the Convention on the Privileges and Immunities of the United Nations, does the Secretary-General of the United Nations have the exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 *(b)* of the Convention?

2. In accordance with Section 34 of the Convention, once the Secretary-General has determined that such words were spoken in the course of the performance of a mission and has decided to maintain, or not to waive, the immunity from legal process, does the Government of a Member State party to the Convention have an obligation to give effect to that immunity in its national courts and, if failing to do so, to assume responsibility for, and any costs, expenses and damages arising from, any legal proceedings brought in respect of such words?

. . . . . .'"

On 5 August 1998, at its forty-ninth meeting, the Council considered and adopted without a vote a draft decision submitted by its Vice-President following informal consultations. After referring to Section 30 of the General Convention, the decision requested the Court to give an advisory

opinion on the question formulated therein, and called upon the Government of Malaysia to ensure that

> "all judgements and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the . . . Court . . . , which shall be accepted as decisive by the parties" (E/1998/L.49/Rev.1).

At that meeting, the Observer for Malaysia reiterated his previous criticism of paragraphs 7, 14 and 15 of the Secretary-General's note, but made no comment on the terms of the question to be put to the Court as now formulated by the Council. On being so adopted, the draft became decision 1998/297 (see paragraph 1 above).

* *

21. As regards events subsequent to the submission of the request for an advisory opinion, and more precisely, the situation with regard to the proceedings pending before the Malaysian courts, Malaysia has provided the Court with the following information:

> "the hearings on the question of stay in respect of three of the four cases have been deferred until 9 February 1999 when they are due again to be mentioned in court, and when the plaintiff will join in requesting further postponements until this Court's advisory opinion has been rendered, and sufficient time has been given to all concerned to consider its implications.
>
> The position in the first of the four cases is the same, although it is fixed for mention on 16 December [1998]. However, it will then be treated in the same way as the other cases. As to cost, the requirement for the payment of costs by the defendant has also been stayed, and that aspect of the case will be deferred and considered in the same way."

* * *

22. The Council has requested the present advisory opinion pursuant to Article 96, paragraph 2, of the Charter of the United Nations. This paragraph provides that organs of the United Nations, other than the General Assembly or the Security Council,

> "which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities".

Article 65, paragraph 1, of the Statute of the Court states that

> "[t]he Court may give an advisory opinion on any legal question at

> the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request".

23. In its decision 1998/297, the Council recalls that General Assembly resolution 89 (I) gave it authorization to request advisory opinions, and it expressly makes reference to the fact

> "that a difference has arisen between the United Nations and the Government of Malaysia, within the meaning of Section 30 of the Convention on the Privileges and Immunities of the United Nations, with respect to the immunity from legal process of Dato' Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers".

24. This is the first time that the Court has received a request for an advisory opinion that refers to Article VIII, Section 30, of the General Convention, which provides that

> "all differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

25. This section provides for the exercise of the Court's advisory function in the event of a difference between the United Nations and one of its Members. In this case, such a difference exists, but that fact does not change the advisory nature of the Court's function, which is governed by the terms of the Charter and of the Statute. As the Court stated in its Advisory Opinion of 12 July 1973,

> "the existence, in the background, of a dispute the parties to which may be affected as a consequence of the Court's opinion, does not change the advisory nature of the Court's task, which is to answer the questions put to it . . ." (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 171, para. 14).

Paragraph 2 of the Council's decision requesting the advisory opinion repeats *expressis verbis* the provision in Article VIII, Section 30, of the General Convention that the Court's opinion "shall be accepted as decisive by the parties". However, this equally cannot affect the nature of the function carried out by the Court when giving its advisory opinion. As the Court said in its Advisory Opinion of 23 October 1956, in a case involving similar language in Article XII of the Statute of the Adminis-

trative Tribunal of the International Labour Organisation, such "decisive" or "binding" effect

> "goes beyond the scope attributed by the Charter and by the Statute of the Court to an Advisory Opinion . . . It in no wise affects the way in which the Court functions; that continues to be determined by its Statute and its Rules. Nor does it affect the reasoning by which the Court forms its Opinion or the content of the Opinion itself." (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 84.)

A distinction should thus be drawn between the advisory nature of the Court's task and the particular effects that parties to an existing dispute may wish to attribute, in their mutual relations, to an advisory opinion of the Court, which, "as such, . . . has no binding force" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71). These particular effects, extraneous to the Charter and the Statute which regulate the functioning of the Court, are derived from separate agreements; in the present case Article VIII, Section 30, of the General Convention provides that "[t]he opinion given by the Court shall be accepted as decisive by the parties". That consequence has been expressly acknowledged by the United Nations and by Malaysia.

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26. The power of the Court to give an advisory opinion is derived from Article 96, paragraph 2, of the Charter and from Article 65 of the Statute (see paragraph 22 above). Both provisions require that the question forming the subject-matter of the request should be a "legal question". This condition is satisfied in the present case, as all participants in the proceedings have acknowledged, because the advisory opinion requested relates to the interpretation of the General Convention, and to its application to the circumstances of the case of the Special Rapporteur, Dato' Param Cumaraswamy. Thus the Court held in its Advisory Opinion of 28 May 1948 that "[t]o determine the meaning of a treaty provision . . . is a problem of interpretation and consequently a legal question" (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61).

27. Article 96, paragraph 2, of the Charter also requires that the legal questions forming the subject-matter of advisory opinions requested by authorized organs of the United Nations and specialized agencies shall arise "within the scope of their activities". The fulfilment of this condition has not been questioned by any of the participants in the present proceedings. The Court finds that the legal questions submitted by the Council in its request concern the activities of the Commission, since they relate to the mandate of its Special Rapporteur appointed

"to inquire into substantial allegations concerning, and to identify and record attacks on, the independence of the judiciary, lawyers and court officials".

Mr. Cumaraswamy's activities as Rapporteur and the legal questions arising therefrom are pertinent to the functioning of the Commission; accordingly they come within the scope of activities of the Council, since the Commission is one of its subsidiary organs. The same conclusion was reached by the Court in an analogous case, in its Advisory Opinion of 15 December 1989, also given at the request of the Council, regarding the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (*I.C.J. Reports 1989*, p. 187, para. 28).

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28. As the Court held in its Advisory Opinion of 30 March 1950, the permissive character of Article 65 of the Statute "gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 72). Such discretionary power does not exist when the Court is not competent to answer the question forming the subject-matter of the request, for example because it is not a "legal question". In such a case, "the Court has no discretion in the matter; it must decline to give the opinion requested" (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155; cf. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, I.C.J. Reports 1996 (I)*, p. 73, para. 14). However, the Court went on to state, in its Advisory Opinion of 20 July 1962, that "even if the question is a legal one, which the Court is undoubtedly competent to answer, it may nonetheless decline to do so" (*I.C.J. Reports 1962*, p. 155).

29. In its Advisory Opinion of 30 March 1950, the Court made it clear that, as an organ of the United Nations, its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950,* p. 71); moreover, in its Advisory Opinion of 20 July 1962, citing its Advisory Opinion of 23 October 1956, the Court stressed that "only 'compelling reasons' should lead it to refuse to give a requested advisory opinion" (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962,* p. 155). (See also, for example, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989,* pp. 190-

191, para. 37; and *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (1)*, p. 235, para. 14.)

30. In the present case, the Court, having established its jurisdiction, finds no compelling reasons not to give the advisory opinion requested by the Council. Moreover, no participant in these proceedings questioned the need for the Court to exercise its advisory function in this case.

* *

31. Article 65, paragraph 2, of the Statute provides that

> "[q]uestions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required".

In compliance with this requirement, the Secretary-General transmitted to the Court the text of the Council's decision, paragraph 1 of which reads as follows:

> "1. *Requests* on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly resolution 89 (I), an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General, and on the legal obligations of Malaysia in this case."

32. Malaysia has asserted to the Court that it had "at no time approved the text of the question that appeared in E/1998/L.49 or as eventually adopted by ECOSOC and submitted to the Court" and that it "never did more than 'take note' of the question as originally formulated by the Secretary-General and submitted to the ECOSOC in document E/1998/94". It contends that the advisory opinion of the Court should be restricted to the existing difference between the United Nations and Malaysia. In Malaysia's view, this difference relates to the question (as formulated by the Secretary-General himself (see paragraph 20 above)) of whether the latter has the exclusive authority to determine whether acts of an expert (including words spoken or written) were performed in the course of his or her mission. Thus, in the conclusion to the revised version of its written statement, Malaysia states, *inter alia*, that it

> "considers that the Secretary-General of the United Nations has not been vested with the exclusive authority to determine whether words

were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 *(b)* of the Convention".

In its oral pleadings, Malaysia maintained that

"in implementing Section 30, ECOSOC is merely a vehicle for placing a difference between the Secretary-General and Malaysia before the Court. ECOSOC does not have an independent position to assert as it might have had were it seeking an opinion on some legal question other than in the context of the operation of Section 30. ECOSOC . . . is no more than an instrument of reference, it cannot change the nature of the difference or alter the content of the question."

33. In the written statement presented on behalf of the Secretary-General, the Legal Counsel of the United Nations requested the Court

"to establish that, subject to Article VIII, Sections 29 and 30 of the Convention, the Secretary-General has exclusive authority to determine whether or not words or acts are spoken, written or done in the course of the performance of a mission for the United Nations and whether such words or acts fall within the scope of the mandate entrusted to a United Nations expert on mission".

In this submission, it has also been argued

"that such matters cannot be determined by, or adjudicated in, the national courts of the Member States parties to the Convention. The latter position is coupled with the Secretary-General's right and duty, in accordance with the terms of Article VI, Section 23, of the Convention, to waive the immunity where, in his opinion, it would impede the course of justice and it can be waived without prejudice to the interests of the United Nations."

34. The other States participating in the present proceedings have expressed varying views on the foregoing issue of the exclusive authority of the Secretary-General.

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35. As the Council indicated in the preamble to its decision 1998/297, that decision was adopted by the Council on the basis of the note submitted by the Secretary General on "Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers" (see paragraph 1 above). Paragraph 1 of the operative part of the decision refers expressly to paragraphs 1 to 15 of that note but not to paragraph 21, containing the two questions that the Secretary-General proposed submitting to the Court (see para-

graph 20 above). The Court would point out that the wording of the question submitted by the Council is quite different from that proposed by the Secretary-General.

36. Participants in these proceedings have advanced differing views as to what is the legal question to be answered by the Court. The Court observes that it is for the Council — and not for a member State nor for the Secretary-General — to formulate the terms of a question that the Council wishes to ask.

37. The Council adopted its decision 1998/297 without a vote. The Council did not pass upon any proposal that the question to be submitted to the Court should include, still less be confined to, the issue of the exclusive authority of the Secretary-General to determine whether or not acts (including words spoken or written) were performed in the course of a mission for the United Nations and whether such words or acts fall within the scope of the mandate entrusted to an expert on mission for the United Nations. Although the Summary Records of the Council do not expressly address the matter, it is clear that the Council, as the organ entitled to put the request to the Court, did not adopt the questions set forth at the conclusion of the note by the Secretary-General, but instead formulated its own question in terms which were not contested at that time (see paragraph 20 above). Accordingly, the Court will now answer the question as formulated by the Council.

* * *

38. The Court will initially examine the first part of the question laid before the Court by the Council, which is:

> "the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General . . ."

39. From the deliberations which took place in the Council on the content of the request for an advisory opinion, it is clear that the reference in the request to the note of the Secretary-General was made in order to provide the Court with the basic facts to which to refer in making its decision. The request of the Council therefore does not only pertain to the threshold question whether Mr. Cumaraswamy was and is an expert on mission in the sense of Article VI, Section 22, of the General Convention but, in the event of an affirmative answer to this question, to the consequences of that finding in the circumstances of the case.

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40. Pursuant to Article 105 of the Charter of the United Nations:

> "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 connexion with the Organization.
>
> 3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose."

Acting in accordance with Article 105 of the Charter, the General Assembly approved the General Convention on 13 February 1946 and proposed it for accession by each Member of the United Nations. Malaysia became a party to the General Convention, without reservation, on 28 October 1957.

41. The General Convention contains an Article VI entitled "Experts on Missions for the United Nations". It is comprised of two Sections (22 and 23). Section 22 provides:

> "Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including time spent on journeys in connection with their missions. In particular they shall be accorded:
>
> . . . . . .
>
> *(b)* in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.
>
> . . . . . ."

42. In its Advisory Opinion of 14 December 1989 on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, the Court examined the applicability of Section 22 *ratione personae, ratione temporis* and *ratione loci*.

In this context the Court stated:

> "The purpose of Section 22 is . . . evident, namely, to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organization, and to guarantee them 'such privileges and immunities as are necessary for the independent exer-

cise of their functions'. . . . The essence of the matter lies not in their administrative position but in the nature of their mission." (*I.C.J. Reports 1989*, p. 194, para. 47.)

In that same Advisory Opinion, the Court concluded that a Special Rapporteur who is appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities and is entrusted with a research mission must be regarded as an expert on mission within the meaning of Article VI, Section 22, of the General Convention (*ibid.*, p. 197, para. 55).

43. The same conclusion must be drawn with regard to Special Rapporteurs appointed by the Human Rights Commission, of which the Sub-Commission is a subsidiary organ. It may be observed that Special Rapporteurs of the Commission usually are entrusted not only with a research mission but also with the task of monitoring human rights violations and reporting on them. But what is decisive is that they have been entrusted with a mission by the United Nations and are therefore entitled to the privileges and immunities provided for in Article VI, Section 22, that safeguard the independent exercise of their functions.

44. By a letter of 21 April 1994, the Chairman of the Commission informed the Assistant Secretary-General for Human Rights of Mr. Cumaraswamy's appointment as Special Rapporteur. The mandate of the Special Rapporteur is contained in resolution 1994/41 of the Commission entitled "Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers". This resolution was endorsed by the Council in its decision 1994/251 of 22 July 1994. The Special Rapporteur's mandate consists of the following tasks:

"*(a)* to inquire into any substantial allegations transmitted to him or her and report his or her conclusions thereon;

(b) to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations, including accommodations for the provision of advisory services or technical assistance when they are requested by the State concerned;

(c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers".

45. The Commission extended by resolution 1997/23 of 11 April 1997 the Special Rapporteur's mandate for a further period of three years.

In the light of these circumstances, the Court finds that Mr. Cumaraswamy must be regarded as an expert on mission within the meaning of Article VI, Section 22, as from 21 April 1994, that by virtue of this capa-

city the provisions of this Section were applicable to him at the time of his statements at issue, and that they continue to be applicable.

46. The Court observes that Malaysia has acknowledged that Mr. Cumaraswamy, as Special Rapporteur of the Commission, is an expert on mission and that such experts enjoy the privileges and immunities provided for under the General Convention in their relations with States parties, including those of which they are nationals or on the territory of which they reside. Malaysia and the United Nations are in full agreement on these points, as are the other States participating in the proceedings.

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47. The Court will now consider whether the immunity provided for in Section 22 *(b)* applies to Mr. Cumaraswamy in the specific circumstances of the case; namely, whether the words used by him in the interview, as published in the article in *International Commercial Litigation* (November issue 1995), were spoken in the course of the performance of his mission, and whether he was therefore immune from legal process with respect to these words.

48. During the oral proceedings, the Solicitor General of Malaysia contended that the issue put by the Council before the Court does not include this question. She stated that the correct interpretation of the words used by the Council in its request

> "does not extend to inviting the Court to decide whether, assuming the Secretary-General to have had the authority to determine the character of the Special Rapporteur's action, he had properly exercised that authority"

and added:

> "Malaysia observes that the word used was *'applicability'* not *'application'*. 'Applicability' means 'whether the provision is applicable to someone' not 'how it is to be applied'."

49. The Court does not share this interpretation. It follows from the terms of the request that the Council wishes to be informed of the Court's opinion as to whether Section 22 *(b)* is applicable to the Special Rapporteur, in the circumstances set out in paragraphs 1 to 15 of the note of the Secretary-General and whether, therefore, the Secretary-General's finding that the Special Rapporteur acted in the course of the performance of his mission is correct.

50. In the process of determining whether a particular expert on mission is entitled, in the prevailing circumstances, to the immunity provided for in Section 22 *(b)*, the Secretary-General of the United Nations has a pivotal role to play. The Secretary-General, as the chief administrative officer of the Organization, has the authority and the responsibility to exercise the necessary protection where required. This authority has been recognized by the Court when it stated:

> "Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter." (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 184.)

51. Article VI, Section 23, of the General Convention provides that "[p]rivileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves". In exercising protection of United Nations experts, the Secretary-General is therefore protecting the mission with which the expert is entrusted. In that respect, the Secretary-General has the primary responsibility and authority to protect the interests of the Organization and its agents, including experts on mission. As the Court held:

> "In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization . . ." (*Ibid.*, p. 183.)

52. The determination whether an agent of the Organization has acted in the course of the performance of his mission depends upon the facts of a particular case. In the present case, the Secretary-General, or the Legal Counsel of the United Nations on his behalf, has on numerous occasions informed the Government of Malaysia of his finding that Mr. Cumaraswamy had spoken the words quoted in the article in *International Commercial Litigation* in his capacity as Special Rapporteur of the Commission and that he consequently was entitled to immunity from "every kind" of legal process.

53. As is clear from the written and oral pleadings of the United Nations, the Secretary-General was reinforced in this view by the fact that it has become standard practice of Special Rapporteurs of the Commission to have contact with the media. This practice was confirmed by the High Commissioner for Human Rights who, in a letter dated 2 October 1998, included in the dossier, wrote that: "it is more common than not for Special Rapporteurs to speak to the press about matters pertaining to their investigations, thereby keeping the general public informed of their work".

54. As noted above (see paragraph 13), Mr. Cumaraswamy was explicitly referred to several times in the article "Malaysian Justice on Trial" in *International Commercial Litigation* in his capacity as United Nations Special Rapporteur on the Independence of Judges and Lawyers. In his reports to the Commission (see paragraph 18 above), Mr. Cumaraswamy

had set out his methods of work, expressed concern about the independence of the Malaysian judiciary, and referred to the civil lawsuits initiated against him. His third report noted that the Legal Counsel of the United Nations had informed the Government of Malaysia that he had spoken in the performance of his mission and was therefore entitled to immunity from legal process.

55. As noted in paragraph 18 above, in its various resolutions the Commission took note of the Special Rapporteur's reports and of his methods of work. In 1997, it extended his mandate for another three years (see paragraphs 18 and 45 above). The Commission presumably would not have so acted if it had been of the opinion that Mr. Cumaraswamy had gone beyond his mandate and had given the interview to *International Commercial Litigation* outside the course of his functions. Thus the Secretary-General was able to find support for his findings in the Commission's position.

56. The Court is not called upon in the present case to pass upon the aptness of the terms used by the Special Rapporteur or his assessment of the situation. In any event, in view of all the circumstances of this case, elements of which are set out in paragraphs 1 to 15 of the note by the Secretary-General, the Court is of the opinion that the Secretary-General correctly found that Mr. Cumaraswamy, in speaking the words quoted in the article in *International Commercial Litigation*, was acting in the course of the performance of his mission as Special Rapporteur of the Commission. Consequently, Article VI, Section 22 *(b)*, of the General Convention is applicable to him in the present case and affords Mr. Cumaraswamy immunity from legal process of every kind.

* *

57. The Court will now deal with the second part of the Council's question, namely, "the legal obligations of Malaysia in this case".

58. Malaysia maintains that it is premature to deal with the question of its obligations. It is of the view that the obligation to ensure that the requirements of Section 22 of the Convention are met is an obligation of result and not of means to be employed in achieving that result. It further states that Malaysia has complied with its obligation under Section 34 of the General Convention, which provides that a party to the Convention must be "in a position under its own law to give effect to [its] terms", by enacting the necessary legislation; finally it contends that the Malaysian courts have not yet reached a final decision as to Mr. Cumaraswamy's entitlement to immunity from legal process.

59. The Court wishes to point out that the request for an advisory opinion refers to "the legal obligations of Malaysia in this case". The difference which has arisen between the United Nations and Malaysia originated in the Government of Malaysia not having informed the competent

Malaysian judicial authorities of the Secretary-General's finding that Mr. Cumaraswamy had spoken the words at issue in the course of the performance of his mission and was, therefore, entitled to immunity from legal process (see paragraph 17 above). It is as from the time of this omission that the question before the Court must be answered.

60. As the Court has observed, the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. This means that the Secretary-General has the authority and responsibility to inform the Government of a member State of his finding and, where appropriate, to request it to act accordingly and, in particular, to request it to bring his finding to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings.

61. When national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.

The governmental authorities of a party to the General Convention are therefore under an obligation to convey such information to the national courts concerned, since a proper application of the Convention by them is dependent on such information.

Failure to comply with this obligation, among others, could give rise to the institution of proceedings under Article VIII, Section 30, of the General Convention.

62. The Court concludes 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. According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule, which is of a customary character, is reflected in Article 6 of the Draft Articles on State Responsibility adopted provisionally by the International Law Commission on first reading, which provides:

> "The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organization of the State." (*Yearbook of the International Law Commission*, 1973, Vol. II, p. 193.)

Because the Government did not transmit the Secretary-General's finding to the competent courts, and the Minister for Foreign Affairs did not refer to it in his own certificate, Malaysia did not comply with the above-mentioned obligation.

63. Section 22 *(b)* of the General Convention explicitly states that experts on mission shall be accorded immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided *in limine litis*. This is a generally recognized principle of procedural law, and Malaysia was under an obligation to respect it. The Malaysian courts did not rule *in limine litis* on the immunity of the Special Rapporteur (see paragraph 17 above), thereby nullifying the essence of the immunity rule contained in Section 22 *(b)*. Moreover, costs were taxed to Mr. Cumaraswamy while the question of immunity was still unresolved. As indicated above, the conduct of an organ of a State — even an organ independent of the executive power — must be regarded as an act of that State. Consequently, Malaysia did not act in accordance with its obligations under international law.

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64. In addition, the immunity from legal process to which the Court finds Mr. Cumaraswamy entitled entails holding Mr. Cumaraswamy financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs.

*

65. According to Article VIII, Section 30, of the General Convention, the opinion given by the Court shall be accepted as decisive by the parties to the dispute. Malaysia has acknowledged its obligations under Section 30.

Since the Court holds that Mr. Cumaraswamy is an expert on mission who under Section 22 *(b)* is entitled to immunity from legal process, the Government of Malaysia is obligated to communicate this advisory opinion to the competent Malaysian courts, in order that Malaysia's international obligations be given effect and Mr. Cumaraswamy's immunity be respected.

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66. Finally, the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.

The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29, of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that "[t]he United Nations shall make provisions for" pursuant to Section 29.

Furthermore, it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations.

* * *

67. For these reasons,

THE COURT

Is of the opinion:

(1) *(a)* By fourteen votes to one,

That Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations is applicable in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: *Judge* Koroma;

(b) By fourteen votes to one,

That Dato' Param Cumaraswamy is entitled to immunity from legal process of every kind for the words spoken by him during an interview as published in an article in the November 1995 issue of *International Commercial Litigation*;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: *Judge* Koroma;

(2) *(a)* By thirteen votes to two,

That the Government of Malaysia had the obligation to inform the Malaysian courts of the finding of the Secretary-

General that Dato' Param Cumaraswamy was entitled to immunity from legal process;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: *Judges* Oda, Koroma;

(b) By fourteen votes to one,

That the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: *Judge* Koroma;

(3) Unanimously,

That Dato' Param Cumaraswamy shall be held financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs;

(4) By thirteen votes to two,

That the Government of Malaysia has the obligation to communicate this Advisory Opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and Dato' Param Cumaraswamy's immunity be respected;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: *Judges* Oda, Koroma.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-ninth day of April, one thousand nine hundred and ninety-nine, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) Stephen M. SCHWEBEL,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

32

Vice-President WEERAMANTRY and Judges ODA and REZEK append separate opinions to the Advisory Opinion of the Court.

Judge KOROMA appends a dissenting opinion to the Advisory Opinion of the Court.

(Initialled) S.M.S.

(Initialled) E.V.O.

STICHTING MOTHERS OF SREBRENICA AND OTHERS
against the Netherlands

(European Court of Human Rights, 11 June 2013, App. No. 65542/12)

THE FACTS

1. Stichting Mothers of Srebrenica is a foundation (*stichting*) under Netherlands law. It was created with a view to taking proceedings on behalf of the relatives of persons killed in and around Srebrenica, Bosnia and Herzegovina, in the course of the events of July 1995 described below.

2. The other applicants are individual surviving relatives of persons killed. They also state that they are victims in their own right of violations of their human rights that occurred in the course of the events of July 1995. A list of the applicants is set out in the appendix.

3. The applicants were represented by Mr A. Hagedorn, Mr M.R. Gerritsen and Mr J. Staab, lawyers practising in Amsterdam.

4. The facts of the case, as submitted by the applicants and as apparent from public documents, may be summarised as follows.

A. Background to the case

1. The break-up of the Socialist Federative Republic of Yugoslavia

5. The Socialist Federative Republic of Yugoslavia (SFRY) was made up of six republics: Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia. Slovenia and Croatia declared their independence from the SFRY on 25 June 1991 following referenda held earlier. Thereupon the Presidency of the SFRY ordered the JNA (*Jugoslovenska Narodna Armija/Југословенска народна армија*, or Yugoslav People's Army) into action with a view to reasserting the control of the federal government.

6. Other component republics of the SFRY followed Slovenia and Croatia in declaring independence. Eventually only Serbia and Montenegro were left to constitute the SFRY's successor state, the Federal Republic of Yugoslavia (FRY). Hostilities ensued, largely along ethnic lines, as groups who were ethnic minorities within particular republics and whose members felt difficulty identifying with the emerging independent States sought to

unite the territory they inhabited with that of republics with which they perceived an ethnic bond.

7. By Resolution 743 (1992) of 21 February 1992, the Security Council of the United Nations set up a United Nations Protection Force (UNPROFOR) intended to be "an interim arrangement to create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis". Although UNPROFOR's mandate was originally for twelve months, it was extended; UNPROFOR (later renamed UNPF, the name UNPROFOR coming to refer only to the operation in Bosnia and Herzegovina) continued in operation until late December 1995. Troop-contributing nations included the Netherlands.

2. The war in Bosnia and Herzegovina

8. Bosnia and Herzegovina declared independence on 6 March 1992 as the Republic of Bosnia and Herzegovina. Thereupon war broke out, the warring factions being defined largely according to the country's pre-existing ethnic divisions. The main belligerent forces were the ARBH (Armija Republike Bosne i Hercegovine, or Army of the Republic of Bosnia and Herzegovina, mostly made up of Bosniacs[1] and loyal to the central authorities of the Republic of Bosnia and Herzegovina), the HVO (*Hrvatsko vijeće obrane*, or Croatian Defence Council, mostly made up of Croats[2]) and the VRS (*Vojska Republike Srpske/Војска Републике Српске*, or Army of the Republika Srpska, also called the Bosnian Serb Army, mostly made up of Serbs[3]).

9. It would appear that more than 100,000 people were killed and more than two million people were displaced. It is estimated that almost 30,000 people went missing; in 2010, approximately one-third of them were still so listed[4].

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1. Bosniacs (sometimes spelt Bosniaks) were known as "Muslims" or "Yugoslav Muslims" until the 1992-95 war. The term "Bosniacs" (*Bošnjaci*) should not be confused with the term "Bosnians" (*Bosanci*) which is commonly used to denote citizens of Bosnia and Herzegovina irrespective of their ethnic origin.

2. The Croats are an ethnic group whose members may be natives of Croatia or of other former component republics of the SFRY including Bosnia and Herzegovina. The expression "Croat" is normally used (both as a noun and as an adjective) to refer to members of the ethnic group, regardless of their nationality; it is not to be confused with "Croatian", which normally refers to nationals of Croatia.

3. The Serbs are an ethnic group whose members may be natives of Serbia or of other former component republics of the SFRY including Bosnia and Herzegovina. The expression "Serb" is normally used (both as a noun and as an adjective) to refer to members of the ethnic group, regardless of their nationality; it is not to be confused with "Serbian", which normally refers to nationals of Serbia. This convention is followed by the Court in the present decision except when quoting from a document not originating from the Court itself, where the original wording is retained.

4. See the Press Release of the United Nations Working Group on Enforced or Involuntary Disappearances of 21 June 2010 on its visit to Bosnia and Herzegovina.

10. The conflict came to an end on 14 December 1995 when the General Framework Agreement for Peace ("the Dayton Peace Agreement", adopted in Dayton, Ohio, USA) entered into force. One of the effects of the Dayton Peace Agreement was the division of Bosnia and Herzegovina into two component Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska (Serb Republic).

3. The Srebrenica massacre

11. Srebrenica is a municipality in eastern Bosnia. It is delimited to the south by the river Drina which forms the border between Bosnia and Herzegovina and Serbia. To the north it adjoins the municipality of Bratunac. Its western neighbours are the municipalities of Milići and Rogatica. It is now part of the Republika Srpska.

12. The municipality of Srebrenica is constituted of a number of towns and villages, among them the town of Srebrenica from which the municipality takes its name. Before the outbreak of the war its population was almost entirely Bosniac and Serb, Bosniacs outnumbering Serbs by more than three to one.

13. Since it constituted an obstacle to the formation of the Republika Srpska as a continuous territorial entity as long as it remained in the hands of the central government of the Republic of Bosnia and Herzegovina, Srebrenica came under VRS attack as early as 1992.

14. It appears that the central government of the Republic of Bosnia and Herzegovina refused to countenance any evacuation of Srebrenica's civilian population, since that would amount to the acceptance of "ethnic cleansing" and facilitate the surrender of territory to the VRS.

15. On 16 April 1993 the Security Council of the United Nations adopted, by a unanimous vote, a resolution (Resolution 819 (1993)) demanding that "all parties and others concerned treat [the eastern Bosnian town of] Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act."

16. By July 1995 the Srebrenica "safe area" was an enclave surrounded by territory held by the VRS. It contained ARBH combatants, most of them disarmed, and civilians. The latter numbered in their tens of thousands, mostly Bosniacs; these included by then, in addition to the local residents, persons displaced from elsewhere in eastern Bosnia. There was also an UNPROFOR presence within the enclave, nominally consisting of some four hundred lightly-armed Netherlands air-mobile infantry, known as Dutchbat (from "Dutch" and "battalion"), under the command of a lieutenant colonel. In fact, however, Dutchbat was under-strength by this time, as troops returning from leave had been prevented by the VRS from re-joining their unit.

17. On 10 July 1995 the Drina Corps of the VRS attacked the Srebrenica "safe area" with overwhelming force. The commander of the Netherlands

air-mobile battalion asked his United Nations superiors for air support. However, no decisive use of air power was made. The VRS overran the area and took control despite the presence of Dutchbat.

18. On 12 July 1995 the Security Council of the United Nations adopted, by a unanimous vote, a resolution (Resolution 1004 (1995)) demanding an immediate end to the VRS offensive and the withdrawal of VRS forces from the Srebrenica safe area as well as respect for the safety of UNPROFOR personnel and restoration of their freedom of movement.

19. In the days that followed, Bosniac men who had fallen into the hands of the VRS were separated from the women and children and killed. Others managed to evade immediate capture and attempted to escape from the enclave. Some succeeded in reaching safety but many were caught and put to death, or died *en route* of their wounds or were killed by landmines. It is now generally accepted as fact that upwards of 7,000, perhaps as many as 8,000 Bosniac men and boys died in this operation at the hands of the VRS and of Serb paramilitary forces.

20. The "Srebrenica massacre", as it has come to be known, is widely recognised as an atrocity which is unique in the history of Europe since the end of the Second World War[5].

[Para 21-53 Omitted]

B. The domestic proceedings

1. Initiation of the main proceedings

54. On 4 June 2007 the applicants summoned the Netherlands State and the United Nations before the Regional Court (*rechtbank*) of The Hague. The summons was a 203-page document in which the applicants stated that the State of the Netherlands (responsible for Dutchbat) and the United Nations (which bore overall responsibility for UNPROFOR), despite earlier promises and despite their awareness of the imminence of an attack by the VRS, had failed to act appropriately and effectively to defend the Srebrenica "safe area" and, after the enclave had fallen to the VRS, to protect the non-combatants present. They therefore bore responsibility for the maltreatment of members of the civilian population, the rape and (in some

[5] See, for example, Parliamentary Assembly of the Council of Europe, Committee on the Honouring of Obligations and Commitments by member States of the Council of Europe (Monitoring Committee), Doc. 10200, 4 June 2004 (*Honouring of obligations and commitments by Bosnia and Herzegovina*): "The Srebrenica massacre, which took place in July 1995 in a UN safe haven in and around the town of Srebrenica, is one of the worst atrocities committed since the Second World War: around 7,000 Bosniac boys and men were executed by the Serbian [*sic*] forces and their bodies thrown into mass graves." (§ 33)

cases) murder of women, the mass murder of men, and genocide. The applicants based their position both on Netherlands civil law and on international law.

55. The argument under civil law was, firstly, that the United Nations and the State of the Netherlands had entered into an agreement with the inhabitants of the Srebrenica enclave (including the applicants) to protect them inside the Srebrenica "safe area" in exchange for the disarmament of the ARBH forces present, which agreement the United Nations and the State of the Netherlands had failed to honour; and secondly, that the Netherlands State, with the connivance of the United Nations, had committed a tort (*onrechtmatige daad*) against them by sending insufficiently armed, poorly trained and ill-prepared troops to Bosnia and Herzegovina and failing to provide them with the necessary air support.

56. The argument under international law, in so far as relevant to the case now before the Court, was based on the International Law Commission's Draft Articles on State Responsibility and Draft Articles on the Responsibility of International Organizations, the applicants taking the position that the actions of Dutchbat were attributable to both the State of the Netherlands and the United Nations.

57. Although recognising that individuals were not subjects of classical international law, the applicants argued that the right of victims to redress under international law had been recognised directly by the United Nations General Assembly's Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which had direct effect in the Netherlands by virtue of Article 93 of the Constitution for the Kingdom of the Netherlands.

58. Anticipating the likelihood that the United Nations would invoke its immunity based on Article 105 of the Charter of the United Nations, the applicants argued that any immunity which that organisation enjoyed could go no further than was necessary for it to carry out its tasks, and moreover that access to a court was guaranteed by, in particular, Article 6 § 1 of the Convention.

Para 59-111 Omitted

COMPLAINTS

112. The applicants complained under Article 6 of the Convention, firstly, that the grant of immunity to the United Nations violated their right of access to court, and secondly, that the Supreme Court had rejected with

summary reasoning their request for a preliminary ruling to be sought from the Court of Justice of the European Union.

113. They complained under Article 13 of the Convention that the grant of immunity to the United Nations would allow the Netherlands State to evade its liability towards the applicants by laying all blame on the United Nations, thus effectively depriving their claims of all their substance.

THE LAW

A. Standing of the applicant Stichting Mothers of Srebrenica

114. As to whether all applicants can be regarded as "victims" within the meaning of Article 34 of the Convention, the Court has held that this concept must be interpreted autonomously and independently of domestic concepts such as those concerning the interest in taking proceedings or the capacity to do so. In the Court's opinion, for an applicant to be able to claim that he or she is the victim of a violation of one or more of the rights and freedoms recognised by the Convention and its Protocols, there must be a sufficiently direct link between the applicant and the damage which he or she claims to have sustained as a result of the alleged violation (see, among other authorities, *Association des amis de Saint-Raphaël et de Fréjus v. France* (dec.), no. 45053/98, 29 February 2000, in respect of the applicant association; and *Uitgeversmaatschappij De Telegraaf B.V. and Others v. the Netherlands* (dec.), no. 39315/06, 18 May 2010, in respect of the applicants *Nederlandse Vereniging van Journalisten* (Netherlands Association of Journalists) and *Nederlands Genootschap van Hoofdredacteuren* (Netherlands Society of Editors-in-Chief)).

115. The Court has actually denied standing as applicants to non-governmental bodies set up with no other aim than to vindicate the rights of alleged victims (see *Smits, Kleyn, Mettler Toledo B.V. et al., Raymakers, Vereniging Landelijk Overleg Betuweroute and Van Helden v. the Netherlands* (dec.), nos. 39032/97, 39343/98, 39651/98, 43147/98, 46664/99 and 61707/00, 3 May 2001, in respect of the applicant *Vereniging Landelijk Overleg Betuweroute*); and even to non-governmental organisations whose very purpose was to defend human rights (see *Van Melle and Others v. the Netherlands* (dec.), no. 19221/08, 29 September 2009, in respect of the applicant *Liga voor de Rechten van de Mens*).

116. The first applicant in the present case, Stichting Mothers of Srebrenica, is a foundation set up for the express purpose of promoting the interests of surviving relatives of the Srebrenica massacre. The fact remains,

however, that the first applicant has not itself been affected by the matters complained of under Articles 6 and 13 of the Convention: neither its "civil rights and obligations" nor its own Convention rights of which a violation is alleged were in issue (see *Smits, Kleyn, Mettler Toledo B.V. et al., Raymakers, Vereniging Landelijk Overleg Betuweroute and Van Helden*, cited above). Consequently it cannot claim to be a "victim" of a violation of those provisions within the meaning of Article 34 of the Convention.

117. It follows that in so far as the application was lodged by the first applicant it is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

B. Alleged violation of Article 6 of the Convention

118. The applicants alleged violations of Article 6 of the Convention, which, in its relevant parts, provides as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

1. Applicability of Article 6

119. Article 6 § 1 applies to disputes (*contestations*) concerning civil "rights" which can be said, at least on arguable grounds, to be recognised under domestic law, whether or not they are also protected by the Convention (see, among many other authorities, *Cyprus v. Turkey* [GC], no. 25781/94, § 233, ECHR 2001-IV; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 46, ECHR 2001-XI; *Fogarty v. the United Kingdom* [GC], no. 37112/97, § 24, ECHR 2001-XI (extracts); *Cudak v. Lithuania* [GC], no. 15869/02, § 45, ECHR 2010; and *Sabeh El Leil v. France* [GC], no. 34869/05, § 40, 29 June 2011). The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and finally, the result of the proceedings must be directly decisive for the right in question (see, among many other authorities, *Zander v. Sweden*, 25 November 1993, § 22, Series A no. 279-B; *Markovic and Others v. Italy* [GC], no. 1398/03, § 93, ECHR 2006-XIV; and *Micallef v. Malta* [GC], no. 17056/06, § 74, ECHR 2009).

120. The Court accepts that the right asserted by the applicants, being based on the domestic law of contract and tort (see paragraph 55 above), was a civil one. There is no doubt that a dispute existed; that it was sufficiently serious; and that the outcome of the proceedings here in issue was directly decisive for the right in question. In the light of the treatment afforded the applicants' claims by the domestic courts, and of the judgments given by the Court of Appeal of The Hague on 26 June 2012 in the *Mustafić*

and *Nuhanović* cases (see paragraph 110 above), the Court is moreover prepared to assume that the applicants' claim was "arguable" in terms of Netherlands domestic law (see, *mutatis mutandis*, *Al-Adsani*, cited above, § 48). In short, Article 6 is applicable.

2. The immunity of the United Nations

(a) The applicants' submissions

121. The applicants complained that the recognition of immunity from domestic jurisdiction of the United Nations by the Netherlands courts violated their right of access to a court.

122. Article 105 of the Charter of the United Nations by its very wording created for the United Nations an immunity that was functional in character, not absolute. That immunity was justified by, and limited by, the necessity for the organisation to enjoy independence in carrying out its tasks. Accordingly, whenever the United Nations invoked its immunity, the courts had to determine whether a functional need for such immunity existed.

123. In the applicants' view, the immunity from jurisdiction of international organisations was different from the immunity enjoyed by States. Whereas the immunity from jurisdiction of foreign States was based on sovereign equality, as per the maxim "*par in parem non habet imperium*", the right of access to a court was not thereby extinguished: it remained possible to institute proceedings against foreign States in their own courts.

124. Article II, section 2 of the Convention on the Privileges and Immunities of the United Nations made explicit provision for waiving the United Nations' immunity. Moreover, the ICJ, in paragraph 61 of its *Advisory Opinion on a Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, had made it clear that the immunity of a United Nations official (in that case a special rapporteur on human rights) was presumed, and had to be given "the greatest possible weight" by the domestic courts, but could nonetheless be set aside "for the most compelling reasons".

125. Article VIII, section 29 of the Convention on the Privileges and Immunities of the United Nations required the United Nations to make provision for appropriate modes of settlement of disputes involving it. This showed that there was a perceived need to avoid situations in which the immunity of the United Nations would give rise to a *de facto* denial of justice.

126. The importance of the availability of an alternative judicial remedy was also borne out by the Court's own case-law in the matter of international organisations' immunity from domestic jurisdiction, in particular *Waite and Kennedy v. Germany* (cited above).

127. As to the particular case, in 1999 the then Secretary-General of the United Nations had recognised that errors of judgement and fundamental mistakes had been made. He had concluded that "the international community as a whole", including "the Security Council, the Contact Group and other Governments which [had] contributed to the delay in the use of force [in the early stages of the war], as well as ... the United Nations Secretariat and the mission in the field" bore responsibility for these (Report of the Secretary-General pursuant to General Assembly Resolution 53/35, UN Doc. A/54/549, 15 November 1999, paragraph 501).

128. The massacre at Srebrenica had been an act of genocide, as found by both the ICTY (in the *Krstić* case) and the ICJ (in *Bosnia and Herzegovina v. Serbia and Montenegro*). The *Bosnia and Herzegovina v. Serbia and Montenegro* judgment was especially important in that it formulated the obligation to prevent genocide: States were to take, to that end, all measures within their power: they could not evade their international responsibility by claiming, or even proving, that the means at their disposal would in any case have been insufficient, given that the combined efforts of several States might have sufficed to avert the genocide.

129. The current Secretary-General of the United Nations, in response to the applicants' summons in the present case, had stated that the survivors of the Srebrenica massacre were "absolutely right" to demand justice for "the most heinous crimes committed on European soil since World War II" and had expressed his support for that demand. Likewise, in an address to the United Nations General Assembly on 8 October 2009 the then President of the ICTY had criticised the failure of the international community to create effective legal remedies accessible to the victims of the conflicts that had occurred in the former Yugoslavia.

130. The Supreme Court had been wrong to construe *Waite and Kennedy* so as to differentiate between the United Nations and other international organisations. No such distinction had been made by the Court itself in *Waite and Kennedy*. Furthermore, in its comments on the International Law Commission's Draft Articles on the Responsibility of International Organizations the Secretariat of the United Nations itself had recognised differences between States and international organisations on the one hand and international organisations among themselves on the other, but had nonetheless made it clear that it considered the United Nations an international organisation within the meaning of those draft articles. Nor was such a distinction made by the Institute of International Law, for example in its Resolution on the Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations towards Third Parties, nor yet by the International Law Association, which defined its scope of work broadly as encompassing international organisations "in the traditional sense" without differentiating the United Nations from other such organisations.

131. In the applicants' submission, the Supreme Court had been wrong to draw from the Court's decision in *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* the conclusion that the United Nations enjoyed absolute immunity from domestic jurisdiction. The Court's decision had been entirely unrelated to immunity from domestic jurisdiction: the Court had in fact held that it lacked competence *ratione personae vis-à-vis* the United Nations.

132. The effect of the Supreme Court's judgment had been to deprive the applicants of "access to a court" entirely. No alternative to the domestic courts existed enabling them to assert their rights against the United Nations. The absence of such a jurisdictional alternative had been found by the Court to be incompatible in principle with Article 6 of the Convention in judgments including *Waite and Kennedy*, and (in relation to the sovereign immunity of foreign States) *Fogarty v. the United Kingdom* [GC], no. 37112/97, ECHR 2001-XI (extracts); *Cudak v. Lithuania* [GC], no. 15869/02, ECHR 2010; *Sabeh El Leil v. France* [GC], no. 34869/05, 29 June 2011; and *Wallishauser v. Austria*, no. 156/04, 17 July 2012.

133. The Supreme Court had failed to take into account Article VIII, section 29 of the Convention on the Privileges and Immunities of the United Nations, which required the United Nations to set up some system for the settlements of disputes to which it was a party. The Supreme Court had thereby arrived at a result that was "manifestly absurd or unreasonable" within the meaning of Article 32 of the Vienna Convention on the Law of Treaties. Rather, the domestic courts, and the Court itself, had to bear in mind the special character of the European Convention on Human Rights as a human rights treaty as well as the recommendations made by international bodies such as the International Law Commission and the International Law Association.

134. Finally, the Supreme Court had failed to balance the interests involved against each other. Whatever the interest served by the United Nations' immunity from domestic jurisdiction, absolute immunity was not acceptable if no alternative form of dispute resolution was available. Faced with the failure of the Secretary-General of the United Nations to waive that organisation's immunity, the Netherlands courts ought to have found that there were nonetheless compelling reasons to examine the applicants' claims.

(b) The Court's assessment

i. Scope of the case before the Court

135. The proceedings brought by the applicants in the Netherlands are not the first judicial proceedings brought in connection with the Srebrenica massacre. Complaints connected to the Srebrenica massacre were brought before the Human Rights Chamber, a domestic jurisdictional body in Bosnia

and Herzegovina, against the Republika Srpska; although that body lacked jurisdiction *ratione temporis* to consider the massacre itself, it was able to recognise the suffering of the surviving relatives of its victims in the aftermath and make an award in that connection (see paragraph 48 above).

136. The Court also notes that in France, the Netherlands and the Republika Srpska, domestic inquiries were carried out that investigated the events surrounding the massacre in greater or lesser detail (see paragraphs 26-40 above). One such inquiry led to the resignation of the Netherlands Government (see paragraph 30 above).

137. However, the attribution of responsibility for the Srebrenica massacre or its consequences, whether to the United Nations, to the Netherlands State or to any other legal or natural person, is not a matter falling within the scope of the present application. Nor can the Court consider whether the Secretary-General of the United Nations was under any moral or legal obligation to waive the United Nations' immunity. It has only to decide whether the Netherlands violated the applicants' right of "access to a court", as guaranteed by Article 6 of the Convention, by granting the United Nations immunity from domestic jurisdiction.

138. The Court reiterates that the degree of access afforded by the national legislation must be sufficient to secure the individual's "right to a court", having regard to the principle of the rule of law in a democratic society (see *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93; *Bellet v. France*, 4 December 1995, § 36, Series A no. 333-B; and *F.E. v. France*, 30 October 1998, § 46, *Reports of Judgments and Decisions* 1998-VII). It is undeniable that where immunity from jurisdiction is granted to any person, public or private, the right of access to court, guaranteed by Article 6 § 1 of the Convention, is affected (see *Sabeh el Leil*, cited above, § 50).

ii. Applicable principles

139. The principles established by the Court in its case-law are the following:

(a) Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18; see also, among many other authorities, *Waite and Kennedy* [GC], no. 26083/94, § 50, ECHR 1999-I, and *Beer and Regan* [GC], no. 28934/95, § 49, 18 February 1999).

(b) The right of access to the courts secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain

margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among many other authorities, *Waite and Kennedy*, cited above, § 59).

(c) The attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments. The immunity from jurisdiction commonly accorded by States to international organisations under the organisations' constituent instruments or supplementary agreements is a long-standing practice established in the interest of the good working of these organisations. The importance of this practice is enhanced by a trend towards extending and strengthening international cooperation in all domains of modern society. Against this background, the immunity from domestic jurisdiction afforded to international organisations has a legitimate objective (see, in particular, *Waite and Kennedy*, cited above, § 63).

(d) Where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see *Waite and Kennedy*, cited above, § 67). It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on categories of persons (see, *mutatis mutandis*, *Sabeh el Leil*, cited above, § 50).

(e) The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (see, among other authorities and *mutatis*

mutandis, *Loizidou v. Turkey* (merits), 18 December 1996, § 43, *Reports* 1996-VI; *Al-Adsani*, cited above, § 55; and *Nada v. Switzerland* [GC], no. 10593/08, § 169, ECHR 2012). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of immunity to a State (the Court would add: or to an international organisation) (see *Loizidou*, cited above, § 43; *Fogarty*, cited above, § 35; *Cudak*, cited above, § 56; and *Sabeh el Leil*, cited above, § 48).

(f) Measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity (the Court would add: or the immunity of international organisations) cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guaranteed in that Article, so some restrictions on access must likewise be regarded as inherent. Examples are those limitations generally accepted by the community of nations as part of the doctrine of immunity from domestic jurisdiction, whether it concerns the immunity of a foreign sovereign State or that of an international organisation (see *Fogarty*, cited above, § 36, and *Cudak*, cited above, § 57).

(g) When creating new international obligations, States are assumed not to derogate from their previous obligations. Where a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonised as far as possible so that they produce effects that are fully in accordance with existing law (see *Nada*, cited above, § 170).

iii. Application of the above principles

140. The applicants' argument rests on three pillars. The first is the nature of the immunity from domestic jurisdiction enjoyed by international organisations, which is, in their submission, functional; in this, they argue, it contrasts with the sovereign immunity enjoyed by foreign States, which is grounded on the sovereign equality of States among themselves. The second is the nature of their claim, which derives from the act of genocide committed at Srebrenica and is in their view of a higher order than any immunity which the United Nations may enjoy. The third is the absence of any alternative jurisdiction competent to entertain their claim against the United Nations. The Court will consider each of these in turn.

α. The nature of the immunity enjoyed by the United Nations

141. The Court takes note of the various understandings of the immunity of the United Nations in State practice and international legal doctrine. For instance, in its judgment of 15 September 1969 (*Manderlier v. United*

Nations and Belgian State, *Pasicrisie belge*, 1969, II, page 247, (1969) 69 *International Law Reports* 169), the Court of Appeal of Brussels adopted reasoning implying that that immunity was absolute. In contrast, in *Askir v. Boutros-Ghali*, 933 F. Supp. 368 (1996), the District Court of New York considered the immunity of the United Nations in terms appropriate to the restricted immunity of a foreign sovereign State, effectively taking the view that military operations were *acta iure imperii*. In relation to peacekeeping operations, which are seen as "subsidiary organs" of the United Nations, the Secretariat of the United Nations applies a functional "command and control" test as regards accountability but maintains that the organisation enjoys immunity in the local courts (Report of the United Nations Secretary-General entitled "Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters" and "Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations", UN Doc A/51/389, paragraphs 7 and 17; "Responsibility of international organizations: Comments and observations received from international organizations", UN Doc A/CN.4/637/Add.1). Meanwhile, the Draft Articles of the International Law Commission on the Responsibility of International Organizations are "without prejudice" to the Charter of the United Nations (Sixty-third session of the International Law Commission, UN Doc A/66/10, to appear in *Yearbook of the International Law Commission, 2011*, vol. II, Part Two; see Draft Article 67).

142. Scholarly opinion is that international organisations continue to enjoy immunity from domestic jurisdiction. The International Law Association describes international organisations' immunity from domestic jurisdiction as a "decisive barrier to remedial action for non-State claimants" (International Law Association, Report of the Seventy-First Conference held in Berlin, 16-21 August 2004, pages 164 and following, at page 209). This is also the opinion of the Institute for International Law ("The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties", Lisbon Session, 1995, *Annuaire de l'Institut de droit international* 66-I, page 251 et seq.). The International Law Association considers, *de lege ferenda*, that legal remedies ought to be created to allow individuals to seek redress from international organisations where this has not already been done, going so far as to suggest that a role could be envisaged for domestic courts in the absence of direct access to an international dispute settlement body (loc. cit., at page 228).

143. The Court for its part reiterates that it is not its role to seek to define authoritatively the meaning of provisions of the UN Charter and other international instruments. It must nevertheless examine whether there

was a plausible basis in such instruments for the matters impugned before it (see *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, cited above, § 122).

144. Moreover, as mentioned above (see paragraph 139 (e)), the Convention forms part of international law. The Court must consequently determine State responsibility in conformity and harmony with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty. Thus, although the Vienna Convention on the Law of Treaties of 23 May 1969 postdates the United Nations Charter, the General Convention on Privileges and Immunities of the United Nations and the Convention, and is therefore not directly applicable (see Article 4 of the Vienna Convention), the Court must have regard to its provisions in so far as they codify pre-existing international law, and in particular Article 31 § 3 (c) (see *Golder*, cited above, § 29; as more recent authorities and *mutatis mutandis*, see also *Al-Adsani*, cited above, § 55; *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, cited above, § 122; and *Cudak*, cited above, § 56).

145. Article 103 of the United Nations Charter provides that the obligations of the Members of the United Nations under the Charter shall prevail in the event of a conflict with obligations under any other international agreement. The Court has had occasion to state its position as regards the effect of that provision, and of obligations flowing from the Security Council's use of its powers under the United Nations Charter, on its interpretation of the Convention (see *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, § 102, ECHR 2011):

> "... the Court must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first subparagraph of Article 1 of the United Nations Charter, the third subparagraph provides that the United Nations was established to 'achieve international cooperation in ... promoting and encouraging respect for human rights and fundamental freedoms'. Article 24(2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to 'act in accordance with the Purposes and Principles of the United Nations'. Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law."

As is borne out by *Nada*, cited above, § 172, the presumption here expressed is rebuttable.

146. The Court now turns to the immunity granted to the United Nations by the Netherlands courts.

147. Article 105 of the United Nations Charter provides that the United Nations "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes".

148. Article II, section 2 of the Convention on the Privileges and Immunities of the United Nations takes matters further by providing that the United Nations "shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity".

149. Previous cases before the Court in which the question of the immunity from domestic jurisdiction of international organisations has come up have, until now, concerned disputes between the organisation and members of its staff (see *Waite and Kennedy* and *Beer and Regan*, both cited above; see also *Lopez Cifuentes v. Spain* (dec.), no. 18754/06, 7 July 2009).

150. In a number of other cases the Court has been asked to impute acts of international organisations to State Parties to the Convention by virtue of their membership of those organisations (see *Boivin v. France and 33 other States* (dec.), no. 73250/01, ECHR 2008; *Connolly v. 15 Member States of the Council of Europe* (dec.), no. 73274/01, 9 December 2009; *Gasparini v. Italy and Belgium* (dec.), no. 10750/03, 12 May 2009; *Beygo v. 46 Member States of the Council of Europe* (dec.), no. 36099/06, 16 June 2009; *Rambus Inc. v. Germany* (dec.), no. 40382/04, 16 June 2009; and *Lechouritou and Others v. Germany and 26 other Member States of the European Union* (dec.), no. 37937/07, 3 April 2012) or their position as host State of such an organisation or of an administrative or judicial body created by it (see, in particular, *Berić and Others v. Bosnia and Herzegovina* (dec.), nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05, 16 October 2007; *Galić v. the Netherlands* (dec.), no. 22617/07, ECHR 2009; *Blagojević v. the Netherlands*, no. 49032/07, 9 June 2009; and *Djokaba Lambi Longa v. the Netherlands* (dec.), no. 33917/12, ECHR 2012).

151. In addition, the Court has been asked to consider acts performed by Contracting States themselves by virtue of their membership of international organisations. In this connection, it has expressed the presumption that as long as fundamental rights are protected in a manner which can be considered at least equivalent to that for which the Convention provides, State action taken in compliance with legal obligations flowing from membership of the European Union will be in accordance with the

requirements of the Convention (see, in particular, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 156, ECHR 2005-VI; and *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands* (dec.), no. 13645/05, ECHR 2009).

152. The present case is different from all those mentioned. At its root is a dispute between the applicants and the United Nations based on the use by the Security Council of its powers under Chapter VII of the United Nations Charter.

153. Like resolutions of the Security Council, the United Nations Charter and other instruments governing the functioning of the United Nations will be interpreted by the Court as far as possible in harmony with States' obligations under international human rights law.

154. The Court finds that since operations established by United Nations Security Council resolutions under Chapter VII of the United Nations Charter are fundamental to the mission of the United Nations to secure international peace and security, the Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations. To bring such operations within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the United Nations in this field, including with the effective conduct of its operations (see, *mutatis mutandis*, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, cited above, § 149).

155. Moreover, the Court cannot but have regard to the Advisory Opinion of the ICJ concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, I.C.J. Reports 1999, p. 62 and following (delivered on 29 April 1999), at § 66, where the ICJ holds as follows:

> "Finally, the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their officia1 capacity.
>
> The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29, of the General Convention [on Privileges and Immunities of the United Nations], any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that '[t]he United Nations shall make provisions for' pursuant to Section 29. ..."

β. The nature of the applicants' claim

156. The applicants argued that since their claim was based on an act of genocide for which they held the United Nations (and the Netherlands)

accountable, and since the prohibition of genocide was a rule of *ius cogens*, the cloak of immunity protecting the United Nations should be removed.

157. The Court recognised the prohibition of genocide as a rule of *ius cogens* in *Jorgić v. Germany* (no. 74613/01, § 68, ECHR 2007-III). In that case it found, based on the Genocide Convention, that Germany could claim jurisdiction to put the applicant on trial (loc. cit., §§ 68-70).

158. However, unlike *Jorgić*, the present case does not concern criminal liability but immunity from domestic civil jurisdiction. International law does not support the position that a civil claim should override immunity from suit for the sole reason that it is based on an allegation of a particularly grave violation of a norm of international law, even a norm of *ius cogens*. In respect of the sovereign immunity of foreign States this has been clearly stated by the ICJ in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, judgment of 3 February 2012, §§ 81-97. In the Court's opinion this also holds true as regards the immunity enjoyed by the United Nations.

159. Notwithstanding the possibility of weighing the immunity of an official of the United Nations in the balance, suggested in paragraph 61 of the ICJ's Advisory Opinion concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the Court sees no reason to reach a different finding as regards the immunity enjoyed by the United Nations in the present case, especially since – unlike the acts impugned in the *Jurisdictional Immunities* case – the matters imputed to the United Nations in the present case, however they may have to be judged, ultimately derived from resolutions of the Security Council acting under Chapter VII of the United Nations Charter and therefore had a basis in international law.

160. Nor can the statements of the current Secretary-General of the United Nations (Highlights of the noon briefing by Marie Okabe, Deputy Spokesperson for Secretary-General Ban Ki-Moon, U.N. Headquarters, New York, Friday, June 8, 2007) and the former President of the ICTY (Address of the President of the ICTY to the General Assembly of the United Nations, 8 October 2009), cited by the applicants, lead the Court to find otherwise. Although both purport to encourage States to secure "justice" to surviving relatives of the Srebrenica massacre, neither calls for the United Nations to submit to Netherlands domestic jurisdiction: the former calls for the perpetrators to be put on trial and for the recovery of Srebrenica itself to be assisted; the latter, for the setting up of a claims commission or a compensation fund.

γ. The absence of any alternative jurisdiction

161. The General Assembly of the United Nations' Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Resolution A/RES/60/147, 16 December

2005) reiterate a "right to a remedy for victims of violations of international human rights law" found in a variety of international instruments. In so doing the Guidelines refer to, among other things, Article 13 of the Convention (cited in the preamble). They are addressed to States, which are enjoined to take appropriate action and create the necessary procedures. In so doing, however, they state a right of access to justice as provided for under existing international law (see, in particular, paragraph VIII, "Access to justice", and paragraph XII, "Non-derogation").

162. The only international instrument on which individuals could base a right to a remedy against the United Nations in relation to the acts and omissions of UNPROFOR is the Agreement on the status of the United Nations Protection Force in Bosnia and Herzegovina of 15 May 1993, 1722 United Nations Treaty Series (UNTS) 77, Article 48 of which requires that a claims commission be set up for that purpose. However, it would appear that this has not been done.

163. As the applicants rightly pointed out, in *Waite and Kennedy* (cited above, § 68) – as in *Beer and Regan* (cited above, § 58) – the Court considered it a "material factor", in determining whether granting an international organisation immunity from domestic jurisdiction was permissible under the Convention, whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention. In the present case it is beyond doubt that no such alternative means existed either under Netherlands domestic law or under the law of the United Nations.

164. It does not follow, however, that in the absence of an alternative remedy the recognition of immunity is *ipso facto* constitutive of a violation of the right of access to a court. In respect of the sovereign immunity of foreign States, the ICJ has explicitly denied the existence of such a rule (*Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening*), § 101). As regards international organisations, this Court's judgments in *Waite and Kennedy* and *Beer and Regan* cannot be interpreted in such absolute terms either.

165. There remains the fact that the United Nations has not, until now, made provision for "modes of settlement" appropriate to the dispute here in issue. Regardless of whether Article VIII, section 29 of the Convention on the Privileges and Immunities of the United Nations can be construed so as to require a dispute settlement body to be set up in the present case, this state of affairs is not imputable to the Netherlands. Nor does Article 6 of the Convention require the Netherlands to step in: as pointed out above, the present case is fundamentally different from earlier cases in which the Court has had to consider the immunity from domestic jurisdiction enjoyed by international organisations, and the nature of the applicants' claims did not compel the Netherlands to provide a remedy against the United Nations in its own courts.

δ. Link with the claim against the Netherlands State

166. The applicants complained under Article 13 of the Convention that the State of the Netherlands sought to impute responsibility for the failure to prevent the Srebrenica massacre entirely to the United Nations; given that the United Nations had been granted absolute immunity, this amounted in their view to an attempt by the State to evade its accountability towards the applicants altogether. The Court deems it appropriate to consider this complaint under Article 6 § 1 of the Convention rather than Article 13.

167. The Court cannot at present find it established that the applicants' claims against the Netherlands State will necessarily fail. The Court of Appeal of The Hague at least has shown itself willing, in the *Mustafić* and *Nuhanović* cases, to entertain claims against the State arising from the actions of the Netherlands Government, and of Dutchbat itself, in connection with the deaths of individuals in the Srebrenica massacre (see paragraph 110 above). The Court notes moreover that the appeals on points of law lodged by the State in both cases are currently still pending (see paragraph 111 above).

168. At all events, the question whether the applicants' claims should prevail against any defendant is dependent on the establishment of relevant facts and the application of substantive law by the domestic courts. Without prejudice to any decision the Supreme Court may yet take in the applicants' case and in the cases of *Mustafić* and *Nuhanović*, it should be pointed out that Article 6 § 1 does not guarantee any particular content for (civil) "rights and obligations" in the substantive law of the Contracting States: the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see, for example, *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 98, ECHR 2001-V; *Roche v. the United Kingdom* [GC], no. 32555/96, § 119, ECHR 2005-X; and *Boulois v. Luxembourg* [GC], no. 37575/04, § 91, ECHR 2012).

ε. Conclusion

169. The above findings lead the Court to find that in the present case the grant of immunity to the United Nations served a legitimate purpose and was not disproportionate.

170. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

3. The Supreme Court's refusal to seek a preliminary ruling from the Court of Justice of the European Union

171. The applicants complained of the Supreme Court's refusal, based on summary reasoning, to seek a preliminary ruling from the Court of Justice of the European Union. They argued that the question of the

interrelation between the jurisdictional immunity granted to the United Nations and the principle of effective judicial protection enshrined in European Union law was highly relevant to their case and had never been explored by the Court of Justice before; the Supreme Court ought therefore not to have treated the issue so dismissively.

172. The Court reiterates that the Convention does not guarantee, as such, any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling (see, among other authorities, *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 114, ECHR 2000-VII; *Ullens de Schooten and Rezabek v. Belgium*, nos. 3989/07 and 38353/07, § 57, 20 September 2011; and *Ferreira Santos Pardal v. Portugal* (dec.), no. 30123/10, 4 September 2012). Even so, a court or tribunal against whose decisions there is no judicial remedy under national law is required, if it refuses to seek a preliminary ruling from the Court of Justice of the European Union, to indicate the reasons why it finds that the question raised is irrelevant, that the Community provision in question has already been interpreted by the Court of Justice, or that the correct application of community law is so obvious as to leave no scope for any reasonable doubt (see *Ullens de Schooten and Rezabek*, cited above, § 62).

173. The Court finds that in the instant case the summary reasoning used by the Supreme Court was sufficient. Having already found that the United Nations enjoyed immunity from domestic jurisdiction under international law, the Supreme Court was entitled to consider a request to the Court of Justice of the European Union for a preliminary ruling redundant.

174. More generally, although Article 6 requires judgments of tribunals adequately to state the reasons on which they are based, it does not go so far as to require a detailed answer to every submission put forward; nor is the Court called upon to examine whether an argument is adequately met, or the rejection of a request adequately reasoned. Furthermore, in dismissing an appeal an appellate court may, in principle, simply endorse the reasons for the lower court's decision (see, among other authorities, *Kok v. the Netherlands* (dec.), no. 43149/98, ECHR 2000-VI).

175. It follows that this complaint also is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

C. Alleged violation of Article 13 of the Convention

176. The applicants complained that the State of the Netherlands was abusing the immunity granted to the United Nations by laying the blame for the failure to prevent the Srebrenica massacre on the United Nations alone, thus evading its own responsibility towards the applicants. They relied on Article 13 of the Convention, which provides as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

177. Having already considered this complaint under Article 6 § 1 of the Convention, the Court finds that there is no separate issue under Article 13. The requirements of the latter Article are in any case less strict than, and are here absorbed by, Article 6 § 1 (see, among many other authorities, *Coëme and Others*, cited above, § 117).

178. It follows that this part of the application too is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

D. The Court's decision

For these reasons, the Court unanimously

Declares the application inadmissible.

Marialena Tsirli	Josep Casadevall
Deputy Registrar	President

Appendix

1. STICHTING MOTHERS OF SREBRENICA is a foundation (*stichting*) with legal personality under Netherlands law created in 2006 with its registered office in Amsterdam.
2. Ms Munira SUBAŠIĆ is a national of Bosnia and Herzegovina who was born in 1948 and lives in Vogošća, Bosnia and Herzegovina.
3. Ms Zumra ŠEHOMEROVIĆ is a national of Bosnia and Herzegovina who was born in 1951 and lives in Vogošća, Bosnia and Herzegovina.
4. Ms Kada HOTIĆ is a national of Bosnia and Herzegovina who was born in 1945 and lives in Vogošća, Bosnia and Herzegovina.
5. Ms Sabaheta FEJZIĆ is a national of Bosnia and Herzegovina who was born in 1956 and lives in Vogošća, Bosnia and Herzegovina.
6. Ms Kadira GABELJIĆ is a national of Bosnia and Herzegovina who was born in 1955 and lives in Vogošća, Bosnia and Herzegovina.
7. Ms Ramiza GURDIĆ is a national of Bosnia and Herzegovina who was born in 1953 and lives in Sarajevo, Bosnia and Herzegovina.
8. Ms Mila HASANOVIĆ is a national of Bosnia and Herzegovina who was born in 1946 and lives in Sarajevo, Bosnia and Herzegovina.
9. Ms Šuhreta MUJIĆ is a national of Bosnia and Herzegovina who was born in 1951 and lives in Sarajevo, Bosnia and Herzegovina.
10. Ms X is a national of Bosnia and Herzegovina who was born in 1982 and lives in Cologne, Germany.
11. Ms Y is a national of Bosnia and Herzegovina who was born in 1952 and lives in Sarajevo, Bosnia and Herzegovina.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

JAM ET AL. *v.* INTERNATIONAL FINANCE CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17–1011. Argued October 31, 2018—Decided February 27, 2019

In 1945, Congress passed the International Organizations Immunities Act (IOIA), which, among other things, grants international organizations the "same immunity from suit . . . as is enjoyed by foreign governments." 22 U. S. C. §288a(b). At that time, foreign governments were entitled to virtually absolute immunity as a matter of international grace and comity. In 1952, the State Department adopted a more restrictive theory of foreign sovereign immunity, which Congress subsequently codified in the Foreign Sovereign Immunities Act (FSIA), 28 U. S. C. §1602. The FSIA gives foreign sovereign governments presumptive immunity from suit, §1604, subject to several statutory exceptions, including, as relevant here, an exception for actions based on commercial activity with a sufficient nexus with the United States, §1605(a)(2).

Respondent International Finance Corporation (IFC), an IOIA international organization, entered into a loan agreement with Coastal Gujarat Power Limited, a company based in India, to finance the construction of a coal-fired power plant in Gujarat. Petitioners sued the IFC, claiming that pollution from the plant harmed the surrounding air, land, and water. The District Court, however, held that the IFC was immune from suit because it enjoyed the virtually absolute immunity that foreign governments enjoyed when the IOIA was enacted. The D. C. Circuit affirmed in light of its decision in *Atkinson* v. *Inter-American Development Bank*, 156 F. 3d 1335.

Held: The IOIA affords international organizations the same immunity from suit that foreign governments enjoy today under the FSIA. Pp. 6–15.

(a) The IOIA "same as" formulation is best understood as making international organization immunity and foreign sovereign immunity

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continuously equivalent. The IOIA is thus like other statutes that use similar or identical language to place two groups on equal footing. See, *e.g.*, Civil Rights Act of 1866, 42 U. S. C. §§1981(a), 1982; Federal Tort Claims Act, 28 U. S. C. §2674. Whatever the ultimate purpose of international organization immunity may be, the immediate purpose of the IOIA immunity provision is expressed in language that Congress typically uses to make one thing continuously equivalent to another. Pp. 6–9.

(b) That reading is confirmed by the "reference canon" of statutory interpretation. When a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises. In contrast, when a statute refers to another statute by specific title, the referenced statute is adopted as it existed when the referring statute was enacted, without any subsequent amendments. Federal courts have often relied on the reference canon to harmonize a statute with an external body of law that the statute refers to generally. The IOIA's reference to the immunity enjoyed by foreign governments is to an external body of potentially evolving law, not to a specific provision of another statute. Nor is it a specific reference to a common law concept with a fixed meaning. The phrase "immunity enjoyed by foreign governments" is not a term of art with substantive content but rather a concept that can be given scope and content only by reference to the rules governing foreign sovereign immunity. Pp. 9–11.

(c) The D. C. Circuit relied upon *Atkinson*'s conclusion that the reference canon's probative force was outweighed by an IOIA provision authorizing the President to alter the immunity of an international organization. But the fact that the President has power to modify otherwise applicable immunity rules is perfectly compatible with the notion that those rules might themselves change over time in light of developments in the law governing foreign sovereign immunity. The *Atkinson* court also did not consider the opinion of the State Department, whose views in this area ordinarily receive "special attention," *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U. S. ___, ___, and which took the position that immunity rules of the IOIA and the FSIA were linked following the FSIA's enactment. Pp. 11–13.

(d) The IFC contends that interpreting the IOIA immunity provision to grant only restrictive immunity would defeat the purpose of granting immunity in the first place, by subjecting international organizations to suit under the commercial activity exception of the FSIA for most or all of their core activities. This would be particularly true with respect to international development banks, which use the tools of commerce to achieve their objectives. Those concerns are

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inflated. The IOIA provides only default rules. An international organization's charter can always specify a different level of immunity, and many do. Nor is it clear that the lending activity of all development banks qualifies as commercial activity within the meaning of the FSIA. But even if it does qualify as commercial, that does not mean the organization is automatically subject to suit, since other FSIA requirements must also be met, see, *e.g.*, 28 U. S. C. §§1603, 1605(a)(2). Pp. 13–15.

860 F. 3d 703, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, GINSBURG, ALITO, SOTOMAYOR, KAGAN, and GORSUCH, JJ., joined. BREYER, J., filed a dissenting opinion. KAVANAUGH, J., took no part in the consideration or decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 17–1011

BUDHA ISMAIL JAM, ET AL., PETITIONERS *v.* INTERNATIONAL FINANCE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[February 27, 2019]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The International Organizations Immunities Act of 1945 grants international organizations such as the World Bank and the World Health Organization the "same immunity from suit . . . as is enjoyed by foreign governments." 22 U. S. C. §288a(b). At the time the IOIA was enacted, foreign governments enjoyed virtually absolute immunity from suit. Today that immunity is more limited. Most significantly, foreign governments are not immune from actions based upon certain kinds of commercial activity in which they engage. This case requires us to determine whether the IOIA grants international organizations the virtually absolute immunity foreign governments enjoyed when the IOIA was enacted, or the more limited immunity they enjoy today.

Respondent International Finance Corporation is an international organization headquartered in the United States. The IFC finances private-sector development projects in poor and developing countries around the world. About 10 years ago, the IFC financed the construc-

tion of a power plant in Gujarat, India. Petitioners are local farmers and fishermen and a small village. They allege that the power plant has polluted the air, land, and water in the surrounding area. Petitioners sued the IFC for damages and injunctive relief in Federal District Court, but the IFC claimed absolute immunity from suit. Petitioners argued that the IFC was entitled under the IOIA only to the limited or "restrictive" immunity that foreign governments currently enjoy. We agree.

I

A

In the wake of World War II, the United States and many of its allies joined together to establish a host of new international organizations. Those organizations, which included the United Nations, the International Monetary Fund, and the World Bank, were designed to allow member countries to collectively pursue goals such as stabilizing the international economy, rebuilding war-torn nations, and maintaining international peace and security.

Anticipating that those and other international organizations would locate their headquarters in the United States, Congress passed the International Organizations Immunities Act of 1945, 59 Stat. 669. The Act grants international organizations a set of privileges and immunities, such as immunity from search and exemption from property taxes. 22 U. S. C. §§288a(c), 288c.

The IOIA defines certain privileges and immunities by reference to comparable privileges and immunities enjoyed by foreign governments. For example, with respect to customs duties and the treatment of official communications, the Act grants international organizations the privileges and immunities that are "accorded under similar circumstances to foreign governments." §288a(d). The provision at issue in this case provides that international organizations "shall enjoy the same immunity from suit

and every form of judicial process as is enjoyed by foreign governments." §288a(b).

The IOIA authorizes the President to withhold, withdraw, condition, or limit the privileges and immunities it grants in light of the functions performed by any given international organization. §288. Those privileges and immunities can also be expanded or restricted by a particular organization's founding charter.

B

When the IOIA was enacted in 1945, courts looked to the views of the Department of State in deciding whether a given foreign government should be granted immunity from a particular suit. If the Department submitted a recommendation on immunity, courts deferred to the recommendation. If the Department did not make a recommendation, courts decided for themselves whether to grant immunity, although they did so by reference to State Department policy. *Samantar* v. *Yousuf*, 560 U. S. 305, 311–312 (2010).

Until 1952, the State Department adhered to the classical theory of foreign sovereign immunity. According to that theory, foreign governments are entitled to "virtually absolute" immunity as a matter of international grace and comity. At the time the IOIA was enacted, therefore, the Department ordinarily requested, and courts ordinarily granted, immunity in suits against foreign governments. *Ibid.*; *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486 (1983).[1]

In 1952, however, the State Department announced that it would adopt the newer "restrictive" theory of foreign

[1]The immunity was "virtually" absolute because it was subject to occasional exceptions for specific situations. In *Republic of Mexico* v. *Hoffman*, 324 U. S. 30 (1945), for example, the State Department declined to recommend, and the Court did not grant, immunity from suit with respect to a ship that Mexico owned but did not possess.

sovereign immunity. Under that theory, foreign governments are entitled to immunity only with respect to their sovereign acts, not with respect to commercial acts. The State Department explained that it was adopting the restrictive theory because the "widespread and increasing practice on the part of governments of engaging in commercial activities" made it "necessary" to "enable persons doing business with them to have their rights determined in the courts." Letter from Jack B. Tate, Acting Legal Adviser, Dept. of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984–985 (1952).

In 1976, Congress passed the Foreign Sovereign Immunities Act. The FSIA codified the restrictive theory of foreign sovereign immunity but transferred "primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Republic of Austria* v. *Altmann*, 541 U. S. 677, 691 (2004); see 28 U. S. C. §1602. Under the FSIA, foreign governments are presumptively immune from suit. §1604. But a foreign government may be subject to suit under one of several statutory exceptions. Most pertinent here, a foreign government may be subject to suit in connection with its commercial activity that has a sufficient nexus with the United States. §1605(a)(2).

C

The International Finance Corporation is an international development bank headquartered in Washington, D. C. The IFC is designated as an international organization under the IOIA. Exec. Order No. 10680, 3 CFR 86 (1957); see 22 U. S. C. §§282, 288. One hundred eighty-four countries, including the United States, are members of the IFC.

The IFC is charged with furthering economic development "by encouraging the growth of productive private enterprise in member countries, particularly in the less

developed areas, thus supplementing the activities of" the World Bank. Articles of Agreement of the International Finance Corporation, Art. I, Dec. 5, 1955, 7 U. S. T. 2193, T. I. A. S. No. 3620. Whereas the World Bank primarily provides loans and grants to developing countries for public-sector projects, the IFC finances private-sector development projects that cannot otherwise attract capital on reasonable terms. See Art. I(i), *ibid*. In 2018, the IFC provided some $23 billion in such financing.

The IFC expects its loan recipients to adhere to a set of performance standards designed to "avoid, mitigate, and manage risks and impacts" associated with development projects. IFC Performance Standards on Environmental and Social Sustainability, Jan. 1, 2012, p. 2, ¶1. Those standards are usually more stringent than any established by local law. The IFC includes the standards in its loan agreements and enforces them through an internal review process. Brief for Respondent 10.

In 2008, the IFC loaned $450 million to Coastal Gujarat Power Limited, a company located in India. The loan helped finance the construction of a coal-fired power plant in the state of Gujarat. Under the terms of the loan agreement, Coastal Gujarat was required to comply with an environmental and social action plan designed to protect areas around the plant from damage. The agreement allowed the IFC to revoke financial support for the project if Coastal Gujarat failed to abide by the terms of the agreement.

The project did not go smoothly. According to the IFC's internal audit, Coastal Gujarat did not comply with the environmental and social action plan in constructing and operating the plant. The audit report criticized the IFC for inadequately supervising the project.

In 2015, a group of farmers and fishermen who live near the plant, as well as a local village, sued the IFC in the United States District Court for the District of Columbia.

They claimed that pollution from the plant, such as coal dust, ash, and water from the plant's cooling system, had destroyed or contaminated much of the surrounding air, land, and water. Relying on the audit report, they asserted several causes of action against the IFC, including negligence, nuisance, trespass, and breach of contract. The IFC maintained that it was immune from suit under the IOIA and moved to dismiss for lack of subject matter jurisdiction.

The District Court, applying D. C. Circuit precedent, concluded that the IFC was immune from suit because the IOIA grants international organizations the virtually absolute immunity that foreign governments enjoyed when the IOIA was enacted. 172 F. Supp. 3d 104, 108–109 (DC 2016) (citing *Atkinson* v. *Inter-American Development Bank*, 156 F. 3d 1335 (CADC 1998)). The D. C. Circuit affirmed in light of its precedent. 860 F. 3d 703 (2017). Judge Pillard wrote separately to say that she would have decided the question differently were she writing on a clean slate. *Id.*, at 708 (concurring opinion). Judge Pillard explained that she thought the D. C. Circuit "took a wrong turn" when it "read the IOIA to grant international organizations a static, absolute immunity that is, by now, not at all the same 'as is enjoyed by foreign governments,' but substantially broader." *Ibid.* Judge Pillard also noted that the Third Circuit had expressly declined to follow the D. C. Circuit's approach. See *OSS Nokalva, Inc.* v. *European Space Agency*, 617 F. 3d 756 (CA3 2010).

We granted certiorari. 584 U. S. ___ (2018).

II

The IFC contends that the IOIA grants international organizations the "same immunity" from suit that foreign governments enjoyed in 1945. Petitioners argue that it instead grants international organizations the "same immunity" from suit that foreign governments enjoy to-

day. We think petitioners have the better reading of the statute.

A

The language of the IOIA more naturally lends itself to petitioners' reading. In granting international organizations the "same immunity" from suit "as is enjoyed by foreign governments," the Act seems to continuously link the immunity of international organizations to that of foreign governments, so as to ensure ongoing parity between the two. The statute could otherwise have simply stated that international organizations "shall enjoy absolute immunity from suit," or specified some other fixed level of immunity. Other provisions of the IOIA, such as the one making the property and assets of international organizations "immune from search," use such noncomparative language to define immunities in a static way. 22 U. S. C. §288a(c). Or the statute could have specified that it was incorporating the law of foreign sovereign immunity as it existed on a particular date. See, *e.g.*, Energy Policy Act of 1992, 30 U. S. C. §242(c)(1) (certain land patents "shall provide for surface use to the same extent as is provided under applicable law prior to October 24, 1992"). Because the IOIA does neither of those things, we think the "same as" formulation is best understood to make international organization immunity and foreign sovereign immunity continuously equivalent.

That reading finds support in other statutes that use similar or identical language to place two groups on equal footing. In the Civil Rights Act of 1866, for instance, Congress established a rule of equal treatment for newly freed slaves by giving them the "same right" to make and enforce contracts and to buy and sell property "as is enjoyed by white citizens." 42 U. S. C. §§1981(a), 1982. That provision is of course understood to guarantee continuous equality between white and nonwhite citizens with respect

to the rights in question. See *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 427–430 (1968). Similarly, the Federal Tort Claims Act states that the "United States shall be liable" in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U. S. C. §2674. That provision is most naturally understood to make the United States liable in the same way as a private individual at any given time. See *Richards* v. *United States*, 369 U. S. 1, 6–7 (1962). Such "same as" provisions dot the statute books, and federal and state courts commonly read them to mandate ongoing equal treatment of two groups or objects. See, *e.g.*, *Adamson* v. *Bowen*, 855 F. 2d 668, 671–672 (CA10 1988) (statute making United States liable for fees and expenses "to the same extent that any other party would be liable under the common law or under the terms of any statute" interpreted to continuously tie liability of United States to that of any other party); *Kugler's Appeal*, 55 Pa. 123, 124–125 (1867) (statute making the procedure for dividing election districts "the same as" the procedure for dividing townships interpreted to continuously tie the former procedure to the latter).

The IFC objects that the IOIA is different because the purpose of international organization immunity is entirely distinct from the purpose of foreign sovereign immunity. Foreign sovereign immunity, the IFC argues, is grounded in the mutual respect of sovereigns and serves the ends of international comity and reciprocity. The purpose of international organization immunity, on the other hand, is to allow such organizations to freely pursue the collective goals of member countries without undue interference from the courts of any one member country. The IFC therefore urges that the IOIA should not be read to tether international organization immunity to changing foreign sovereign immunity.

But that gets the inquiry backward. We ordinarily

assume, "absent a clearly expressed legislative intention to the contrary," that "the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 68 (1982) (alterations omitted). Whatever the ultimate purpose of international organization immunity may be—the IOIA does not address that question—the immediate purpose of the immunity provision is expressed in language that Congress typically uses to make one thing continuously equivalent to another.

B

The more natural reading of the IOIA is confirmed by a canon of statutory interpretation that was well established when the IOIA was drafted. According to the "reference" canon, when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises. 2 J. Sutherland, Statutory Construction §§5207–5208 (3d ed. 1943). For example, a statute allowing a company to "collect the same tolls and enjoy the same privileges" as other companies incorporates the law governing tolls and privileges as it exists at any given moment. *Snell* v. *Chicago*, 133 Ill. 413, 437–439, 24 N. E. 532, 537 (1890). In contrast, a statute that refers to another statute by specific title or section number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted, without any subsequent amendments. See, *e.g.*, *Culver* v. *People ex rel. Kochersperger*, 161 Ill. 89, 95–99, 43 N. E. 812, 814–815 (1896) (tax-assessment statute referring to specific article of another statute does not adopt subsequent amendments to that article).

Federal courts have often relied on the reference canon, explicitly or implicitly, to harmonize a statute with an external body of law that the statute refers to generally. Thus, for instance, a statute that exempts from disclosure

agency documents that "would not be *available by law* to a party . . . in litigation with the agency" incorporates the general law governing attorney work-product privilege as it exists when the statute is applied. *FTC* v. *Grolier Inc.*, 462 U. S. 19, 20, 26–27 (1983) (emphasis added); *id.*, at 34, n. 6 (Brennan, J., concurring in part and concurring in judgment). Likewise, a general reference to federal discovery rules incorporates those rules "as they are found on any given day, today included," *El Encanto, Inc.* v. *Hatch Chile Co.*, 825 F. 3d 1161, 1164 (CA10 2016), and a general reference to "the crime of piracy as defined by the law of nations" incorporates a definition of piracy "that changes with advancements in the law of nations," *United States* v. *Dire*, 680 F. 3d 446, 451, 467–469 (CA4 2012).

The same logic applies here. The IOIA's reference to the immunity enjoyed by foreign governments is a general rather than specific reference. The reference is to an external body of potentially evolving law—the law of foreign sovereign immunity—not to a specific provision of another statute. The IOIA should therefore be understood to link the law of international organization immunity to the law of foreign sovereign immunity, so that the one develops in tandem with the other.

The IFC contends that the IOIA's reference to the immunity enjoyed by foreign governments is not a general reference to an external body of law, but is instead a specific reference to a common law concept that had a fixed meaning when the IOIA was enacted in 1945. And because we ordinarily presume that "Congress intends to incorporate the well-settled meaning of the common-law terms it uses," *Neder* v. *United States*, 527 U. S. 1, 23 (1999), the IFC argues that we should read the IOIA to incorporate what the IFC maintains was the then-settled meaning of the "immunity enjoyed by foreign governments": virtually absolute immunity.

But in 1945, the "immunity enjoyed by foreign govern-

ments" did not *mean* "virtually absolute immunity." The phrase is not a term of art with substantive content, such as "fraud" or "forgery." See *id.*, at 22; *Gilbert* v. *United States*, 370 U. S. 650, 655 (1962). It is rather a concept that can be given scope and content only by reference to the rules governing foreign sovereign immunity. It is true that under the rules applicable in 1945, the *extent* of immunity from suit was virtually absolute, while under the rules applicable today, it is more limited. But in 1945, as today, the IOIA's instruction to grant international organizations the immunity "enjoyed by foreign governments" is an instruction to look up the applicable rules of foreign sovereign immunity, wherever those rules may be found—the common law, the law of nations, or a statute. In other words, it is a general reference to an external body of (potentially evolving) law.

C

In ruling for the IFC, the D. C. Circuit relied upon its prior decision in *Atkinson*, 156 F. 3d 1335. *Atkinson* acknowledged the reference canon, but concluded that the canon's probative force was "outweighed" by a structural inference the court derived from the larger context of the IOIA. *Id.*, at 1341. The *Atkinson* court focused on the provision of the IOIA that gives the President the authority to withhold, withdraw, condition, or limit the otherwise applicable privileges and immunities of an international organization, "in the light of the functions performed by any such international organization." 22 U. S. C. §288. The court understood that provision to "delegate to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances." *Atkinson*, 156 F. 3d, at 1341. That delegation, the court reasoned, "undermine[d]" the view that Congress intended the IOIA to in effect update itself by incorporating changes in the law governing foreign sover-

eign immunity. *Ibid.*

We do not agree. The delegation provision is most naturally read to allow the President to modify, on a case-by-case basis, the immunity rules that would otherwise apply to a particular international organization. The statute authorizes the President to take action with respect to a single organization—"any such organization"—in light of the functions performed by "such organization." 28 U. S. C. §288. The text suggests retail rather than wholesale action, and that is in fact how authority under §288 has been exercised in the past. See, *e.g.*, Exec. Order No. 12425, 3 CFR 193 (1984) (designating INTERPOL as an international organization under the IOIA but withholding certain privileges and immunities); Exec. Order No. 11718, 3 CFR 177 (1974) (same for INTELSAT). In any event, the fact that the President has power to modify otherwise applicable immunity rules is perfectly compatible with the notion that those rules might themselves change over time in light of developments in the law governing foreign sovereign immunity.

The D. C. Circuit in *Atkinson* also gave no consideration to the opinion of the State Department, whose views in this area ordinarily receive "special attention." *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l. Drilling Co.*, 581 U. S. ___, ___ (2017) (slip op., at 9). Shortly after the FSIA was enacted, the State Department took the position that the immunity rules of the IOIA and the FSIA were now "link[ed]." Letter from Detlev F. Vagts, Office of the Legal Adviser, to Robert M. Carswell, Jr., Senior Legal Advisor, OAS, p. 2 (Mar. 24, 1977). The Department reaffirmed that view during subsequent administrations, and it has reaffirmed it again here.[2] That longstanding

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[2]See Letter from Roberts B. Owen, Legal Adviser, to Leroy D. Clark, Gen. Counsel, EEOC (June 24, 1980) in Nash, Contemporary Practice of the United States Relating to International Law, 74 Am. J. Int'l. L. 917,

view further bolsters our understanding of the IOIA's immunity provision.

D

The IFC argues that interpreting the IOIA's immunity provision to grant anything less than absolute immunity would lead to a number of undesirable results.

The IFC first contends that affording international organizations only restrictive immunity would defeat the purpose of granting them immunity in the first place. Allowing international organizations to be sued in one member country's courts would in effect allow that member to second-guess the collective decisions of the others. It would also expose international organizations to money damages, which would in turn make it more difficult and expensive for them to fulfill their missions. The IFC argues that this problem is especially acute for international development banks. Because those banks use the tools of commerce to achieve their objectives, they may be subject to suit under the FSIA's commercial activity exception for most or all of their core activities, unlike foreign sovereigns. According to the IFC, allowing such suits would bring a flood of foreign-plaintiff litigation into U. S. courts, raising many of the same foreign-relations con-

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918 (1980) ("By virtue of the FSIA, and unless otherwise specified in their constitutive agreements, international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities, while retaining immunity for their acts of a public character."); Letter from Arnold Kanter, Acting Secretary of State, to President George H. W. Bush (Sept. 12, 1992) in Digest of United States Practice in International Law 1016–1017 (S. Cummins & D. Stewart eds. 2005) (explaining that the Headquarters Agreement of the Organization of American States affords the OAS "full immunity from judicial process, thus going beyond the usual United States practice of affording restrictive immunity," in exchange for assurances that OAS would provide for "appropriate modes of settlement of those disputes for which jurisdiction would exist against a foreign government under the" FSIA); Brief for United States as *Amicus Curiae* 24–29.

cerns that we identified when considering similar litigation under the Alien Tort Statute. See *Jesner* v. *Arab Bank, PLC*, 584 U. S. ___, ___–___ (2018); *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108, 116–117 (2013).

The IFC's concerns are inflated. To begin, the privileges and immunities accorded by the IOIA are only default rules. If the work of a given international organization would be impaired by restrictive immunity, the organization's charter can always specify a different level of immunity. The charters of many international organizations do just that. See, *e.g.*, Convention on Privileges and Immunities of the United Nations, Art. II, §2, Feb. 13, 1946, 21 U. S. T. 1422, T. I. A. S. No. 6900 ("The United Nations . . . shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity"); Articles of Agreement of the International Monetary Fund, Art. IX, §3, Dec. 27, 1945, 60 Stat. 1413, T. I. A. S. No. 1501 (IMF enjoys "immunity from every form of judicial process except to the extent that it expressly waives its immunity"). Notably, the IFC's own charter does not state that the IFC is absolutely immune from suit.

Nor is there good reason to think that restrictive immunity would expose international development banks to excessive liability. As an initial matter, it is not clear that the lending activity of all development banks qualifies as commercial activity within the meaning of the FSIA. To be considered "commercial," an activity must be "the *type*" of activity "by which a private party engages in" trade or commerce. *Republic of Argentina* v. *Weltover, Inc.*, 504 U. S. 607, 614 (1992); see 28 U. S. C. §1603(d). As the Government suggested at oral argument, the lending activity of at least some development banks, such as those that make conditional loans to governments, may not qualify as "commercial" under the FSIA. See Tr. of Oral Arg. 27–30.

And even if an international development bank's lending activity does qualify as commercial, that does not mean the organization is automatically subject to suit. The FSIA includes other requirements that must also be met. For one thing, the commercial activity must have a sufficient nexus to the United States. See 28 U. S. C. §§1603, 1605(a)(2). For another, a lawsuit must be "based upon" either the commercial activity itself or acts performed in connection with the commercial activity. See §1605(a)(2). Thus, if the "gravamen" of a lawsuit is tortious activity abroad, the suit is not "based upon" commercial activity within the meaning of the FSIA's commercial activity exception. See *OBB Personenverkehr AG* v. *Sachs*, 577 U. S. ___, ___–___ (2015); *Saudi Arabia* v. *Nelson*, 507 U. S. 349, 356–359 (1993). At oral argument in this case, the Government stated that it has "serious doubts" whether petitioners' suit, which largely concerns allegedly tortious conduct in India, would satisfy the "based upon" requirement. Tr. of Oral Arg. 25–26. In short, restrictive immunity hardly means unlimited exposure to suit for international organizations.

* * *

The International Organizations Immunities Act grants international organizations the "same immunity" from suit "as is enjoyed by foreign governments" at any given time. Today, that means that the Foreign Sovereign Immunities Act governs the immunity of international organizations. The International Finance Corporation is therefore not absolutely immune from suit.

The judgment of the United States Court of Appeals for the D. C. Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KAVANAUGH took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 17–1011

BUDHA ISMAIL JAM, ET AL., PETITIONERS *v.*
INTERNATIONAL FINANCE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[February 27, 2019]

JUSTICE BREYER, dissenting.

The International Organizations Immunities Act of 1945 extends to international organizations "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U. S. C. §288a(b). The majority, resting primarily upon the statute's language and canons of interpretation, holds that the statute's reference to "immunity" moves with the times. As a consequence, the statute no longer allows international organizations immunity from lawsuits arising from their commercial activities. In my view, the statute grants international organizations that immunity—just as foreign governments possessed that immunity when Congress enacted the statute in 1945. In reaching this conclusion, I rest more heavily than does the majority upon the statute's history, its context, its purposes, and its consequences. And I write in part to show that, in difficult cases like this one, purpose-based methods of interpretation can often shine a useful light upon opaque statutory language, leading to a result that reflects greater legal coherence and is, as a practical matter, more sound.

I

The general question before us is familiar: Do the words of a statute refer to their subject matter "statically," as it

was when the statute was written? Or is their reference to that subject matter "dynamic," changing in scope as the subject matter changes over time? It is hardly surprising, given the thousands of different statutes containing an untold number of different words, that there is no single, universally applicable answer to this question.

Fairly recent cases from this Court make that clear. Compare *New Prime Inc.* v. *Oliveira*, 586 U. S. ___, ___ (2019) (slip op., at 7) (adopting the interpretation of "'contracts of employment'" that prevailed at the time of the statute's adoption in 1925); *Wisconsin Central Ltd.* v. *United States*, 585 U. S. ___, ___ (2018) (slip op., at 2) (adopting the meaning of "'money'" that prevailed at the time of the statute's enactment in 1937); *Carcieri* v. *Salazar*, 555 U. S. 379, 388 (2009) (interpreting the statutory phrase "'now under Federal jurisdiction'" to cover only those tribes that were under federal jurisdiction at the time of the statute's adoption in 1934); and *Republic of Argentina* v. *Weltover*, *Inc.*, 504 U. S. 607, 612–613 (1992) (adopting the meaning of "'commercial'" that was "attached to that term under the restrictive theory" when the Foreign Sovereign Immunities Act was enacted in 1976), with *Kimble* v. *Marvel Entertainment*, *LLC*, 576 U. S. ___, ___ (2015) (slip op., at 14) (noting that the words "'restraint of trade'" in the Sherman Act have been interpreted dynamically); *West* v. *Gibson*, 527 U. S. 212, 218 (1999) (interpreting the term "'appropriate'" in Title VII's remedies provision dynamically); and *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265, 275–276 (1995) (interpreting the term "'involving commerce'" in the Federal Arbitration Act dynamically).

The Court, like petitioners, believes that the language of the statute itself helps significantly to answer the static/dynamic question. See *ante*, at 7–9. I doubt that the language itself helps in this case. Petitioners point to the words "as is" in the phrase that grants the international

organizations the "same immunity from suit . . . *as is* enjoyed by foreign governments." Brief for Petitioners 23–24. They invoke the Dictionary Act, which states that "words used in the present tense include the future" "unless the context indicates otherwise." 1 U. S. C. §1. But that provision creates only a presumption. And it did not even appear in the statute until 1948, *after* Congress had passed the Immunities Act. Compare §1, 61 Stat. 633, with §6, 62 Stat. 859.

More fundamentally, the words "as is enjoyed" do not conclusively tell us *when* enjoyed. Do they mean "as is enjoyed" at the time of the statute's enactment? Or "as is enjoyed" at the time a plaintiff brings a lawsuit? If the former, international organizations enjoy immunity from lawsuits based upon their commercial activities, for that was the scope of immunity that foreign governments enjoyed in 1945 when the Immunities Act became law. If the latter, international organizations do not enjoy that immunity, for foreign governments can no longer claim immunity from lawsuits based upon certain commercial activities. See 28 U. S. C. §1605(a)(2).

Linguistics does not answer the temporal question. Nor do our cases, which are not perfectly consistent on the matter. Compare *McNeill* v. *United States*, 563 U. S. 816, 821 (2011) (present-tense verb in the Armed Career Criminal Act requires applying the law at the time of previous conviction, not the later time when the Act is applied), with *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 478 (2003) (present-tense verb requires applying the law "at the time suit is filed"). The problem is simple: "Without knowing the point in time at which the law speaks, it is impossible to tell what is past and what is present or future." *Carr* v. *United States*, 560 U. S. 438, 463 (2010) (ALITO, J., dissenting). It is *purpose*, not linguistics, that can help us here.

The words "same . . . as," in the phrase "same immunity

. . . as," provide no greater help. The majority finds support for its dynamic interpretation in the Civil Rights Act of 1866, which gives all citizens the "*same* right" to make and enforce contracts and to buy and sell property "*as* is enjoyed by white citizens." 42 U. S. C. §§1981(a), 1982 (emphasis added). But it is *purpose*, not words, that readily resolves any temporal linguistic ambiguity in that statute. The Act's objective, like that of the Fourteenth Amendment itself, was a Nation that treated its citizens equally. Its purpose—revealed by its title, historical context, and other language in the statute—was "to guarantee the then newly freed slaves the same legal rights that other citizens enjoy." *CBOCS West*, *Inc.* v. *Humphries*, 553 U. S. 442, 448 (2008). Given this purpose, its dynamic nature is obvious.

Similarly, judges interpreting the words "same . . . as" have long resolved ambiguity not by looking at the words alone, but by examining the statute's purpose as well. Compare, *e.g.*, *Kugler's Appeal*, 55 Pa. 123, 123–125 (1867) (adopting a dynamic interpretation of "same as" statute in light of "plain" and "manifest" statutory purpose); and *Gaston* v. *Lamkin*, 115 Mo. 20, 34, 21 S. W. 1100, 1104 (1893) (adopting a dynamic interpretation of "same as" election statute given the legislature's intent to achieve "simplicity and uniformity in the conduct of elections"), with *O'Flynn* v. *East Rochester*, 292 N. Y. 156, 162, 54 N. E. 2d 343, 346 (1944) (adopting a static interpretation of "same as" statute given that the legislature "did not contemplate" that subsequent changes to a referenced statute would apply (interpreting N. Y. Gen. Mun. Law Ann. §360(5) (West 1934))). There is no hard-and-fast rule that the statutory words "as is" or the statutory words "same as" require applying the law as it stands today.

The majority wrongly believes that it can solve the temporal problem by bringing statutory canons into play. It relies on what it calls the "reference canon." That canon,

as it appeared more than 75 years ago in Sutherland's book on statutory construction, says that "when a statute refers to a general subject, the statute adopts the law on that subject as it exists *whenever a question under the statute arises.*" *Ante*, at 9 (citing 2 J. Sutherland, Statutory Construction §§5207–5208 (3d ed. 1943); emphasis added).

But a canon is at most a rule of thumb. Indeed, Sutherland himself says that "[n]o single canon of interpretation can purport to give a certain and unerring answer." 2 Sutherland, *supra*, §4501, p. 316. And hornbooks, summarizing case law, have long explained that whether a reference statute adopts the law as it stands on the date of enactment or includes subsequent changes in the law to which it refers is "fundamentally a question of legislative intent and purpose." Fox, Effect of Modification or Repeal of Constitutional or Statutory Provision Adopted by Reference in Another Provision, 168 A. L. R. 627, 628 (1947); see also 82 C. J. S., Statutes §485, p. 637 (2009) ("The question of whether a statute which has adopted another statute by reference will be affected by amendments made to the adopted statute is one of legislative intent and purpose"); *id.*, at 638 (statute that refers generally to another body of law will ordinarily include subsequent changes in the adopted law only "as far as the changes are consistent with the purpose of the adopting statute").

Thus, all interpretive roads here lead us to the same place, namely, to context, to history, to purpose, and to consequences. Language alone cannot resolve the statute's linguistic ambiguity.

II

"Statutory interpretation," however, "is not a game of blind man's bluff." *Dole Food Co.*, 538 U. S., at 484 (BREYER, J., concurring in part and dissenting in part). We are "free to consider statutory language in light of a

statute's basic purposes," *ibid.*, as well as "'the history of the times when it was passed,'" *Leo Sheep Co.* v. *United States*, 440 U. S. 668, 669 (1979) (quoting *United States* v. *Union Pacific R. Co.*, 91 U. S. 72, 79 (1875)). In this case, historical context, purpose, and related consequences tell us a great deal about the proper interpretation of the Immunities Act.

Congressional reports explain that Congress, acting in the immediate aftermath of World War II, intended the Immunities Act to serve two related purposes. First, it would "enabl[e] this country to fulfill its commitments in connection with its membership in international organizations." S. Rep. No. 861, 79th Cong., 1st Sess., 3 (1945); see also *id.*, at 2–3 (explaining that the Immunities Act was "basic legislation" expected to "satisfy in full the requirements of . . . international organizations conducting activities in the United States"); H. R. Rep. No. 1203, 79th Cong., 1st Sess., 3 (1945) (similar). And second, it would "facilitate fully the functioning of international organizations in this country." S. Rep. No. 861, at 3.

A

I first examine the international commitments that Congress sought to fulfill. By 1945, the United States had entered into agreements creating several important multilateral organizations, including the United Nations (UN), the International Monetary Fund (IMF), the World Bank, the UN Relief and Rehabilitation Administration (UNRRA), and the Food and Agriculture Organization (FAO). See *id.*, at 2.

The founding agreements for several of these organizations required member states to grant them broad immunity from suit. The Bretton Woods Agreements, for example, provided that the IMF "shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity." Articles of Agreement of

the International Monetary Fund, Art. IX, §3, Dec. 27, 1945, 60 Stat. 1413, T. I. A. S. No. 1501. UNRRA required members, absent waiver, to accord the organization "the facilities, privileges, immunities, and exemptions which they accord to each other, including . . . [i]mmunity from suit and legal process." 2 UNRRA, A Compilation of the Resolutions on Policy: First and Second Sessions of the UNRRA Council, Res. No. 32, p. 51 (1944). And the UN Charter required member states to accord the UN "such privileges and immunities as are necessary for the fulfillment of its purposes." Charter of the United Nations, Art. 105, 59 Stat. 1053, June 26, 1945, T. S. No. 993.

These international organizations expected the United States to provide them with essentially full immunity. And at the time the treaties were written, Congress understood that foreign governments normally enjoyed immunity with respect to their commercial, as well as their noncommercial, activities. Thus, by granting international organizations "the same immunity from suit" that foreign governments enjoyed, Congress expected that international organizations would similarly have immunity in both commercial and noncommercial suits.

More than that, Congress likely recognized that immunity in the commercial area was even more important for many international organizations than it was for most foreign governments. Unlike foreign governments, international organizations are *not* sovereign entities engaged in a host of different activities. See R. Higgins, Problems & Process: International Law and How We Use It 93 (1994) (organizations do not act with "'sovereign authority,'" and "to assimilate them to states . . . is not correct"). Rather, many organizations (including four of the five I mentioned above) have specific missions that often require them to engage in what U. S. law may well consider to be commercial activities. See *infra*, at 12.

Nonetheless, under the majority's view, the immunity of

many organizations contracted in scope in 1952, when the State Department modified foreign government immunity to exclude commercial activities. Most organizations could not rely on the treaty provisions quoted above to supply the necessary immunity. That is because, unless the treaty provision granting immunity is "self-executing," *i.e.*, automatically applicable, the immunity will not be effective in U. S. courts until Congress enacts additional legislation to implement it. See *Medellin* v. *Texas*, 552 U. S. 491, 504–505 (2008); but see *id.*, at 546–547 (BREYER, J., dissenting). And many treaties are not self-executing. Thus, in the ordinary case, not even a treaty can guarantee immunity in cases arising from commercial activities.

The UN provides a good example. As noted, the UN Charter required the United States to grant the UN all "necessary" immunities, but it was not self-executing. In 1946, the UN made clear that it needed absolute immunity from suit, including in lawsuits based upon its commercial activities. See Convention on Privileges and Immunities of the United Nations, Art. II, §2, Feb. 13, 1946, 21 U. S. T. 1422, T. I. A. S. No. 6900 (entered into force Apr. 29, 1970); see also App. to S. Exec. Rep. No. 91–17, p. 14 (1970) ("The U. N.'s immunity from legal process extends to matters arising out its commercial dealings . . . "). But, until Congress ratified that comprehensive immunity provision in 1970, no U. S. law provided that immunity *but for* the Immunities Act. *Id.*, at 1. Both the UN and the United States found this circumstance satisfactory because they apparently assumed the Immunities Act extended immunity in cases involving both commercial and noncommercial activities: When Congress eventually (in 1970) ratified the UN's comprehensive immunity provision, the Senate reported that the long delay in ratification "appears to have been the result of the executive branch being content to operate under the provisions of the" Immunities Act. *Id.*, at 2.

In light of this history, how likely is it that Congress, seeking to "satisfy *in full* the requirements of . . . international organizations conducting activities in the United States," S. Rep. No. 861, at 2–3 (emphasis added), would have understood the statute to take from many international organizations with one hand the immunity it had given them with the other? If Congress wished the Act to carry out one of its core purposes—fulfilling the country's international commitments—Congress would not have wanted the statute to change over time, taking on a meaning that would fail to grant not only full, but even partial, immunity to many of those organizations.

B

Congress also intended to facilitate international organizations' ability to pursue their missions in the United States. To illustrate why that purpose is better served by a static interpretation, consider in greater detail the work of the organizations to which Congress wished to provide broad immunity. Put the IMF to the side, for Congress enacted a separate statute providing it with immunity (absent waiver) in all cases. See 22 U. S. C. §286h. But UNRRA, the World Bank, the FAO, and the UN itself all originally depended upon the Immunities Act for the immunity they sought.

Consider, for example, the mission of UNRRA. The United States and other nations created that organization in 1943, as the end of World War II seemed in sight. Its objective was, in the words of President Roosevelt, to "'assure a fair distribution of available supplies among'" those liberated in World War II, and "'to ward off death by starvation or exposure among these peoples.'" 1 G. Woodbridge, UNRRA: The History of the United Nations Relief and Rehabilitation Administration 3 (1950). By the time Congress passed the Immunities Act in 1945, UNRRA had obtained and shipped billions of pounds of food, clothing,

and other relief supplies to children freed from Nazi concentration camps and to others in serious need. 3 *id.*, at 429; see generally L. Nicholas, Cruel World: The Children of Europe in the Nazi Web 442–513 (2005).

These activities involved contracts, often made in the United States, for transportation and for numerous commercial goods. See B. Shephard, The Long Road Home: The Aftermath of the Second World War 54, 57–58 (2012). Indeed, the United States conditioned its participation on UNRRA's spending what amounted to 67% of its budget on purchases of goods and services in the United States. *Id.*, at 57–58; see also Sawyer, Achievements of UNRRA as an International Health Organization, 37 Am. J. Pub. Health 41, 57 (1947) (describing UNRRA training programs for foreign doctors within the United States, which presumably required entering into contracts); *International Refugee Org.* v. *Republic S. S. Corp.*, 189 F. 2d 858, 860 (CA4 1951) (describing successor organization's transportation of displaced persons, presumably also under contract). Would Congress, believing that it had provided the absolute immunity that UNRRA sought and expected, also have intended that the statute be interpreted "dynamically," thereby removing most of the immunity that it had then provided—not only potentially from UNRRA itself but also from other future international organizations with UNRRA-like objectives and tasks?

C

This history makes clear that Congress enacted the Immunities Act as part of an effort to encourage international organizations to locate their headquarters and carry on their missions in the United States. It also makes clear that Congress intended to enact "basic legislation" that would fulfill its broad immunity-based commitments to the UN, UNRRA, and other nascent organizations. S. Rep. No. 861, at 2. And those commitments, of neces-

sity, included immunity from suit in commercial areas, since organizations were buying goods and making contracts in the United States.

To achieve these purposes, Congress enacted legislation that granted necessarily broad immunity. And that fact strongly suggests that Congress would not have wanted the statute to reduce significantly the scope of immunity that international organizations enjoyed, particularly organizations engaged in development finance, refugee assistance, or other tasks that U. S. law could well decide were "commercial" in nature. See *infra*, at 12.

To that extent, an examination of the statute's purpose supports a static, not a dynamic, interpretation of its cross-reference to the immunity of foreign governments. Unlike the purpose of the Civil Rights Act, the purpose here was not to ensure parity of treatment for international organizations and foreign governments. Instead, as the Court of Appeals for the D. C. Circuit pointed out years ago, the statute's reference to the immunities of "foreign governments" was a "shorthand" for the immunities those foreign governments enjoyed at the time the Act was passed. *Atkinson* v. *Inter-American Development Bank*, 156 F. 3d 1335, 1340, 1341 (1998).

III

Now consider the consequences that the majority's reading of the statute will likely produce—consequences that run counter to the statute's basic purposes. Although the UN itself is no longer dependent upon the Immunities Act, many other organizations, such as the FAO and several multilateral development banks, continue to rely upon that Act to secure immunity, for the United States has never ratified treaties nor enacted statutes that might extend the necessary immunity, commercial and noncommercial alike.

A

The "commercial activity" exception to the sovereign immunity of foreign nations is broad. We have said that a foreign state engages in "commercial activity" when it exercises "'powers that can also be exercised by private citizens.'" *Republic of Argentina*, 504 U. S., at 614. Thus, "a contract to buy army boots or even bullets is a 'commercial' activity," even if the government enters into the contract to "fulfil[l] uniquely sovereign objectives." *Ibid.*; see also H. R. Rep. No. 94–1487, p. 16 (1976) ("[A] transaction to obtain goods or services from private parties would not lose its otherwise commercial character because it was entered into in connection with an [Agency for International Development] program").

As a result of the majority's interpretation, many of the international organizations to which the United States belongs will discover that they are now exposed to civil lawsuits based on their (U. S.-law-defined) commercial activity. And because "commercial activity" may well have a broad definition, today's holding will at the very least create uncertainty for organizations involved in finance, such as the World Bank, the Inter-American Development Bank, and the Multilateral Investment Guarantee Agency. The core functions of these organizations are at least arguably "commercial" in nature; the organizations exist to promote international development by investing in foreign companies and projects across the world. See Brief for International Bank for Reconstruction and Development et al. as *Amici Curiae* 1–4; Brief for Member Countries and the Multilateral Investment Guarantee Agency as *Amici Curiae* 13–15. The World Bank, for example, encourages development either by guaranteeing private loans or by providing financing from its own funds if private capital is not available. See Articles of Agreement of the International Bank for Reconstruction and Development, Art. I, Dec. 27, 1945, 60 Stat. 1440, T. I. A. S. No.

1502.

Some of these organizations, including the International Finance Corporation (IFC), themselves believe they do not need broad immunity in commercial areas, and they have waived it. See, *e.g.*, Articles of Agreement of the International Finance Corporation, Art. 6, §3, Dec. 5, 1955, 7 U. S. T. 2214, 264 U. N. T. S. 118 (implemented by 22 U. S. C. §282g); see also 860 F. 3d 703, 706 (CADC 2017). But today's decision will affect them nonetheless. That is because courts have long interpreted their waivers in a manner that protects their core objectives. See, *e.g.*, *Mendaro* v. *World Bank*, 717 F. 2d 610, 614–615 (CADC 1983). (This very case provides a good example. The D. C. Circuit held below that the IFC's waiver provision does not cover petitioners' claims because they "threaten the [IFC's] policy discretion." See 860 F. 3d, at 708.) But today's decision exposes these organizations to potential liability in *all* cases arising from their commercial activities, without regard to the scope of their waivers.

Under the majority's interpretation, that broad exposure to liability is at least a reasonable possibility. And that being so, the interpretation undercuts Congress' original objectives and the expectations that it had when it enacted the Immunities Act in 1945.

B

The majority's opinion will have a further important consequence—one that more clearly contradicts the statute's objectives and overall scheme. It concerns the important goal of weeding out lawsuits that are likely bad or harmful—those likely to produce rules of law that interfere with an international organization's public interest tasks.

To understand its importance, consider again that international organizations, unlike foreign nations, are multilateral, with members from many different nations.

See H. R. Rep. No. 1203, at 1. That multilateralism is threatened if one nation alone, through application of its own liability rules (by nonexpert judges), can shape the policy choices or actions that an international organization believes it must take or refrain from taking. Yet that is the effect of the majority's interpretation. By restricting the immunity that international organizations enjoy, it "opens the door to divided decisions of the courts of different member states," including U. S. courts, "passing judgment on the rules, regulations, and decisions of the international bodies." *Broadbent* v. *Organization of Am. States*, 628 F. 2d 27, 35 (CADC 1980); cf. Singer, Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns, 36 Va. J. Int'l L. 53, 63–64 (1995) (recognizing that "[i]t would be inappropriate for municipal courts to cut deep into the region of autonomous decision-making authority of institutions such as the World Bank").

Many international organizations, fully aware of their moral (if not legal) obligations to prevent harm to others and to compensate individuals when they do cause harm, have sought to fulfill those obligations without compromising their ability to operate effectively. Some, as I have said, waive their immunity in U. S. courts at least in part. And the D. C. Circuit, for nearly 40 years, has interpreted those waivers in a way that protects the organization against interference by any single state. See, *e.g.*, *Mendaro*, 717 F. 2d, at 615. The D. C. Circuit allows a lawsuit to proceed when "insistence on immunity would actually prevent or hinder the organization from conducting its activities." *Id.*, at 617. Thus, a direct beneficiary of a World Bank loan can generally sue the Bank, because "the commercial reliability of the Bank's direct loans . . . would be significantly vitiated" if "beneficiaries were required to accept the Bank's obligations without recourse to judicial process." *Id.*, at 618. Where, however, allowing

a suit would lead to "disruptive interference" with the organization's functions, the waiver does not apply. *Ibid.*

Other organizations have attempted to solve the liability/immunity problem by turning to multilateral, not single-nation, solutions. The UN, for instance, has agreed to "make provisions for appropriate modes of settlement of . . . [d]isputes arising out of contracts or other disputes of a private law character." Convention on Privileges and Immunities of the United Nations, Art. VIII, §29, 21 U. S. T. 1438, T. I. A. S. No. 6900. It generally does so by agreeing to submit commercial disputes to arbitration. See Restatement (Third) of Foreign Relations Law of the United States §467, Reporters' Note 7 (1987). Other organizations, including the IFC, have set up alternative accountability schemes to resolve disputes that might otherwise end up in court. See World Bank, Inspection Panel: About Us (describing World Bank's three-member "independent complaints mechanism" for those "who believe that they have been . . . adversely affected by a World Bank-funded project"), https://inspectionpanel.org/about-us/about-inspection-panel (as last visited Feb. 25, 2019); Compliance Advisor Ombudsman, How We Work: CAO Dispute Resolution (describing IFC and Multilateral Investment Guarantee Agency dispute-resolution process, the main objective of which is to help resolve issues raised about the "social and environmental impacts of IFC/MIGA projects"), www.cao-ombudsman.org/howwework/ombudsman.

These alternatives may sometimes prove inadequate. And, if so, the Immunities Act itself offers a way for America's Executive Branch to set aside an organization's immunity and to allow a lawsuit to proceed in U. S. courts. The Act grants to the President the authority to "withhold," to "withdraw," to "condition," or to "limit" any of the Act's "immunities" in "light of the functions performed by any such international organization." 22 U. S. C. §288.

Were we to interpret the statute statically, then, the default rule would be immunity in suits arising from an organization's commercial activities. But the Executive Branch would have the power to withdraw immunity where immunity is not warranted, as the Act itself provides. And in making that determination, it could consider whether allowing the lawsuit would jeopardize the organization's ability to carry out its public interest tasks. In a word, the Executive Branch, under a static interpretation, would have the authority needed to separate lawsuit sheep from lawsuit goats.

Under the majority's interpretation, by contrast, there is no such flexibility. The Executive does not have the power to tailor immunity by taking into account the risk of a lawsuit's unjustified interference with institutional objectives or other institutional needs. Rather, the majority's holding takes away an international organization's immunity (in cases arising from "commercial" activities) across the board. And without a new statute, there is no way to restore it, in whole or in part. Nothing in the present statute gives the Executive, the courts, or the organization the power to restore immunity, or to tailor any resulting potential liability, where a lawsuit threatens seriously to interfere with an organization's legitimate needs and goals.

Thus, the static interpretation comes equipped with flexibility. It comes equipped with a means to withdraw immunity where justified. But the dynamic interpretation freezes potential liability into law. It withdraws immunity automatically and irretrievably, irrespective of institutional harm. It seems highly unlikely that Congress would have wanted this result.

* * *

At the end of World War II, many in this Nation saw international cooperation through international organiza-

tion as one way both to diminish the risk of conflict and to promote economic development and commercial prosperity. Congress at that time and at the request of many of those organizations enacted the Immunities Act. Given the differences between international organizations and nation states, along with the Act's purposes and the risk of untoward consequences, I would leave the Immunities Act where we found it—as providing for immunity in both commercial and noncommercial suits.

My decision rests primarily not upon linguistic analysis, but upon basic statutory purposes. Linguistic methods alone, however artfully employed, too often can be used to justify opposite conclusions. Purposes, derived from context, informed by history, and tested by recognition of related consequences, will more often lead us to legally sound, workable interpretations—as they have consistently done in the past. These methods of interpretation can help voters hold officials accountable for their decisions and permit citizens of our diverse democracy to live together productively and in peace—basic objectives in America of the rule of law itself.

With respect, I dissent.