United Nations A/CN.4/756

General Assembly

Distr.: General
3 February 2023

Original: English

International Law Commission
Seventy-fourth session
Geneva, 24 April–2 June and 3 July–4 August 2023

First report on the settlement of international disputes to which international organizations are parties, by August Reinisch, Special Rapporteur*

* The Special Rapporteur wishes to thank Judith Bauder, René Figueredo Corrales and Johannes Tropper for their invaluable research assistance in the preparation of this report.

23-01948 (E) 160323

Contents

Introduction

A. Inclusion of the topic in the Commission's programme of work

1. The topic "The settlement of international disputes to which international organizations are parties", proposed by Sir Michael Wood,[1] was put on the long-term programme of work of the International Law Commission in 2016.[2] In 2022, at the end of its seventy-third session, the Commission decided to place the topic "Settlement of international disputes to which international organizations are parties" on its current programme of work and appointed Mr. August Reinisch as Special Rapporteur.[3] The present first report is mainly of an explorative character; it sets out the Special Rapporteur's preliminary thoughts on the topic, particularly on the scope and tentative programme of work, and invites comments by the members of the Commission.

2. At its seventy-third session, the Commission noted that it would appreciate receiving, by 1 May 2023, information from States and relevant international organizations which may be of relevance to its future work on the topic.[4] To this end, the Special Rapporteur prepared a questionnaire which the Secretariat communicated to States and relevant international organizations in December 2022.[5] The Commission also requested the Secretariat to prepare

[1] Sir Michael Wood, "The settlement of international disputes to which international organizations are parties", *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), p. 233 (annex I).

[2] Report of the International Law Commission on the work of its sixty-eighth session, *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), para. 29.

[3] Report of the International Law Commission on the work of its seventy-third session, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 238.

[4] *Ibid.*, para. 31.

[5] "Questionnaire and background to the topic 'Settlement of international disputes to which international organizations are parties'", forwarded by the Under-Secretary-General for Legal Affairs, the United Nations Legal Counsel, in a letter dated 2 December 2022. After providing a brief background of the Commission's decision to work on the topic, an overview of disputes to which international organizations may be parties and a summary of the work of the Commission concerning international organizations, particularly in the fields of treaty law, privileges and immunities, and responsibility, the questionnaire addressed the following questions (with cross references to the introductory material omitted) to both States and international organizations:
1) What types of disputes/issues … have you encountered?
2) What methods of dispute settlement … have been resorted to in cases of disputes with other international organizations, States or private parties? Please provide any relevant case law, or a representative sample thereof. If you cannot provide such information for confidentiality reasons, could you provide any such decisions or awards in redacted form, or a generic description/digest of such decisions?
3) In your dispute settlement practice, for each of the types of disputes/issues arising, please describe the relative importance of negotiation, conciliation or other informal consensual dispute settlement and/or third-party dispute resolution, such as arbitration or judicial settlement.
4) Which methods of dispute settlement do you consider to be most useful? Please indicate the preferred methods of dispute settlement … for different types of disputes/issues …
5) From a historical perspective, have there been any changes or trends in the types of disputes arising, the numbers of such disputes and the modes of settlement used?
6) Do you have suggestions for improving the methods of dispute settlement (that you have used in practice)?
7) Are there types of disputes that remain outside the scope of available dispute settlement methods?
8) Does your organization have a duty to make provision for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character under the 1946 Convention on the Privileges and Immunities of the United Nations, the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, or an equivalent treaty? How in practice has your organization interpreted and applied the relevant provisions?

a memorandum providing information on the practice of States and international organizations regarding their international disputes and disputes of a private law character.[6]

3. In its resolution 77/103 of 7 December 2022, the General Assembly noted the Commission's decision to include the topic in its programme of work, and drew the attention of Governments to the importance for the Commission of having their views on the specific issues identified in chapter III of the report of the Commission on the work of its seventy-third session,[7] which included information on the present topic and a reference to the above-mentioned questionnaire.[8] During the debate on the annual report of the Commission in the Sixth Committee in 2022,[9] the topic gathered general support, with a number of delegations already addressing the scope of the topic.[10]

4. The present report is introductory. It aims to provide a basis for future work and discussions on the topic. Chapter I describes the previous relevant work of the Commission and several other bodies dealing with international law. Chapter II discusses the scope of the topic and possible outcomes of the Commission's work on this topic. Chapter III then addresses a number of core definitional issues concerning the topic. Chapter IV comprises the text of the suggested guidelines and Chapter V briefly outlines the future work planned.

I. Related previous work

5. Both the Commission and other bodies dealing with the progressive development and codification of international law have addressed some aspects of the settlement of disputes to which international organizations are parties in the past, albeit in a limited fashion. The past endeavours of other bodies will be outlined first before providing a brief overview of the relevant work of the Commission.

A. Previous work of other bodies

6. In 1957, the Institute of International Law adopted a resolution on "Judicial Redress Against the Decisions of International Organs".[11] It acknowledged the difficulty of establishing judicial redress. However, it emphasized that "judicial control of the decisions of international organs must have as its object the assurance of respect for rules of law which are binding on the organ or organization under consideration".[12] These rules of law included,

9) Are there standard/model clauses concerning dispute settlement in your treaty and/or contractual practice? Please provide representative examples.
10) Does "other disputes of a private law character" (see (8) above) encompass all disputes other than those arising from contracts? If not, which categories are not included? What has been the practice of your organization in determining this? What methods of settlement have been used for "other disputes of a private law character" and what has been regarded as the applicable law?
11) Have you developed a practice of agreeing *ex post* to third-party methods of dispute settlement (arbitration or adjudication) or waiving immunity in cases where disputes have already arisen and cannot be settled otherwise, *e.g.* because no treaty/contractual dispute settlement has been provided for?

[6] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 241.
[7] General Assembly resolution 77/103 of 7 December 2022, paras. 5 and 7.
[8] See footnote 5 above.
[9] See the statements from the seventy-seventh session, available on the website of the Sixth Committee of the General Assembly, at https://www.un.org/en/ga/sixth/77/summaries.shtml.
[10] See footnote 85 below.
[11] Institute of International Law, resolution on "Judicial Redress Against the Decisions of International Organs", adopted on 25 September 1957, *Annuaire de l'Institut de Droit International*, vol. 47 (II), Session of Amsterdam (1957), p. 488 (available at www.idi-iil.org, under "Resolutions").
[12] *Ibid*., para. II.

among others, "the rules established by that organ or organization whether they concern the States members, the agents and officials of the organ or organization, or private persons to the extent that their rights and interests are involved".[13] The resolution also called for arbitral or juridical dispute settlement where private rights or interests are involved.[14] The Institute's 1971 resolution on "Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May be Engaged"[15] contained several provisions on the procedure for implementing the liability of the United Nations for damage caused by its forces.[16] The resolution expressed the desirability of establishing "bodies composed of independent and impartial persons" for the assessment of injured persons' damage claims.[17] In 1977, the Institute adopted a resolution on "Contracts Concluded by International Organizations with Private Persons",[18] which focused on "The Proper Law of the Contract", but also addressed the "Settlement of Disputes in Case of Immunity from Jurisdiction". It recommended that contracts "provide for the settlement of disputes arising out of such contracts by an independent body",[19] which may be an arbitral tribunal, an intraorganizational tribunal or a national judicial body.[20] Finally, it suggested that the Organization either waive immunity or agree on an alternative dispute settlement method such as arbitration.[21] Furthermore, the Institute's resolution on "The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties"[22] addressed some aspects of the settlement of disputes between international organizations and member States. It expressed the view that, in the absence of specific rules of an organization, "there is no general rule of international law whereby States members are, due solely to their membership, liable concurrently or subsidiarily, for the obligations of an international organization of which they are members".[23] In addition, the resolution recommended the development of such internal rules and suggested providing for arbitration or other binding forms of dispute settlement between organizations and member

[13] *Ibid*., para. II (c).

[14] *Ibid*., para. III (1) ("As a minimum, expresses the wish that, for every particular decision of an international organ or organization which involves private rights or interests, there be provided appropriate procedures for settling by judicial or arbitral methods juridical differences which might arise from such a decision").

[15] Institute of International Law, resolution on "Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May be Engaged", adopted on 3 September 1971, *Annuaire de l'Institut de Droit International*, vol. 54 (II), Session of Zagreb (1971), p. 465.

[16] *Ibid*., art. 8, para. 1 ("The United Nations is liable for damage which may be caused by its Forces in violation of the humanitarian rules of armed conflict, without prejudice to any possible recourse against the State whose contingent has caused the damage").

[17] *Ibid*., art. 8, para. 2 ("It is desirable that claims presented by persons thus injured be submitted to bodies composed of independent and impartial persons. Such bodies should be designated or set up either by the regulations issued by the United Nations or by the agreements concluded by the Organisation with the States which put contingents at its disposal and, possibly, with any other interested State").

[18] Institute of International Law, resolution on "Contracts Concluded by International Organizations with Private Persons", adopted on 6 September 1977, *Annuaire de l'Institut de Droit International*, vol. 57 (II), Session of Oslo (1977), p. 333.

[19] *Ibid*., art. 7.

[20] *Ibid*., art. 8.

[21] *Ibid*., art. 9 ("If a dispute arises in connection with a contract which contains no clause on the settlement of disputes, the organization concerned should either waive immunity from jurisdiction or negotiate with the other party to the contract with a view to settling the dispute or to establishing an appropriate procedure for its settlement – particularly through arbitration").

[22] Institute of International Law, resolution on "The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties", adopted on 1 September 1995, *Annuaire de l'Institut de Droit International*, vol. 66 (II), Session of Lisbon (1995), p. 445.

[23] *Ibid*., art. 6 (a).

States.[24] In 2017, the Institute adopted a resolution on "Review of Measures Implementing Decisions of the Security Council in the Field of Targeted Sanctions",[25] based on previous work on "Judicial Redress Against the Decisions of International Organs".[26] Having regard to the *Kadi* cases before the European Court of Justice[27] and related developments,[28] the resolution carefully balanced the absence of judicial review of Security Council decisions and the limited possibility of regional or national courts to review implementing measures.[29] The resolution also called for "further improvement of listing and delisting procedures".[30]

7. The International Law Association (ILA) frequently addressed issues of dispute settlement in general. In its 1964 resolution on arbitration, it specifically drew attention to the availability of arbitration in cases of "international disputes, including: (a) International disputes which cannot be submitted to the International Court of Justice … [and] (c) Disputes between States and international organizations".[31] In the late 1990s, the Association's Committee on "Accountability of International Organisations" undertook work on the "accountability" of international organizations, conceiving it as a broader concept than "responsibility".[32] At the Association's Berlin Conference in 2004, the Committee adopted an extensive report[33] and a final resolution on the "Rules and Recommended Practices on Liability/Responsibility of International Organisations".[34] The report addressed issues of good governance, applicable law and responsibility, but also questions of dispute settlement in its final part, entitled "Remedies against international

[24] *Ibid*., art. 12 ("Where liability of member States is provided for, the Rules of the organization should provide for international arbitration or other mechanisms leading to a binding decision to resolve any dispute arising between the organization and a member State or between member States over the liability of the latter *inter se* or to put the former in funds").

[25] Institute of International Law, resolution on "Review of Measures Implementing Decisions of the Security Council in the Field of Targeted Sanctions", adopted on 8 September 2017, *Annuaire de l'Institut de Droit International*, vol. 78 (II), Session of Hyderabad (2017), pp. 94–98.

[26] See footnote 11 above.

[27] *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Case T-315/01, Judgment of 21 September 2005, Second Chamber, Court of First Instance of the European Communities, *European Court Reports 2005*; *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P, Judgment of 3 September 2008, Grand Chamber, Court of Justice of the European Communities, *European Court Reports 2008*; *Yassin Abdullah Kadi v. European Commission*, Case T-85/09, Judgment of 30 September 2010, Seventh Chamber, General Court, *European Court Reports 2010*; *European Commission and Others v. Yassin Abdullah Kadi*, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, Judgment of 18 July 2013, Grand Chamber, Court of Justice of the European Union, Court Reports – general.

[28] *Youssef Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Case No. 1A 45/2007, Administrative Appeal Judgment of 14 November 2007, Federal Supreme Court of Switzerland; *Nada v. Switzerland*, Application No. 10593/08, European Court of Human Rights, Grand Chamber Judgment of 12 December 2012.

[29] Institute of International Law, resolution on "Review of Measures Implementing Decisions of the Security Council in the Field of Targeted Sanctions" (see footnote 25 above), arts. 4 and 11.

[30] *Ibid*., art. 8.

[31] "International Arbitration", *International Law Association Reports of Conferences*, vol. 52 (1966), p. xii, para. 1.

[32] August Reinisch, "Securing the accountability of international organizations", *Global Governance*, vol. 7 (2001), pp. 131–149; Gerhard Hafner, "Accountability of international organizations – a critical view", in Ronald St. John Macdonald and Douglas M. Johnston (eds.), *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community* (Leiden, Brill Nijhoff, 2005), pp. 585–630.

[33] "Accountability of International Organisations", Final Report, International Law Association, Berlin Conference (2004), *International Law Association Reports of Conferences*, vol. 71 (2004), pp. 164–234.

[34] Resolution No. 1/2004, "Accountability of International Organisations" (see footnote 33 above), p. 13.

organizations".[35] Among the judicial remedies discussed therein, the Committee reviewed the use of administrative tribunals, the potential roles of domestic courts and arbitration proceedings. On the one hand, it proposed the insertion of arbitration clauses in agreements both with States and non-State entities.[36] On the other hand, it advocated for a greater role of the International Court of Justice. It suggested the more extensive use of quasi-binding advisory opinions from the Court[37] and wider access to the Court through amending Article 34 of the Statute of the International Court of Justice.[38] [39] From 2005 to 2012, the Association's Study Group on the Responsibility of International Organisations pursued the mandate "first, to contribute to the work of the ILC on the ARIO [articles on the responsibility of international organizations]; and secondly, to monitor the practice of international organisations on the basis of the 2004 ILA Report on the Accountability of International Organisations".[40]

8. Since 2014, the Committee of Legal Advisers on Public International Law (CAHDI)[41] of the Council of Europe has been dealing with the question of the "Settlement of disputes of a private character to which an international organisation is a party".[42] This work focuses on the settlement of third-party claims for bodily injury or death, and for loss of property or damage, allegedly caused by an international organization, and the effective remedies available to claimants in these situations.[43] In a related manner, the Parliamentary Assembly of the Council of Europe has worked in the field of staff disputes. It encouraged "the international organisations to which the member States of the Council of Europe belong to look at whether 'reasonable alternative means of legal protection' are available in the event of disputes between international organisations and members of their staff".[44]

9. From 2015 to 2018, the Inter-American Juridical Committee,[45] one of the principal organs and advisory body on juridical matters of the Organization of American States (OAS), studied the topic "immunities of international organizations" and developed a

[35] International Law Association, Final Report (see footnote 33 above), pp. 205–230.

[36] *Ibid*., pp. 228–229 ("1. When concluding agreements with States or non-state entities, IO-s should continue inserting a clause providing for compulsory referral to arbitration of any dispute that the parties have been unable to solve through other means. 2. IO-s should faithfully comply with their undertakings to resort to arbitration procedures").

[37] As contained in a number a treaties, whereby the disputing parties (States and international organizations) accept the outcome of an advisory opinion as binding upon them. See *e.g.* art. VIII, sect. 30, Convention on the privileges and immunities of the United Nations (New York, 13 February 1946), United Nations, *Treaty Series*, vol. 1, No. 4, p. 15. See also Christian Dominicé, "Request of advisory opinions in contentious cases?", in Laurence Boisson de Chazournes, Cesare P.R. Romano and Ruth Mackenzie (eds.), *International Organizations and International Dispute Settlement: Trends and Prospects* (Ardsley, New York, Transnational Publishers, 2002), pp. 91–103.

[38] Statute of the International Court of Justice (San Francisco, 26 June 1945, entered into force 24 October 1945), United Nations, *Treaty Series*, chap. I.3. Available from https://treaties.un.org/.

[39] International Law Association, Final Report (see footnote 33 above), p. 233 ("Article 34 of the Statute should read: States and International Organisations, duly authorised by their constituent instrument, may be parties in cases before the Court").

[40] "(Study Group on) the Responsibility of International Organisations", Final Report, International Law Association, Sofia Conference (2012), *International Law Association Reports of Conferences*, vol. 75 (2012), p. 880.

[41] Council of Europe/Conseil de l'Europe (ed.) *The CAHDI Contribution to the Development of Public International Law / La contribution du CAHDI au développement du droit international public* (Leiden, Brill Nijhoff, 2016), p. vi.

[42] Committee of Legal Advisers on Public International Law (CAHDI), "Meeting report, 47th meeting, Strasbourg, 20–21 March 2014" (Strasbourg, 18 September 2014), para. 20.

[43] *Ibid.*, paras. 20–26.

[44] Parliamentary Assembly of the Council of Europe "Jurisdictional immunity of international organisations and the rights of their staff", Recommendation 2122 (2018), adopted on 26 January 2018, para. 1.1.

[45] See A.A. Cançado Trindade, "The Inter-American Juridical Committee: an overview", *The World Today*, vol. 38, No. 11 (Nov. 1982), pp. 437–442.

practical application guide on jurisdictional immunities of international organizations.[46] In addition to noting a tendency of domestic courts in various States in the Americas to limit their immunity in disputes with private parties,[47] one of the guidelines states that "International organizations should provide means of dispute resolution in order to ensure access to justice for individuals who are parties to a dispute not [sic] covered by jurisdictional immunity".[48]

10. Apparently, the question of disputes involving international organizations has not been addressed in a similar way by the Asian-African Legal Consultative Organization,[49] the African Union Commission on International Law[50] or other comparable bodies. National and regional societies dealing with public international law have addressed international organizations and the settlement of their disputes on various occasions. These are not reviewed here, but will be referred to in the course of the future work on the present topic.

B. Previous work of the Commission

11. In the past, the Commission has not directly addressed questions concerning the settlement of disputes to which international organizations are parties. However, it has worked on topics related to dispute settlement and international organizations, in particular their status, relations with States, treaty-making and responsibility.

12. In the 1950s, the Commission took up the topic of arbitration, which led to a final report in 1958, containing a set of model rules on arbitral procedure together with a general commentary.[51] These model rules have been influential on the drafting of other arbitration rules such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,[52] in particular article 52 on the annulment of awards.[53]

13. The Commission has repeatedly addressed legal issues concerning international organizations. After completing the topic "Law of treaties" with draft articles and

[46] "Practical application guide on the jurisdictional immunities of international organizations", in "Inter-American Juridical Committee Report: Immunities of International Organizations", document CJI/doc.554/18 rev.2, 16 August 2018, p. 3. Available at http://www.oas.org/en/sla/dil/docs/CJI_Immunities_Of_International_Organizations_report_practical_guide_2018.pdf.

[47] *Ibid*., p. 6, "Guideline 4, Rapporteur's notes".

[48] *Ibid*., p. 7, "Guideline 5, means of dispute resolution".

[49] See Sompong Sucharitkul, "Contribution of the Asian-African Legal Consultative Organization to the codification and progressive development of international law", in *Essays in International Law* (New Delhi, Asian-African Legal Consultative Organization, 2007), p. 9.

[50] Adelardus Kilangi, "The African Union Commission on International Law (AUCIL): an elaboration of its mandate and functions of codification and progressive development of international law", *AUCIL Journal of International Law*, vol. 1 (2013), p. 1; Blaise Tchikaya, "La Commission de l'Union africaine sur le droit international : bilan des trois premières années", *Annuaire français de droit international*, vol. 58 (2012), p. 307.

[51] Model rules on arbitral procedure with a general commentary, *Yearbook of the International Law Commission, 1958*, vol. II, pp. 83–88.

[52] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington D.C., 18 March 1965), United Nations, *Treaty Series*, vol. 575, No. 8359, p. 159.

[53] See Evelyne Lagrange, "Model rules on arbitral procedure: International Law Commission (ILC)", *Max Planck Encyclopedia of International Procedural Law*, para. 39, available at www.mpeipro.com/; V.V. Veeder, "Inter-State arbitration", in Thomas Schultz and Federico Ortino (eds.), *The Oxford Handbook of International Arbitration* (Oxford, Oxford University Press, 2020), p. 227; Anthony Sinclair, "Article 52", in Stephan W. Schill and others (eds.), *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* 3rd ed. (Cambridge, Cambridge University Press, 2022), p. 1224.

commentary in 1966,[54] subsequently leading to the adoption of the Vienna Convention on the Law of Treaties in 1969,[55] the Commission started working on "the question of treaties concluded between States and international organizations or between two or more international organizations".[56] In 1982, the Commission successfully completed its work with the second reading of the draft articles with commentary,[57] which ultimately led to the adoption of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations in 1986.[58] Upon invitation of the General Assembly in 1958, the Commission started in 1963 to address the topic "Relations between States and inter-governmental organizations".[59] It split the work on the topic into two parts. From 1963 to 1971, the Commission dealt with the first part, relating to the status, privileges and immunities of the representatives of States to international organizations, which led to the adoption, in 1971, of draft articles on the representation of States in their relations with international organizations, with commentaries.[60] These draft articles formed the basis for the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.[61] Between 1976 and 1992, the Commission considered the second part of the topic, dealing with the "status, privileges and immunities of international organizations, their officials, and experts and other persons engaged in their activities not being representatives of States".[62] In 1990, the Commission discussed eleven draft articles focusing on the legal personality, inviolability, and immunities of international organizations.[63] In 1991, it dealt with a further set of eleven draft articles focusing on the archives, communications and tax privileges of international organizations.[64] In 1992, the Commission decided to discontinue considering the topic

[54] Draft articles on the law of treaties, with commentaries, *Yearbook of the International Law Commission, 1966*, vol. II, p. 187.

[55] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, entered into force 27 January 1980), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[56] General Assembly resolution 2501 (XXIV) of 12 November 1969; Report of the International Law Commission on the work of its twenty-second session, *Yearbook of the International Law Commission, 1970*, vol. II (Part Two), p. 310, para. 89.

[57] Draft articles on the law of treaties between States and international organizations or between international organizations, with commentaries, *Yearbook of the International Law Commission, 1982*, vol. II (Part Two), p. 17.

[58] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986, not yet in force), *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (Documents of the Conference)*, vol. II, document A/CONF.129/15 (reproduced in A/CONF.129/16/Add.1 (Vol. II)).

[59] *Yearbook of the International Law Commission, 1963*, vol. II, document A/CN.4/161 and Add.1, p. 159.

[60] Draft articles on the representation of States in their relations with international organizations, with commentaries, *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 284.

[61] Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975, not yet into force), United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87.

[62] At the twenty-ninth session of the International Law Commission in 1977, Special Rapporteur Mr. Abdullah El-Erian, presented his preliminary report on the second part of the topic. See *Yearbook of the International Law Commission, 1977*, vol. II (Part One), p. 139, document A/CN.4/304. At its forty-fourth session, the Commission decided not to pursue consideration of the topic further during the current term of office of its members and the General Assembly endorsed that decision. See Report of the International Law Commission on the work of its forty-fourth session, *Yearbook of the International Law Commission, 1992*, vol. II (Part Two), paras. 359–362; General Assembly resolution 47/33 of 25 November 1992.

[63] Report of the International Law Commission on the work of its forty-second session, *Yearbook of the International Law Commission, 1990*, vol. II (Part Two), paras. 414–464 (draft articles 1–11).

[64] Report of the International Law Commission on the work of its forty-third session, *Yearbook of the International Law Commission, 1991*, vol. II (Part Two), paras. 260–301 (draft articles 12–22).

"Relations between States and international organizations".[65] Still, the topic "Jurisdictional immunity of international organizations" was put and remains on the long-term programme of work of the Commission.[66] Finally, the Commission's work from 2001 to 2010 led to the adoption of the articles on the responsibility of international organizations.[67] The long-term programme of work of the Commission continues to include two topics concerning international organizations with specific dispute settlement relevance: "Arrangements to enable international organizations to be parties to cases before the International Court of Justice"[68] (1968) and the "Status of international organizations before the International Court of Justice"[69] (1970).[70]

14. The previous work of the Commission on international organizations only tangentially addressed issues of dispute settlement. The draft articles on the law of treaties between States and international organizations or between international organizations provide for arbitration and conciliation in case of disputes concerning invalidity, termination, withdrawal from or suspension of the operation of a treaty.[71] The draft articles on the representation of States in their relations with international organizations provide for conciliation in case of disputes between a sending State, a host State and an organization.[72] The articles on the responsibility of international organizations do not contain any dispute settlement provisions. However, they refer to arbitral or judicial dispute settlement having a preclusive effect on the taking of countermeasures.[73] The discontinued work of the Commission on the status, privileges and immunities of international organizations, the second part of the topic "Relations between States and international organizations", addressed some aspects of dispute settlement. In particular, the Commission dealt with the question of how far the status of international organizations enabled them to bring legal proceedings in domestic courts,[74] and at the same time, to invoke immunity in case of legal proceedings being brought against them in domestic courts.[75]

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[65] *Yearbook of the International Law Commission, 1992*, vol. II (Part Two), para. 355.

[66] Giorgio Gaja, "Jurisdictional immunity of international organizations", *Yearbook of the International Law Commission, 2006*, vol. II (Part Two), annex II, p. 201.

[67] The articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook of the International Law Commission, 2011*, vol. II (Part Two), paras. 87–88; see also General Assembly resolution 66/100 of 9 December 2011, annex.

[68] Report of the Commission to the General Assembly, *Yearbook of the International Law Commission, 1968*, vol. II, p. 233.

[69] Documents of the twenty-second session including the report of the Commission to the General Assembly, *Yearbook of the International Law Commission, 1970*, vol. II, p. 268, para. 138 (proposal by Mr. Arnold J.P. Tammes).

[70] See Long-term programme of work, Review of the list of topics established in 1996 in the light of subsequent developments, Working paper prepared by the Secretariat, document A/CN.4/679, para. 58.

[71] Draft articles on the law of treaties between States and international organizations or between international organizations, with commentaries, *Yearbook of the International Law Commission, 1982*, vol. II (Part Two), para. 63, art. 66 (Procedures for arbitration and conciliation).

[72] Draft articles on the representation of States in their relations with international organizations, with commentaries, *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 284, art. 82 (Conciliation).

[73] Articles on the responsibility of international organizations, with commentaries (see footnote 67 above), article 55, para. 3 (Conditions relating to resort to countermeasures: "Countermeasures may not be taken, and if already taken must be suspended without undue delay if: … (b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties").

[74] See draft article 5 (c), as submitted by the Special Rapporteur for the topic in his fourth report, referring to the capacity to "institute legal proceedings", and the Commission's discussion, referring to "capacity to file an international claim", *Yearbook of the International Law Commission, 1990*, vol. II (Part Two), para. 441 and footnote 320.

[75] See draft article 7, as submitted by the Special Rapporteur for the topic in his fourth report, suggesting that "[i]nternational organizations … shall enjoy immunity from every form of legal

15. The current topic, with its focus on dispute settlement, complements and continues the previous work of the Commission on legal issues involving international organizations in many respects.[76]

16. Both the capacities of entering into treaties and of incurring international responsibility are premised on the idea that international organizations have an existence separate from their members, often expressed in the concept of the possession of international legal personality. Similarly, the capabilities of assuming obligations under contracts and incurring liability for breaches of national law presuppose their personality under domestic law. The status of international organizations, normally enjoying international as well as domestic legal personality, implies that international organizations may find themselves in various (legal) relationships with other entities, such as other international organizations, States (both members or non-members) or private parties. These relationships may sometimes give rise to disputes, for instance regarding the application and interpretation of treaties or contracts. In addition, the invocation of the responsibility of international organizations or the invocation of State responsibility by international organizations may form the basis for various disagreements. Likewise, alleged breaches of contracts or other obligations under domestic law may trigger disputes, the settlement of which may be affected by the privileges and immunities enjoyed by international organizations.

17. These examples illustrate the multifaceted, potential disputes that may arise and the need to address their settlement systematically. Such inquiry appears particularly important in the light of the Commission's awareness of "the limited use of procedures for third-party settlement of disputes to which international organizations are parties".[77]

II. Scope and outcome of the topic

A. Scope of the topic

18. The topic is concerned with disputes to which international organizations are parties and their settlement. In order to delimit the scope of the topic, it is useful to indicate which organizations are meant by the term "international organizations" and are thus intended to be covered by the present topic. Likewise, the report addresses which forms of "disputes" and "dispute settlement" should be included. These may appear to be simple definitional questions. However, their careful consideration will ensure that the topic deals only with intergovernmental organizations and not with non-governmental organizations (NGOs) or business entities, which may equally be regarded as "organizations" in a colloquial sense.[78] It will also make sure that the topic will address the established forms of dispute settlement. Such definitional questions are discussed below and should lead to the adoption of a guideline[79] on the use of terms.

19. Any topic studied by the Commission has to be delimited in order to remain sufficiently focused. Previous work of the Commission dealing with international organizations has addressed their treaty-making, their relations with States, their (international and domestic) legal personality, their privileges and immunities, and their responsibility. The present work

process except in so far as in any particular case they have expressly waived their immunity". *Yearbook of the International Law Commission, 1990*, vol. II (Part Two), para. 448, footnote 323.

[76] *Yearbook of the International Law Commission, 2011*, vol. I, p. 123, para. 11 ("Consideration of that issue [dispute settlement involving international organizations] followed naturally from the Commission's work on the topic of the responsibility of international organizations …").

[77] Articles on the responsibility of international organizations, with commentaries (see footnote 67 above), para. (5) of the general commentary.

[78] José E. Alvarez, *International Organizations as Law-makers* (Oxford, Oxford University Press, 2005), p. 1.

[79] See paras. 30 et seq. below.

centres on the settlement of disputes to which they are parties. While the precise scope of the potential types of disputes that should be addressed needs to be decided by the Commission,[80] adopting sufficiently flexible language appears desirable in order to ensure that any disputes to which international organizations are parties can be addressed.

20. It is thus proposed that language along the following lines be used in order to delimit the scope of the topic:

> "1. Scope of the draft guidelines
>
> "The present draft guidelines apply to the settlement of disputes to which international organizations are parties."

21. A provision on the scope of the topic is intended to clarify that it addresses disputes international organizations may have with other parties. The main elements of the proposed guideline, the notions of "disputes", of "dispute settlement" and of "international organizations", should be defined in a separate provision clarifying the use of terms.[81]

B. Whether disputes of a private law character should be covered

22. The topic is currently referred to as "Settlement of international disputes to which international organizations are parties". This formulation leaves it open as to whether disputes of a private law character are included, but the reference to "international" disputes might be understood as not comprising such disputes. The Commission has been aware of this apparent limitation, which stems from the original formulation of the 2016 syllabus on the topic.[82] Thus, it stated in regard to "disputes of a private law character" that "[c]onsidering the importance of such disputes for the functioning of international organizations in practice, it was presumed that the Special Rapporteur and the Commission would take such disputes into account".[83] The Commission has also requested the Secretariat to prepare a memorandum providing information on the practice of States and international organizations that may be of relevance to its work on the topic, "including both international disputes and disputes of a private law character".[84]

23. In the debate in the Sixth Committee at its seventy-seventh session in 2022, several States expressly supported the inclusion of disputes of a private law character in the Commission's work;[85] no State expressed opposition.

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[80] See paras. 22 et seq. below.

[81] See para. 83 below.

[82] Nevertheless, Sir Michael Wood suggested that it would be for a future decision of the Commission whether certain disputes of a private law character might also be covered. Sir Michael Wood, "The settlement of international disputes to which international organizations are parties" (see footnote 1 above), p. 233.

[83] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 238.

[84] *Ibid.*, para. 241.

[85] See, *e.g.*, Armenia, 26 October 2022, Statement on Cluster I ("This is a practical and important topic in modern international practice. We urge the Special Rapporteur and the Commission to include disputes of a private or tortious character in the scope of the work because these have been the most pertinent categories of dispute in practice. Examples include disputes arising out of the use of force, peacekeeping as well as contractual relationships"); Austria, 25 October 2022, Statement on Cluster I ("Because of the implications that private law disputes with international organisations often have for host countries, Austria welcomes the idea to also take such disputes into account as suggested in paragraph 238 of the report"); Czech Republic, 25 October 2022, Statement on Cluster I ("We also note with satisfaction the comment by the Commission that the scope of this topic should include also certain disputes of a private law character, to which international organizations are parties. We believe that the Special Rapporteur's and Commission's work will consolidate and clarify both theoretical and practical aspects of this topic and will be of benefit to practice of States and international organizations in this area"); The Netherlands, 26 October 2022, Statement on Cluster I ("There is an increase of

24. In practice, disputes of a private law character form a highly important part of disputes to which international organizations are parties. They raise numerous issues of international law, such as jurisdictional immunity or the obligation to make provision for appropriate modes of settlement provided for in various treaties.[86] As already recognized by the International Court of Justice in its advisory opinion in the *Effect of Awards* case, the need to provide for dispute settlement methods in case of disputes with private parties may also have human rights implications.[87] On the basis of the previous work of the Commission and other bodies, as outlined above,[88] it also seems that, in practice, the most pressing questions relate to the settlement of disputes of a private law character. Thus, the Commission rightly suggested that such disputes should be considered.

25. The Special Rapporteur shares those views. However, he also believes that the Commission should discuss and decide in the upcoming session whether disputes of a private law character should be addressed.

C. Outcome of the topic's consideration

26. Over the past decades, the outcome of the work of the Commission has become more diverse than what the mandate of its Statute suggests, when it requires the Commission to "prepare its drafts in the form of articles".[89] In addition to drafting articles that may form the basis of treaties, sometimes also referred to as "draft conventions", "draft codes" or "draft statutes", the Commission has also adopted "draft principles",[90] "draft guidelines",[91] "draft

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disputes with a private law character that are brought against international organizations and their host States. The settlement of these disputes comes with legal complexities which makes a study by the ILC timely and useful"). Statements from the seventy-seventh session of the General Assembly, available on the website of the Sixth Committee of the General Assembly, https://www.un.org/en/ga/sixth/77/summaries.shtml.

[86] Sir Michael Wood, "The settlement of international disputes to which international organizations are parties" (see footnote 1 above), p. 233, footnote 7.

[87] *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, Advisory Opinion, *I.C.J. Reports 1954*, p. 47 at p. 57 (finding that it would "hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals … that [the United Nations] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them").

[88] See paras. 6 et seq. above.

[89] See article 20 of the Statute of the International Law Commission ("The Commission shall prepare its drafts in the form of articles and shall submit them to the General Assembly together with a commentary containing: (a) Adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine; (b) Conclusions defining: (i) The extent of agreement on each point in the practice of States and in doctrine; (ii) Divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution").

[90] See, *e.g.*, Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal with commentaries, *Yearbook of the International Law Commission, 1950*, vol. II, p. 374, para. 97; Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, *Yearbook of the International Law Commission, 2006*, vol. II (Part Two), p. 161, at para. 176; Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. The draft principles and the commentaries thereto are reproduced in *Yearbook of the International Law Commission, 2006*, vol. II (Part Two), paras. 66–67; see also General Assembly resolution 61/36 of 4 December 2006, annex; and Draft principles on protection of the environment in relation to armed conflicts, *Official Records of the General Assembly, Seventy-seventh Session*, *Supplement No. 10* (A/77/10), para. 59.

[91] Guide to Practice on Reservations to Treaties, *Yearbook of the International Law Commission, 2011*, vol. II (Part Two), para. 75; Guide to Provisional Application of Treaties, *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 51; Draft guidelines on protection of the atmosphere, *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 39.

conclusions"[92] and several reports.[93] At the same time, there is a growing awareness that some of the more recent topics do not lend themselves to the preparation of draft articles with a view to the adoption of a convention.[94]

27. The Commission should consider the question of the potential outcome of its work on this topic circumspectly. The diversity of international organizations and the diverse legal "embeddedness" of their legal relationships with other entities through constituent instruments and headquarters agreements, as well as other treaty and/or contractual arrangements, implies that adopting a uniform outcome, in particular in the form of draft articles, might not be appropriate.[95] While it will be highly instructive to analyse existing provisions for dispute settlement in such instruments as well as their actual use, and to discuss advantages and shortcomings, it may prove difficult to aim at any form of uniform treaty language. Rather, it appears that the Commission's major contribution in this area could be to analyse the *status quo* and to make carefully weighted recommendations for the settlement of disputes that are apt to be taken into consideration by international organizations generally. For this purpose, the elaboration of a set of guidelines would be an appropriate form. To paraphrase the Commission's characterization in regard to the 2011 Guide to Practice on Reservations to Treaties, "guidelines" are "not a binding instrument but a *vade mecum*, a 'toolbox' in which [addressees] should find answers to the practical questions".[96]

28. The Special Rapporteur is aware that the form of the outcome regarding this topic requires a debate among the members of the Commission. He welcomes a collaborative

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[92] Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *Yearbook of the International Law Commission, 2018*, vol. II (Part Two), para. 51; Draft conclusions on the identification of customary international law, *Yearbook of the International Law Commission, 2018*, vol. II (Part Two), para. 65; Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *Official Records of the General Assembly, Seventy-seventh Session*, *Supplement No. 10* (A/77/10), para. 44.

[93] See, *e.g.*, Report by the Commission on the ways and means for making the evidence of customary international law more readily available, *Yearbook of the International Law Commission, 1950*, vol. II, p. 367; Report of the Commission on Reservations to Multilateral Conventions, *Yearbook of the International Law Commission, 1951*, vol. II, p. 125; Report by the Commission on the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations, *Yearbook of the International Law Commission, 1963*, vol. II, p. 35; Report of the Working Group on review of the multilateral treaty-making process, *Yearbook of the International Law Commission, 1979*, vol. II (Part One), p. 183; "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", Report of the Study Group of the International Law Commission, *Yearbook of the International Law Commission 2006*, vol. II (Part One), addendum 2, document A/CN.4/L/682 and Corr. 1; Final report of the Working Group on the obligation to extradite or prosecute, *Yearbook of the International Law Commission, 2014*, vol. II (Part Two), para. 65; Final report of the Study Group on the most-favoured nation clause, *Yearbook of the International Law Commission, 2015*, vol. II (Part Two), annex.

[94] *Yearbook of the International Law Commission, 1998*, vol. II (Part Two), para. 553 ("The Commission … should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole"). See also the recent work of the Commission in the Study Group on sea-level rise in relation to international law, which was included as a new topic in 2018. Bogdan Aurescu, Yocouba Cissé, Patrícia Galvão Teles, Nilüfer Oral and Juan José Ruda Santolaria, "Sea-level rise in relation to international law", *Yearbook of the International Law Commission, 2018*, vol. II (Part Two), annex II.

[95] For similar considerations regarding the lacking feasibility of drafting articles on the privileges and immunities of international organizations, see *Yearbook of the International Law Commission, 1992*, vol. II (Part Two), paras. 359–362.

[96] Report of the International Law Commission on the work of its sixty-third session, *Yearbook of the International Law Commission, 2011*, vol. II (Part Three), para. (4) of the introduction to the Guide to Practice on Reservations to Treaties.

reflection on the desirable form of the ultimate outcome of the work on this topic, starting at the Commission's 2023 session.

III. Definitional questions

29. When reflecting on the settlement of disputes involving international organizations, it must be recognized that definitional issues immediately arise which have direct implications for the scope of the topic.

30. This concerns the notions of "international organizations" and "disputes" as well as the concept of "dispute settlement". The present topic is limited to studying disputes involving "international organizations". Such organizations are created by subjects of international law, namely States and international organizations, on the basis of international law, treaties and other instruments under international law.[97] While acknowledging that "disputes" may have a wide meaning, including political and policy disagreements, it is suggested that the topic will focus on legal disputes arising either under international or domestic law. Finally, although the Commission's work should take into account all forms of peaceful settlement of disputes,[98] including negotiation, good offices, conciliation and mediation, it will probably concentrate on judicial and quasi-judicial, independent third-party dispute settlement methods, usually provided for by courts and arbitral tribunals. This has a two-fold, mostly practical, reason. On the one hand, information about instances of informal dispute settlement is even less available than about cases of arbitration and/or adjudication. On the other hand, is seems that the broadly discretionary character of such dispute settlement methods makes them less amenable to be the subject of useful guidelines.

A. International organizations

31. "International organizations" are often also referred to as "public international"[99] or "intergovernmental" [100] organizations. In addition, the expressions "agencies" or "specialized agencies", for international organizations having specific relations to the United

[97] See para. 38 below.

[98] See paras. 73 et seq. below.

[99] Art. 34, Statute of the International Court of Justice; art. 12, Constitution of the International Labour Organization (ILO Constitution) (Montreal, 9 October 1946, entered into force 20 April 1948), United Nations, *Treaty Series*, vol. 15, No. 229, p. 35. See also United States of America, International Organizations Immunities Act, chapter 7, subchapter XVIII, para. 288 (defining international organization as "a public international organization in which the United States participates pursuant to any treaty").

[100] See art. 95, Charter of the Organization of American States (Bogotá, 30 April 1948, entered into force 13 December 1951), United Nations, *Treaty Series*, vol. 119, No. 1609, p. 3 ("For the purposes of the present Charter, Inter-American Specialized Organizations are the intergovernmental organizations established by multilateral agreements and having specific functions with respect to technical matters of common interest to the American States"); art. 3, Charter of the Association of Southeast Asian Nations (Singapore, 20 November 2007, entered into force on 15 December 2008), United Nations, *Treaty Series*, vol. 2624, No. 46745, p. 223 ("ASEAN, as an inter-governmental organisation, is hereby conferred legal personality"); art. 2, para. (1) (i), Vienna Convention on the Law of Treaties (footnote 55 above) ("'international organization' means an intergovernmental organization"); art. 1, para. 1 (1), Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (footnote 61 above) ("'international organization' means an intergovernmental organization"); art. 2, para. 1 (i), Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (footnote 58 above) ("'international organization' means an intergovernmental organization").

Nations,[101] or "international institutions",[102] especially in the form of international financial institutions,[103] are used to denote international organizations.

1. Defining elements of international organizations

32. The core notion of an international organization is fairly well established, even if there exists no generally accepted definition. Typically, the emphasis of any definition of an international organization lies in distinguishing such an entity from other forms of organizations that operate beyond a purely national level, such as international NGOs and business entities like transnational corporations or multinational enterprises. Both NGOs and business entities are created under national law, subject to national law, and they ordinarily possess personality under national law.[104] In contrast, international organizations, which are created under international law, are subject to international law, and are usually endowed with international legal personality, *i.e.* personality under international law.[105] The international legal personality of international organizations is sometimes regarded as a defining element, sometimes as a consequence of "organization-hood".[106] Such personality is particularly important for international organizations to enter into treaties, to claim privileges and immunities, to incur responsibility and to make claims or defend against claims raised against them under international dispute settlement mechanisms.[107]

33. Generally, international organizations are considered to be entities made up mostly of States, created by any type of instrument governed by international law, having their own organs able to express the organizations' "own will" and entrusted to fulfil some common (usually public) tasks.[108] Each of these elements may require specification and will have to

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[101] See Articles 57 and 63 of the Charter of the United Nations; see also Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947), United Nations, *Treaty Series*, vol. 33, No. 521, p. 261.

[102] D.W. Bowett, *The Law of International Institutions* (London, Stevens and Sons, 1963); Philippe Sands Q.C. and Pierre Klein, *Bowett's Law of International Institutions*, 6th ed. (London, Sweet and Maxwell, 2009); Jean Charpentier, *Institutions internationales*, 17th ed. (Paris, Dalloz, 2009); Matthias Ruffert and Christian Walter, *Institutionalisiertes Völkerrecht. Das Recht der Internationalen Organisationen und seine wichtigsten Anwendungsfelder,* 2nd ed. (München, C.H. Beck, 2015); H.G. Schermers, *Inleiding tot het Internationale Institutionele Recht*, 2nd ed. (Deventer, Kluwer, 1985); Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity*, 6th ed. (Leiden, Brill Nijhoff, 2018); Henry G. Schermers, "The birth and development of international institutional law", *International Organizations Law Review*, vol. 1 (2004), pp. 5–8; Kirsten Schmalenbach, "International organizations or institutions, general aspects", in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* vol. V (Oxford, Oxford University Press, 2012), p. 1126.

[103] In particular, a number of international development banks, such as the International Bank for Reconstruction and Development, the International Finance Corporation and the International Development Association, but also regional ones, such as the African Development Bank, the Asian Development Bank, the Asian Infrastructure Investment Bank and the European Bank for Reconstruction and Development, are regularly referred to as international financial institutions.

[104] See para. 39 below.

[105] See paras. 48 et seq. below.

[106] See para. 52 below. On the terminology, see also Niels M. Blokker and Ramses A. Wessel, "Revisiting questions of organisationhood, legal personality and membership in the OSCE: the interplay between law, politics and practice", in Manteja Steinbrück Platise, Carolyn Moser and Anne Peters (eds.), *The Legal Framework of the OSCE* (Cambridge, Cambridge University Press, 2019), pp. 135–164.

[107] Patrick Daillier and others, *Droit international public*, 9th ed. (Paris, LGDJ, 2022), p. 830.

[108] Hildebrando Accioly, G.E. do Nascimento e Silva and Paulo Borba Casella, *Manual de Direito Internacional Público*, 22nd ed. (São Paulo, Editora Saraiva, 2016), p. 428; Dapo Akande, "International organizations", in Malcolm D. Evans (ed.) *International Law*, 5th ed. (Oxford, Oxford University Press, 2018), pp. 228–229; Alvarez, *International Organizations as Law-makers* (see footnote 78 above), p. 6; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (Cambridge, Cambridge University Press, 2005), p. 20; Heber Arbuet-Vignali, "Las organizaciones internacionales como sujetos del derecho

take into account the fact that it may be difficult to fully capture some particular international organizations by this definition. In fact, any definition should be regarded as containing typical features which indicate that an entity may be qualified as an international organization. Viewed as typical characteristics, these elements will usually all be present. However, in certain borderline cases, some of them may be questionable.

i. Establishment by States and other entities

34. Most international organizations are created by (at least two) States.[109] However, increasingly international organizations have also acceded to or even been (founding)

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internacional", in Eduardo Jiménez de Aréchaga, Heber Arbuet-Vignali and Roberto Puceiro Ripoll (eds.), *Derecho Internacional Público: Principios, normas y estructuras* vol. I (Montevideo, Fundación de Cultura Universitaria, 2005), pp. 147–148 and 149–152; Cecilio Báez, *Derecho Internacional Público: Europeo y Americano* (Asunción, Imprenta Nacional, 1936), p. 7; Jean Combacau and Serge Sur, *Droit international public*, 13th ed. (Paris, LGDJ, 2019), p. 756; Angelo Golia Jr and Anne Peters, "The concept of international organization", in Jan Klabbers (ed.), *The Cambridge Companion to International Organizations Law* (Cambridge, Cambridge University Press, 2022), p. 28; Jan Klabbers, *An Introduction to International Organizations Law*, 4th ed. (Cambridge, Cambridge University Press, 2022), pp. 6–13; Inés Martínez Valinotti, *Derecho Internacional Público* (Asunción, Colección de Estudios Internacionales, 2012), pp. 228–232; José Antonio Pastor Ridruejo, *Curso de derecho internacional público y organizaciones internacionales*, 16th ed. (Madrid, Tecnos, 2012), pp. 661–665; César Sepúlveda, *Derecho Internacional*, 26th ed. (Mexico City, Editorial Porrúa, 2009), p. 283; August Reinisch, *International Organizations Before National Courts* (Cambridge, Cambridge University Press, 2000), p. 5; Francisco Rezek, *Direito internacional público*, 16th ed. (São Paulo, Editora Saraiva, 2016), pp. 301–303; Schermers and Blokker, *International Institutional Law …* (see footnote 102 above), p. 41; Ruffert and Walter, *Institutionalisiertes Völkerrecht …* (see footnote 102 above), p. 3; Sands and Klein, *Bowett's Law of International Institutions* (see footnote 102 above), pp. 15–16; Schmalenbach, "International organizations …" (see footnote 102 above), p. 1128; Ignaz Seidl-Hohenveldern and Gerhard Loibl, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften*, 7th ed. (Köln, Carl Heymanns, 2000) p. 5; *Restatement of the Law Third, The Foreign Relations Law of the United States*, vol. I (Philadelphia, American Law Institute, 1987), sect. 221; Manuel Diez de Velasco Vallejo, *Las Organizaciones Internacionales*, 14th ed. (Madrid, Tecnos, 2006), pp. 43–47; Michel Virally, *L'Organisation mondiale* (Paris, Armand Colin, 1972), p. 59; Karl Zemanek, *Das Vertragsrecht der Internationalen Organisationen* (Wien, Springer, 1957), p. 9.

[109] That only two States are needed to create an international organization was recently confirmed by the International Court of Justice in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, *I.C.J. Reports 2010*, p. 14 at para. 89 (holding that the principle of speciality "also applies of course to organizations, which like CARU [Administrative Commission of the River Uruguay], only have two member States"). See also Alvarez, *International Organizations as Law-makers* (footnote 78 above), p. 5; Arbuet-Vignali, "Las organizaciones internacionales …" (footnote 108 above), pp. 156–157; Klabbers, *An Introduction to International Organizations Law* (footnote 108 above), p. 9; Schmalenbach, "International organizations …" (footnote 102 above), p. 1129; Schermers and Blokker, *International Institutional Law …* (footnote 102 above), p. 43; Seidl-Hohenveldern and Loibl, *Das Recht der Internationalen Organisationen …* (footnote 108 above), p. 7. Some older writings have asserted that international organizations are founded by multilateral treaties and thus require a minimum of three States. See, *e.g.*, Anthony J.N. Judge, "International institutions: diversity, borderline cases, functional substitutes and possible alternatives", in Paul Taylor and A.J.R. Groom (eds.), *International Organisation: A Conceptual Approach* (London, Frances Pinter, 1978), p. 30 ("defines … [intergovernmental organisations] as … including three or more nation states as parties to the agreement"); Grigorii Morozov, "The socialist conception", *International Social Science Journal*, vol. XXIX, No. 1 (1977), p. 30 ("International organizations have, as a rule, at least three member countries"). This view seems no longer relevant. See, however, Konstantinos D. Magliveras, "Membership in international organizations", in Jan Klabbers and Åsa Wallendah1 (eds.), *Research Handbook on the Law of International Organizations* (Cheltenham, Edward Elgar Publishing, 2011), p. 84 ("International organizations are made up of at least three members").

members of international organizations,[110] a development highlighted by the Commission's definition of an international organization for purposes of responsibility.[111]

35. That international organizations are themselves members of international organizations has been a recurrent phenomenon over the last decades. As a result of a transfer of powers by their member States, regional economic integration organizations,[112] in particular, have acceded to or been founding members of other international organizations. Regional economic integration organizations such as the Andean Community,[113] the African Union,[114] the Caribbean Community (CARICOM),[115] the Common Market for Eastern and Southern Africa (COMESA),[116] the East African Community,[117] the European Union, the Economic Community of Western African States (ECOWAS),[118] the Southern African Development Community (SADC),[119] the Southern Common Market (MERCOSUR)[120] and

[110] See H.G. Schermers, "International organizations as members of other international organizations", in Rudolf Bernhardt and others (eds.), *Völkerrecht als Rechtsordnung – Internationale Gerichtsbarkeit – Menschenrechte: Festschrift für Hermann Mosler* (1983), pp. 823–837; Ruffert and Walter, *Institutionalisiertes Völkerrecht …* (footnote 102 above), p. 44; Klabbers, *An Introduction to International Organizations Law* (footnote 108 above), p. 9.

[111] Article 2 (a) of the articles on the responsibility of international organizations provides that "[i]nternational organizations may include as members, in addition to States, other entities" (see footnote 6760 above). Thus, an organization can even be established by only one State together with one international organization. See, *e.g.*, Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Freetown, 16 January 2002, entered into force 12 April 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137.

[112] See Won-Mog Choi and Freya Baetens, "Regional co-operation and organization: Asian States", in Anne Peters and Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law*, available at www.mpepil.com/; Alberta Fabbricotti, "Economic organizations and groups, international", *ibid*.; Mathias Forteau, "Regional co-operation", in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* vol. VIII (Oxford, Oxford University Press, 2012), pp. 759–768; Luis Alfonso García-Corrochano Moyano, "Regional co-operation and organization: American States", *ibid*., pp. 782–798; Shotaro Hamamoto, "Regional co-operation and organization: Pacific region", *ibid*., pp. 816–824; Magnus Killander, "Regional co-operation and organization: African States", *ibid*., pp. 768–782; Markus Kotzur, "Regional co-operation and organization: European States", *ibid*., pp. 806–816; Tan Hsien-Li, "Regional organizations", in Simon Chesterman, Hisashi Owada and Ben Saul, *The Oxford Handbook of International Law in Asia and the Pacific* (Oxford, Oxford University Press, 2019).

[113] Andean Subregional Integration Agreement (Cartagena Agreement) (Cartagena, 26 May 1969, entered into force 16 October 1969), available at www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=393.

[114] Constitutive Act of the African Union (Lomé, 11 July 2000, entered into force 26 May 2001), United Nations, *Treaty Series*, vol. 2158, No. 37733, p. 3.

[115] Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy (Nassau, 5 July 2001, entered into force 4 February 2002), United Nations, *Treaty Series*, vol. 2259, No. 40269, p. 293.

[116] Treaty establishing the Common Market for Eastern and Southern Africa 1993 (Kampala, 5 November 1993, entered into force 8 December 1994), United Nations, *Treaty Series*, vol. 2314, No. 21341, p. 265; *International Legal Matters*, vol. 33, No. 5 (September 1994), pp. 1067–1123.

[117] Treaty for the Establishment of the East African Community (Arusha, 30 November 1999, entered into force 7 July 2000), United Nations, *Treaty Series*, vol. 2144, No. 37437, p. 255.

[118] Treaty of the Economic Community of Western African States (ECOWAS) (Lagos, 28 May 1975, entered into force 1 August 1995), United Nations, *Treaty Series*, vol. 1010, No. 14843, p. 17.

[119] Treaty of the Southern African Development Community (Windhoek, 17 August 1992, entered into force 5 October 1993), United Nations, *Treaty Series*, vol. 3062, No. 52885, p. 331.

[120] Treaty for the establishment of a Common Market (Asunción Treaty) between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (Asunción, 26 March 1991, entered into force 29 November 1991), United Nations, *Treaty Series*, vol. 2140, No. 37341, p. 257.

the West African Economic and Monetary Union (WAEMU)[121] are regional international organizations to which their member States have transferred powers, often including treaty-making powers, relevant to their cooperation in organizations of a broader scope.[122] For instance, the European Union is a founding member of the World Trade Organization (WTO) according to the Marrakesh Agreement,[123] exercising large parts of its members' foreign trade powers in the form of the European Union's external trade policy.[124] Furthermore, the European Union is a member of the Food and Agriculture Organization of the United Nations (FAO)[125] and numerous commodity agreements and fisheries commissions, as well as the European Bank for Reconstruction and Development,[126] and has a status akin to membership in the World Customs Organization.[127] The European Investment Bank is also a member of the European Bank for Reconstruction and Development.[128] Some constituent instruments of international organizations expressly provide for regional economic integration organization membership, such as the FAO

[121] Treaty on the West African Economic and Monetary Union (WAEMU) (10 January 1994, entered into force 1 August 1994), available at www.wipo.int/wipolex/en/treaties/details/313.

[122] This is expressly acknowledged in some instruments. For instance, art. 1, annex IX to the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, entered into force 16 November 1994), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3 ("'international organization' means an intergovernmental organization constituted by States to which its member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters").

[123] Art. XI, para. 1 ("Original Membership"), Marrakesh Agreement establishing the World Trade Organization (Marrakesh, 15 April 1994, entered into force 1 January 1995), United Nations, *Treaty Series*, vol. 1867, No. 31874, p. 3.

[124] Art. 207, Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union, vol. 55, 26 October 2012, p. 47.

[125] Constitution of the Food and Agriculture Organization of the United Nations (16 October 1945), 145 BSP 910.

[126] For a detailed list, see Schermers and Blokker, *International Institutional Law …* (see footnote 102 above), p. 79. On the membership of the European Union in international organizations, see also Frank Hoffmeister, "Outsider or frontrunner? Recent developments under international and European law on the status of the European Union in international organizations and treaty bodies", *Common Market Law Review*, vol. 44, No. 1 (2007), pp. 41–68; Christine Kaddous (ed.), *The European Union in International Organisations and Global Governance: Recent Developments* (Oxford, Hart Publishing, 2015); Ramses A. Wessel and Jed Odermatt (eds.), *Research Handbook on the European Union and International Organizations* (Cheltenham, Edward Elgar Publishing, 2019).

[127] See the homepage of the World Customs Organization, indicating that the European Union enjoys "status akin to WCO membership": https://www.wcoomd.org/-/media/wco/public/global/pdf/about-us/wco-members/list-of-members-with-membership-date.pdf?db=web. See also art. II (a), Convention establishing a Customs Co-operation Council (Brussels, 15 December 1950, entered into force on 4 November 1952), United Nations, *Treaty Series*, vol. 157, No. 2052, p. 129 (permitting membership, in addition to the Contracting Parties of the Convention, to "the Government of any separate Customs territory which is proposed by a Contracting Party having responsibility for the formal conduct of its diplomatic relations, which is autonomous in the conduct of its external commercial relations and whose admission as a separate Member is approved by the Council").

[128] Art, 3, para. 1, Agreement establishing the European Bank for Reconstruction and Development, Official Journal of the European Union, vol. 33, 31 December 1990*, p. 4* ("Membership in the Bank shall be open: (i) to (1) European countries and (2) non-European countries which are members of the International Monetary Fund; and (ii) to the European Economic Community and the European Investment Bank").

Constitution.[129] With regard to the Common Fund for Commodities,[130] itself an international organization, in spite of its name,[131] the European Union and numerous other regional economic integration organizations, such as the Andean Community, the African Union, CARICOM, COMESA, the East African Community, ECOWAS, SADC and WAEMU, have relied upon such a clause[132] to become members.[133] In exceptional cases, an international organization may even have only international organizations as members, as in the case of the Joint Vienna Institute.[134]

36. Furthermore, some international organizations have members that are not sovereign States, but territories or entities with capacities relevant to the respective organizations.[135] Such territories or entities have become members of a number of technical international organizations because they required for membership only the possession of certain external powers. Thus, certain territories have been able to become members of WTO[136] and of the World Meteorological Organization (WMO).[137]

37. In a few cases, some forms of membership may even be open to entities other than States or international organizations.[138] An example is the World Tourism Organization

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[129] Art. II, para. 3, FAO Constitution (see footnote 125 above), provides for the possibility "to admit as a Member of the Organization any regional economic integration organization meeting the criteria set out in paragraph 4 of this Article". That paragraph specifies that "a regional economic integration organization must be one constituted by sovereign States, a majority of which are Member Nations of the Organization, and to which its Member States have transferred competence over a range of matters within the purview of the Organization, including the authority to make decisions binding on its Member States in respect of those matters"). To date, only the European Union has made use of this option. See *Basic texts of the Food and Agriculture Organization of the United Nations, vols. I and II*, 2017 edition, p. 240.

[130] Agreement establishing the Common Fund for Commodities (Geneva, 27 June 1980, entered into force 19 June 1989), United Nations, *Treaty Series*, vol. 1538, No. 26691, p. 3.

[131] Robin Trevor Tait and George N. Sfeir, "The Common Fund for Commodities", *George Washington Journal of International Law and Economics*, vol. 16, No. 3 (1982), p. 483 at p. 529; Sands and Klein, *Bowett's Law of International Institutions* (see footnote 102 above), pp. 131 et seq.

[132] Art. 4, Agreement establishing the Common Fund for Commodities (see footnote 130 above) ("Membership in the Fund shall be open to: … [a]ny intergovernmental organization of regional economic integration which exercises competence in fields of activity of the Fund").

[133] See https://www.common-fund.org/about-us/member-states.

[134] Agreement for the establishment of the Joint Vienna Institute (Vienna, 27 and 29 July 1994 and 10 and 19 August 1994, entered into force 19 August 1994), *International Legal Matters*, vol. 33, No. 6 (November 1994), pp. 1505–1513, and United Nations, *Treaty Series*, vol. 2029, No. 1209, p. 391, established by the Bank for International Settlements, the European Bank for Reconstruction and Development, the International Bank for Reconstruction and Development, the International Monetary Fund and the Organisation for Economic Co-operation and Development. Subsequently, WTO also joined.

[135] For further details, see Schermers and Blokker, *International Institutional Law …* (footnote 102 above), pp. 75 et seq. See also Accioly, do Nascimento e Silva and Borba Casella, *Manual de Direito Internacional Público* (footnote 108 above), p. 479; Combacau and Sur, *Droit international public* (footnote 108 above), p. 778; Daillier and others, *Droit international public* (footnote 107 above), p. 817; Pastor Ridruejo, *Curso de derecho internacional público …* (footnote 108 above), p. 663; Diez de Velasco Vallejo, *Las Organizaciones Internacionales* (footnote 108 above), p. 44.

[136] Art. XII, para. 1 ("Accession"), Marrakesh Agreement establishing the World Trade Organization (see footnote 123 above) (permitting membership of "[a]ny separate customs territory possessing full autonomy in the conduct of its external commercial relations").

[137] Art. 3, Convention of the World Meteorological Organization (Washington D.C., 11 November 1947, entered into force on 23 March 1950), United Nations, *Treaty Series*, vol. 77, No. 998, p. 143 (permitting membership of "[a]ny territory or group of territories maintaining its own meteorological service").

[138] Articles on the responsibility of international organizations, with commentaries (see footnote 67 above), para. (14) of the commentary to article 2 ("The reference in the second sentence of article 2, subparagraph (*a*), to entities other than States – such as international organizations,

(UNWTO),[139] a specialized agency of the United Nations, providing for three categories of membership: full members (sovereign States), associate members (dependent territories) and affiliate members (companies, international organizations and NGOs).[140] A variant of an international organization that is also open to non-governmental representatives is ILO. Although consisting of States members,[141] its plenary organ, the General Conference, comprises four delegates from each member State, of whom two represent the Government, one employers and one employees.[142]

ii. Establishment by international agreement or instrument

38. Almost all international organizations are established by treaties or other agreements or instruments governed by international law.[143] Such constituent treaties may be referred to as conventions, charters, constitutions, statutes, articles of agreement or the like.[144] Such differences in terminology are insignificant. Furthermore, it is generally accepted that any – even a highly informal – instrument may create an international organization as long as such an instrument is governed by international law,[145] and not by any domestic law.[146] Thus, some international organizations have been set up by decisions at conferences, such as the Asian-African Legal Consultative Organization,[147] the Organization of Petroleum Exporting

territories or private entities – 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"). See also Miguel de Serpa Soares, "Responsibility of international organizations", in *Courses of the Summer School on Public International Law*, vol. 7 (Moscow, 2022), p. 104 ("The effect of this is to significantly broaden the scope of application of the articles to a whole host of international organizations with a variety of members").

[139] Statutes of the World Tourism Organization (Mexico City, 27 September 1970, entered into force 2 January 1975), United Nations, *Treaty Series*, vol. 985, No. 14403, p. 339.

[140] *Ibid.*, art. 7, para. 1 ("Affiliate membership of the Organization shall be open to international bodies, both intergovernmental and non-governmental, concerned with specialised interests in tourism and to commercial bodies and associations whose activities are related to the aims of the Organization or fall within its competence").

[141] ILO Constitution, art. 1, para. 2 (see footnote 99 above).

[142] *Ibid*., art. 3, para. 1 ("four representatives of each of the Members, of whom two shall be Government delegates and the two others shall be delegates representing respectively the employers and the workpeople of each of the Members"). See also Daillier and others, *Droit international public* (footnote 107 above), p. 883; Diez de Velasco Vallejo, *Las Organizaciones Internacionales* (footnote 108 above), pp. 104 and 356–357.

[143] Article 2 (a), articles on the responsibility of international organizations, with commentaries ("'international organization' means an organization established by treaty or other instrument governed by international law") (see footnote 67 above). See also Article 57 of the Charter of the United Nations (referring to specialized agencies "established by intergovernmental agreements").

[144] Daillier and others, *Droit international public* (see footnote 107 above), p. 811.

[145] Schmalenbach, "International organizations …" (see footnote 102 above), p. 1128, para. 4.

[146] Klabbers, *An Introduction to International Organizations Law* (see footnote 108 above), p. 10.

[147] The Asian-African Legal Consultative Organization (originally known as the Asian Legal Consultative Committee) was constituted by the Governments of Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria on 15 November 1956, as an outcome of the Asia-Africa Conference, held in Bandung, Indonesia, in April 1955. Asian Legal Consultative Committee Statutes (1956), in "Asian Legal Consultative Committee: first session – New Delhi: India, April 18 to 27, 1957" (New Delhi, Caxton Press), p. 7, available at https://www.aalco.int/First%20Session%20New%20Delhi.pdf ("Article 1: The Asian Legal Consultative Committee shall consist of Seven original members nominated by the Governments of Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria. The Committee may from time to time admit to membership persons nominated by the Governments of other Asian countries"). See also Statutes of the Asian-African Legal Consultative Organization (revised and adopted at the forty-third annual session, held in Bali, Indonesia, in 2004), available at https://www.aalco.int/STATUTES.pdf.

Countries (OPEC)[148] and SADC,[149] or through parallel parliamentary decisions, such as the Nordic Council.[150] Similarly, international organizations may be set up through decisions of existing international organizations, [151] since such establishment is also based on international law. The creation of the United Nations Industrial Development Organization (UNIDO) is an example.[152] It was originally a subsidiary organ of the General Assembly of the United Nations,[153] was then separated from the United Nations in 1979,[154] and finally became a United Nations specialized agency when the relationship agreement was accepted by the General Assembly in 1985.[155]

39. The establishment of international organizations based on an agreement governed by international law is crucial for distinguishing them from NGOs.[156] NGOs are created on the

[148] See Agreement concerning the creation of the Organization of Petroleum Exporting Countries (OPEC) (Baghdad, 14 September 1960), United Nations, *Treaty Series*, vol. 443, No. 6363, p. 247, Resolution I. 2, para. 1 ("With a view to giving effect to the provisions of Resolution No. I the Conference decides to form a permanent Organization called the Organization of the Petroleum Exporting Countries, for regular consultation among its Members with a view to coordinating and unifying the policies of the Members and determining among other matters the attitude which Members should adopt whenever circumstances such as those referred to in Paragraph 2 of Resolution No. I have arisen"). Art. 1, OPEC Statute (referring to the Organization's creation "as a permanent intergovernmental organization in conformity with the Resolutions of the Conference of the Representatives of the Governments of Iran, Iraq, Kuwait, Saudi Arabia and Venezuela, held in Baghdad from September 10 to 14, 1960"), available at www.opec.org/opec_web/static_files_project/media/downloads/publications/OPEC%20Statute.pdf; see also "Statute of the Organization of the Petroleum Exporting Countries (OPEC)", Resolution VIII.56, adopted at the eighth conference (extraordinary) of OPEC, held in Geneva, 5–10 April 1965, *International Legal Matters*, vol. 4, No. 6 (1965), p. 1175. The original text of the Organization's Statute (Resolution II.6) was approved by the OPEC Conference held in Caracas in January 1961.

[149] The predecessor of the Southern African Development Community (SADC) was the Southern African Development Co-ordination Conference (SADCC). On 17 August 1992, SADC was founded at a summit held in Windhoek. See Declaration and Treaty of the Southern African Development Community, available at https://www.sadc.int/sites/default/files/2021-11/Declaration__Treaty_of_SADC_0.pdf. See also SADC, "History and Treaty", available at https://www.sadc.int/pages/history-and-treaty; Schermers and Blokker, *International Institutional Law* ... (see footnote 102 above), p. 41.

[150] Denmark, Iceland, Norway and Sweden were the founding members of the Nordic Council when it was formed in 1952. See Nordic Co-Operation, "The Nordic Council", available at https://www.norden.org/en/information/nordic-council; Schermers and Blokker, *International Institutional Law* ... (see footnote 102 above), p. 42.

[151] Institute of International Law, resolution of the 7th Commission, "Limits to evolutive interpretation of the constituent instruments of the organizations within the United Nations system by their internal organs", 4 September 2021, first preambular para. ("Noting that international organizations are established by multilateral agreements or by decisions of other international organizations").

[152] Constitution of the United Nations Industrial Development Organization, United Nations, *Treaty Series*, vol. 1401, No. 23432, p. 3. See also Abdulqawi A. Yusuf, "The role of the legal adviser in the reform and restructuring of an international organization: the case of UNIDO", in United Nations (ed.), *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (United Nations, 1999), pp. 329–350; Schmalenbach, "International organizations …" (footnote 102 above), p. 1128.

[153] General Assembly resolution 2152 (XXI) (1966).

[154] General Assembly resolution 34/96 of 13 December 1979.

[155] General Assembly resolution 40/180 of 17 December 1985; United Nations, *Treaty Series*, vol. 1412, No. 937, p. 305.

[156] See the arrangements for consultation with non-governmental organizations, Economic and Social Council resolution 1996/31, para. 12 ("Any such organization that is not established by a governmental entity or intergovernmental agreement shall be considered a non-governmental organization for the purpose of these arrangements"); draft conclusions on identification of customary international law, with commentaries, *Yearbook of the International Law Commission, 2018*, vol. II (Part Two), para. 66, footnote 665 ("The term 'international organizations' refers, in

basis of domestic law and usually take various forms available to non-profit entities, such as associations, foundations, charities and the like.[157] Even in the rare instances where an NGO is transformed into an international organization, the international organization is so created by an international agreement. For instance, the International Union of Official Travel Organizations (IUOTO) was originally a non-governmental organization under Swiss law that was subsequently transformed into the World Tourism Organization.[158] Today, the World Tourism Organization (UNWTO) is a specialized agency of the United Nations.[159] It was created by States "whose official tourism organisations are Full Members of IUOTO at the time of adoption of these Statutes" through ratifying a treaty.[160]

40. Similarly, the creation of international organizations on the basis of an instrument governed by international law is crucial for distinguishing them from "internationally" operating business entities, such as transnational corporations and multinational enterprises.[161] Such business entities are usually established on the basis of national corporate law and may operate internationally or transnationally through parent/subsidiary or other forms of corporate affiliation and follow a profit-making purpose.[162]

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these draft conclusions, to organizations that are established by instruments governed by international law (usually treaties), and possess their own international legal personality. The term does not include non-governmental organizations"). See also Dan Sarooshi, "Legal capacity and powers", in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds.), *The Oxford Handbook of International Organizations* (Oxford, Oxford University Press, 2016), p. 986.

[157] A useful definition of NGOs is found in article 1 of the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations (Strasbourg, 24 April 1986, entered into force 1 January 1991), European Treaty Series, No. 124 (NGOs are "associations, foundations and other private institutions which …: (a) have a non-profit-making aim of international utility; (b) have been established by an instrument governed by the internal law of a Party; (c) carry on their activities with effect in at least two States; and (d) have their statutory office in the territory of a Party and the central management and control in the territory of that Party or of another Party"). See also Bas Arts, Math Noortmann and Bob Reinalda (eds.), *Non-State Actors in International Relations* (Aldershot, Ashgate, 2001); Math Noortmann, August Reinisch and Cedric Ryngaert (eds.), *Non-State Actors in International Law* (Oxford, Bloomsbury, 2015); Stephan Hobe, "Non-governmental organizations", in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* vol. VII (Oxford, Oxford University Press, 2012), p. 716; Waldemar Hummer, "Internationale nichtstaatliche Organisationen im Zeitalter der Globalisierung – Abgrenzung, Handlungsbefugnisse, Rechtsnatur", in Klaus Dicke and others (eds.), *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System – Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen* (Heidelberg, C.F. Müller, 2000), pp. 45–230.

[158] Statutes of the World Tourism Organization (see footnote 139 above).

[159] General Assembly resolution 58/232 of 23 December 2003.

[160] Art. 36, Statutes of the World Tourism Organization (see footnote 139 above).

[161] In United Nations terminology, the notion "transnational corporations" prevailed (see Commission on Transnational Corporations, established by the Economic and Social Council, pursuant to its resolution 1913 (LVII) (*Yearbook of the United Nations 1974* (United Nations publication, Sales No. E.76.I.1), vol. 28, part 1, p. 485), whereas the Organisation for Economic Co-operation and Development (OECD) uses the expression "multinational enterprises" (see OECD, *Guidelines for Multinational Enterprises* (2011 ed.)). See also Peter T. Muchlinski, *Multinational Enterprises and the Law*, 3rd ed. (Oxford, Oxford University Press, 2021), pp. 3 et seq.

[162] The Code of Conduct on Transnational Corporations refers to transnational corporations as enterprises "comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operate under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others" (E/1988/39/Add.1, para. 1) and the OECD *Guidelines for Multinational Enterprises* indicate that "multinational enterprises … operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in

41. States are also free to establish business entities under national law and have exceptionally done so by setting up entities sometimes referred to as "joint undertakings" or "enterprises", "établissements publics internationaux", "gemeinsame zwischenstaatliche Unternehmen" and the like.[163] Where they are created on the basis of a domestic corporate law and not by an instrument governed by international law, they are not international organizations. However, there are a few examples of entities created by States on the basis of domestic corporate law which, because of their public functions and an additional legal basis in an instrument governed by international law, are considered to be international organizations,[164] although often their precise categorization may be unclear.[165] A classic example is the Bank for International Settlements, which has been incorporated as a company under Swiss law, but because of its fulfilment of public purposes and the endorsement of its creation by a treaty, [166] has been considered an international organization.[167]

42. The "privatization" of some organizations also illustrates the distinction. Both the International Telecommunications Satellite Organization (INTELSAT) [168] and the

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various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed" (sect. I. Concepts and Principles, para. 4).

[163] H.T. Adam, *Les établissements publics internationaux* (Paris, Pichon et Durand-Auzias, 1957); Geneviève Burdeau, "Les organisations internationales, entre gestion publique et gestion privée", in Jerzy Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (The Hague, Kluwer, 1996), pp. 611–624; Éric David, *Droit des Organisations Internationales* (Bruxelles, Bruylant, 2016), pp. 67–69; Shotaro Hamamoto, "Joint undertakings", in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* vol. VI (Oxford, Oxford University Press, 2012), pp. 483-488; Ignaz Seidl-Hohenveldern, "Gemeinsame zwischenstaatliche Unternehmen", in Friedrich-Wilhelm Baer-Kaupert, Georg Leistner and Henning Schwaiger (eds.), *Liber Amicorum B.C.H. Aubin* (Kehl am Rhein, Engel, 1979), pp. 193–216. See also Institute of International Law, resolution on "The law applicable to joint international State or quasi-State enterprises of an economic nature", adopted on 28 August 1985, in *Annuaire de l'Institut de Droit International*, vol. 61 (II), Session of Helsinki (1985), p. 269.

[164] See, *e.g.*, art. 1, Convention on the establishment of "Eurofima", European Company for the financing of railway equipment (Berne, 20 October 1955, entered into force 22 July 1959), United Nations, *Treaty Series*, vol. 378, No. 5425, p. 159 ("Les Gouvernements parties à la présente Convention approuvent la constitution de la Société qui sera régie par les Statuts annexés à la présente Convention … et, à titre subsidiaire par le droit de l'État du siège, dans la mesure où il n'y est pas dérogé par la présente Convention"/"The Governments Parties to this Convention approve the establishment of the Company which shall be governed by the Statute anneded to this Convention … and, secondarily, by the laws of the State in which its Headquarters are situated, in so far as this Convention does not derogate therefrom"). See also Convention between France and Switzerland concerning the construction and operation of the Basel-Mulhouse Airport at Blotzheim (Berne, 4 July 1949, entered into force 25 November 1950), United Nations, *Treaty Series*, vol. 1323, No. 22048, p. 81.

[165] Hamamoto, "Joint undertakings", in Wolfrum (ed.), *The Max Planck Encyclopedia …* (see footnote 163 above), p. 483, para. 3.

[166] Convention respecting the Bank for International Settlements, with Annex (The Hague, 20 January 1930, entered into force 27 February 1930), League of Nations, *Treaty Series*, vol. CIV, No. 2398, p. 441.

[167] Permanent Court of Arbitration, *Reineccius and others v. Bank for International Settlements* (Partial Award on the lawfulness of the recall of the privately held shares on 8 January 2001 and the applicable standards for valuation of those shares), Decision of 22 November 2002, United Nations, *Reports of International Arbitral Awards*, vol. XXIII, pp. 183–251 at p. 212 et seq. See also Marc Jacob, "Bank for International Settlements (BIS)", in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* vol. I (Oxford, Oxford University Press, 2012), p. 821 at p. 825, paras. 19–20.

[168] Agreement relating to the International Telecommunications Satellite Organization "INTELSAT" (Washington, 20 August 1971, entered into force 12 February 1973), United Nations, *Treaty Series*, vol. 1220, No. 19677, p. 21.

International Maritime Satellite Organization (INMARSAT) [169] were treaty-based international organizations tasked with providing satellite connections for telecommunications. In 2001, these tasks were transferred to private companies under the laws of Bermuda, the United Kingdom of Great Britain and Northern Ireland and the United States of America and the original organizations, now referred to as the International Telecommunications Satellite Organization (ITSO) and the International Mobile Satellite Organization (IMSO),[170] merely exercise supervisory functions.[171]

iii. Establishment of organs capable of expressing the organization's will

43. It is generally accepted that an international organization must have at least one organ that is capable of expressing the organization's will ("will of its own" or "*volonté distincte*"),[172] and to perform the tasks or functions entrusted to the organization. The concept of its own will is closely related to the idea that an international organization has a legal personality separate from its members,[173] or, as the International Court of Justice put it, "a certain autonomy", and that through such organs international organizations can pursue "common goals" or "interests".[174]

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[169] Convention on the International Maritime Satellite Organization (INMARSAT) (London, 3 September 1976, entered into force 16 July 1979), United Nations, *Treaty Series*, vol. 1143, No. 17948, p. 105.

[170] Agreement relating to the International Telecommunications Satellite Organization "ITSO" (as amended, entry into force 30 November 2004), available at https://itso.int/wp-content/uploads/2018/01/ITSO-Agreement-Booklet-new-version-FINAL-EnFrEs.pdf; Amendments to the Convention and Operating Agreement on the International Mobile Satellite Organization (London, 24 April 1998, entered into force 31 July 2001), United Kingdom, Treaty Series No. 49 (2001). IMSO entered into a Public Services Agreement with INMARSAT One Ltd. and INMARSAT Two Company (signed 15 April 1999), in *Annals of Air and Space Law*, vol. 24 (1999), p. 493.

[171] See Patricia K. McCormick and Maury J. Mechanick (eds.), *The Transformation of Intergovernmental Satellite Organisations: Policy and Legal Perspectives* (Leiden, Brill Nijhoff, 2013).

[172] Arbuet-Vignali, "Las organizaciones internacionales …" (see footnote 108 above), p. 151; David, *Droit des Organisations Internationales* (see footnote 163 above), p. 582; Rosalyn Higgins and others, *Oppenheim's International Law: United Nations* (Oxford University Press, Oxford, 2017), p. 385; Klabbers, *An Introduction to International Organizations Law* (see footnote 108 above), p. 12; Pastor Ridruejo, *Curso de derecho internacional público …* (see footnote 108 above), p. 664; Rezek, *Direito internacional público* (see footnote 108 above), pp. 301–302; Ruffert and Walter, *Institutionalisiertes Völkerrecht …* (see footnote 102 above), p. 4; Schermers and Blokker, *International Institutional Law …* (see footnote 102 above), pp. 48 and 1031; Schmalenbach, "International organizations …" (see footnote 102 above), p. 1128; Pierre-Yves Marro, *Rechtsstellung internationaler Organisationen* (Zürich, Dike, 2021), p. 29; Seidl-Hohenveldern and Loibl, *Das Recht der Internationalen Organisationen …* (see footnote 108 above) p. 7; Diez de Velasco Vallejo, *Las Organizaciones Internacionales* (see footnote 108 above), pp. 46–47.

[173] See articles on the responsibility of international organizations, with commentaries (footnote 67 above), para. (10) of the commentary to article 2 (referring to "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'"). See also the scope of the Institute of International Law resolution on "The legal consequences for member States of the non-fulfilment by international organizations of their obligations toward third parties", adopted on 1 September 1995, art. 1, in *Annuaire de l'Institut de Droit International*, vol. 66 (II), Session of Lisbon (1995), p. 445 ("This Resolution deals with issues arising in the case of an international organization possessing an international legal personality distinct from that of its members").

[174] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, *I.C.J. Reports 1996*, p. 66 at p. 75, para. 19 (characterizing the object of constituent instruments of international organizations as "to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals"); see also p. 78, para. 25 ("[i]nternational organizations are governed by the 'principle of speciality', that is to say, they

44. While the goals or purposes of an international organization are usually "public" or "(quasi)-governmental" ones,[175] these goals or purposes are sometimes pursued by "commercial" or "*jure gestionis*" activities of an international organization. This is particularly evident in the case of international financial institutions, which regularly borrow and lend money.[176] Another example is commodity agreements, which concern engaging in the buying and selling of certain primary commodities.[177] Such "commercial" or "*jure gestionis*" activities do not deprive such organizations of their character as international organizations,[178] in particular since they will often still be regarded as acting in the "public" interest.[179] This remains more controversial in regard to organizations that pursue commercial purposes.[180]

45. International organizations regularly possess numerous organs, such as plenary organs, in which all members are represented, executive ones with more restrictive composition, secretariats and often also expert or judicial organs with individuals serving in their personal

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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").

[175] Anne Peters and Simone Peter, "International organizations: between technocracy and democracy", in Bardo Fassbender and Anne Peters (eds.), *Oxford Handbook of the History of International Law* (Oxford, Oxford University Press, 2012), p. 186 et seq.

[176] Amerasinghe, *Principles of the Institutional Law of International Organizations* (see footnote 108 above), p. 426 ("financial organizations or those that engage in some form of banking or commercial transactions in the discharge of their main functions").

[177] Issam Azzam, "The organization of petroleum exporting countries (OPEC)", *American Journal of International Law*, vol. 57, No. 1 (January 1963), pp. 112–114; B.S. Chimni, *International Commodity Agreements: A Legal Study* (London, Croom Helm, 1987); J.E.S. Fawcett, "The function of law in international commodity agreements", *The British Yearbook of International Law*, vol. 44 (1970), pp. 157–176.

[178] One should note, however, that some authors appear to argue that the activities of an international organization also need to be of a governmental sovereign or non-commercial nature. See, *e.g.*, Ignaz Seidl-Hohenveldern, *Corporations in and under International Law* (Cambridge, Grotius Publications, 1987), p. 72 ("An international organization will be a subject of international law if it has been established by a meeting of the wills of its member States for activities which, if pursued by a single State, would be *jure imperii* activities"); see, however, Reinisch, *International Organizations Before National Courts* (footnote 108 above), p. 7 et seq.

[179] See, in particular, the International Tin Council litigation mostly before courts in the United Kingdom where the stabilization of world market prices was viewed as a *jure imperii* goal pursued through *jure gestionis* activities of buying and selling. See Ignaz Seidl-Hohenveldern, "Piercing the corporate veil of international organizations: the International Tin Council case in the English Court of Appeals", *German Yearbook of International Law*, vol. 32 (1989), pp. 47–48 ("Judge Nourse rightly considers the ITC to be an international organization, properly so called. The aims of the ITC belong to the sphere of State activities *jure imperii*. … Judge *Nourse*, however, is also right when he says that the principal activity of the ITC, that of buying and selling tin in large quantities is one which, if viewed in isolation, ought to be regarded as *jure gestionis*").

[180] See, *e.g.*, Golia Jr and Peters, "The concept of international organization" (footnote 108 above), p. 45 (suggesting that "interstate actors based on international treaties but with a mainly commercial objective are not international organizations but rather transnational corporations").

capacities.[181] That a minimum of one organ is required to distinguish an organization from a mere treaty-based form of cooperation seems inherent in the notion of "organization".[182]

46. The "distinct will" requirement is crucial for distinguishing organizations with at least one organ from mere forms of collective cooperation of States.[183] Moreover, it also distinguishes international organizations from so-called treaty bodies or organs,[184] such as human rights treaty bodies[185] or environmental treaty bodies.[186] Such bodies are regularly established by treaties that equip them with the capacity to form some kind of "will" when they exercise their independent functions. However, when such treaty bodies perform their judicial or quasi-judicial tasks or make assessments, their expression of a "will" can be viewed in two differing ways: either it represents the treaty bodies' own will, which is not attributable to an international organization as a separate legal entity,[187] or it represents not the treaty bodies' own will, but the collective will of the treaty parties.[188] It must be acknowledged, though, that the distinction between international organizations and treaty bodies is often difficult to draw in practice. Frequently, the differentiation may be a question of degree rather than a clear line.[189]

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[181] See the detailed overview in Schermers and Blokker, *International Institutional Law …* (footnote 102 above), pp. 301 et seq.; see also Celso D. de Albuquerque Mello, *Curso de Direito Internacional Público* vol. I, 12th ed., (Rio de Janeiro, Renovar, 2000), pp. 577–579; Alvarez, *International Organizations as Law-makers* (footnote 78 above), p. 9; Combacau and Sur, *Droit international public* (footnote 108 above), pp. 782 et seq.; Daillier and others, *Droit international public* (footnote 107 above), pp. 863 et seq.; Pastor Ridruejo, *Curso de derecho internacional público …* (footnote 108 above), pp. 676–679; Rezek, *Direito internacional público* (footnote 108 above), pp. 302–303; Diez de Velasco Vallejo, *Las Organizaciones Internacionales* (footnote 108 above), pp. 101–109.

[182] See Accioly do Nascimento e Silva and Borba Casella, *Manual de Direito Internacional Público* (footnote 108 above), p. 428; Antônio Augusto Cançado Trindade, *Princípios do Direito Internacional Contemporâneo*, 2nd ed. (Brasília, Fundação Alexandre de Gusmão, 2017) p. 336; Combacau and Sur, *Droit international public* (footnote 108 above), p. 756; Daillier and others, *Droit international public* (footnote 107 above), p. 861; David, *Droit des Organisations Internationales* (footnote 163 above), pp. 22–23; Martínez Valinotti, *Derecho Internacional Público* (footnote 108 above), p. 229; Diez de Velasco Vallejo, *Las Organizaciones Internacionales* (footnote 108 above), p. 43.

[183] Manual Rama-Montaldo, "International legal personality and implied powers of international organizations", *The British Yearbook of International Law*, vol. 44 (1970), p. 145.

[184] Conclusion 13 (1), draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (see footnote 92 above), p. 25 ("For the purposes of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization").

[185] See Geir Ulfstein, "Reflections on institutional design – especially treaty bodies", in Klabbers and Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (footnote 109 above), pp. 431–447.

[186] There exist various environmental treaty meetings or conferences of the parties aimed at managing the respective treaties that establish them. See Robin R. Churchill and Geir Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law", *American Journal of International Law*, vol. 94, No. 4 (October 2000), pp. 623–659; Geir Ulfstein, "Treaty bodies", in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press, 2007), pp. 877–889; Volker Röben, "Environmental treaty bodies", *The Max Planck Encyclopedia of Public International Law*, available at www.mpepil.com/; Alan Boyle, "Environmental dispute settlement", in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* vol. III (Oxford, Oxford University Press, 2012), pp. 567–568.

[187] Schmalenbach, "International organizations …" (see footnote 102 above), p. 1128, para. 7.

[188] Röben, "Environmental treaty bodies" (see footnote 186 above), para. 2.

[189] The broad powers conferred on the Administrative Commission of the River Uruguay (CARU) may have been the reason why the International Court of Justice qualified it as an international organization without discussion, and not a mere treaty body. See *Pulp Mills* (footnote 109

47. The ability of organs to express a separate will of an organization is related to the underlying theoretical conceptualization of an international organization as a separate entity or as a mere forum for the collective pursuit of common goals by its members.[190] To the extent that an international organization is considered to be "established" by its members through an instrument governed by international law, but then acting in its own capacity, such an organization is considered to have a will of its own and, as a consequence, is usually also regarded as an entity separate from its members that normally possesses (international) legal personality. When an international organization is thought to be merely a forum in which its members convene to pursue their collective interests, the notion of its capability to form a separate will vanishes, and with it the idea that it is a separate entity that possesses legal personality.[191] In fact, there are a number of international organizations in which the "forum for members" quality is particularly conspicuous; in these instances, their status as international organizations with independent legal personality is uncertain.[192]

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above), para. 93 ("Consequently, the Court considers that, because of the scale and diversity of the functions they have assigned to CARU, the Parties intended to make that international organization a central component in the fulfilment of their obligations to co-operate as laid down by the 1975 Statute"). See also Gloria Fernández Arribas, "Rethinking institutionalization through treaty bodies", *International Organizations Law Review*, vol. 17 (2020), pp. 457–483; Golia Jr and Peters, "The concept of international organization" (footnote 108 above), p. 44 ("Depending on the degree of autonomy from the treaty parties, some of these bodies should be qualified as international organizations, others not").

[190] See Combacau and Sur, *Droit international public* (footnote 108 above), pp.758–759; Daillier and others, *Droit international public* (footnote 107 above), p. 861; David, *Droit des Organisations Internationales* (footnote 163 above), p. 582; Jan Klabbers, "Two concepts of international organization", *International Organizations Law Review*, vol. 2 (2005), pp. 277–293; Pastor Ridruejo, *Curso de derecho internacional público …* (footnote 108 above), p. 676; Diez de Velasco Vallejo, *Las Organizaciones Internacionales* (footnote 108 above), p. 101.

[191] The problem is further exacerbated by the fact that, depending on the perspective of the observer, the "separate entity" – or the "forum for members" – quality may not only be more easily perceivable, but also more apparently true. Our colleagues from the natural sciences may have become more willing to accept such indeterminacy, *e.g.* in the form of the wave-particle duality of light which has dominated twentieth century physics up to modern quantum physics, than lawyers striving for certainty. See presentation speech by Professor C.W. Oseen, Chairman of the Nobel Committee for Physics of the Royal Swedish Academy of Sciences, 10 December 1929, awarded to Louis de Broglie, available at https://www.nobelprize.org/prizes/physics/1929/ceremony-speech/ ("It thus seems that light is at once a wave motion and a stream of corpuscles. Some of its properties are explained by the former supposition, others by the second. Both must be true"). See also Gösta Ekspong, "The dual nature of light as reflected in the Nobel archives", available at https://www.nobelprize.org/prizes/themes/the-dual-nature-of-light-as-reflected-in-the-nobel-archives.

[192] See, for instance, the debate about the legal personality of the Organization for Security and Cooperation in Europe (OSCE) in Steinbrück Platise, Moser and Peters (eds.), *The Legal Framework of the OSCE* (footnote 106 above). Although the original Conference on Security and Co-operation in Europe (CSCE) now possesses organs and has been renamed "Organization", there is disagreement among its participants/members whether this forum for political cooperation has gained organization quality and legal personality. The conclusion of a headquarters agreement seems to indicate that it has. See Helmut Tichy and Catherine Quidenus, "Consolidating the international legal personality of the OSCE", *International Organizations Law Review*, vol. 14, No. 2 (2017), pp. 403–413. The General Agreement on Tariffs and Trade (GATT) (Geneva, 30 October 1947, provisionally applied since 1 January 1948), United Nations, *Treaty Series*, vol. 55, No. 814, p. 187, was originally merely considered to be a forum for its "contracting parties" to conduct trade negotiations and only gradually evolved into an international organization. See Wolfgang Benedek, *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht* (Berlin, Springer, 1990), pp. 248–280; Kenneth W. Dam, "The GATT as an international organization", *Journal of World Trade Law*, vol. 3, No. 4 (July–August 1969), pp. 374–389. This may be contrasted with the unquestioned legal personality of WTO pursuant to art. VIII, para. 1 ("Status of the WTO") of the Agreement establishing WTO (see footnote 123 above) ("The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions"), although it is also

iv. The role of international legal personality

48. In addition to the three above-mentioned defining elements, and in particular related to the last one – having at least one organ capable of expressing an organization's separate will – international legal personality[193] is sometimes also regarded as a potential defining characteristic of an international organization.[194]

49. While it is generally accepted that, for the purposes of entering into treaties, incurring international responsibility or raising international claims, the possession of a separate international legal personality is required, it is less clear how such personality is acquired by international organizations. There exists a long-standing scholarly debate about the source of such personality.[195] According to the "will theory",[196] international organizations derive their international legal personality from the express or implied will of the entities creating

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specifically considered to be first and foremost a forum for its members, as established in art. III, para. 2 ("Functions of the WTO") of the Agreement ("The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference"). Similarly, art. 3 of the Charter of the Association of Southeast Asian Nations (see footnote 100 above) expressly stipulates the Association's character as an international organization possessing legal personality ("ASEAN, as an inter-governmental organisation, is hereby conferred legal personality"), although it maintains the forum-like character of intergovernmental decision-making in the basis of consensus, in art. 20 ("As a basic principle, decision-making in ASEAN shall be based on consultation and consensus").

[193] See Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (The Hague, T.M.C. Asser Press, 2004); Catherine Brölmann, *The Institutional Veil in Public International Law: International Organizations and the Law of Treaties* (Oxford, Hart Publishing, 2007). For a thorough historical account of the development of the notion of international (and domestic) legal personality of international organizations, see David J. Bederman, "The souls of international organizations: legal personality and the lighthouse at Cape Spartel", *Virginia Journal of International Law*, vol. 36, No. 2 (Winter 1996), pp. 275–377.

[194] See, in particular, the Commission's definition in the context of article 2 (a) of the articles on the responsibility of international organizations, with commentaries (footnote 67 above). See also Claude-Albert Colliard and Louis Dubois, *Institutions internationales* (Paris, Dalloz, 1995) p. 169; Daillier and others, *Droit international public* (footnote 107 above), p. 828 ("Toute organisation international est dotée, dès sa naissance, de la personnalité juridique internationale. C'est un élément de sa definition"); David, *Droit des Organisations Internationales* (footnote 163 above), pp. 550–551; Sands and Klein, *Bowett's Law of International Institutions* (footnote 102 above), p. 473 ("Legal personality is now generally considered to be the most important constitutive element of international organisations"). But see James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford, Oxford University Press, 2019), p. 157 ("It is possible for an international organization to have no such personality but still – by virtue of its treaty-based, interstate character and activity – be considered an international organization. Nonetheless, most international organizations will possess separate personality").

[195] Alvarez, *International Organizations as Law-makers* (see footnote 78 above), p. 129 et seq.; Arbuet-Vignali, "Las organizaciones internacionales …" (see footnote 108 above), pp. 154–156; Daillier and others, *Droit international public* (see footnote 107 above), pp. 828–829; David, *Droit des Organisations Internationales* (see footnote 163 above), pp. 554–562; Hugo Llanos-Mansilla, "Las organizaciones internationales como sujetos del derecho internacional", *Anuario Hispano-Luso-Americano de Derecho Internacional*, vol. 8 (1987), p. 97; Chris Osakwe, "Contemporary Soviet doctrine on the juridical nature of universal international organizations", *American Journal of International Law*, vol. 65, No. 3 (July 1971), pp. 502–521; Rama-Montaldo, "International legal personality …" (see footnote 183 above), pp. 111–155; Diez de Velasco Vallejo, *Las Organizaciones Internacionales* (see footnote 108 above), pp. 63–68.

[196] Sands and Klein, *Bowett's Law of International Institutions* (see footnote 102 above), p. 479; Ruffert and Walter, *Institutionalisiertes Völkerrecht …* (see footnote 102 above), p. 58. See also Grigory I. Tunkin, "The Legal Nature of the United Nations", *Receuil des Cours*, vol. 119 (1966-III), pp. 1–68.

them. Pursuant to the "objective personality theory", their international legal personality stems from their mere existence.[197] In practice, the will to endow an organization with international legal personality was rarely made explicit before the 1990s,[198] but had to be deduced from the conferment of powers. A third, compromise approach[199] asserts that the international legal personality of an international organization can be presumed, when it performs acts that require such separate personality.

50. The International Court of Justice confirmed the international legal personality of the United Nations in its advisory opinion in the *Reparation* case.[200] The Court's wide interpretation of the implied powers doctrine may help to bridge the divide between the "will" and the "objective personality" approaches.[201] In that case, the Court derived the international legal personality of the United Nations from the Charter-based rights of the Organization, which require its members to assist it, to accept and carry out Security Council decisions, as well as from its privileges and immunities, and its powers to conclude international agreements, observing that this was confirmed in practice. The Court stated that

> "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".[202]

Since most international organizations will perform at least some of these acts, having been either explicitly or implicitly empowered to do so, it seems safe to conclude that most international organizations enjoy international legal personality as a result. In fact, without

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[197] Originally developed in a series of contributions by Finn Seyersted. See Finn Seyersted, "International personality of intergovernmental organizations: do their capacities really depend upon their constitutions?", *Indian Journal of International Law*, vol. 4 (1964), pp. 1–74; "Is the international personality of intergovernmental organizations valid vis-à-vis non-members?", *ibid*., pp. 233–268; "Objective international personality of intergovernmental organizations: do their capacities really depend upon the conventions establishing them?", *Nordisk Tidsskrift for International Ret*, vol. 34 (1964), pp. 1–112. See also Pierre d'Argent, "La personnalité juridique international de l'organisation internationale", in Evelyne Lagrange and Jean-Marc Sorel (eds.), *Droit des organisations internationales* (Paris, LGDJ, 2013), p. 452; Akande, "International organizations" (footnote 108 above), pp. 233–234; Crawford, *Brownlie's Principles of Public International Law* (footnote 194 above), p. 159 ("The alternative and better view is that international organizations are capable of attaining 'objective' legal personality independent of recognition by performing certain functions on the international plane").

[198] See art. 4, para. 1, Rome Statute of the International Criminal Court (Rome, 17 July 1998, entered into force 1 July 2002), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3 ("The Court shall have international legal personality"); art. I, para. 2, Agreement for the establishment of the International Anti-Corruption Academy as an international organization (Vienna, 2 September 2010, entered into force 8 March 2011), United Nations, *Treaty Series*, vol. 2751, No. 48545, p. 81 ("The Academy shall possess full international legal personality").

[199] Jan Klabbers, "Presumptive personality: the European Union in international law", in Martti Koskenniemi (ed.), *International Law Aspects of the European Union* (The Hague, Kluwer Law International, 1998), p. 231; Klabbers, *An Introduction to International Organizations Law* (see footnote 108 above), p. 49; Golia Jr and Peters, "The concept of international organization" (see footnote 108 above), p. 37. See also David Nauta, *The International Responsibility of NATO and its Personnel during Military Operations* (Leiden, Brill Nijhoff, 2018), pp. 88–99 (on whether the North Atlantic Treaty Organization (NATO) has legal personality pursuant to the "presumptive personality" theory).

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

[201] Reinisch, *International Organizations Before National Courts* (see footnote 108 above), p. 59.

[202] *Reparation for injuries suffered in the service of the United Nations* (see footnote 200 above), p. 179.

possessing personality, an international organization could not carry out some functions.[203] Therefore, it is meanwhile generally accepted that, as a rule, international organizations possess international legal personality.[204]

51. In the *Reparation* case, the Court, which was asked whether the United Nations had the power to bring an international claim against a non-member State, also found that it had "objective international personality"[205] implying that the UN's personality had effect not only for its members, but also for third States. While it was argued that such "objective international personality" appertained only to the United Nations, allowing non-member States to refuse to recognize other international organizations,[206] recent practice seems to indicate that other international organizations are also generally considered to possess such personality.[207] Nevertheless, formal or implied recognition, *e.g.* through the conclusion of treaties, may serve as supporting evidence of the international legal personality of international organizations.[208]

52. It is submitted that the conferment of powers to international organizations and the ability to possess rights and duties under international law that are typical for the creation of international organizations under the three above-mentioned elements indicate that such

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[203] See also the more recent opinion of the International Court of Justice in the International Fund for Agricultural Development (IFAD) case, *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion, *I.C.J. Reports 2012*, p. 10 at p. 36, para. 61, in which it found that "the Global Mechanism [of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa] had no power and has not purported to exercise any power to enter into contracts, agreements or 'arrangements', internationally or nationally". This led the Court to conclude that in the absence of a separate legal personality, the Global Mechanism had to "identify an organization to house it and to make appropriate arrangements with such an organization for its administrative operations", which included acting on behalf of IFAD for employing staff members.

[204] Schermers and Blokker, *International Institutional Law …* (see footnote 102 above), pp. 1031 et seq.; Crawford, *Brownlie's Principles of Public International Law* (see footnote 194 above), p. 157; Paola Gaeta, Jorge E. Viñuales and Salvatore Zappalà, *Cassese's International Law*, 3rd ed. (Oxford, Oxford University Press, 2020), pp. 143–145; Golia Jr and Peters, "The concept of international organization" (see footnote 108 above), p. 37; see also Tarcisio Gazzini, "Personality of international organizations", in Klabbers and Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (footnote 109 above), p. 33. There remains controversy over the international legal personality of organizations such as OSCE (see footnote 192 above) and the European Union, in particular, prior to the signing in 2009 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (*Official Journal of the European Union*, No. C 306 (17 December 2007), p. 1).

[205] *Reparation for injuries suffered in the service of the United Nations* (see footnote 200 above), p. 185 ("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").

[206] See, *e.g.*, the Soviet Union's policy of non-recognition of the European Economic Community (EEC). Sands and Klein, *Bowett's Law of International Institutions* (footnote 102 above), p. 480; Schermers and Blokker, *International Institutional Law …* (footnote 102 above), pp. 1238 et seq.

[207] Crawford, *Brownlie's Principles of Public International Law* (see footnote 194 above), p. 160 ("Although the Court conditioned its opinion on the quantity and standing of the founding Members of the UN, there are good reasons for applying this proposition to *all* international organizations, and in practice this has occurred"); more limited, Schermers and Blokker, *International Institutional Law …* (see footnote 102 above), p. 1031 ("other international organizations of a universal character could claim international personality vis-à-vis non-member states on the grounds cited by the International Court; closed international organizations could not").

[208] The practice at the United Nations of granting observer status to international organizations can be regarded as a recognition of the status of an entity as an international organization. See Serpa Soares, "Responsibility of international organizations" (footnote 138 above), p. 100.

organizations should be regarded as possessing international legal personality. This would support the view that the possession of international legal personality is the consequence of an entity being created as an international organization and not itself a prerequisite or a defining element of an international organization.[209]

2. The International Law Commission definitions of an international organization

53. The International Law Commission developed a definition of "international organizations", which has tended to become increasingly elaborate over time, most prominently in the course of its work on the responsibility of international organizations between 2001 and 2011.[210] It was only at an advanced stage of the work of the Commission that a relatively detailed definition was agreed upon, although the Commission had encountered international organizations in various topics it had dealt with before. In fact, already in 1950, in the context of the Commission's work on treaties, suggestions for the definition of international organizations were made.[211] It appears, however, that arriving at a commonly accepted definition proved difficult and was considered unnecessary for most topics. Thus, the Commission initially merely defined "international organizations" as "intergovernmental organizations". Such identical definitions can be found in the Vienna Convention on the Law of Treaties,[212] the Vienna Convention on the Law of Treaties

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[209] Amerasinghe, *Principles of the Institutional Law of International Organizations* (see footnote 108 above), pp. 10–11; Reinisch, *International Organizations Before National Courts* (see footnote 108 above), p. 6; see also Golia Jr and Peters, "The concept of international organization" (footnote 108 above), p. 29 ("international legal personality should in the end not be seen as a *conditio sine qua non* for the existence of an international organization").

[210] See footnote 222 below. See also Niels M. Blokker, "Preparing articles on responsibility of international organizations: does the International Law Commission take international organizations seriously? A mid-term review", in Klabbers and Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (footnote 109 above), pp. 313–341; Stephan Bouwhuis, "The International Law Commission's definition of international organizations", *International Organizations Law Review*, vol. 9, No. 2 (2012), pp. 451–465; Maurice Mendelson, "The definition of 'international organization' in the International Law Commission's current project on the responsibility of international organizations", in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden, Brill Nijhoff, 2005), pp. 371–389.

[211] The first Special Rapporteur on the topic "Law of treaties", James L. Brierly, proposed the following definition in his draft Convention of the Law of Treaties: art 2 (b): "An 'international organization' is an association of States with common organs which is established by treaty", *Yearbook of the International Law Commission, 1950*, vol. II (document A/CN.4/23), p. 223. In his commentary to that draft article, he acknowledged that "[t]he term 'international organization' is an ambiguous one" (para. 39). He explained that "[t]he requirement which the clause imposes that an international organization shall be established by treaty is derived from Article 57 of the Charter of the United Nations. The further requirement that an international organization shall have common organs rests upon no such authority but is derived from the inherent nature of treaties as joint expressions of the several wills of the parties, and from the circumstance that an entity without sovereign organs can have no will" (para. 40). The summary records of the discussion concerning the topic of "Law of treaties: Report by Mr. Brierly" reveal that suggestions were made by Manley O. Hudson ("An international organization is a body established by a number of States, having permanent organs with capacity to act within the field of its competence on behalf of those States"), *Yearbook of the International Law Commission, 1950*, vol. I, p. 84, para. 23, and Ricardo J. Alfaro ("An international organization is an association of States which exercises political or administrative functions concerning vital common interests of the associated States and which is constituted and recognized as an international person"), *ibid.*, p. 85, para. 26. In his report, Special Rapporteur G.G. Fitzmaurice suggested the following definition (art. 3 (b)): "The term 'international organization' means a collectivity [sic] of States established by treaty, with a constitution and common organs, having a personality distinct from that of its member-States, and being a subject of international law with treaty-making capacity"), *Yearbook of the International Law Commission, 1956*, vol. II, p. 108.

[212] Article 2, para. 1 (i), Vienna Convention on the Law of Treaties (see footnote 55 above) ("'international organization'" means an intergovernmental organization").

between States and International Organizations or between International Organizations,[213] the Vienna Convention on the Representation of States in their Relations with International Organizations,[214] and the Vienna Convention on Succession of States in respect of Treaties.[215] In its work on treaty law, this definition served the purpose of excluding non-governmental organizations from its scope. However, merely identifying "international organizations" as "intergovernmental organizations", without further defining them, was critically discussed within the Commission.[216] The Commission continued avoiding the controversial issue during its discussion of the second part of the topic "Relations between States and international organizations",[217] although the Special Rapporteur's report referred to more traditional definitions of international organizations.[218]

54. During the work on the responsibility of international organizations, the Commission started elaborating a more precise definition.[219] The past mere reference to their "intergovernmental" nature was criticized as too narrow because several organizations consist of members other than States, in particular other international organizations.[220] The resulting 2011 articles on the responsibility of international organizations, stressing that the definition was considered "appropriate for the purposes of the present draft articles and is not intended as a definition for all purposes",[221] define an "international organization" as

[213] Art. 2, para. 1 (i), Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (see footnote 58 above), ("'international organization' means an intergovernmental organization").

[214] Art. 1, para. 1, Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (see footnote 61 above), ("'international organization' means an intergovernmental organization").

[215] Art. 2, para. 1 (n), Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978, entered into force 6 November 1996), United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3 ("'international organization' means an intergovernmental organization").

[216] *Yearbook of the International Law Commission, 1982*, vol. II (Part Two), p. 21, para. (23) ("the Commission has wondered whether the concept of international organization should not be defined by something other than the 'intergovernmental' nature of the organization").

[217] Leonardo Díaz-González, in *Yearbook of the International Law Commission, 1985*, vol. I, p. 284, para. 11 ("in order to avoid starting interminable discussions on theoretical and doctrinal questions, on which there were conflicting opinions in the Commission and the General Assembly, as was only natural").

[218] Second report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz-González, Special Rapporteur, document A/CH.4/391 and Add.1, *Yearbook of the International Law Commission, 1985*, vol. II (Part One), p. 106, para. 20 ("According to the terminology most commonly used by writers on international law, an international organization is a permanent grouping of States with organs which are intended, in matters of common interest, to express views that differ from those of the member States").

[219] The Commission's Special Rapporteur Giorgio Gaja originally suggested the use of the term "international organization" for "an organization which includes States among its members insofar as it exercises in its own capacity certain governmental functions". See the first report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur, document A/CN.4/532, para. 34 (reproduced in *Yearbook of the International Law Commission, 2003*, vol. II (Part One), p. 105).

[220] Articles on the responsibility of international organizations, with commentaries (see footnote 67 above), para. (3) of the commentary to article 2 ("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").

[221] *Ibid*., para. (1) of the commentary to article 2.

> "an organization established by 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".[222]

While this definition emphasizes that the legal basis of an international organization is to be found in international law, by referring to an "organization established by treaty or other instrument governed by international law", it does not define the term "organization". The existence of "organs" is arguably inherent in the notion of "organization"[223] and the articles on the responsibility of international organizations even contain a definition of organs,[224] indicating that these are integral features of international organizations. However, in the view of the Special Rapporteur, it would be preferable to explicitly mention the existence of organs as defining elements of an international organization.

55. Importantly, the definition in the articles on the responsibility of international organizations emphasizes that membership of an international organization is not limited to States, but may include other entities. As already mentioned, international organizations are often members of other international organizations.[225]

56. There are different interpretations of the "international legal personality" aspect, prominently contained in the definition in the articles on the responsibility of international organizations. The formulation "and possessing its own international legal personality" could be read to suggest that the possession of such personality is a prerequisite for an entity to be regarded as an international organization. The commentary acknowledges, though, that "[a]ccording to one view, the mere existence for an organization of an obligation under international law implies that the organization possesses legal personality"[226] and that, while another view requires "further elements",[227] the "*dicta* [of the International Court of Justice] on the legal personality of international organizations do not appear to set stringent requirements for this purpose".[228] Referring to the Court's advisory opinions in its *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*[229] and on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*,[230] the commentary concluded that the Court "appears to take a liberal view of the acquisition by international organizations of legal personality under international law".[231]

57. The commentary also rightly notes that international legal personality does not depend upon the inclusion of clauses like Article 104 of the Charter of the United Nations,[232] since

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[222] *Ibid*., article 2 (a) ("'international organization' means an organization established by 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").

[223] See para. 45 above.

[224] Article 2 (c), articles on the responsibility of international organizations, with commentaries (see footnote 67 above) ("'organ of an international organization' means any person or entity which has that status in accordance with the rules of the organization").

[225] See paras. 34 et seq. above.

[226] Articles on the responsibility of international organizations, with commentaries (see footnote 67 above), para. (8) of the commentary to draft article 2.

[227] *Ibid*.

[228] *Ibid*.

[229] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, *I.C.J. Reports 1980*, p. 73.

[230] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion (see footnote 174 above), p. 66.

[231] Articles on the responsibility of international organizations, with commentaries (see footnote 67 above), para. (8) of the commentary to draft article 2.

[232] Article 104 of the Charter of the United Nations ("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 fulfillment of its purposes").

such clauses typically only require member States of an organization to recognize its legal personality under their domestic law.[233]

58. One may thus conclude that the possession of an organization's "own international legal personality", required for the purposes of meaningfully talking about an organization's responsibility, may not necessarily reflect the view that such personality is a prerequisite for or a defining element of an international organization. Rather, it should be regarded as a consequence of an organization's ability to express its own will – distinct from that of its members – through its organs.[234]

3. Suggested definition

59. On the basis of the above considerations, it would appear useful to capture the most important defining elements of an international organization in the following way:

> "'International organization' refers to an entity established by States and/or other entities on the basis of a treaty or other instrument governed by international law and possessing at least one organ capable of expressing a will distinct from that of its members."

60. The suggested wording builds on the previous work of the Commission, in particular, the definition contained in the articles on the responsibility of international organizations. It integrates the wording of that definition, referring to the requirement that a "treaty or other instrument governed by international law"[235] be the legal basis for the establishment of an international organization.

61. Instead of the separate sentence found in the definition in the articles on the responsibility of international organizations, pursuant to which "[i]nternational organizations may include as members, in addition to States, other entities",[236] this proposal gives the potential members of organizations, States and/or other entities a more prominent place in the suggested definition. At the same time, by keeping in the articles on the responsibility of international organizations a reference to States and "other entities" as potential members of international organizations, it endorses its openness to members other than States and international organizations.[237] Alternatively, it would also be possible to keep the additional sentence with the definition in the articles on the responsibility of international organizations. A more restrictive concept could make reference to "an entity established by States and/or international organizations" in order to emphasize the currently predominant members of international organizations.[238] Considering that only States and international organizations have the power to enter into treaties, one might even omit any reference to States or international organizations in the proposed guideline and confine the

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[233] Articles on the responsibility of international organizations, with commentaries (see footnote 67 above), para. (7) of the commentary to article 2. On domestic legal personality of international organizations, see Niels Blokker, "Juridical personality (Article I Section 1 General Convention)", in August Reinisch (ed.), *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary* (Oxford, Oxford University Press, 2016), pp. 49–56; Tarcisio Gazzini, "Personality of international organizations", in Klabbers and Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (footnote 109 above), pp. 44–46.

[234] See para. 52 above.

[235] Article 2 (a), articles on the responsibility of international organizations, with commentaries (see footnote 67 above).

[236] *Ibid*.

[237] See footnote 138 above.

[238] See draft conclusions on identification of customary international law, with commentaries, *Yearbook of the International Law Commission, 2018*, vol. II (Part Two), p. 97, para. (5) ("International organizations are … entities established and empowered by States (or by States and/or other international organizations) to carry out certain functions").

question of potential membership to the commentary. Such an omission would have the flaw of making the defining constituent members disappear.

62. The suggested wording clarifies the definition in the articles on the responsibility of international organizations insofar as it proposes the insertion of the requirement of "possessing at least one organ". Although the possession of organs may be considered implicit in the notion of an organization,[239] making it explicit not only serves clarity, but also helps avoid the rather infelicitous use of the partial tautology in defining an "international organization" as an "organization". The establishment of organs indeed appears to be a crucial defining element of international organizations, distinguishing them from other forms of treaty-based cooperation.

63. The proposed wording suggests referring to the possession of an organ capable of expressing an international organization's will instead of the possession of international legal personality. It appears appropriate to focus on the defining element of possessing organs capable of expressing the will of international organizations in the suggested definition. The proposed wording also refers to a "will distinct from that of its members", indicating the crucial separateness between the organization and its members. It may well be that this was intended to be expressed in the Commission's earlier definition referring to the possession of an international organization's "own international legal personality". However, it is submitted that the possession of organs is the more generally accepted defining element of an international organization. As explained above, the possession of international legal personality is more a consequence than a defining element of being an international organization.[240] One may thus also consider adding after the words "a will distinct from that of its members" the phrase "and thus [possessing] its own international legal personality".

B. Disputes

64. The notion of dispute is not clearly defined in international law; nor is it in domestic law. It plays a particular role in the Statute of the International Court of Justice, where it serves to delimit the Court's jurisdiction to "legal disputes"[241] and ascribes to the Court the function of "decid[ing] in accordance with international law such disputes as are submitted to it".[242] The discussion and mostly judicially developed notion of a (legal) dispute, as found in a series of decisions by the Court and its predecessor, the Permanent Court of International Justice, has been generally regarded as useful to define the term.

1. Notions of disputes

65. When it comes to defining the notion of "dispute" in international law, the so-called *Mavrommatis* definition is usually invoked, originally stemming from the judgment of the Permanent Court of International Justice in the *Mavrommatis* case,[243] and endorsed by the International Court of Justice in numerous subsequent cases.[244] Pursuant to this definition,

[239] See para. 54 above.
[240] See para. 52 above.
[241] Art. 36, para. 2, Statute of the International Court of Justice (see footnote 38 above).
[242] Art. 38, Statute of the International Court of Justice (see footnote 38 above).
[243] *The Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Judgment, P.C.I.J. Series A 1924, No. 2, p. 7.
[244] *Interpretation of Peace Treaties*, Advisory Opinion, *I.C.J. Reports 1950*, p. 65 at p. 74; *Certain Property (Liechtenstein v. Germany), Preliminary Objections*, Judgment, *I.C.J. Reports 2005*, p. 6 at p. 18, para. 24; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility*, Judgment, I.C.J. Reports 2006, p. 6 at p. 40, para. 90; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007*, p. 659 at p. 700, para. 130.

a legal dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".[245] This distinguishes it from a mere "situation", which does not imply an existing difference of views between the persons concerned.[246]

66. The *Mavrommatis* definition is very broad. The International Court of Justice thus clarified that a "conflict of … interests" will not necessarily amount to a legal dispute. Rather, "[i]t must be shown that the claim of one party is positively opposed by the other".[247] In the so-called *Headquarters Agreement* case, dealing with a dispute between the United Nations and the United States of America, the Court clarified that "positively opposed claims" can already be fulfilled "where one party to a treaty protests against the behaviour or a decision of the other party", although "the party accused does not advance any argument to justify its conduct under international law".[248] The Court has further clarified that the "positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*"[249] and that the existence of an "international dispute is a matter for

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[245] *The Mavrommatis Palestine Concessions (Greece v. Great Britain)* (see footnote 243 above), p. 11. See also Sir Robert Jennings, "Reflections on the term 'dispute'", in Ronald St. John Macdonald (ed.), *Essays in Honour of Wang Tieya* (Dordrecht, Martinus Nijhoff, 1993), p. 404; Paolo Palchetti, "Dispute", in Hélène Ruiz Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law*, available at www.mpeipro.com/; Christoph Schreuer, "What is a legal dispute?", in Isabelle Buffard and others (eds.), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Leiden, Martinus Nijhoff, 2008), pp. 959–979; Hugh Thirlway, "Quelques observations sur le concept de *dispute* (différend, contestation) dans la jurisprudence de la C.I.J.", in Maurice Kamga and Makane Moïse Mbengue (eds.), *Liber Amicorum Raymond Ranjeva: l'Afrique et le droit international: variations sur l'organisation internationale* (Paris, Pedone, 2013), pp. 611–622.

[246] Alain Pellet, "Peaceful settlement of international disputes", in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* vol. VIII (see footnote 112 above), p. 202, para. 1.

[247] See *e.g.*, *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, *I.C.J. Reports 1962*, p. 319 at p. 328; *Certain Property (Liechtenstein v. Germany)* (see footnote 244 above), para. 24 ("for the purposes of verifying the existence of a legal dispute it falls to the Court to determine whether 'the claim of one party is positively opposed by the other'"); *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports 2016*, p. 255 at p. 270, para. 34; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, *I.C.J. Reports 2016*, p. 3 at p. 26, para. 50 ("It does not matter which one of them advances a claim and which one opposes it. What matters is that 'the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain' international obligations) (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,* First Phase, Advisory Opinion*, I.C.J. Reports 1950*, p. 74)".

[248] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 April 1988*, Advisory Opinion, *I.C.J. Reports 1988*, p. 28, para. 38 ("In the view of the Court, where one party to a treaty protests against the behaviour or a decision of the other party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty").

[249] *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, *I.C.J. Reports 1998*, p. 275 at p. 315, para. 89 ("a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party"). See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, *I.C.J. Reports 2011*, p. 70 at p. 84, para. 30, and p. 87, para. 37; *Republic of Ecuador v. United States of America*, Permanent Court of Arbitration, Case No. 2012-5, Award, 29 September 2012, para. 219 et seq.

objective determination".[250] At the same time, it has stressed the importance of "objective awareness" for the existence of a dispute.[251]

67. Clearly, such concepts are focused on legal disputes. Legal disputes form the core of what will be discussed in the context of the present topic. However, one has to be aware that a number of disputes between international organizations and their members may be of a more political nature, especially when they concern policy decisions and their implementation. The distinction between political and legal disputes has played a certain role before the International Court of Justice, in particular in attempts to challenge the jurisdiction of the Court to decide on "political" disputes. Meanwhile, it appears to be established jurisprudence that the Court will hear disputes to the extent that they concern legal issues, even if they may also have political aspects.[252] As the Court explained in the *Tehran Hostages Case*, "legal disputes … often form only one element in a wider and long-standing political dispute",[253] but that fact does not deprive the Court of its jurisdiction.[254]

68. On the basis of the *Mavrommatis* definition, a useful broader definition of a dispute was developed, ostensibly going beyond merely legal disputes, by characterizing a dispute as "a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another".[255]

69. Many national legal systems rely on similar concepts when defining "disputes". They refer to "disputes" as assertions of rights, claims or demands met by contrary claims or allegations,[256] and to "legal disputes" as disputes between at least two parties that are to be settled by a judicial or arbitral third-party decision.[257]

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[250] *Interpretation of Peace Treaties* (see footnote 244 above), p. 74 ("Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence").

[251] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)* (see footnote 247 above), p. 271, para. 38 ("a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant").

[252] See also Christian Tomuschat, "Part Three: Statute of the International Court of Justice, Ch. II: Competence of the Court, Article 36", in Andreas Zimmermann and others (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed. (Oxford, Oxford University Press, 2019), p. 725.

[253] *United States Diplomatic and Consular Staff in Tehran*, Judgment, *I.C.J. Reports 1980*, p. 3 at p. 20, para. 37 ("legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned").

[254] *United States Diplomatic and Consular Staff in Tehran*, Request for the Indication of Provisional Measures, Order of 15 December 1979, *I.C.J. Reports 1979*, p. 7 at p. 15, para. 24 ("no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important").

[255] John Merrills and Eric De Brabandere, *Merrills' International Dispute Settlement*, 7th ed. (Cambridge, Cambridge University Press, 2022), p. 1.

[256] Jeffrey Lehman and Shirelle Phelps (eds.), *West's Encyclopedia of American Law* vol. 3, 2nd ed. (Farmington Hills, Thomson Gale, 2005), p. 461 ("DISPUTE: A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other. The subject of litigation; the matter for which a suit is brought and upon which issue is joined, and in relation to which jurors are called and witnesses examined").

[257] See, *e.g.*, Maria Federica Moscati, Michael Palmer and Marian Roberts, "Introduction to *Comparative Dispute Resolution*", in Maria Federica Moscati, Michael Palmer and Marian Roberts (eds.), *Comparative Dispute Resolution* (Cheltenham, Edward Elgar Publishing, 2020), p. 2, footnote 3. See also Bryan A. Garner (ed.), *Black's Law Dictionary*, 9th ed. (St. Paul, Thomson Reuters, 2009), p. 540 (defining "dispute" as "[a] conflict or controversy, esp. one that has given rise to a particular lawsuit").

2. Suggested definition

70. Based on the above considerations, it appears most useful to define disputes in a way that is sufficiently wide so as to encompass non-legal disputes. The following wording is suggested:

> "'Dispute' refers to a disagreement concerning a point of law, fact or policy in which a claim or assertion of one party is met with refusal or denial by another."

71. This definition builds on the main elements contained in the *Mavrommatis* formula, by referring to disagreements over law and/or fact. In order to differentiate "disputes" from mere "situations", the element of opposing is highlighted by stating that claims or assertions of one party must be met by refusal or denial of another party. The terms "claim" and "assertion" are chosen because they seem most appropriate to indicate that legal or policy interests are invoked by way of "claims", whereas facts are invoked by way of "assertion". Similarly, the use of the terms "refusal" and "denial" best reflect the rejection of claims or of factual assertions. This formulation also takes into consideration the judicially developed requirement of the International Court of Justice for (express and implicit) positive opposition.[258]

72. The express reference to disagreements concerning a point of "policy" is intended to broaden the scope of disputes covered beyond purely legal disputes. This seems appropriate also in the light of the methods of dispute settlement available to international organizations. Non-legal disputes are more likely to be settled by the less juridical forms of dispute settlement, such as negotiation, enquiry, mediation or conciliation, than by arbitration or adjudication. However, the reverse is not necessarily true since, especially in the case of international organizations where arbitration or adjudication are often not available, negotiation, enquiry, mediation or conciliation may also be resorted to in cases of legal disputes.[259] The question of the scope of disputes may also be something to be considered by the Commission, in particular, whether it would regard it as advisable to limit the topic to legal disputes or whether it finds it preferable to include all kinds of disputes. This issue may also have to be revisited as the work on this topic progresses.

C. Dispute settlement

73. Both in international as well as in domestic law, methods of dispute settlement have varied over the centuries, ranging from direct attempts of the disputing parties to settle their disputes to various degrees of bringing in third parties to assist in this endeavour. Although encompassed in the treaty-based obligation of States Members of the United Nations to peacefully settle their disputes, the methods of dispute settlement referred to in Article 33 of the Charter of the United Nations are illustrative of a wider understanding of forms of dispute settlement generally available in international law.[260]

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[258] See para. 66 above.

[259] See, *e.g.*, art. 66, para. 4, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (footnote 58 above), providing for the "conciliation procedure specified in the Annex to the Convention" as the dispute settlement mechanism envisaged for most disputes arising under the Convention.

[260] Merrills and De Brabandere, *Merrills' International Dispute Settlement* (see footnote 255 above), p. 24 ("The means of settlement are usually listed as negotiation, good offices, mediation, inquiry/fact-finding, conciliation (diplomatic means of dispute settlement), and arbitration and judicial settlement (legal means of settlement) mirroring closely Article 33 UN Charter"); Yoshifumi Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge, Cambridge University Press, 2018), p. 7 ("A catalogue of means of international dispute settlement is provided in Article 33(1) of the UN Charter"). See also Office of Legal Affairs, Codification Division, *Handbook on the Peaceful Settlement of Disputes between States* (United Nations publication, Sales No. E.92.V.7).

1. Traditional methods of settling disputes

74. Article 33 of the Charter of the United Nations is the generally accepted starting point of discussions concerning methods of dispute settlement. It provides that:

> "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

75. The obligation to settle disputes peacefully is a "corollary of the prohibition of the use of force".[261] It is widely acknowledged to be a principle of customary international law.[262]

76. While the text of Article 33, echoing the wording of Article 2, paragraph 3, of the Charter of the United Nations,[263] suggests that the obligation to settle disputes peacefully is limited to disputes "likely to endanger the maintenance of international peace and security", the dispute settlement methods mentioned therein are regarded as the options available to dispute settlement in general.[264]

77. Although accepted as non-exhaustive and subject to additional specifications and nuances, it is generally assumed that Article 33 of the Charter of the United Nations captures well the scope of settlement methods from purely inter-party attempts to settle a dispute, starting with negotiations, to increased involvement of non-disputing, third parties.[265] These

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[261] Pellet, "Peaceful settlement of international disputes", in Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (see footnote 246 above), p. 202, para. 3. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits, Judgment, *I.C.J. Reports 1986*, p. 14 at p. 145, para. 290 (where the Court regarded "the principle that the parties to any dispute, particularly any dispute the continuance of which is likely to endanger the maintenance of international peace and security, should seek a solution by peaceful means" as "complementary to the principles of a prohibitive nature" like the prohibition of the threat or use of force or the principle of non-intervention). See also General Assembly resolution 2625 (XXV) of 24 October 1970, annex (referring to the "the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered").

[262] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 261 above), para. 290 ("Enshrined in Article 33 of the United Nations Charter, which also indicates a number of peaceful means which are available, this principle has also the status of customary law").

[263] Article 2, paragraph 3, of the Charter of the United Nations ("All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered").

[264] Gaeta, Viñuales and Zappalà, *Cassese's International Law* (see footnote 204 above), p. 277; Martínez Valinotti, *Derecho Internacional Público* (see footnote 108 above), pp. 446–447; Pastor Ridruejo, *Curso de derecho internacional público …* (see footnote 108 above), pp. 576–579; Sepúlveda, *Derecho Internacional* (see footnote 108 above), pp. 391–392; Christian Tomuschat, "Article 33", in Bruno Simma and others (eds.), *The Charter of the United Nations: A Commentary* vol. II, 3rd ed. (Oxford, Oxford University Press, 2012), p. 1071, para. 3; Manuel Diez de Velasco Vallejo, *Instituciones de Derecho Internacional Público*, 18th ed. (Madrid, Tecnos, 2013), p. 946.

[265] Tomuschat, "Article 33" in Simma and others (eds.) (see footnote 264 above) p. 1076, para. 23 ("The notion of peaceful means as used in Art. 33 (1) appears to encompass all available procedures for the peaceful settlement of disputes which are characterized by the absence of unilateral action and strict equality of the parties") and pp. 1080–1081, para. 34 ("Although the catalogue of Art. 33 (1) lists nearly all mechanisms of dispute settlement which are known in international practice, it has been deliberately left open-ended ('other peaceful means')"). See also Eduardo Jiménez de Aréchaga, "La solución pacífica de las controversias, Sección V 'El arreglo pacífico de controversias por las Naciones Unidas'", in Eduardo Jiménez de Aréchaga, Heber Arbuet-Vignali and Roberto Puceiro Ripoll (eds.), *Derecho Internacional Público* vol. III (Montevideo, Fundación de la Cultura Universitaria, 2005), pp. 213–214; Fabián Novak Talavera and Luis García-Corrochano Moyano, *Derecho Internacional Público* vol. III (Lima, Fondo Editorial de la Pontificia Universidad Católica del Perú, 2002), pp. 99–168; Juan Bautista

neutral third parties may be delegated different powers to contribute to the settlement of a dispute, from mediation or conciliation to fully fledged third-party, adjudicatory powers.

78. Nevertheless, parties to a dispute are free to choose which method of dispute settlement they consider appropriate; there is no obligation to move to binding third-party adjudication if other means fail to bring about a settlement.[266] This free choice of methods was reaffirmed by the General Assembly in 1982 in the Manila Declaration on the Peaceful Settlement of International Disputes.[267] It has also been stressed by the International Court of Justice in various cases, such as the *Fisheries Jurisdiction* case,[268] the *Aerial Incident* case[269] and more recently, the *Obligation to Negotiate Access to the Pacific Ocean* case.[270]

79. Although the methods of peaceful settlement of disputes referred to in Article 33 of the Charter of the United Nations may appear to enshrine an obligation for States Members of the United Nations only, it is formulated in a broader way, referring to the "parties to any dispute". That the methods of dispute settlement mentioned therein are also available to international organizations was taken for granted by the International Court of Justice in the *Reparation* case when it discussed the "customary methods recognized by international law for the establishment, the presentation and the settlement of claims" available to the United Nations. It specifically stated that "[a]mong these methods may be mentioned protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal or to the Court".[271]

80. A cursory comparative overview demonstrates that most domestic legal systems also rely on adjudication and arbitration as forms of third-party dispute settlement procedures while outlawing most forms of self-help.[272] Similarly, they regularly permit and sometimes

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Rivarola Paoli, *Derecho Internacional Público*, 3rd ed. (Asunción, Juan Bautista Rivarola Paoli, 2000), pp. 721–760.

[266] Daillier and others, *Droit international public* (see footnote 107 above), p. 1163.

[267] General Assembly resolution 37/10 of 15 November 1988, annex. See also Hanspeter Neuhold, *Internationale Konflikte – verbotene und erlaubte Mittel ihrer Austragung* (Wien, Springer, 1977).

[268] *Fisheries Jurisdiction (Spain v. Canada)* (Jurisdiction of the Court), Judgment, *I.C.J. Reports 1998*, p. 432 at p. 456, para. 56 ("disputes are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties").

[269] *Aerial Incident of 10 August 1999 (Pakistan v. India)* (Jurisdiction of the Court), Judgment, *I.C.J. Reports 2000*, p. 12 at p. 33, para. 53 ("The choice of those means admittedly rests with the parties under Article 33 of the United Nations Charter. They are nonetheless under an obligation to seek such a settlement, and to do so in good faith in accordance with Article 2, paragraph 2, of the Charter").

[270] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, *I.C.J. Reports 2018*, p. 507 at pp. 560–561, para. 165 ("The Court recalls that, according to Article 2, paragraph 3, of the Charter of the United Nations, '[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. This paragraph sets forth a general duty to settle disputes in a manner that preserves international peace and security, and justice, but there is no indication in this provision that the parties to a dispute are required to resort to a specific method of settlement, such as negotiation. Negotiation is mentioned in Article 33 of the Charter, alongside 'enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements' and 'other peaceful means' of the parties' choice. However, this latter provision also leaves the choice of peaceful means of settlement to the parties concerned and does not single out any specific method, including negotiation. Thus, the parties to a dispute will often resort to negotiation, but have no obligation to do so").

[271] *Reparation for injuries suffered in the service of the United Nations* (see footnote 200 above), p. 177.

[272] See Michael Palmer, "Violence", in Moscati, Palmer and Roberts (eds), *Comparative Dispute Resolution* (footnote 257 above), pp. 87–101. See also Arwed Blomeyer, "Chapter 4: types of relief available (judicial remedies)", in Mauro Cappelletti (ed.), *International Encyclopedia of Comparative Law* vol. XVI: Civil Procedure (Tübingen, Mohr Siebeck, 2014), paras. 2–6;

even encourage alternative dispute resolution methods, such as negotiation, mediation and conciliation.[273]

2. Suggested definition

81. On the basis of the above considerations, it would appear useful to define dispute settlement along the generally accepted typology contained in Article 33 of the Charter of the United Nations, but in a way that is sufficiently wide to also encompass other forms of peaceful dispute settlement. The following wording is suggested:

> "'Dispute settlement' refers to negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement and other peaceful means of solving disputes."

82. In so far as the Commission's work on the present topic will rely on well-documented outcomes, it is most likely that it will focus on arbitration and adjudication. These judicial and quasi-judicial forms of third-party dispute settlement with legally binding results are most likely to be reflected in published judgments or awards.[274] They are also of primary importance to a Commission devoted to the study of international law. Nevertheless, as a result of the frequent inaccessibility of judicial or arbitral forms of dispute settlement,[275] disputes involving international organizations are often settled by recourse to other methods. The suggested definition thus recognizes the practical importance of non-binding forms of dispute settlement. It remains to be seen whether the Commission's study of the topic, also based on the results of the questionnaire sent to States and relevant international organizations,[276] will provide material to conclude that the prominent place of such alternative forms of dispute settlement may often result from the non-availability of adjudicatory forms of dispute settlement.

Herbert M. Kritzer (ed.), *Legal Systems of the World: a Political, Social, and Cultural Encyclopedia* vol. I–IV (Santa Barbara, ABC-CLIO, 2002).

[273] See, *e.g.*, Klaus J. Hopt and Felix Steffek (eds.), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford, Oxford University Press, 2013). Sometimes legal systems even require recourse to alternative forms of dispute resolution in some instances prior to litigation, see, *e.g.*, Oscar G. Chase and Vincenzo Varano, "Comparative civil justice" in Mauro Bussani and Ugo Mattei (eds.), *The Cambridge Companion to Comparative Law* (Cambridge, Cambridge University Press, 2012), p. 234.

[274] While arbitral awards often remain confidential, there is an increased tendency towards transparency and some awards are published in the *Reports of International Arbitral Awards* edited by the Codification Division of the Office of Legal Affairs. In addition, arbitration institutions, like the Permanent Court of Arbitration and the International Chamber of Commerce, have published awards in cases where international organizations have been involved.

[275] As will be discussed in more detail in the second report of the Special Rapporteur, international courts and tribunals frequently do not have jurisdiction over disputes involving international organizations. See, in general, Laurence Boisson de Chazournes, Cesare Romano and Ruth Mackenzie (eds.), *International Organizations and International Dispute Settlement: Trends and Prospects* (Leiden, Martinus Nijhoff, 2002); Karel Wellens, *Remedies against International Organisations* (Cambridge, Cambridge University Press, 2002). See also the suggestion made in a debate in the Commission, "Peaceful settlement of disputes", Working paper prepared by Sir Michael Wood, document A/CN.4/641 (reproduced in *Yearbook of the International Law Commission, 2011*, vol. II (Part 1), p. 247 at p. 250, para. 16) ("The need for States and international organizations to reinforce procedures for the settlement of disputes, the position of international organizations being particularly problematic. In the case of international organizations to which ICJ was not open, arbitration needed to be made more effective").

[276] See footnote 5 above.

IV. Proposed guidelines

83. The following guidelines present an initial proposal for the "scope of the draft guidelines" and the "use of terms", which can be further developed as work on the topic proceeds:

"1. Scope of the draft guidelines.

"The present draft guidelines apply to the settlement of disputes to which international organizations are parties."

"2. Use of terms.

"For the purposes of the draft guidelines:

"(a) 'International organization' refers to an entity established by States and/or other entities on the basis of a treaty or other instrument governed by international law and possessing at least one organ capable of expressing a will distinct from that of its members.

"(b) 'Dispute' refers to a disagreement concerning a point of law, fact or policy in which a claim or assertion of one party is met with refusal or denial by another.

"(c) 'Dispute settlement' refers to negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement and other peaceful means of solving disputes."

V. Future programme of work

84. In the second report, in 2024, the Special Rapporteur intends to analyse in detail the practice of the settlement of "international" disputes to which international organizations are parties, *i.e.* mostly disputes arising between international organizations and States. Based on this inquiry, he will attempt to suggest recommended practices, most likely in the form of further guidelines. The third report, in 2025, will continue this discussion in the light of progress with the topic, as well as address in more detail certain issues. Should the Commission so decide, this may also include disputes of a private law character. In developing the work programme on this topic, the Special Rapporteur will be guided by the information provided by States and international organizations in response to the questionnaire sent by the Secretariat.[277]

[277] *Ibid*.