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Dispute settlement

Introduction

All legal systems will have found a way to settle disputes between their subjects in a legally prescribed manner. That may range from having disputes settled by the elders of tribe or village following their wisdom to highly formal and formalized procedures involving barristers, judges, juries and journalists, following strictly defined rules of law.

A similar variety can be seen within international organizations: most organizations will have some mechanism to settle disputes, and these may range from highly complex and organized ways where a premium is put on application of strict rules (the EC is the paradigm example) to rather more flexible ways where the ironing out of the conflict is deemed more important than the rigid application of strict rules (e.g., the old GATT[1]).

Those different mechanisms may well stem from the consideration that, within an organization made up of a relatively small number of states, strict judicial settlement is somehow incongruous: if those states embark on a common project, it may not be a particularly good idea to have them meet in court on a regular basis; litigation, with its connotations of winners and losers, guilty parties and victims, crime and punishment, is not conducive to fostering the spirit of community. This may explain why advisory opinions are relatively popular within international organizations,[2] whereas binding judicial settlement is reasonably rare and usually deals with the legal protection of individuals or companies rather than with inter-state disputes.

[1] The seminal study is Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* (New York, 1975).

[2] For an overview of the popularity of advisory opinions, see Kenneth J. Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice* (Leiden, 1971), pp. 16–18.

Additionally, the variety of dispute settlement mechanisms reflects a variety of ideas as to the roles of law and of dispute settlement within the organization. In an organization such as the EC, it has always been assumed that the Court of Justice could and should play an important role in 'cementing' the organization. The Court is not just, according to Article 220 (ex-Article 164) TEC, the ultimate guardian of legality, but is also assigned the task of guaranteeing the unity of Community law (in particular via the preliminary reference procedure of what used to be Article 177 TEC[3]) and has traditionally been viewed as the motor of the integration process.[4]

In contrast, dispute settlement procedures in other organizations are usually more limited in ambition: they purport to settle disputes, by legal means if possible but taking liberties where necessary. Here, then, the dispute settlement mechanism is not envisaged to play an additional role in organizational politics; indeed, the somewhat ironic hypothesis may be formulated according to which the greater the element of politics in dispute settlement is thought to be, the smaller will be the political role of the dispute settlement organ.

The types of disputes to be settled may also vary, and will vary from organization to organization.[5] First and foremost, dispute settlement mechanisms may facilitate the settlement of disputes between member-states of the organization.[6] In addition, there may also be disputes between a member-state and the organization or a member and one or more organs of the organization. Within the EC, it happens not infrequently that the dispute to be settled is one between various organs of the organization among themselves. A recurring feature, typical of international organizations, is the settlement of staff disputes. And finally, even more typical of international organizations is that some of them provide for the advisory jurisdiction of tribunals.

Where international organizations themselves are involved, formal methods of dispute settlement may not always be utilized: organizations

[3] Nowadays Art. 234 TEC.

[4] So, e.g., Richard H. Lauwaars & C. W. A. Timmermans, *Europees Gemeenschapsrecht in kort bestek* (3rd edn, Groningen, 1994), pp. 21–2; for a balanced (if brief) assessment of the role of law in European integration generally, see T. Koopmans, 'The Role of Law in the Next Stage of European Integration' (1986) 35 ICLQ, 925–31.

[5] Judicial review of organizational acts is addressed in the previous chapter.

[6] Thus, within the ILO, a procedure of inquiry may be initiated under Art. 26 ILO by a member concerning the degree of observance by another member of any convention concluded under ILO auspices. The first of these was a complaint by Ghana against Portugal in 1962 concerning the Abolition of Forced Labour Convention; see 35 ILR 285.

have no standing before the ICJ,[7] and claims before domestic courts may often encounter immunity defences.[8] Hence, often recourse is had to arbitration or to claims commissions.[9] In both cases, the organization remains in control, as its consent is required for the establishment of an arbitral tribunal or claims commission.

The ICJ's advisory jurisdiction

The UN Charter enumerates, in Article 33, a number of methods for the peaceful settlement of disputes. States may resort to negotiations, conciliation, good offices, mediation, arbitration, judicial settlement, et cetera. There is no point in generally describing those, except to say perhaps that, according to some, the duty to settle disputes peacefully is itself a hard and fast rule of international law.[10]

The jurisdiction of the ICJ in cases involving states need not be described here in great detail. In general terms, the ICJ can have jurisdiction in contentious proceedings between states only if those states have somehow consented thereto, and the most prominent means for consenting to the Court's jurisdiction include the conclusion of a *compromis*; providing for the Court's jurisdiction in a more general treaty; and the unilateral acceptance of the Court's jurisdiction as compulsory.[11]

Of course, the ICJ is one of the principal organs of the UN, and there is a clear organizational link between the UN and the ICJ, but the ICJ is more than just the judicial organ of a particular international organization: its ambitions go beyond a merely organizational role, although in particular its advisory role pays homage to the organizational backdrop.

The ICJ does not, in contentious proceedings, grant access to entities other than states, and this renders the possibility of requesting an advisory opinion the sole means by which international organizations (some of them, at any rate) may come before the Court. The facility of rendering advisory opinions is provided for in Article 96 of the UN Charter:

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

[7] Article 34 Statute ICJ. [8] See chapter 8 above.

[9] See, e.g., Mahnoush H. Arsanjani, 'Claims against International Organizations: *Quis Custodiet Ipsos Custodes*' (1981) *7 Yale Journal of World Public Order*, 131–76, esp. pp. 161–3.

[10] A useful overview is J. G. Merrills, *International Dispute Settlement* (2nd edn, Cambridge, 1991).

[11] Article 36 Statute ICJ.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

The procedure is further outlined in the Court's Statute, which provides in Article 65 that the question shall be put in writing and shall be as precise as possible. Article 66 proceeds by stating that the registrar of the ICJ will give notice of the request to all states entitled to appear before the Court. It will ask those states, as well as international organizations, for further information. Apart from providing information, states and organizations are also entitled to make substantive comments.

The ICJ has rather consistently held that its advisory power establishes the connection with the UN family: through its advisory powers it is in the position to provide legal counsel to the UN. It follows that the Court has usually been very broad-minded concerning its advisory role.[12] While the power to accept a request is discretionary, there are few, if any, arguments which it will invoke to deny a request for advice, provided of course the request itself is admissible.

Still, the system did not get off to a flying start. One of the first cases ever before the PCIJ, the *Eastern Carelia* case, was a request for advice coming from the League of Nations concerning a dispute between Russia and Finland.[13] They had concluded the Treaty of Dorpat (Tartu) in 1920, but a dispute ensued over the precise legal status of two communities in Eastern Carelia (which had been Finnish territory). The dispute was submitted to the League of Nations. The League, in turn, submitted the dispute to the PCIJ for advice, but the Court refused to become involved, holding that the dispute was in reality a quite contentious one between two states, one of whom had not accepted the Court's jurisdiction in contentious proceedings and was not even a member of the League at the time. Were the Court to give advice in such a case and under such circumstances, it would pronounce on an inter-state dispute through the back-door of the advisory power. As the Court put it: 'Answering the question would be substantially equivalent to deciding the dispute between the parties.'[14]

[12] See also Keith, *The Advisory Jurisdiction*, p. 146.

[13] *Request for advisory opinion concerning the Status of Eastern Carelia*, Court's reply, 23 July 1923, [1923] Publ. PCIJ, Series B, no. 5.

[14] *Ibid*., p. 29.

In later cases, however, the Court has been quite willing to lend an ear to requests for advisory opinions, even if the background would involve a clear dispute between states.[15] States have made the most curious arguments in trying to stop the Court from rendering an advisory opinion (the eternal yet desperate favourite being that the question put to the Court is political rather than legal), but as soon as the Court can identify any link between the request and the work of the organization concerned, it will assume that it has the required jurisdiction. As the Court put it in 1950: 'The Court's opinion is given not to the States, but to the Organization which is entitled to request it; the reply of the Court, itself an organ of the United Nations, represents its participation in the activities of the Organization, and, in principle, should not be refused.'[16] The only request which the Court has rejected was that of the World Health Assembly to pronounce on the legality of the use of nuclear weapons. Here the Court found that as the WHO (and thus also the WHA) has no powers to deal with issues of nuclear weapons, it could not possibly have the power to ask the ICJ for an advisory opinion on the topic. After all, 'none of the functions of the WHO is dependent upon the legality of the situations upon which it must act'.[17]

In rendering advisory opinions, the Court has granted itself the liberty to reformulate the questions asked of it, on the theory that sometimes the requesting organ formulates its questions in an unfortunate manner. In attempting to identify what is 'really in issue', the Court is guided by the idea that it should uncover the intentions of the requesting body.[18] The risk, of course, is that by reformulating the question, the Court might end up not answering the initial question at all.

It could be (and has been) argued[19] that there are two kinds of advisory opinions. The first sort is the sort contemplated by the UN Charter and the Court's Statute, where the Court literally gives advice. As the Court itself

[15] An example is *Western Sahara*, advisory opinion, [1975] ICJ Reports 12. Here the background involved 'a legal question actually pending' between, at least, Spain and Morocco; as the Court included a Spanish judge, Morocco was entitled to appoint a judge *ad hoc*. See *Western Sahara*, order of 22 May 1975, [1975] ICJ Reports 6.

[16] *Interpretation of peace treaties with Bulgaria, Hungary and Romania*, advisory opinion, [1950] ICJ Reports 65, p. 71.

[17] *Legality of the use by a state of nuclear weapons in armed conflict*, advisory opinion, [1996] ICJ Reports 66, para. 20.

[18] See, e.g., *Application for review of Judgement No. 333 of the United Nations Administrative Tribunal*, advisory opinion, [1987] ICJ Reports 18, paras. 43–5.

[19] See Roberto Ago, ' "Binding" Advisory Opinions of the International Court of Justice' (1991) 85 AJIL, 439–51.

has put it: 'The Court's reply is only of an advisory character: as such, it has no binding force.'[20]

Thus, if the General Assembly or the Security Council, or any other organ so authorized, files a request on the basis of the Charter and the Statute, it is clear that the Opinion is only advisory. It may be of great weight, and it may be accepted as authoritative and, for all practical purposes, as binding as a judgment,[21] but still, as a formal matter, it is not to be considered binding.

In some cases, however, the power to request an advisory opinion is not based on the Charter and the Statute as such, but on a different convention. An example is offered by Article 30 of the 1946 General Convention on Privileges and Immunities of the UN: 'If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.' Thus, although in name an advisory opinion, it will be accepted as 'decisive', or final. Several other conventions contain similar clauses, opening up the possibility of adding weight to advisory opinions. It is important to note though, as the Court underlined in its 1999 *Cumaraswamy* opinion, that the binding effect of such opinions stems from a collateral agreement (such as, for example, the 1946 General Convention); the opinion itself remains, as it were, advisory.[22]

In the *Mazilu* case,[23] the possibility of a 'binding' advisory opinion created something of a problem. Romania, Mr Mazilu's state of origin, had made a reservation relating to Article 30 of the General Convention, thus precluding the possibility of asking the Court for a binding advisory opinion. For that reason, it also advanced the argument that no advisory opinions at all could be sought. The Court however disagreed, holding in effect that even if the procedure of Article 30 cannot be used, that still leaves

[20] *Interpretation of peace treaties*, p. 71. The same argument was happily embraced by South Africa's Supreme Court with respect to the ICJ's 1971 *Namibia* opinion in *Binga* v. *The Administrator-General for South West Africa and others*, decision of 22 June 1984, in 82 ILR 465.

[21] See also Keith, *The Advisory Jurisdiction*, pp. 221–2.

[22] *Difference relating to immunity of legal process of a special rapporteur of the Commission of Human Rights (Cumaraswamy)*, advisory opinion of 29 April 1999 (nyr), para. 25.

[23] *Applicability of Article VI, Section 22, of the Convention on Privileges and Immunities of the United Nations*, advisory opinion, [1989] ICJ Reports 177.

the General Assembly (or, in this case, ECOSOC), free to ask for an advice by way of the procedure envisaged in Charter and Statute. Obviously, Romania's reservation implied that the Court could give no binding advisory opinion; but there was no problem in rendering a non-binding advisory opinion.[24]

Other tribunals within the UN system

While the ICJ is the principal judicial organ of the UN, it is by no means the only one. As observed earlier, an important innovation was the creation of an administrative tribunal by the General Assembly, and quite a number of treaties concluded under auspices of the UN have included the creation of some organ or other with a judicial or quasi-judicial function.

Thus, a number of specialized human rights treaties concluded under the aegis of the UN all have their own supervisory organs: there is a Committee against Torture, a Committee on the Elimination of Discrimination against Women as well as one on the Elimination of Racial Discrimination, and a Committee on the Rights of the Child.[25] In addition, the two general human rights covenants (those on Civil and Political Rights, and on Economic, Social and Cultural Rights, respectively) also have their own supervisory organs.

Generally speaking, those bodies will receive reports from the parties to the conventions establishing them on the human rights situation, and will proceed, on the basis of those reports, to make suggestions and recommendations. Some may, however, also entertain complaints or communications made by states or even by individuals, provided the state against whom the communication is addressed has recognized the jurisdiction of the body in question and usually insisting that local remedies are exhausted.[26]

Strictly speaking, all those bodies will hardly qualify as judicial bodies; none of them can make binding decisions in cases before them, and,

[24] *Ibid*., in particular paras. 29–36.

[25] On the work of the latter, see Jutta Gras, *Monitoring the Convention on the Rights of the Child* (Helsinki, 2001).

[26] This applies to the Committee against Torture and to the Human Rights Committee set up to supervise the implementation of the International Covenant on Civil and Political Rights, and may one day also apply to the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, which is envisaged in a convention that has yet to enter into force.

indeed, actual cases can only come before a few of them to begin with. Nonetheless, their impact is generally felt to be considerable: the statements emanating from those bodies are usually regarded as authoritative interpretations of the underlying conventions, and the absence of the power to make binding determinations has not impeded in particular the Human Rights Committee in coming up with an impressive body of 'case-law', and much of the contents of the International Covenant on Civil and Political Rights has been further developed by means of General Comments and through questioning states on the basis of their national reports.[27]

More in the nature of judicial bodies are the two *ad hoc* bodies established by the Security Council in the early 1990s. Those do not purport to oversee the implementation of a single convention, but are rather responses to grave atrocities committed. Both the Yugoslavia Tribunal,[28] created in 1993, and the Rwanda Tribunal,[29] created in 1994, allow for binding determinations to be made after cases have been brought by a prosecutor (itself quite an innovation in international law). Defendants may eventually end up in prison once it is established by a Trial Chamber or Appeals Chamber that they have been guilty of violations of humanitarian law, crimes against humanity, or genocide; the death penalty is, however, excluded.

The very creation of the tribunals by the Security Council implies that the consent of states is deemed of lesser importance.[30] Hence, there is no need for optional protocols through which states can recognize the jurisdiction of either of the tribunals, nor are there any parties to the Statutes of either tribunal. Instead, the binding nature of the tribunals' decisions derives from Article 25, in conjunction with Chapter VII, of the Charter. Where a jurisdictional claim of one of the tribunals may overlap with that of a state, the basic notion to be applied is that of primacy: the tribunal has the final

[27] The seminal study is Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford, 1991).

[28] See generally Daphna Shraga & Ralph Zacklin, 'The International Criminal Tribunal for the Former Yugoslavia' (1994) 5 EJIL, 360–80. On the practicalities involved in setting up the Tribunal, see Julian J. E. Schutte, 'Legal and Practical Implications, from the Perspective of the Host Country, Relating to the Establishment of the International Tribunal for the Former Yugoslavia' (1994) 5 *Criminal Law Forum*, 423–50.

[29] See generally Roy S. Lee, 'The Rwanda Tribunal' (1996) 9 Leiden JIL, 37–61.

[30] In August 2000, the Security Council gave the green light for the creation of a tribunal dealing with atrocities in Sierra Leone (Resolution 1315). Here, however, the consent of the government of Sierra Leone was envisaged.

say, at least as a formal matter, but may have to respect the position of a recalcitrant member-state as it lacks the means to actually take a suspect into custody unless he or she is handed over,[31] short of using shady techniques such as luring or abduction.[32]

Of a different order altogether is the United Nations Compensation Commission, although this too was created by the Security Council. The Compensation Commission grew out of the aftermath of Iraq's invasion of Kuwait, and is designed to provide compensation for war damages on the basis of claims. Such claims could[33] be brought by individuals, corporations, governments and international organizations, although only governments had direct access to the Commission. The Commission, it has been observed, is a political body, despite the fact that its main function consists of the consideration and verification of claims and the determination of any losses. Obviously then, political as it may be, its tasks (and composition) ensure that judicial elements are not entirely absent.[34]

The Yugoslavia and Rwanda Tribunals and the UN Compensation Commission have in common not only that they were all created by the Security Council on the basis of the collective security functions of the Charter, but also that their existence is, in principle, temporary. Their jurisdiction is limited in time, so sooner or later they will have decided all cases or settled all claims before them, after which they can be dissolved. The same applies to the various Sanctions Committees, quasi-judicial bodies set up by the Security Council to monitor and regulate compliance with UN-ordained sanctions.[35]

By contrast, the International Tribunal for the Law of the Sea, created by means of the 1982 Law of the Sea Convention which was concluded

[31] For an analysis of some of the problems involved, see Göran Sluiter, 'To Cooperate or not to Cooperate? The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal' (1998) 11 Leiden JIL, 383–95.

[32] For an argument that abductions may be permissible under certain conditions, see Michael P. Scharf, '*The Prosecutor* v. *Slavko Dokmanovic*: Irregular Rendition and the ICTY' (1998) 11 Leiden JIL, 369–82.

[33] The deadline for submitting claims was 1 August 1994.

[34] See Carlos Alzamora, 'The UN Compensation Commission: An Overview', in Richard B. Lillich (ed.), *The United Nations Compensation Commission* (Irvington, NY, 1995), 3–14. The panelists are invariably drawn from the legal profession.

[35] See, e.g., Martti Koskenniemi, 'Le Comité de Sanctions (créé par la résolution 661 (1990) du Conseil de Sécurité)' (1991) 37 AFDI, 119–37; see also Michael P. Scharf & Joshua L. Dorosin, 'Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee' (1993) 19 Brooklyn JIL, 771–827.

under the aegis of the UN, is established for an unlimited period of time. It has jurisdiction in cases arising under (but not limited to) the Law of the Sea Convention, provided that the parties to the dispute have accepted its jurisdiction. Those that have not were nonetheless required to accept another mode of peaceful dispute settlement. A particular competence of the Tribunal is dealing with urgent cases: prescription of interim measures (even if main proceedings are brought elsewhere), and requests concerning the prompt release of vessels and crew. The Tribunal comprises a special Sea-Bed Disputes Chamber, which not only is competent to decide contentious cases but also may render advisory opinions. Also noteworthy is the fact that a right of access is granted to non-state entities.[36]

Dispute settlement in the EC

Within the European Community system, the role of the Court of Justice is of the utmost importance. It shall ensure, as Article 220 (ex-Article 164) TEC puts it, that in the interpretation and application of the EC Treaty the law is observed. To that end, fifteen judges (one for each member-state) and a number of advocates-general[37] deliver well over a hundred judgments per year. In addition, the fifteen judges of the Court of First Instance (created by virtue of the 1986 Single European Act so as to relieve the Court's workload) decide a similar amount of cases annually.

Curiously perhaps, traditional inter-state dispute settlement is almost non-existent before the Court. One of the very few cases brought by a member-state against another member-state involved a dispute between France and Britain over fisheries.[38]

To some extent, this finds its cause no doubt in the circumstance that cases against member-states may be, and often are, brought by the Commission, under Article 226 (formerly Article 169) TEC: where the Commission brings a case, individual member-states no longer have to feel compelled to do so. Indeed, it may happen that the Commission acts upon the instigation of a member-state which would be reluctant to start proceedings itself.

A peculiar feature is the facility (largely under the rubric of judicial review, dealt with in the previous chapter) for the Community's institutions

[36] For a general overview, see Thomas A. Mensah, 'The International Tribunal for the Law of the Sea' (1998) 11 Leiden JIL, 527–46.

[37] Compare Art. 222 (ex-Art. 166) TEC.

[38] Case 141/ 78, *France* v. *United Kingdom* [1979] ECR 2923.

to bring proceedings against each other. Usually, such cases reflect constitutional struggles about which institutions shall exercise what powers, or struggles relating to the proper decision-making procedures to be followed.[39] Here too, in the background, power issues loom large. For a dispute concerning decision-making procedures is often one involving the prerogatives of the institutions involved.

The most innovative feature of the judicial mechanism of the EC is without a doubt the possibility for national courts to refer matters to the EC Court: the preliminary reference procedure of Article 234 (formerly Article 177) TEC. Under this procedure, usually understood as an attempt to institutionalize dialogue between the EC Court and the courts of the member-states, the latter can (and if they are the highest national courts, must) ask the EC Court for a preliminary ruling on questions relating to (in a nutshell) the interpretation of the Treaty and the interpretation and validity of the acts of the institutions.[40]

The precise circumstances in which the highest national courts must ask for a ruling remain somewhat nebulous though: while the Court has clarified that the obligation to ask for a ruling evaporates when the legal situation has already been clarified (the *acte éclairé* doctrine) or when the answer is abundantly clear (the *acte clair* doctrine), in particular the latter scenario has been given so many caveats by the Court that it could, if it wants, always question the appropriateness of a member-state court's invocation of the *acte clair* doctrine.[41]

Finally, apart from the possibility of appearing as a sort of cassation court in staff and other cases (cases that are first brought to the Court of First Instance), the EC Court may also act in something of an advisory capacity when it concerns the conclusion of international agreements by the Community. Under Article 300 (ex-Article 228) TEC the Council, the

[39] Or, related, the proper legal basis for Community measures. On this, see Ronald H. van Ooik, *De keuze der rechtsgrondslag voor besluiten van de Europese Unie* (Deventer, 1999).

[40] A similar procedure was later created within Benelux; for an application, see the decision of the Benelux Court of Justice in *MBAK and another* v. *Minister for Foreign Affairs*, decision of 20 December 1988, in 99 ILR 38.

[41] See case 283/81, *Srl CILFIT* v. *Italian Ministry of Health* [1982] ECR 3415, para. 21, holding that the highest domestic courts need not bother the EC Court when 'the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretations give rise and the risk of divergences in judicial decisions within the Community.'

Commission, or any member-state may ask the Court for an 'opinion' as to whether 'an agreement envisaged' is compatible with the EC Treaty.[42]

This facility has been increasingly used in recent years, and not always for the right reasons. Thus, in *Opinion 1/94*[43] (asked for by the Commission and dealing with the EC as a founding member of the WTO), the Court ended up outlining the external powers of the various institutions. But that is hardly what Article 300 (ex-Article 228) sets out to accomplish in concentrating on the compatibility of the agreement with EC law. It takes a rather big leap to subsume internal power struggles also under that heading.[44]

The Commission is not the only one trying to use the Court for more political reasons. Another example is *Opinion 2/94*,[45] this time asked for by the Council, on whether it is at all possible that the EC would accede to the European Convention on Human Rights (ECHR). The Court held, not surprisingly perhaps, such accession to be impossible at present, since accession to a human rights instrument would remain outside the competences of the EC. The point to note is that the Council asked for advice even prior to contemplating acceding to the European Convention. Paragraph 6 of Article 300 (ex-Article 228) TEC mentions that the Court can be asked for an opinion on 'an agreement envisaged'. To consider something as abstract as the hypothetical possibility that one day the EC might be willing to accede to the ECHR is stretching that provision just a little bit.[46]

The terms of Article 300 (ex-Article 228) TEC are somewhat ambiguous on the legal effect of the Court's opinions, but by and large appear to suggest that they are best regarded as binding. The provision specifies that if the Court finds that an envisaged agreement is adverse to EC law, then the agreement may only enter into force in accordance with Article 48 (ex-Article N) TEU. In other words: if a proposed treaty conflicts with the EC Treaty, the EC Treaty should be amended. That itself seems to point in the direction that the Court's opinions are to be regarded as binding.

[42] In *Opinion 3/ 94 (Framework Agreement on Bananas)* [1995] ECR I–4577, the Court declined to say anything about an agreement already concluded.

[43] *Opinion 1/ 94 (WTO)* [1994] ECR I-5267.

[44] Although the leap can be made (if somewhat contrived perhaps) in that, ultimately, the test of compatibility with EC law presupposes that the envisaged treaty topic falls within Community competence to begin with.

[45] *Opinion 2/ 94 (ECHR)* [1996] ECR I-1759.

[46] See also Meinhard Hilf, 'The ECJ's Opinion 1/ 94 on the WTO – No Surprise, But Wise?' (1995) 6 EJIL, 245–59, p. 250, note 15.

Still, the more usual practice is not that the EC Treaty will be amended, but rather that the 'envisaged agreement' will be renegotiated: a prime example is the EEA agreement, first rejected by the Court, later renegotiated and given the stamp of approval.[47] That is, of course, a lot easier than amending the EC Treaty itself: the latter would open up Pandora's Box and, ironically perhaps, undermine the very supremacy of EC law.

Dispute settlement in other organizations

Other organizations have, as a rule, less elaborate dispute settlement mechanisms, although the machinery set up to supervise the implementation of the European Convention on Human Rights, concluded under auspices of the Council of Europe, is impressive in its own right. Other organizations having their own judicial organ include the OSCE,[48] ECOWAS,[49] EFTA, the Andean Common Market, Benelux, the Organization of Central American States, the Organization of Arab Petroleum Exporting Countries, and the Common Market for Eastern and Southern Africa.[50]

Other organizations have difficulties envisaging legal methods of dispute settlement at all. There is, for example, no such thing as a NATO court. What will usually happen if NATO's member-states have a serious dispute is that politicians will exercise some deep massage: the remedy will be to look for a compromise between the disputants, and such compromise, needless to say, may not have much to do with applicable rules of law.

Indeed, the solutions sought need not necessarily have too much to do with law. When in the 1960s France was getting disheartened by the dominant role of the USA in NATO, the French strategy was to withdraw from NATO's military structures. Clearly, there is nothing in NATO specifically authorizing such a move: there is no article saying that states may withdraw from the military structure while remaining members of NATO and while remaining to participate in NATO's policy-making.[51] Yet, there is

[47] *Opinion 1/ 91 (EEA)* [1991] ECR I-6079, and *Opinion 1/ 92 (EEA)* [1992] ECR I-2825.

[48] See generally Susanne Jacobi, 'The OSCE Court: An Overview' (1997) 10 Leiden JIL, 281–94.

[49] See Koti Ofeng Kufuor, 'Securing Compliance with the Judgements of the ECOWAS Court of Justice' (1996) 8 *African Journal of International & Comparative Law*, 1–11.

[50] See generally Henry G. Schermers & Niels M. Blokker, *International Institutional Law* (3rd edn, Dordrecht, 1995), who also list a number of inactive or not-yet-active tribunals, at pp. 423–34.

[51] Indeed, the integrated military structure was initially not even envisaged. For a close-up account of the creation and the early years of NATO, see the brilliant memoirs of Dean Acheson, *Present at the Creation: My Years in the State Department* (New York, 1969).

also nothing in the treaty prohibiting such a move, and in the end it must have seemed like a wise compromise to everyone involved: NATO without France does not make too much sense, but France should also not be made more important than it is.

In quite a few organizations, dispute settlement is to a large extent an overtly political mode of dealing with conflicts, applying diplomacy rather than strict legal rules. Thus, organizations such as the OAU or the OAS provide their good offices or engage in mediation. The OAU, for example, managed to settle a long-standing boundary dispute between Algeria and Morocco in 1963, while in 1972 the President of Somalia mediated in a dispute between Tanzania and Uganda.[52]

Similarly, the OAS successfully intervened in a dispute between Honduras and Nicaragua in 1957 as well as in several disputes involving Nicaragua and Costa Rica in the 1940s and 1950s. The Arab League proved highly instrumental in guaranteeing Kuwait's newly won independence in 1961 against Iraqi claims, while the *ad hoc* Contadora group settled long-standing difficulties in volatile Central America.[53]

In some cases, the creation of special *ad hoc* (quasi-)tribunals can serve useful purposes, and not only legal purposes at that. Perhaps the prime example is the creation by the EC, during the dissolution of Yugoslavia, of the Badinter Commission, which functioned as a high-level policy advisor rather than a settler of disputes. Through a number of opinions on legal questions, it helped the EU to formulate its policy towards Yugoslavia and its offspring. As Craven observed, the Badinter Commission's opinions helped to rationalize an otherwise not always coherent state practice, and guided subsequent practice.[54]

In addition, the very existence of organizations where states may meet both formally and more informally may already provide valuable services relating to dispute settlement. As Merrills notes with respect to NATO and the disputes over Cyprus (involving Turkey, Greece and Britain) and the British–Icelandic 'cod wars' of the 1970s, 'the fact that all states concerned were members of NATO ensured that the lines of communication remained

[52] The OAU's role in determining the boundary between Mali and Burkina Faso proved less successful, finally leading to litigation before the International Court of Justice: *Case Concerning the Frontier Dispute* (Burkina Faso v. Mali), [1986] ICJ Reports 554.

[53] See generally Merrills, *International Dispute Settlement*, pp. 214–18.

[54] See Matthew C. R. Craven, 'The European Community Arbitration Commission on Yugoslavia' (1995) 66 BYIL, 333–413, p. 335.

open, despite a degree of bitterness and hostility which on several occasions led to the use of force'.[55]

The GATT/WTO system

Most international dispute settlement is rather political in nature, and is destined to retain that character in most cases. One of the few exceptions thereto is to be found in the world trading regime. Within GATT, dispute settlement procedures developed largely in practice, and while they started out as exercises in trade diplomacy, they have gone through a distinct process of juridification.

GATT was created in 1947 as the General Agreement on Tariffs and Trade. It had been part of the Havana Charter establishing an International Trade Organization (ITO), but since this ITO proved still-born, the provisions on tariffs and other trade restrictions were lifted out of the Havana Charter and turned into a separate agreement, to be provisionally applied by most of its contracting parties. As GATT was but an agreement, it did not mention any institutions, with the exception of a plenary body called the 'CONTRACTING PARTIES' (rather unimaginatively so).[56] It followed that there was also no dispute settlement mechanism to speak of: if states had a dispute, they called upon the CONTRACTING PARTIES, and hoped for the best.

When the first disputes arose, already in the 1940s, the CONTRACTING PARTIES resolved to settle those disputes in a flexible way, and for that purpose started to establish working parties and, later, panels consisting of three or five persons to look into the matter, and to render advice. That was, for a time, the long and the short of GATT dispute settlement. If there was a dispute, parties were supposed first to enter into consultations,[57] and, if that would not work out, to resort to the CONTRACTING PARTIES.[58] The CONTRACTING PARTIES would establish a panel, and the panel would produce a report. If the report met with the approval of the Council, it would qualify as 'accepted', and the advice or the recommendation of the panel would be given the stamp of approval of the Council.

[55] Merrills, *International Dispute Settlement*, p. 213.

[56] For a general overview, see Kenneth W. Dam, *GATT: Law and International Economic Organization* (Chicago, 1970). The seminal work on substantive GATT law is John H. Jackson, *World Trade and the Law of GATT* (Indianapolis, 1969).

[57] Article XXII GATT. [58] Article XXIII GATT.

What this meant in legal terms has always remained unclear, though. First, it has always been uncertain whether panel decisions, once adopted, would be binding upon the parties to the dispute. There are some grounds to suppose this to be the case. For one thing, many adopted decisions have been adhered to, albeit sometimes after a considerable period of time had lapsed. It took the USA, for example, some four years to change a part of its tax laws to bring it into conformity with GATT, after the USA had blocked adoption of the panel report for another four or five years. Thus, some nine years after the panel itself came to its findings, finally US law was adapted.[59]

Moreover, if states really would have a hard time agreeing to a panel report, they could simply block its adoption: the Council was supposed to adopt the panel's decisions by consensus, thereby giving every Council member effectively a veto.[60] Thus, one could argue that mere adoption already specified the consent of the guilty party to be bound by the findings of the panel.

A second question, however, is whether the panel decisions would also be binding upon others besides the parties directly concerned. Would they contribute to the development of a standing body of GATT law, or would their binding force be limited to the parties involved (if it existed at all)? Opinions diverge. Perhaps the better view is that no binding precedents are created. There is, after all, nothing in GATT to allow for the creation of binding precedent, and it could be argued that such a provision would be important enough to warrant explicit mentioning in the agreement. That said, panels have rather regularly referred to earlier decisions, and at times, where they reached a different conclusion, have been anxious to distinguish the dispute before them from previous decisions.

The dispute settlement has been streamlined and, many think, improved with the creation of the WTO. The most eye-catching innovations are that blocking panel reports is now only possible by consensus,[61] and the creation of an Appellate Body, which may and does scrutinize panel reports on

[59] See Jan Klabbers & Annerie Vreugdenhil, 'Dispute Settlement in GATT: DISC and its Successor' (1986/1) LIEI, 115–38.

[60] This caught public attention after the USA had blocked acceptance of (unfavourable) panel reports concerning US legislation to combat driftnet fishing (*Tuna I* and *Tuna II*). The reports are reproduced in (1991) 30 ILM 1594, and (1994) 33 ILM 839.

[61] Insiders speak of a negative consensus, in order to indicate that what is at issue is the negation of a report. For an excellent analysis of the role of the WTO in a world of sovereign states, see Robert Howse, 'The Legitimacy of the World Trade Organization', in Jean-Marc Coicaud & Veijo Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo, 2001), 355–407.

points of law and has already been considered instrumental in cementing an otherwise rather incoherent body of case-law.[62]

On the topic of precedent, the WTO agreement remains less than unequivocal. It states that the WTO 'shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947'.[63] There is, moreover, an Understanding on Rules and Procedures Governing the Dispute Settlement Procedures, but that too is not very specific, holding that 'members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947'.[64]

An intriguing feature of GATT/WTO dispute settlement mechanism is that it may be activated even without a violation of the organization's rules: under Article XXIII it suffices if a state feels that benefits to which it is entitled are nullified or impaired by another contracting party. Such nullification or impairment may result from a violation of GATT/WTO rules, but such need not necessarily be the case.[65]

In theory, then, this opens the door for having GATT/WTO deal with a number of issues which are not expressly prohibited, but which are nonetheless contrary to the spirit of GATT/WTO. In practice, however, there have not been all that many findings of a nullification or impairment of benefits without a violation, for the obvious reason that if there is no violation, then it is difficult to hold someone responsible. It is one thing to say that behaviour of state X hurts the interests of state Y, but if X can claim that it is really not doing anything illegal, that effectively ends most debate.[66]

Administrative tribunals

When we think of dispute settlement within organizations, we usually think of disputes between member-states *inter se*, or disputes between a member

[62] For a balanced assessment, see Rambod Behboodi, 'Legal Reasoning and the International Law of Trade: The First Steps of the Appellate Body of the WTO' (1998/4) 32 JWT, 55–99. See also Deborah Z. Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm-generation as the Engine of Constitutional Development in International Trade' (2001) 12 EJIL, 39–75.

[63] Article XVI, para. 1 WTO.

[64] Article 3, para. 1 of the Understanding.

[65] And it has been suggested that a breach which does not nullify or impair benefits may actually be insufficient. See John H. Jackson, 'The Jurisprudence of International Trade: The DISC Case in GATT' (1978) 72 AJIL, 747–81, p. 754.

[66] Indeed, in later disputes it would seem that the order has been reversed, in that a violation would automatically be regarded as nullification or impairment of benefits. See John H. Jackson, 'Dispute Settlement and the WTO: Emerging Problems' (1998) 1 JIEL, 329–51, p. 337.

and an organ of the organization. But there is also a whole class of disputes that concerns the organization and its employees: the staff cases. While these may on occasion challenge the legality of the organization's acts in a more general sense (if an employee's legal position is influenced by a general instrument[67]), they usually deal with relatively straightforward individual complaints.

Some international organizations have created specialized tribunals to deal with such cases in a more or less legal procedure: as noted earlier, the General Assembly has created such a tribunal under the name United Nations Administrative Tribunal. Other organizations having their own administrative tribunal include the World Bank, the IMF and the ILO. The ILO Administrative Tribunal is, moreover, authorized also to hear cases stemming from other organizations, and a host of them have used this opportunity, ranging from GATT to the FAO, and from the WHO to UNESCO.

Administrative tribunals can also be found in a number of regional international organizations, from the League of Arab States to the Asian Development Bank.[68] In the EC, however, staff cases are dealt with by the Court of First Instance, which also hears other designated classes of cases and is thus not an administrative tribunal *pur sang*.[69]

Some points concerning the administrative law of international organizations are worth mentioning. First of all, there is a certain logic involved in having a unified system of labour rules for employees and having internal systems to deal with disputes.[70] An obvious reason for this is the fact that employees will usually come from different countries with different labour laws; equally obvious, they should be independent from their home states in all possible respects, including those of employment.

[67] See Paul C. Szasz, 'Adjudicating Staff Challenges to Legislative Decisions of International Organizations', in Gerhard Hafner *et al.* (eds.), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday* (The Hague, 1998), 699–720.

[68] For an overview of the latter, see Kari T. Takamaa, 'Aspects of Procedure and Jurisprudence of the Asian Development Bank Administrative Tribunal 1991–1996' (1997) 8 FYIL, 70–137.

[69] Before the creation of the Court of First Instance, staff cases were dealt with by the regular Court of Justice.

[70] See, e.g., the decision of the Tribunal Civil of Versailles of 27 July 1945 in *Chemidlin* v. *International Bureau of Weights and Measures*, in (1943–5) 12 AD, 281, holding that the international character of the Bureau meant that French law was not applicable to labour relations between it and its staff. In a similar vein the Conseil d'Etat held on 20 February 1953 *(In re Weiss)* that it had no jurisdiction over labour disputes, not even with respect to French candidates for international positions, in 20 ILR 531.

Moreover, there should be some remedy against machinations of the organization, and as organizations are usually immune from local jurisdiction, it stands to reason that their servants should have other possibilities for legal recourse.[71]

In essence, international civil servants are hired on two bases. One possibility is employment on the basis of a contract; the other is statutory employment, where the decision to employ Mr or Ms X will be a legal act of the organization concerned. Most organizations use the contract; the EU, however, is an important example of an organization using statutory employment.

While the differences between the two need not necessarily be exaggerated, there are some differences nevertheless: in particular the applicable law will to some extent be inspired either by contractual notions, or by more administrative notions. Thus, there may be differences relating to, for example, the way in which the employment relationship may come to an end. Still, according to one authority, the two systems are growing more and more towards each other.[72]

Apart from contract or decision, the employment law of international organizations may have some other sources as well. The most obvious of these is the constituent treaty: if an employment decision or contract would go against the constitution of the organization, it may well be annulled. To name one apposite example: Article 288 (ex-Article 215) TEC specifies that the personal liability of EC employers towards the EC will be regulated in Staff Rules and Conditions of Employment. It follows that employment decisions may not ignore such prescriptions.

Of more practical importance, however, than constituent charters are instruments such as staff rules and regulations, and even manuals, circulars and similar documents may be deemed of law-creative character. As a matter of hierarchy, usually the staff regulations will be of higher status than staff rules.

Like all legal systems, the administrative law of international organizations also has a place for general principles of law (good faith, for example, or *force majeure*), and some argue that the body of rules making up the international civil service employment law often incorporates more specific

[71] See generally Michael Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' (1995) 36 VaJIL, 53–165.

[72] C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge, 1996), p. 334.

principles under the banner of general principles of law within the meaning of the Statute of the International Court of Justice.[73]

Issues of administrative law occasionally used to reach the International Court of Justice in the form of a request for an advisory opinion, granting the ICJ a curious form of appellate jurisdiction.[74] Thus, under the Statute of the ILO Administrative Tribunal, the opinion of the ICJ was to be considered as binding.[75] Following the *Effect of awards* opinion of 1954, the General Assembly even created a special Committee on Applications for Review of Administrative Tribunal Judgements,[76] with the task (inserted into Article 11 of the UNAT's Statute) of screening applications and selecting those which would be suitable as the basis of a request for an advisory opinion.

In this regard, the Court has described its task as follows:

> the task of the Court is not to retry the case but to give its opinion on the questions submitted to it concerning the objections lodged against the Judgement [of the Administrative Tribunal]. The Court is not therefore entitled to substitute its own opinion for that of the Tribunal on the merits of the case adjudicated by the Tribunal. Its role is to determine if the circumstances of the case, whether they relate to merits or procedure, show that any objection made to the Judgement . . . is well founded.[77]

In the early 1950s, several UNESCO employees had seen their contracts expire without renewal, despite the fact that UNESCO's Director-General had earlier issued an administrative memorandum in which he stated that all employees who fulfil certain conditions and whose services were needed would be offered a new contract. The disgruntled employees figured that they met the conditions and that their services were needed. They thought the only reason their contracts were not renewed was the upsurge of McCarthyism: their leftist sympathies were apparently the cause for their dismissal. They went to the ILO Administrative Tribunal (which also handles UNESCO cases), which found in their favour. In turn, UNESCO appealed to the ICJ.[78]

[73] So, e.g., Michael Akehurst, *A Modern Introduction to International Law* (6th edn, London, 1987), pp. 34–5.

[74] The General Assembly terminated this possibility in 1996. See Szasz, 'Adjudicating Staff Challenges', p. 715. This termination does not, of course, deprive past decisions of their validity.

[75] Article XII, ILOAT Statute.

[76] By means of General Assembly Resolution 957 (X).

[77] *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal (Fasla)*, advisory opinion, [1973] ICJ Reports 166, para. 47 (hereinafter referred to as the *Fasla* opinion).

[78] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made Against the UNESCO*, advisory opinion, [1956] ICJ Reports 77.

The ICJ held that an administrative memorandum, such as that issued by the Director-General, may well be regarded as binding upon the organization, given the terms in which it was cast. Thus, if the employees met the conditions, the memorandum created a 'right of renewal of the contracts'.

More important for present purposes, the Court indicated how its own role could be of use, and how, its own limitations on standing notwithstanding, it could nevertheless guarantee good administration of justice. In particular on the point that the Court is not available to individuals and proceedings would therefore be lacking in equality, the Court found an elegant way out, noting that the difficulty 'was met, on the one hand, by the procedure under which the observations of the officials were made available to the Court through the intermediary of Unesco and, on the other hand, by dispensing with oral proceedings'.[79]

In the 1973 *Fasla* opinion, arising out of the discontent of an employee whose contract was not extended and for whom no other assignment was found, partly due to incorrect information circulating within the UN concerning his qualifications and experience, the Court was asked whether, in not specifically *(eo nomine)* addressing some of Mr Fasla's claims and in awarding Mr Fasla a relatively small amount of compensation, the Tribunal had failed to exercise proper jurisdiction. The Court upheld the idea that tribunals possess a wide margin of discretion when it comes to delimiting their proper jurisdiction and awarding damages.

In respect of the Tribunal's exercise of jurisdiction, the Court's chosen criterion is a formal one: to find out whether the Tribunal 'addresses its mind to a claim or question'.[80] If so, it cannot be accused of failing to exercise its proper jurisdiction. In respect of reparation, the Court affirmed the principle that 'reparation must, as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[81]

Alternatives

To some extent, the experiences of the latter part of the twentieth century appear to indicate a move away from traditional dispute settlement

[79] *Ibid*., p. 86.

[80] *Fasla* opinion, paras. 59, 70 and 74. In a similar vein, on the claim that an error in procedure had been committed, the Court affirmed the importance of some form of apparent reasoning in a judgment (para. 95).

[81] *Fasla* opinion, para. 65.

mechanisms, and towards a replacement by two distinct but presumably related phenomena. A first is an increasing emphasis on the management of international regulatory regimes, guiding states towards compliance with norms formulated both within and without international organizations rather than assigning blameworthiness and responsibility. The second is an increasing tendency to settle disputes in-doors, using the organization's own substantive rules and leaving the general doctrines of international law, most notably the law of treaties and the law of responsibility, aside.

The first trend, a sign of post-modern times perhaps,[82] is to focus increasingly on management of a regime. In this view, most sophisticatedly set out by Chayes & Handler Chayes,[83] the traditional binary way of legal thought (behaviour is either in conformity with the law or it is not) is gradually replaced by more diverse opinions, where small violations may not be counted or taken seriously, as long as the regime itself is not threatened. That this phenomenon takes place is undeniable; whether it is also a good thing, as Chayes & Handler Chayes seem to suggest, is a different matter. Taking the management approach one step further, it has already been suggested that it is 'incorrect to assume that more compliance is always good',[84] and from there it is only a small step to claiming that whether or not to comply with international law is, really, a matter for the law's subjects to decide for themselves.

A second trend (arguably) in the law of international organizations relating to dispute settlement is that, increasingly, the law of any given organization tends to become self-contained.[85] While usually general international law will remain present in the background, resort to it will as much as possible be avoided: general international law is increasingly becoming the law of last resort.[86]

[82] It has been argued that the attempt to cast aside politics by technical management is a typical feature of present-day post-modern thinking, which has not left international organizations unaffected. For an argument to this effect, see Veijo Heiskanen, 'The Rationality of the Use of Force and the Evolution of International Organization', in Coicaud & Heiskanen (eds.), *The Legitimacy of International Organizations*, 155–85.

[83] Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA, 1995).

[84] See Joel P. Trachtman, 'Bananas, Direct Effect and Compliance' (1999) 10 EJIL, 655–78, p. 657.

[85] The wording is borrowed from the ICJ, which held diplomatic law to be a self-contained regime and thereby presumably meant that no remedies were to be sought for outside that regime: *United States diplomatic and consular staff in Tehran*, [1980] ICJ Reports 3, para. 86.

[86] See generally Martti Koskenniemi, 'Breach of Treaty or Non-compliance? Reflections on the Enforcement of the Montreal Protocol' (1992) 3 *Yearbook of International Environmental Law*, 123–62.

Thus, the 1993 Chemical Weapons Convention (CWC),[87] creating the Organization for the Prohibition of Chemical Weapons (OPCW), envisages three types of breach in Article XII. The first is somewhat euphemistically referred to as 'compliance' problems; if these exist, then diplomacy shall solve the problems. If that does not work, the rights and privileges of the defaulting state may be restricted or suspended by the OPCW's plenary body (the Conference), upon recommendation of its Executive Council.

Secondly, there may be cases resulting in 'serious damage to the object and purpose' of the Chemical Weapons Convention. If these occur, the Conference may recommend collective measures to state parties, 'in conformity with international law'. Third, in cases of 'particular gravity', the issue may be brought to the attention of the General Assembly and the Security Council.

What is interesting to note is the fact that it was deemed necessary to specify various categories of violations at all, rather than rely on international law's general doctrines. The most plausible explanation is a serious dissatisfaction with general international law on this point, which is indeed lacking in clarity. Under general international law, there may be an ordinary internationally wrongful act, or a 'material' breach of treaty or, as it was thought for a while, an international crime of state.[88] But how to distinguish between them, and how to apply these notions, is hopelessly unclear.[89]

Moreover, and perhaps more important for present purposes, the various legal consequences to be attached to the various categories of non-compliance remain subject to debate. Committing an international crime would obviously have had to result in criminal responsibility, but the consequences thereof as drafted by the International Law Commission in 1996

[87] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, reproduced in (1993) 32 ILM 800. Some aspects of the OPCW's position in international law are discussed in Eric Myjer (ed.), *Issues of Arms Control Law and the Chemical Weapons Convention* (The Hague, 2001).

[88] The International Law Commission introduced the latter notion in 1976 while drafting its articles on state responsibility, in an attempt to underline the seriousness of some forms of behaviour. The problematic nature of distinguishing between crimes and torts, however, meant that the concept was put on hold and later dropped from the draft articles on state responsibility. For a brief discussion, see James Crawford, 'Revising the Draft Articles on State Responsibility' (1999) 10 EJIL 435–60, esp. pp. 442–3.

[89] See generally also Jan Klabbers, 'Side-stepping Article 60: Material Breach of Treaty and Responses Thereto', in Matti Tupamäki (ed.), *Finnish Branch of International Law Association 1946–1996: Essays on International Law* (Helsinki, 1998), 20–42.

were not terribly far-reaching.[90] Committing a material breach of treaty may result in being expelled from the entire treaty regime, but when the treaty creates an international organization such a consequence is not very fortunate: the organization loses control of the expelled state.[91]

Dispute settlement properly speaking is, in the OPCW, left to the political organs, and much the same holds true with other organizations: if they provide for some organ having the power to take binding decisions, it is usually one of the political organs. Within ICAO, for instance, the power rests with the executive body, the Council; and such was unambiguously confirmed by the ICJ in 1972, in a dispute between Pakistan and India. Admittedly though, the ICJ reserved for itself the possibility of functioning as an appeals court, but could of course only do so on the basis of the ICAO Treaty itself: in this case, its jurisdiction to handle appeals against ICAO decisions finds its origin in the ICAO convention.[92]

Concluding remarks

The complex relationship between the organization and its members is also visible in the realm of dispute settlement. On the one hand, where organizations assume judicial settlement functions beyond inter-state disputes, as with the EC Court, or the Yugoslavia Tribunal, partly the organization is relieving its members from some tasks, under the banner of the greater good for all. This is generally considered as a highly welcome development; after all, for the committed internationalist, any international settlement is instinctively preferable to a domestic solution.

Yet, at the same time, the member-states jealously guard their sovereign prerogatives. With many human rights treaties, it is no coincidence that exhaustion of local remedies is a strict condition for the admissibility of complaints, assuring the member-states that the organization can only become active if they (the members) let it. While the exhaustion rule allows international tribunals to act as courts of appeal (thus catering to organizational demands), it also narrows down considerably the situations

[90] Broadly, it boiled down to a duty not to recognize the practical consequences of a criminal act and to refrain from assisting the criminal state. Compare Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994/VI) 250 RdC, 219–384, esp. pp. 304–8.

[91] See also Nagendra Singh, *Termination of Membership of International Organisations* (London, 1958), p. 58.

[92] *Appeal Relating to the Jurisdiction of the ICAO Council* (India v. Pakistan), [1972] ICJ Reports 46.

in which appeals may arise, therewith protecting the position of member-states.

In other organizations, awkward or ingenious procedures of co-operation are envisaged. Thus, the Yugoslavia and Rwanda Tribunals know full well that, when push comes to shove, they may have the formal final say but lack the means actually to force states to hand over those who are on its territory.[93] The EC has the preliminary reference procedure, but the EC Court has also been forced to devise complex rules on which court has what to say in which circumstances; witness the open-ended nature of the *acte clair* doctrine.

By the same token, it is no coincidence that many of the tribunals that somehow deal with the rights of private citizens either are unable to render binding decisions (think of all the human rights tribunals operating under the flag of the UN) or do not even allow private citizens or companies standing, despite relating, in as far as the substance of their work goes, to the activities of private actors (the WTO dispute settlement mechanism is a good example). And it is no coincidence that advisory, non-binding opinions are at their most popular within international organizations.

Such doctrines, rules and procedures may grow haphazardly, as pragmatic answers to practical questions, but taken together they confirm the by-now-familiar pattern: they fit the pattern of the law of international organizations resembling an intricate tug of war between the organization and its members.

[93] The ICC Statute, by contrast, envisages a more 'co-operative' notion of complementarity, but this too leaves jurisdictional conflicts ultimately unresolved. See Immi Tallgren, 'Completing the "International Criminal Order": The Rhetoric of International Repression and the Notion of Complementarity in the Draft Statute for an International Criminal Court', (1998) 67 Nordic JIL, 107–37, p. 123.