

Course: LAWS341  
Subject: Lecture Notes

**CONTENTS:**

<b>Lecture 1: Introduction and Legal Personality</b> .....	<b>3</b>
Notes from Readings .....	3
Notes from Lecture .....	5
<b>Lecture 2: Legal Personality (cont.); Organs, Membership and Financing; Law of Treaties</b> .....	<b>8</b>
Notes from Readings .....	8
Notes from Lectures .....	11
<b>Lecture 3: Law of Treaties (starting Acts and Instruments)</b> .....	<b>16</b>
Notes from Readings (Acts and Instruments) .....	16
Notes from Lectures .....	17
<b>Lecture 4: Acts and Instruments (Unit 5)</b> .....	<b>21</b>
Notes from Readings .....	21
Notes from Lectures .....	21
<b>Lecture 5: Unit 5 (cont.) and Unit 6 (Doctrinal Foundations of Power)</b> .....	<b>25</b>
Notes from Readings (Powers of International Organisations: Doctrinal Foundations of Power (Unit 6)) .....	25
Notes for Panel: Interpretation .....	26
Notes from Readings (Validity and Review (Unit 7)) .....	28
Notes from Lectures .....	28
Unit 6: Doctrinal Foundations of Powers .....	31
<b>Lecture 6:</b> .....	<b>32</b>
Notes from Lecture .....	32
Unit 8: Validity and Review .....	34
<b>REVISION SESSION</b> .....	<b>36</b>

<b>Lecture 7: Judicial Review .....</b>	<b>37</b>
Notes from Readings .....	37
Notes from Lecture .....	37
Unit 8: Responsibility for Wrongful Wrongful Acts .....	40
Unit 9: Privileges and Immunities .....	43
<b>Lecture 8: .....</b>	<b>44</b>
Notes from Readings .....	44
Notes from Lecture .....	44
Unit 10: Accountability and Reform in Practice.....	47
<b>Lecture 9: .....</b>	<b>49</b>
Notes from Readings .....	49
Notes from Lecture: Finishing Reforms .....	49
<b>----- PART B ----- .....</b>	<b>51</b>
Unit 11: Historical and Socio-legal Approaches to studying IOs .....	51
Unit 12: Establishing the ILO and other IOs after WWII .....	52
<b>Lecture 10: .....</b>	<b>53</b>
Notes from Readings .....	53
Notes from Lecture: The ILO and Technical Assistance (Unit 13).....	53
Unit 14: ILO and Development – 1930s and 1940s. ....	55
<b>Lecture 11: .....</b>	<b>56</b>
Notes from Readings .....	56
Notes from Lecture .....	56
<b>Lecture 12: .....</b>	<b>57</b>
Notes from Readings .....	57
Notes from Lecture .....	57
Unit 16: World Bank and Development.....	58

<b>Lecture 13:</b> .....	<b>59</b>
<b>Notes from Readings</b> .....	<b>59</b>
<b>Notes from Lecture</b> .....	<b>59</b>
<b>Unit 17: The World Bank and Global Governance</b> .....	<b>60</b>
<b>Unit 18: Conclusion and Themes</b> .....	<b>63</b>
<b>Final Assessment</b> .....	<b>63</b>
<b>Themes and Musings</b> .....	<b>63</b>

## LECTURE 1: INTRODUCTION AND LEGAL PERSONALITY

Dated: 20 November 2018

### Notes from Readings

1. Readings List:
  - (a) Ian Hurd *International Organizations: Politics, Law, Practice*:<sup>1</sup> applying IR theories (realism, liberalism, constructivism and Marxism) to IOs, forming three groupings, of IOs as actors, for a or resources.
    - (i) Other notes: theories provide intellectual frameworks – rather than falsifiable hypotheses – illustrate different ways of **how power should be conceived** rather than only being about power/self-interest.
    - (ii) Realism:
      - (aa) Core ontological claim of state as starting point, their insecurity leads to seeking power (theory on motivation) through military dominance (a theory of materiality: military force as what constitutes power).
      - (bb) Empirical question of how IOs help/hinder this pursuit.
      - (cc) Normative question of whether they should.
    - (iii) Liberalism: focus on choices of actors
      - (aa) IOs as agreements formed by states – look to mutual benefits – conditions necessary for IOs to form – look at unintended consequences of such agreements. Viewed in contractual terms, eg Rome Statute, WTO, GATT<sup>2</sup> and negotiations
      - (bb) Contractualism: states as active agents – consent to intrn rules – delegate power to IOs, IOs as servants. Consequence: that IOs acting autonomously is problematic. This view is problematic, certain unforeseen circumstances arise (not contemplated during contracting) may require IOs to act autonomously. Can be viewed as a zero-sum game of power (Klabbers).
      - (cc) “Interest-group liberalism”, looking at state being influenced by web of domestic institutions. Contrast “regime theory”, looking

<sup>1</sup> (2nd ed, 2014), (p17-33).

<sup>2</sup> General Agreement on Tariffs and Trade.

- at web of international institutions impacting choices of states, eg IMF and monetary flows.
- (iv) Constructivism: shaped by ideas and past interactions (US reaction to nuclear bomb development of UK v North Korea). IOs as a product eg powers of UN Security Council
    - (aa) Relationship between states and IOs shaped by processes of interaction between both groups
    - (bb) Tension of legitimation and practice – seen through constructivist lens eg refusing ICJ jurisdiction.
    - (cc) **How actors think about their self-interest and how perception of those interests shaped by external environment.**
  - (v) Marxist: international political and international economic orders are linked – (Chimni) – inherently an unequal system – reinforce and maintaining existing power structures of rich states over poor states.
  - (vi) **Ontology:**
    - (aa) IOs as actors: issues of IOs constituted by many sub-organisations, therefore collective rather than unitary – issues of defining legal personhood and independence, whether power is delegated or constituted otherwise.
    - (bb) IOs as forum: meeting place, physical manifestation too – include plenary body for decision-making – decisions have legitimating effect.
    - (cc) IOs as resources: used by states to pursue (intrn/domestic) goals – limits of power of IOs especially how states then take and use (or ignore) decisions by IOs.
- (b) United Nations Charter, especially Art 104: *The Organisation shall enjoy in the territory of each of its Members **such legal capacity** as may be necessary for the exercise of its functions and the fulfilment of its purposes.*
- (i) Issues of enforcement – rejection by states – enforcement (eg forcing a state to accept UN’s legal capacity) might breach sovereignty, protected in Article...)
- (c) International Labour Organisation (“ILO”) Constitution, especially Art 39: *The International Labour Organisation shall possess full juridical personality and in particular the capacity:*
- (a) To contract;
  - (b) To acquire and dispose of immovable and movable property;
  - (c) To institute legal proceedings.
- (d) International Bank for Reconstruction and Development (“IBRD”) Articles of Agreement, especially Art VII: “*Status, Immunities and Privileges*”.
- (i) Section 2 (“Status of the Bank”) mirrors ILO wording on legal personality.
  - (ii) Section 3 on immunities from suit of Bank assets, and s 4 on immunities against search, confiscation, expropriation etc.
  - (iii) Section 9 on immunity from taxation.
- (e) Draft Articles on the Responsibility of International Organisations (2011), Art 2
- (i) **Definition (art 2 (a)): “international organization” means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International Organizations may include as members, in addition to States, other entities.**

- (f) Reparation for Injuries Suffered in the Service of the United Nations (ICJ Adv Op. 1949), pp 177-179:
  - (i) ICJ: UN has legal capacity – without it, could not exercise rights – states entrusted UN with such functions. Other reasons: IL developed through requirements of international life – UN needed, confirmed through practice.
  - (ii) Qualifier: scope of rights not defined – unlikely to be the same level of states. But primary power of international legal capacity is ability to bring international claim.

2. Videos and Reflection Questions:

- (a) Questions:
  - (i) What different kinds of international organisations do we have today, and why?
  - (ii) Are they necessary, or can we do without them?
  - (iii) What kinds of justifications have been offered for them, and on what grounds can they be criticised?
  - (iv) What is the difference between “multilateralism” and “globalism”?
    - (aa) Multilateral: multiple states pursuing same goal. Globalism is working toward issues on a global basis. One is state-focused. Another is world-focus.
    - (bb) Eg climate change. Multilateral = many oil-rich states ignoring Paris. Globalist = do something or we fucked.
  - (v) Can we imagine any alternatives to international organisations?
- (b) [UN News](#): “New Zealand Prime Minister calls any breakdown of multilateralism ‘catastrophic’”
- (c) [UN News](#): “US President Trump rejects globalism in speech to UN General Assembly’s annual debate”
- (d) [UN News](#): “Dialogue and multilateralism key to tackling global challenges France’s Macron says at UN, urging leaders not to accept ‘our world unraveling’”
- (e) [The Guardian](#): (Bernie Sanders) “The Future of the international left: A new authoritarian axis demands an international progressive front”
- (f)

## Notes from Lecture

3. History:

- (a) History of IOs: 1800s Universal Postal Union – Trump withdrew recently - late 1800s Red Cross – LON 1919 – UN in 1945 - ITU – originally, 1865, International Telegraph Union - Waste management organisations, river commissions.
  - (i) Pre-IOs, how was the world organised? Treaties, certain leagues/congresses/conferences, role of Empires (as possible proto-IOs).
  - (ii) **1919**: end of WWI – ILO forms.
  - (iii) **1945**: creation of UN and specialised agencies – Bretton Woods Institutions (GATT, IMF) – NATO, Warsaw Pact/ComiCon – Oil/Steel community in Europe.
  - (iv) Some waves in 19<sup>th</sup> Century. Several main waves in 20<sup>th</sup> Century. Post WWs and from decolonisation. 1955-1975: development agencies, UNCLOS (Law of the Sea). End of Cold War: EU, WTO, ICC, African Union (previously Intn Org of African States).
- (b) Is there a wave starting now? AIIB in 2016 (Belt and Road Initiative?), New Development Bank (Brazil, Russia, India, China, South Africa) – Eurasian Economic Union (in 2014).

4. Why do we have them?

- (a) Globalisation of issues – intn org created in response. Globalisation drives integration of world.
  - (b) Post-WWII: liberalist view toward world peace. Prevention of war by entangling economies and disincentive to war.
  - (c) Achievement of goals for states: ideals, economic, material, security, integration. Soft-power mechanism.
  - (d) IOs as forums:
5. Application of theories:
- (a) Realism: wielding economic power through WTO, IMF etc
  - (b) Liberalism: not merely power-seeking entities – sub-state, civil society. Each seek different goals. IOs permit different interest groups to exercise their voices/desires.
6. Normative Question: are IOs good or bad? **BAD.**
- (a) Perpetuation of norms
  - (b) Historical account
  - (c) Power balance
  - (d) Self-perpetuating – an oppression of “no alternative”
  - (e) Moral calculus
  - (f) Coordination and monitoring: WHO, Aviation – **a difference** between “power-holding” organisation and coordinating bodies. But is this a false distinction?
7. Why are we studying it?
- (a) Pervade all aspects of governance – part of world of laws *and norms*.
  - (b) Cholera outbreak from Nepalese workers – peacekeepers and assault in the Congo – UN Security Council in Syria and Ukraine, NATO in Afghanistan.
  - (c) **A moment of change:** world order is changing – forces moving against IOs – longstanding criticisms, some turning away from globalism. Worries of authoritarian globalisation.
  - (d) How do we want to be governed, who is governing us?
8. [See slide for “Waves of IOs” and “Why do we have IOs?”]
9. Different types of IOs: a rough typology (qualifier: not the soundest of distinctions):
- (a) Inter-governmental vs. non-governmental (aka “Public v Private”)
  - (b) Regional (“Closed”) vs. Universal (“open”)
  - (c) Judicial vs. Non-judicial: eg ICC vs. UN
  - (d) Broad focus vs. narrow focus:
  - (e) Political vs. technical/functional: political organisation like a UN, or World Bank which is “just” technical.
  - (f) Other distinctions: peace and security, economics, trade, human rights, environmental etc.
  - (g) *Commentary:* problematic typology- are hybrids of both eg ISO. Non-judicial organisations have judicial bodies. ICC have bureaucracies which are non-judicial. UN has ICJ. ILO has administrative tribunal. Meaning of “politics” or is HR distinguished from environments? NATO is “regional” but operates in Afghanistan. OPEC is “regional”, based largely in Middle East but important members reside outside.
10. **Scope of this course:**
- (a) Mostly intergovernmental/public, non-judicial, universal. Both political and technical organisations.
  - (b) Key examples: different foci, histories, structures – to show the variety that is possible.
    - (i) UN
    - (ii) World Bank
    - (iii) ILO
    - (iv) Others: FAO, WHO, ICAO, WTO, IMF.

- (c) Excluded: NGOs (eg Amnesty or Red Cross), trans-governmental networks (eg of judges), organisations with unclear statuses eg G7, EU, ECOWAS.
- (d) Focus: variety and complexity of different IOs – many are different from UN (cannot only study UN). Doctrinal issue-focused (in some other courses), however this can flatten the subject as a set of doctrines and structures. How IOs are similar and different.
- (e) **Part I: Doctrinal/Principles**
  - (i) Structural Features of IOs
    - (aa) Legal personality
    - (bb) Organs and membership and financing
    - (cc) IOs and law of treaties.
  - (ii) Powers:
  - (iii) Controls: legal issues of IOs
- (f) **Part II: Practice (analysis of legal issues)**
  - (i) ILO and World Bank focus
  - (ii) Law overlapping with morality, expertise, norms
  - (iii) Change of IOs over time – expansion – controls and limits
  - (iv) Still looking at institutional law of IOs
- (g) [See expectations on power-point].
- (h) Purpose of first test: closed-book to test knowledge and understanding on Part A.
- (i) Final Exam: answerable with material from class – essay-based.

### Legal Personality:

- 11. Outline:
  - (i) What kinds of thing is an 'international organisation'?
  - (ii) Definitions of 'international organisation'
  - (iii) Indicators of international subjecthood
  - (iv) International legal personality ("ILP")
  - (v) Theories of ILP
  - (vi) ILP in practice: *Reparations for Injuries*
- 12. What kind of a thing is an IO?
  - (a) Some preliminary questions:
    - (i) Is an IO separate from its membership?
    - (ii) Is it a place or an actor or a forum or a resource? (Heard)
    - (iii) As a resource, symbolism of IOs, used by other political actors (for positive or negative). Eg blue helmet of UN – symbol of peacekeeping, sign of hope – today, a mixed symbol? Colin Powell seeking action against Iraq (when others in Bush Administration derided the UN). UNICEF branding on Barcelona football team.
    - (iv) As an actor, do they have a separate legal personality? Resistance to them, worrying they become states or super-states and unintended consequences.
- 13. Definition:
  - (a) "Created between states; On basis of a treaty; Possessing **a distinct will**".
  - (b) Compare draft articles art 2 (from International Law Commission): established by treaty or governed by international law. Possessing own distinct legal personality. May include, in addition to States, *other entities*.
- 14. Indicators of international subjecthood:
  - (a) Historically involved states.
  - (b) ICJ recognised other subjects: "not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community". *Reparations for Injuries*, *Advisory Opinion*.

- (c) Indicators: Three areas of ILP: treaty-making capacity, right to bring/receive claims, to send the receive legations.
- (i) Treaty-making capacity: generally accepted IOs can and do. *Where does this capacity derive from? The IOs constituent instrument? (constitution) or public international law?*
    - (aa) If constituent instrument, then depends on the instrument's terms. Capacity depends on what instrument says.
    - (bb) If not based on instrument, it can make treaties even if constitution says nothing of it.
    - (cc) At CM95: Vienna Convention on Treaty-making – preamble notes IOs have capacity and art 6 stating power derives from constituent instruments. *Commentary*: preamble suggests power derives from public IL – notes a power which derives without restriction. “Which is necessary for the exercise of their functions and the fulfilment of their purposes”. But still a broad limitation. Contrast art 6 “governed by the rules of the organisation”. Does capacity derive from constituent instrument? Art 2(1)(J) defines “rules of organisation” as broader than constituent instrument.
    - (dd) **Derived by public IL but governed and limited by constituent instrument.**
  - (ii) Right to send and receive legations (diplomatic missions): some IOs have missions with one another, others send missions to different states. A not-yet enforced convention on this [see slide].
  - (iii) Right to bring and receive claims: *Reparation for Injuries* (1945). Some limitations on this capacity – eg can be party to advisory proceedings, but cannot bring a case - IOs cannot be party to “contentious proceedings” to ICJ.
- (d) Three indicators relating to IOs:
15. For next class: on what basis does ICJ decide IOs have ILP? States entrust UN with certain exercises of power which would not be possible without having ILP.

## LECTURE 2: LEGAL PERSONALITY (CONT.); ORGANS, MEMBERSHIP AND FINANCING; LAW OF TREATIES

Dated: 22 November 2018

### Notes from Readings

1. **Summary (Organs and Membership)**
  - (a) Plenary, executive and administrative organs – who participates (and who does not) in each organ – IOs' relationships to members – admitting, suspending, terminating and succeeding members – members exercising power/voice in IOs –
  - (b) Financing: responsible parties for budgeting, disbursements, structure and power of budgeting.
  - (c) Criteria of fairness, efficiency, *realpolitik*, democratic legitimacy etc.
2. **Summary (Law of Treaties)**
  - (a) TWE constituent instruments are treaties – case studies: UN, ILO, World Bank, wrt Vienna Convention on Law of Treaties.
  - (b) Constituent Instruments: objects/purpose, ratification/signature/entry into force, reservations, revisions/amendments, termination.
  - (c) Capacity of IOs to enter into treaties (in passing).



- (d) **Interpretation:** how should treaties be interpreted – by whom? Key factors in treaty-interpretation – differences between treaty-interpretation and interpreting other constituent instruments.

3. **Organs:**

- (a) Charter of the United Nations, Chs III, IV, V and XV (also: Chs X, XIII, and XIV)
- (i) Ch III: Organs – (GA, SC, Economic and Social Council, Trusteeship Council, ICJ, Secretariat).
  - (ii) Ch IV: GA, membership (states in UN) – voting
  - (iii) Ch V: SC – power of veto by 5 (Art 23) – promoting peace and security –
  - (iv) Ch XV: Secretariat – secretary general + staff – independent, no direction from any states (art 100) –
  - (v) Ch X: Economic and Social Council – 54 members elected – initiate reports, uphold HR and fundamental freedoms
  - (vi) Ch XIII: Trusteeship Council – administering “trust territories”, mentioned in 23 not administering and those elected -
  - (vii) Ch XIV: ICJ – failed adherence to judgment could lead to SC (art 94)
- (b) ILO Constitution, Arts 2-10
- (i) Members: General Conference, Governing Body, International Labour Office.
  - (ii) General Conference: four reps of each members, two govt delegates, two employers and workpeople
  - (iii) Governing Body: 28 govt reps, 14 employer reps, 14 worker reps – determining: chief industrial importance”, selection of Members
  - (iv) International Labour Office: Director-General, subject to Governing Body instructions – collect and distribute information on international adjustment of conditions of industrial life.
- (c) IBRD Articles of Agreement, Art V
- (i) Board of Governors: one gov and one “alternate” from each member – may delegate different duties to Exec Directors, including suspension of a member.
  - (ii) Executive Directors: conduct of general operations + delegated powers
  - (iii) President: not a governor – elected with no vote (except tie-breaker) – chief of operating staff
  - (iv) Other: advisory council, loan committees

4. **Membership:**

- (a) Charter of the United Nations, Ch II
- (b) ILO Constitution, Art 1
- (c) IBRD Articles of Agreement, Arts II and VI, and Schedule A
- (d) *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter) (Advisory Opinion) [1948] ICJ Rep 62*
  - (i) [I]: are conditions in art 4 exhaustive? (or can members gain admission on other factors).
  - (ii) Scope: court not dealing with “the abstract”.
  - (iii) Conditions stated: State, peace-loving, accept Charter obligations, able to carry out obligations, willing to carry out obligations.
  - (iv) Step One: clarity of meaning - no conflict between French or English versions - “natural meaning” – conditions are necessary and sufficient, adding more would make provision “lose its significance or weight”.
  - (v) Step Two: “taking into account other factors” – however, lookgin to art 24, couched in general terms – art 4 is exhaustive.

- (e) *Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion)* [1950] ICJ Rep 47
    - (i) [I]: decision of admission effected of GA when SC no recommendation when candidates fails requisite majority?
    - (ii) Majority: both SC and GA are requisite – SC is not subordinate – therefore GA decision cannot affect SC’s silence.
    - (iii) Dissent: issues of limiting States’ rights and the exercise of rights, abuse of rights, interpretation of treaties.
  - (f) Nigel D White, *The Law of International Organisations* (2nd ed, 2005) 108-130
    - (i) [L]: looking at joining/leaving/withdrawals and suspensions.
    - (ii) Presumption of lawful withdrawal – issues of undermining sovereignty in practice
    - (iii) Examples of Yugoslavia and South Africa expulsion – flexibility of interpreting constituent document
    - (iv) Marxist elements: power in hands of few states, collecting more legislative capacity and influencing IOs – lack of checks and balances on IOs – issues of representation.
    - (v) *Commentary/critique*: heavy UN focus.
5. **Financing:**
- (a) Charter of the United Nations, Arts 17, 19
  - (b) ILO Constitution, Art 13
  - (c) IBRD Articles of Agreement, Arts II, III, IV and V
  - (d) C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd ed 2005) 359-365
6. **Background reading:** Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (2017) 36-38, 119-123, 208-211
7. [Guardian Article](#): Kosovo fails in UNESCO membership
- (a) Why seeking membership? Access to fund – legitimacy of state, **bolstering statehood** – protection of heritage sites.
  - (b) [O]: failed three votes – blocked by Russia and her allies. Kosovo warring against Serbia and Montenegro
8. [UNESCO Constitution](#):
9. **Law of Treaties:**
- (a) Charter of the United Nations, Preamble, Chs I, XVIII and XIX
  - (b) IBRD Articles of Agreement, Arts I, VIII, and XI
  - (c) ILO Constitution, Preamble, Art 36
  - (d) Vienna Convention on the Law of Treaties (1969), Arts 19-23, 24-25, 39-41, 54-59
  - (e) Vienna Convention on the Law of Treaties between States and International
  - (f) Organizations or between International Organizations (21 March 1986), Preamble, arts 1-7
10. **Interpretation of Treaties:**
- (a) Charter of the United Nations, Ch XIV
  - (b) IBRD Articles of Agreement, Art IX
  - (c) ILO Constitution, Art 37
  - (d) Statute of the International Court of Justice, Arts 34 and 36
  - (e) Vienna Convention on the Law of Treaties (1969), Arts 31-32
  - (f) José E Alvarez, ‘Constitutional Interpretation in International Organizations’, in Jean- Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations* (2001) pp 104-114
  - (g) *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (Advisory Opinion)* [1960] ICJ Rep 150 (summary)
11. **Background Reading:** Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (2017) 39-41, 135-141, 226-229

## Notes from Lectures

### 12. Legal Personality

- (a) Distinction from “subject of IL” – Opinion does not make a difference – some say “subject” is about *study* whereas legal personality is a status conferred. In practice, not much of a difference.
  - (i) “Three indicators of subjecthood”: arises from cases, lines of practice, centuries old. (indicators include treaty-making etc).
- (b) Legal personality: rights and obligations, entering in Ks – appear in domestic or international proceedings.
- (c) [I]: is it international or domestic legal personality?
- (d) In relation to Domestic Legal Personality (“DLP”): if IO has DLP can dispose of property, institute domestic proceedings etc.
- (e) Examples: ILO art 39 (CM22) juridical right to contract “full juridical personality to contract, moveable/immoveables” – contracting is, at least, DLP, probably ILP too.
  - (i) Contrast UN – only “municipal”/DLP in art 104; enjoy, in territories in its members, full legal personality.
  - (ii) Q: does the UN article impose limits on the UN? Yes, domestic and within “as may be necessary for fulfilment of function of its purposes”. In practice, “functions and purposes” are broad – might be no de facto limitation.
  - (iii) IBRD art 7(2) [CM32]:
- (f) **Definition:** Rights duties, powers and liabilities etc. as distinct from its members or its creators on the international plane and in international law” – (Amerasinghe p 78)
- (g) Q: how would IOs acquire ILP? Options:
  - (i) “Will/subjective theory”: States consent. For formation, need consent – for action, need constituent document; OR
  - (ii) “Objective theory”: Derived from international law, independent of will of its founders – IOW, as soon as IO exists as a matter of law, it has ILP.

### 13. Critiques of Theories of ILP:

- (a) Problems with Subjective Theory: what if instrument says nothing about ILP? Eg UN. Drafters of UN contemplated and decided against ILP, for fear UN becoming a super-state.
- (b) Problem with Objective Theory: what if states intend their creation to have no ILP?
- (c) Pragmatic Approach (in practice) to ILP: “**Presumptive Personality**” – when IO constituent doc creates provisions only explainable through having ILP, then presumed IO has ILP. Then look to what happens in practice

### 14. “Reparations for Injuries” Summary: [to be discussed further later]:

- (a) “In the opinion of the Court... *which can only be explained on the basis of the possession of a large measure of international personality .... Could not carry out the intentions of its founders if it was devoid of international personality... Accordingly, the Court has come to the conclusion that the Organization is an international personal*” – at 179.
- (b) Commentary: UN does not give ILP – but gives rights and functions, explainable only by having ILP.
- (c) Not objective criteria for IOs – look to purpose, fulfilling purpose requires ILP. *Intended* to do so. Look to circumstances of creation of IO, constitution and constituent instrument.
- (d) Q: possible criteria for court for ILP?
  - (i) At art 105: “by giving... immunities in each territories of members” – privileges and immunities indicate ILP because: ILP means suit could be brought, so having immunities is to prevent against it.

- (ii) Having purposes, such as having organs.
- (iii) Ability to enter agreement with its members: suggesting it is something separate from its members.
- (e) Possible Criteria:
  - (i) Is attribution of ULP indispensable to achieving the aims of the organization as set by member states?
  - (ii) Have member states equipped org with organs and given special tasks?
  - (iii) Have member states defined the relations between the organization and member states?
  - (iv) Have practice confirmed character of the organisation? Eg Convention of privileges of UN.
  - (v) Does the organisation employ political means in dealing with its members?
- (f) **Summary: presumption made by provisions, then tested in practice.**
- (g) Q: given this test, is it a waste to look/have an explicit provision? Would still need to look at practice and how members acted as though there was ILP. Explicit provision useful for intention and liabilities of states for IOs.
- 15. Concluding remarks on Legal Personality: **central question of whole subject**
  - (a) What are IOs? Actor or sum of its memberships? Is it itself? Can it have claims brought against it? **[a fraught question]**
  - (b) A definition of ILP is “organ with a *distinct will*”.

### **Organs, membership and financing**

- 16. Organs Overview:
  - (a) Main types of organs:
    - (i) plenary,
    - (ii) executive,
    - (iii) administrative organs
  - (b) Examples.
- 17. A note on organs: required for ILP – perform tasks in name of organisation, but lack separate legal personality, not actors in own right – act as checks on one another. Three types of organs.
- 18. Plenary organ: all members meet – meet (more or less) at regular intervals – usually comprised of members of govt (but many exceptions) – task to set common standards, at least of internal functioning.
  - (a) UN: General Assembly – annual meeting
  - (b) ILO: General Conference – full representatives of each member (two govt, two reps of employer/workers). Critical reason for ILO: to pacify the masses rising up.
  - (c) IBRD (World Bank): art 5(1), Board of Governors –
- 19. Executive organs: fewer members (but who and why?) – meet on shorter notice – regulatory and executive decisions (bindingness is question, sometimes can be)
  - (a) UN: Security Council –
  - (b) ILO: Governing Body, art 7 – tripartite representation (govt, employer, worker). 10 members of “chief industrial importance” (10 states).
    - (i) Critically, to put power in the hands of the powerful.
    - (ii) Most effected states have most buy-in: avoid governance of states with few workers eg India (even though not an independent state).
  - (c) IBRB: Executive Directors – directors all together – five appointed by largest shareholders, 7 elected by all the governors.
- 20. Administrative organs:
  - (a) UN: Secretariat
    - (i) Neutral, impartial (between members) – non-political? – not passive observers: art 99 bringing problems to attention of SC.

- (ii) Broadly reflective of membership of membership, art 101(3) and art 100(1) – responsibility of Secretariat only to organization.
  - (iii) Political functions: mediating member State disputes –
  - (iv) Process: GA voted on by recommendation of SC
  - (b) World Bank: art 5(5) [CM28]:
    - (i) “Gentleman’s Handshake”: Head of IMF would always be European, World Bank always American
    - (ii) Always being American status, challenged by Japan, China and India. China setting up AIIB, on WB model – dominated by China.
    - (iii) IMF: challenged by other powers – Christine Lagarde
  - (c) ILO: art 8(1) – appointed by governing body
  - (d) Commentary:
    - (i) Executive Heads is highly politicised, in UN, Secretariats tend to be small-state nationals. Avoid big-bias toward/against big bloc. (Exception being Trygve Lie – USSR vetoed) – Kofi Annan US tension re: War in Iraq.
    - (ii) Q: what is the best way to appoint? What criteria/process? UN moves to transparency.
    - (iii) Differing practices from constituent instruments.
21. [Side-note: UN heavy in Part A, ILO World Bank focus in Part B]
22. Membership Overview:
- (a) Conditions of membership in UN
  - (b) UN Admissions cases
  - (c) Other admission processes: ILO and IBRD
  - (d) Other kinds of membership
  - (e) State succession
  - (f) Representation
  - (g) Suspension, termination and withdrawal
23. UN Membership:
- (a) Membership – broadly – controlled by constituent document. Difference between founding members and later joiners. Distinction made in art 3.
  - (b) Conditions of membership for non-original members: five points from art 4(1): “states” not necessarily independent, India, Belarus, etc.
  - (c) Examining “States”
    - (i) Who is excluded from UN membership?
      - (aa) Individuals, indigenous groups, IOs. [However, other IOs allow other IOs to be members, not UN].
      - (bb) Vatican: observer status
      - (cc) Palestine
    - (ii) **Debate: What constitutes a state? Unratified Montevideo Convention 1933.**
    - (iii) Admission to UN has strong presumption of statehood.
  - (d) Examining “Peace-loving”: norm-creation – historical context of UN Constitution drafted during WWII (excluded Germany and Japan) –
    - (i) Issues: eye of the beholder.
    - (ii) Very little weight as a criteria – UN aims for universal membership. Better in than out.
  - (e) “Able and willing” vs “accepting obligations”: might accept, but not have resources or ability to carry out obligations eg ineffective government. Eg “neutrality” in constitutions such as Austria. Can neutral state contribute forces to national security? Japan and Germany have constitutions to not have military forces. Can they be members if no capacity to carry out?
    - (i) Practical solution: enforce rather than order enforcement actions.

- (ii) Qualifying phrase “in the judgement of the Organization”
24. UN Admission Cases:
- (a) Article 4(2): decision of GA, upon SC recommendation. Note art 18(2) – decisions require 2/3 majority of members present and voting.
- (b) 1948: Conditions of membership to UN – [I]: are art 4 conditions exhaustive?
- (i) [F]: states rejected eg Spain – collaborating with Germany, failing “peace-loving”. Some states wanted to place additional conditions eg “admit your state if admit our state”. Historical context: Cold War – East v West.
- (ii) [L]: language does not explicitly say “only” these conditions.
- (iii) [O]: exhaustive, could not add other conditions. Admission judged in good faith by Organization.
- (iv) [R]: contrary to purpose of article – art 4 cast in broad terms. However, not forbid other factors, “reasonably and in good faith connected to those conditions”. Eg “peace-loving” might link to other factors to look at.
- (c) 1950: Conditions of membership to UN –
- (i) [F]: application rejected by SC due to veto – no recommendation made to GA. Could GA could accept member without SC recommendation?
- (ii) [L]: two-stage process – SC recommends, GA must confirm. IOW, what is the meaning of “recommendation”?
- (aa) GA: SC only has power to recommend which is not binding. Therefore, GA can confirm, if SC does not recommend.
- (iii) [O]: SC must recommend – must precede decision by GA.
- (iv) [R]: SC not subordinate to GA + natural ordinary meaning of “upon recommendation” (preceding, meaning recommendation is the foundation to admit). Charter to create balance between SC and GA – action by GA conditional on SC, or “condition precedent”, “neither can decide alone”.
- (v) [Imp]: interpretation.
25. Discussion: Why a fuss about membership?
- (a) Power: vote in plenary. 1950s, new members from decolonisation. Who to admit and whose side they would be on?
- (b) Legitimacy
- (c) Quality
- (d) Common goals and purposes
- (e) Privileges of membership: eg WTO. Only certain states with certain economies. WB eligibility for loans.
26. Admission process of
- (a) ILO Constitution: part of UN – 2/3 vote – original, UN-members and non-UN members.
- (b) IBRD: Article 1 – art 2(1) – members of IMF – permissible of other IMF, so long as “such terms” fulfilled, as prescribed by Bank. Art 5(2)(b): decisions on admission by Board of Governors, delegatable to Directors. Note on structure of WB:
- (i) Two parts: IBRD and IDA (International Development Association)
- (ii) IBA includes Schedule A, creating two classes of WB members
- (aa) Part I members: industrialised countries of Americas, European, Japan, Australia and NZ – tend to be lenders
- (bb) Part II members: African, Asian, Caribbean, South American – tend to be borrowers
- (iii) Not formal distinction in admission process, but in practice, distinction referred to.
27. Other kinds of membership:
- (a) “Associate membership”: partial rights – cannot reach office-holder – no voting rights – could lead to full membership later. Sometimes applied to those who cannot control external relations eg Nauru and Cook Islands.

- (b) “Partial Membership” – have some membership in some organs, but not others. Switzerland in ICC but not in UN???. Not a term of art.
  - (c) “Observer Status” – PLO at UN since 1974 – Proclaimed state in 1988, UN acknowledged proclamation – applied for full-membership in 2011 (note Palestine has full membership in League of Arab States, UNESCO – evidence in practice) – 130+ states recognise Palestine as a state – “non-member observer **state** status” since 2012. Membership blocked, GA permitted new status.
    - (i) [!]: is this statehood?
28. State Succession:
- (a) Context: what happens when states fragment, what happens to their membership status? In terms of merger: new state takes over as member. In dissolution of states, more difficult.
  - (b) USSR: Russia would continue membership – SC meeting, Boris Yeltsin still sat in seat, changed plaque.
  - (c) Czechoslovakia: No single clear successive state – two states applied for membership – Czech Republic and Slovakia.
  - (d) Yugoslavia: more complicated – Serbia claimed succession of Yugoslavia, argued Croatia etc, and all others seceded – world disagreed, held Yugoslavia disintegrated, all needed to reapply. (Why? Political gains – ease of access to membership).
29. Representation
- (a) Competing claims to be legitimate government of state, which one represents state at IO? Often not dealt with in constituent instrument. Possibly in rules of procedure of organs. Eg PRC and Republic of China (Taiwan). Taipei repped China until 1971. Then, dismissed by majority vote from SC and GA. PRC took over. Despite PRC always being bigger, there was a shift in politics.
  - (b) South Africa: prevented from participating in GA – legally questionable. Credentials supposed to be verifiable, without looking at policies of state (apartheid). A form of de facto suspension of their membership, without going through their rules of Charter.
30. Suspension, Termination, Withdrawal:
- (a) UN Charter: art 5 and 6 – consistent violation of principles of charter (art 6) – no voting rights when in financial arrears (art 19).
    - (i) No formal provision for withdrawal.
    - (ii) Note on Indonesia in 1965 – stopped participation (protesting Malaysia’s SC) – in 1966, “resume full cooperation”. Not required to reapply through membership test.
  - (b) IBRD: art 6 – s 1, withdrawal at any time – s 2, vote on board of governors to suspend, failing to uphold obligations, leading to expulsion a year after unless reneged in that year. Three months after expulsion from IMF, also expelled from World Bank.
  - (c) ILO: withdrawal in art 1(5), notice in writing to director general, effective two years after receipt. However, withdrawal does not affect obligations under International Labour Convention.
  - (d) *Discussion on withdrawal clause:*
    - (i) Encourage joining, protecting state sov.
    - (ii) Reduce commitment (to purpose of IO)
    - (iii) Legal certainty not clarified with a clause eg Brexit is a mess.
  - (e) *Issues of withdrawal:*
    - (i) What happens to the permanent delegation?
    - (ii) Employees of the state at the IO – do their employment come to an end?
    - (iii) Physical offices of the state?
    - (iv) Payment of outstanding contributions?

## Financing

31. Overview:
  - (a) Sources of funding
  - (b) Expenditure
  - (c) Political questions
32. Effectiveness of IOs dependent on their finances. A source of power when withholding contributions.
33. Sources of funding: membership pay contributions – non-payment violates obligations of membership, can result in suspension of voting rights (or membership, as per WB). UN and ILO follow this model. WB is different.
  - (a) UN: gifts (Ted Turner \$1B gift) – bond issuing in 1960s – special rounds of voluntary contributions by states and their pet projects – core funding through apportioned dues.
  - (b) ILO: art 13
  - (c) IBRD: art 2 – based on shares/stock – pay money into and subscribe shares (art 2(2)) – in IDA, there is negotiated voluntary contributions – currently, most of income comes from interest on loans. At present, poorer countries contributed more to bank than the wealthy lending countries.
  - (d) Other sources of funding:
    - (i) Public-private partnerships
    - (ii) Sponsorship of arrangement – protest in Battle of Seattle, against WTO – sponsored by Boeing, Ford, Microsoft and others.
    - (iii) Trust Funds – see FAO
    - (iv) Sales of items/services –
    - (v) Reverse-sponsorship eg Barcelona paying to use UNICEF logos.
  - (e) *Commentary on other sources of funding*: issues of perception and legitimacy eg WTO being bought and sold by MNCs – removing burdens from states (poorer than MNCs) – avoidance of taxation by MNCs? – changes in expectations and independence
34. Expenditure: “regular expenditure” (standard overheads eg staff salaries, rent, staff travel, conference organisation, libraries) and “operational expenses” (services to members eg peacekeeping missions, special rapporteurs, fact-finding, election-monitors).
35. Political question:
  - (a) **Key issue: who decides? Who sets the budget? Which organ has power of the purse and how is the budget adopted/prepared?**
  - (b) UN: GA prepares, apportions and approves budget, art 17. During San Fran conference, SC (and big five) did not get to control.
  - (c) ILO: Conference determines arrangements.
  - (d) Questions of voting methods in budget – should it be equal votes? 2/3 majority? Weighted voting (like IBRD)?
  - (e) Executing budget is administrative organ (Secretariat).

## LECTURE 3: LAW OF TREATIES (STARTING ACTS AND INSTRUMENTS)

Dated: 23 November 2018

### Notes from Readings (Acts and Instruments)

1. Summary:



- (a) Acts and instruments of the organs and effects such organs – looking at common terms “decide”, “recommend”, “consider”, “call...attention [to]”, “approve”, “determine”
  - (b) Powers of organs – changes over time – two case studies, looking at factual/political context, purported aim of resolutions, type of legal authority invoked, legal effects, issues of such resolutions:
    - (i) UN GA's “Uniting for Peace” resolution (1950)
    - (ii) UN SC response to transnational terrorism
  - (c) Third case study: soft and hard law instruments (Alvarez) – “bindingness”
2. Charter of the United Nations, Chs IV, V, VI, and VII
  3. IBRD Articles of Agreement, Arts IV and V
  4. ILO Constitution, Arts 5-9, 16-21
  5. General Assembly Resolution 377, V (1950) (Uniting for Peace)
  6. Security Council Resolution 1373, S/RES/1373 (2001)
    - (a) Context: in response to 9/11
    - (b) Ill-defined terms: International terrorism “constitute[s] a threat to international peace and security” – taking “additional measures”
    - (c) Criminalise funding – freezing of assets/finances – states to not provide support
    - (d) Actions: exchanges of operational information – bilateral/multilateral arrangements – conformity by IL not to stigmatise refugees (3g)
  7. Security Council Resolution 2249, S/RES/2249 (2015)
    - (a) Context: ISIL aka Da'esh
    - (b) Ramped up language: “terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security... any acts of terrorism are criminal and unjustifiable **regardless of their motivations**, whenever and by whomsoever committed,” – “unprecedented threat”
    - (c) Condemnation of acts of terror abroad (Beirut, Paris) – breaches of HR and humanitarian law, destruction and looting of cultural heritage
    - (d) Act in accordance with IL, UN Charter, refugee law (at 5) – calls on action to stem flow of terrorist fighters to Iraq/Syria and stop financing.
  8. Security Council Resolution 2395, S/RES/2395 (2017) [*Skim*]
    - (a) Mention: “collective efforts” – need to address “conditions conducive to the spread of terrorism” (not merely military, law enforcement of intelligence – but things like HR, rule of law, good governance, inclusiveness and alternatives to avoid radicalisation).
    - (b) Cooperation of other IOs: CTED (counterterrorism executive directorate ), ICAO, UNODC, INTERPOL
    - (c) Ide
  9. Third [report](#) on identification of customary international law by Michael Wood, Special Rapporteur (2015) paras 45-54, 68-79
    - (a) Difference in operative language of organs
    - (b) Opinio juris and acceptance by states at conferences – must be followed with “concomitant practice” – requires modification of national policies.
  10. JE Alvarez, *International Organizations as Law-Makers* (2005) pp 217-257
    - (a) Soft-law v hard-law instruments
  11. **Background:** Sinclair (2017) at 63-64 and 130-134.

## Notes from Lectures

1. Outline:
  - (a) What is a Treaty?
  - (b) Objects and purposes
  - (c) Conclusion
  - (d) Reservations

- (e) Revisions
  - (f) Termination
  - (g) Interpretation
2. What is a Treaty?
- (a) Vienna Convention: (art 2(1) [CM90]) –
    - (i) An international agreement
    - (ii) Concluded between “States” [
    - (iii) In written form
    - (iv) Governed by international law
    - (v) Whether embodied in a single instrument or in two or more related instruments and
    - (vi) What its particular designation [whatever it’s called eg conventions, pacts, charters, constitution, articles of agreement, pacts]
    - (vii) *Commentary: not only states, but also other entities.*
  - (b) UN GA created UNIDO and UNICEF *not* by treaty. UN SC created courts, eg international criminal tribunals for Rwanda. Bodies created through treaties or through organs of the IOs.
3. Objects and Purposes: Compare/contrast constituent instruments to treaties
- (a) Objects and purposes and be broad or narrow eg regional/international, general IOs or specialised/technical.
  - (b) UN Charter: preamble and art 1 – “peace and security”, settlement of disputes, anti-discrimination, promoting equal rights.
  - (c) ILO Constitution: preamble and art 1 – references “Philadelphia Declaration 1944”, end of Constitution in Annex [CM22], under “aims and purposes of ILO”
  - (d) IBRD Articles: art 1 – loans and shit, transition from wartime to peacetime – [commentary: narrow purposes, technical-focused. However, still has a wide-function in practice].
  - (e) **Link:** relevance to interpretation? Scope of organisation?
4. Conclusion (of treaties)
- (a) Concluded through duly authorised reps of states
  - (b) UN Charter: art 110 – “ratification and signature”. [Comm: not merely only ratification, requires other steps]
  - (c) IBRD Articles: art 11(1) – entry into force when signed on, with required subscription.
  - (d) ILO Constitution: no relevant provision – ILO pre-existed, continued through WWII (unlike League of Nations) – agreed by existing members, therefore needn’t accumulate a bunch of signatures for ratification.
5. Reservations:
- (a) Unilateral act by state to treaty, wanting to exclude certain parts of treaties. Ability to join treaty regime without signing up to everything. Common in human rights sphere.
  - (b) Constituent agreements becomes difficult – with too many reservations, undermines objective and purposes.
  - (c) [L]: if treaty silent on reservation, presumption reservations possible so long as not contrary to objectives and purposes.
    - (i) Eg IBRB and ILO silent on reservation.
  - (d) Who decides if reservation is incompatible with objectives and purposes? Parties.
  - (e) [L]: Article 19 of Vienna – and art 20(3):
    - (i) “When a treaty is a constituent instrument of an IO and unless it otherwise provides a reservation requires the **acceptance of the competent organ of that organization.**
    - (ii) **Who is competent organ**, with power to accept reservation?

- (iii) Likely to be same body that admits states. Eg UN, logical might be SC recommends, GA confirms.
- 6. Revisions/Amendments:
  - (a) Requires all parties to agree – why? Possible answers:
    - (i) Incentive states to leave;
    - (ii) Sovereignty issues if forced to stay
  - (b) Tension: need to adapt to changing circumstances v attention to state sovereignty.
  - (c) Are amendments made with *all* members or a majority? If majority, are minority bound?
  - (d) UN Charter: 2/3 Members + permanent members of SC. Changes require super-majority. “shall come into force for all members”.
    - (i) Art 109: review conference – date and place of conference fixed by vote of 2/3 + 7 members of SC (excluding permanent members). If failure to call, then must be placed on UN Agenda.
  - (e) ILO Constitution: art 36 –
  - (f) IBRB: art 8 – 3/5 of members, holding 85% of the voting power (depends on shares)
  - (g) FAO Constitution Art XX: **distinguishes obligations** for new members and procedures for other members.
  - (h) UNESCO: Art XIII – fundamental alternations to aims and obligations for new members require one procedure – other changes require simpler procedure.
  - (i) Other modes of ‘amendment’?
    - (i) A chain of conventions – International Telecommunications Union, rather than tweak, it enacts new constituent instrument. Analogous, possibly, to replacing GATT with WTO. (but arguable if GATT was an IO).
    - (ii) (quasi-)legislation – were IOs pass, for themselves, an amendment, without following proper legal route.
    - (iii) Informal/de facto amendment (interpretation) – art 40(1) of Vienna, on multilateral treaties. At (4)...
- 7. Termination:
  - (a) Nothing marked “termination” or “liquidation” – with the hope that these organisations will not end and be permanent.
  - (b) IBRB: art 6(5) [CM30] – permanent suspension of obligations. Similar in IMF agreement.
  - (c) Cases of dissolution:
    - (i) League of Nations (1939, officially in 1946)
    - (ii) Warsaw Pact and Comecon (1991):
    - (iii) GATT → WTO (1995).
  - (d) Practical issues: debts – assets – personnel – functions
- 8. **Interpretation Outline**
  - (a) What rules apply?
  - (b) What rules should apply?
  - (c) Constitution of IMCO Maritime Safety Committee Advisory Opinion
  - (d) Who interprets?
- 9. What rules apply?
  - (a) Vienna: art 31 (general rule) and 32 (supplementary rules of interpretation, to confirm the meaning or determine the meaning of art 31, and it turns out ambiguous)– interpret in good faith and ordinary language in light of object and purposes, list of other factors to take into account such as practice, subsequent agreements (art 31) – ordinary meaning leads to unreasonable results, then look to other sources (art 32).
    - (i) **In addition to text**, and context around it – preamble, annexes etc.

- (ii) **Other things:** subsequent agreements
    - (iii) **Article 32:** debates, negotiations to find intent – meetings, drafts “travaux”
  - (b) Difference between constituent instruments and treaties – do these rules, of treaty interpretation, apply to constituent instruments?
  - (c) Vienna art 5: “without prejudice to the relevant rules of the organisation” – might be rules of interpretation in constituent instrument eg “interpret with respect to XYZ consideration”.
    - (i) Constituent instruments might be its own set, different from treaties.
    - (ii) “Relevant rules” undefined – see art 2(1)(j), that definition might apply here – a later Vienna Convention, not in force.
10. “Constitutional” Approaches (Alvarez)
- (a) Interpretation as “living document” – imported from domestic law
  - (b) Terms might be gleaned from Vienna, but also other terms used to interpret:
    - (i) Textualist
    - (ii) Historical/“originalist”: however, as per Vienna, should be supplementary, not primary.
    - (iii) Teleological (“telos” meaning aim)/“functionalist” – look to purpose/aim or function of the IO. Expansive: what is the purpose of the UN.
    - (iv) Constitutional principles: democracy, checks and balances.
  - (c) *Commentary: interpreting too broadly, using constitutional principles or teleological purposes could be too expansive, undermining doing actual work and being moot. [CC]: evolution necessary to adapt.*
11. Concluding thoughts:
- (a) No clear formula from art 31 – but a series of considerations. This can vary between interpreters.
  - (b) Interpretation tends to bolster conclusion reached in other ways – **for political means**. Facts also need interpretation (not just the text). Creates further flexibility.
  - (c) Big question: why we bother if interpretation is only instrumental to push aims?
    - (i) To use as arguments
    - (ii) Cannot only focus on moral considerations
12. *Constitution of IMO Maritime Safety Committee*
- (a) [F]: IMO elected safety committee however art 28(A) (as stated in constitution/constituent instrument), 8 of members must be from the biggest ship-owning nations (Panama and Liberia). Not included because “not cared for maritime safety” – no oversight, but only “flags of convenience states” (eg register ship in these countries, even if shipowners reside elsewhere, for safety rules and regulations, relaxed labour/environmental laws, cost-effective).
    - (i) Liberia asks ICJ for advice: what does “largest” mean? Tonnage of ships registered in states or nationality of ownership of ships (difficult to figure out).
  - (b) [O]: held art 28(a), clearest original meaning at drafting was tonnage – compared art 60 of same convention (used “registered tonnage”) – reflected also in practice. Court took “textual” approach of ordinary meaning.
  - (c) *Commentary: did not look to purpose – as argued by others – eg purpose of IMO about ship safety which Liberia and Panama do not care about.*
13. Treaty Interpretation in 1950 ICJ opinion on Admission to UN [at CM 63].
14. **Who can interpret?**
- (a) EVERYONE. But who interprets authoritatively?
  - (b) With treaties, the state parties.
  - (c) In formation of the UN, debated.
    - (i) Some say each member state. However, each arise at different interpretations.

- (ii) Each organ: however, could lead to competing views.
- (iii) General Assembly: all decisions made here. Issue of who comes up with the options? A political resolution for a legal question. Big powers would not want it.
- (iv) A committee of jurists:
- (v) ICJ:
- (vi) Alvarez at [CM103]: inevitable that each organ interprets Charter in day-to-day operations. No need to insert provision approving that practice – it happens. However, difficulty when difference of opinion between organs. Committee decided: different options to resolve that difference. States could submit to ICJ, if between states. Organs could ask ICJ for advisory opinion. If needed, ad hoc jury of jurists could be set-up, if need be or joint conference held. Neither necessary nor desirable to list all options in Charter – still available if not listed to remain flexible. Ultimately, matter of political resolution. If not accepted, not binding.
- (vii) Pragmatic, non-committal/non-binding resolution.
- (d) Key references on who interprets
  - (i) UN Charter: art 10 – GA may discuss powers of organs. Must decide whether within scope of present Charter. Many provisions require interpretation but do not state authoritative standing of interpretation. Art 92 states ICJ principal judicial organ – silent on ICJ's authoritative determination.
  - (ii) On ICJ: Art 36 and 34 (recognition of construction of constituent instrument might be matter that comes in front of Court. ICJ is still **advisory opinions, not binding**, but form authoritative statements of IL.
  - (iii) General San Fran principle applied to other institutions.
  - (iv) IBRD at art 11: questions of interpretation by executive director then to board of governors (Art IX)
  - (v) ILO: ICJ authoritative interpretive body at art 37.

## LECTURE 4: ACTS AND INSTRUMENTS (UNIT 5)

Dated: 27 November 2018

### Notes from Readings

1. Summary
2. **UN SC's response to transnational terrorism** ([see above](#))
  - (a) Resolution 1373 (2001)
  - (b) Resolution 2249 (2015)
  - (c) Resolution 2395 (2017) [*skim*]
- 3.

### Notes from Lectures

1. Summary from Lecture 3:
  - (a) Vienna Convention applies – looked at other customary approaches
  - (b) Who gets to interpret authoritatively? Examples: flexible approach from San Fran of UN Charter – compared UN with other
2. Outline:
  - (a) Methods of decision-making of IOs: **state sov v practical issues and balance of power**
  - (b) Acts and instruments that they are empowered to produce through their constituent instruments

- (c) Examples of acts and instruments (“A&Is”) not explicitly stated, but formed in practice.
  - (d) Other types of A&Is: UN SC resolutions in combatting terrorism
  - (e) Alvarez article
3. Decision-making Methods:
- (a) Four types: Unanimity, consensus, qualified majority voting (“QMV”) and weighted voting.
  - (b) Difference between unanimity v consensus: consensus = no objections, while unanimity = everyone agrees or else no decision – consensus is adoption of decision without formal vote and without formal objection. IOW, Unanimity = all positive vote, consensus = nobody objects.
    - (i) Unanimity is based on state sov. Cannot be bound and therefore has right to object. Symbolic effect of demonstrating unity. Disadvantage: practically, unlikely that everyone agrees. Smaller nations also feel obliged to vote. Also encourages other ways of acting which legally less clear eg if no unanimity, then what happens? What if they pass a non-binding recommendation – left with, what is the effect of the recommendation? Unanimity might push IOs into other ways of acting eg producing authoritative interpretations of constituent instruments, or passing informal instruments.
    - (ii) Few provide for consensus in constituent instrument – with the main counter-example being WTO, which provides for consensus as norm. Many others use consensus in practice eg UN GA used majority vote, but now moving to consensus. Symbolic and fosters negotiation and compromise. Downside: time-consuming. To achieve consensus, decision is watered-down. Package deals also put in place.
    - (iii) QMV: might be addition to 50% + 1. Eg majority of members present and voting + vote of some subset eg P5.
      - (aa) Advantages: may reflect the balance of power.
      - (bb) Disadvantage: undermine sovereignty to states eg bound by majority vote, whether one likes it or not.
    - (iv) Weighted voting: vote of some states carry more weight than others eg in UN SC (P5 have more weight) or World Bank/IBRD, larger shareholders have more votes.
    - (v) **Examples:**
      - (aa) UN GA: 2/3 majority art 18(1) (for “important questions” eg intrn peace and security, election of non-members of SC) and simple majority for other things. In practice, consensus.
      - (bb) UN SC: QMV because of P5 art 27 – procedural matters (affirmative vote of 9 is sufficient) v all other matters 9 members **“including the concurring vote of the permanent members”**: seems like they need to vote in favour to pass. IN practice, method is more lenient. So long as there is no *objection*, then the resolution will pass. Developed in Korean War context – China did not show up to protest – thought that “concurring vote” meant needed positive vote. Position affirmed by ICJ 1971 “abstention = affirmative concurrent vote”.
      - (cc) IBRD: weighted voting – art 5(3)(b): “unless otherwise provided... simple majority”. Voting power sum of share vote and “basic vote” (all members have an equal basic vote, however totally basic vote adds to 5%).
      - (dd) ILO Conference: QMV – 2/3 of Conference + (art 19(2)) – art 17(2): gives overarching rule – “unless otherwise provided... all

matters by simple majority” – art 13(1)(c): approval of ILO budget which requires 2/3 majority.

4. A&Is produced (and their legal effects)
- (a) Organs empowered to act and produce different instruments – eg decisions, recommendations, [see slide for full list of language].
  - (b) Questions:
    - (i) What kinds of A&Is?
    - (ii) Circumstances and to what ends?
    - (iii) Any limitations?
    - (iv) What are their legal effects?
  - (c) **UN GA:**
    - (i) Recommendation – under Charter – art 13 – can approve the budget and shit – SC recommends, GA decides. Art 20: can adopt its own rules of procedures – receive reports.
      - (aa) *Broad articles:* Art 22: can establish subsidiary organs to fulfil its purpose. Art 10: may discuss heaps of things. Purpose defined broadly.
    - (ii)
    - (iii) Article 12: no recommendation about dispute if under SC process unless SC requests –
    - (iv) Effect:
      - (aa) Non-binding language about external effects – to states
      - (bb) Bindingness based on internal stuff: subsidiary organs, budget etc
    - (v) *Commentary: very fluid language “recommendations on decisions” or “decisions to make recommendation” eg art 20*
    - (vi) *Commentary on soft law: while not binding, resolutions can still have normative effect – while not create customary IL, make provide evidence of such norms through practices – binding documents might reference GA resolutions at later stage. Resolution can be basis for “crystalisation of practice and opinion juris” – IOW, if UN acts that way, more likely for states to act that way.*
    - (vii) *Commentary: GA can make a lot of stuff and important stuff – eg Charter, making self-determination customary IL during decolonisation – World Summit, summarising the meaning of being an IO.*
  - (d) **UN SC:**
    - (i) Art 33(2): may call upon parties – art 42: use of force (couched in weird language) – art 41: determining what measures, not involving armed force –
    - (ii) Determining threat to peace, also deciding circumstances of when to act. Art 24:
    - (iii) Limitation: procedural limitation of QMV (P5 + majority) – art 24(2): act in accordance with principles and purposes of UN – carry out decisions made “in accordance with present charter” (art 25) –
    - (iv) Legal effect: actions by UN members - mandatory action required is bding – art 48.
  - (e) **IBRD: (Board of Gov and Exec Directors)**
    - (i) Loan funds, borrow funds art IV (1)(b)
    - (ii) Article IV(10) Decisions limited to economic considerations, political activity prohibited. *Commentary: Thomas Piketty would disagree.*
  - (f) **ILO Conference:**
    - (i) A&Is: art 19(1): conventions and recommendations – adopted as draft treaty, ratified by ILO members, or presented as recommendation (non-

binding). Recommendation in circumstances where not considered suitable – avoid binding law on states if not all capable of fulfilling – not appropriate in their circumstances. Have options for minimum standards.

- (aa) Art 13 on budgetary arrangements
  - (ii) Art 1 – preamble and annex on purposes of organisation
  - (iii) Limitations: follow-up supervision by other IOs, application of convention/ratification – art 16: procedural limit : possible formal objection, not hard limits, one method eg such as agriculture being separate from industry (tried in the past).
  - (iv) Effect: draft conventions binding on states that ratify – reporting mech in art 19(5) – reporting recommendation somewhere.
- (g) **IBRB:**
- (i) A&Is: Board of Directors more substantive role – art 5(2)(a): all powers vested in Board of Governors – Directors, responsible for conduct of bank, use power of Board delegated to them.
  - (ii) Circumstances and ends: purpose in art 1 – art 3 on guarantees –
    - (aa) Art IV (10): political activity prohibited –
    - (bb)

## 5. **Uniting for Peace issue**

- (a) Context: 1950 – North Korean invasion of South Korea – SC condemned and authorised intervention. Background: when SC paralysed by veto and unable to take action, historically. USSR boycotted SC meetings. SC recommended member states provide military assistance, under the command of US General MacArthur.
  - (i) Oct 1950: UN GA authorised UN force to follow South Korean forces into the North (aggressive) – “Acheson Plan”: enable GA to circumvent SC on more regular basis. Want to use again when SC is stalemated.
- (b) [IMP]: IO creative interpretation of its own constituent instruments
- (c) [L]: “Uniting for Peace” Resolution:
  - (i) What it does: when SC deadlocked, creates emergency special session – either by SC or request of majority of GA members.
  - (ii) What authority: SC has primary responsibility peace and sec, but if unable to do so if deadlocked, then GA has responsibility. Not stated that SC has *only* responsibility. Therefore, GA can step in.
  - (iii) IOW, Uniting for Peace steps in where SC is unable to exercise its responsibilities due to unanimity of permanent members, then GA can step in to decide matters of threats to peace, or acts of aggression – then can take appropriate recommendations to members to restore peace/sec. Do so in special emergency session convened by 7 members of SC or by majority of GA. IOW, despite objections by P5.
  - (iv) Invokes purpose of UN Charter:
  - (v) Language carefully use – rather than decision, GA only recommends measures to external matters of other member states
- (d) Q: is this appropriate?
  - (i) SC could say they are still deliberating – GA responds: nah, what is the meaning of “actively considering”. If active, then ability to block.
  - (ii) In practice, rarely invoked power – only in clear circumstances of inaction
  - (iii) UNEF operation 1956 – led by US – could create lower voting threshold for force by members? Is it appropriate in today’s context?
- (e) **Issue of interpretation:**
  - (i) US might argue – constitution cannot be used to clog up all action, must interpret Charter to make things work, maybe document as developing living document



- (ii) USSR: not a living constitution, it's a contract with clear terms and intent – founders did not have this in mind – this is unlawful.
- (f) “Certain Expenses” case: Signpost for later “doctrine of implied powers”
- 6. Other Points:
  - (a) SC Actions since Cold War: SC more active role
    - (i) eg Action against Iraq in first Gulf War (1990) – gave Iraq withdrawal deadline of 15 Jan 1991, “acting under Ch 7 of Charter”, “demand”, “decide”, “authorise” – use all necessary means to uphold. Rare use of Ch7.
    - (ii) Peacekeeping operations – humanitarian intervention and conflict between states – managing of territories eg Kosovo and East Timor
    - (iii) Intn Criminal Tribunals created eg Rwanda and Yugoslavia
    - (iv) Sanctions on states and other actors: groups and individuals
  - (b) Now: SC recommendations used to interpret IL, even though authority not given in Charter. States interpreted as such. **Why is this?**
  - (c) Four functions in SC functions: (**see two main resolutions as examples of this**)
    - (i) Declaration of what is law: eg some group/act is illegal/criminal
    - (ii) Interpreting law eg interpreting Charter to allow for peacekeeping/administer territory protection
    - (iii) Promoting the law: encouraging settlement of disputes
    - (iv) Enforcing the law: anticipated in Charter – interpreted broadly, to include broad range of measures to maintain/restore the peace. Not only threats between states but also within states.
  - (d) Legislating?? [See Slide]
- 7. Next Class: look to two resolutions – look to other acts and instruments discussed in Alvarez
  - (a) **IS IT GOOD TO USE SC RESOLUTION AS INTERPRETATION?**
  - (b) Prep two SC resolutions with those four functions in mind
  - (c) Read Alvarez
  - (d)

## LECTURE 5: UNIT 5 (CONT.) AND UNIT 6 (DOCTRINAL FOUNDATIONS OF POWER)

Dated: 29 November 2018

### Notes from Readings (Powers of International Organisations: Doctrinal Foundations of Power (Unit 6))

1. **Summary**
  - (a) **Where do IOs get their powers from?** - Not all powers from constituent instruments – what falls outside legal competence?
  - (b) **“Attributed Powers”**
  - (c) **“Implied Powers”**
  - (d) Focus on *Reparations for Injuries* and *Certain Expenses of the UN*:
    - (i) Similarities and differences with their propositions
    - (ii) Issues with the principles they espouse?
2. *Reparation for Injuries Suffered in the Service of the United Nations* (ICJ Adv Op. 1949), 174-186
3. *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151
4. **Background:** Sinclair (2017) at 135-136, 141-159, 190-195.

5.

## Notes for Panel: Interpretation

6. Resolutions:

- (i) Declaration of what is law: eg some group/act is illegal/criminal
- (ii) Interpreting law eg interpreting Charter to allow for peacekeeping/administer territory protection
- (iii) Promoting the law: encouraging settlement of disputes
- (iv) Enforcing the law: anticipated in Charter – interpreted broadly, to include broad range of measures to maintain/restore the peace. Not only threats between states but also within states.

7. Security Council Resolution 1373, S/RES/1373 (2001)

- (a) Context: in response to 9/11
- (b) **Defining/interpreting:** Ill-defined terms: International terrorism “constitute[s] a threat to international peace and security” – taking “additional measures”
- (c) Criminalise funding – freezing of assets/finances – states to not provide support
- (d) **Enforcement:** Actions: exchanges of operational information – bilateral/multilateral arrangements – conformity by IL not to stigmatise refugees (3g)
- (e) Comments from **lectures:**
  - (i) Started at 10.50 – ended at 10.53: little discussion/debate.
  - (ii) Action: decides “States shall” act (at para 1 and 2). Heavy focus on financing + SC (counter-terrorism) Committee to receive reports and have states report back in 90 days – promote compliance.
  - (iii) Use of resolution encouraging compliance, signature and ratification from other treaties and instruments eg 3(e) and (f). Repeats certain terms from previous conventions and repeats them, amkign them mandatory – however omitted parts of Convention eg HR requirements of humanitarian law (see Convention on Suppression of Terrorism, in para 1 and 2).
  - (iv) **Authority invoked under** chapter 7 used – odd, as usually for use of force -
  - (v) Para 2(e) – calling on states to change domestic law – dictating, with force of Chapter 7, laws to be passed by states. At 3(b): asking for cooperation of information
  - (vi) Para 9: “[SC] decides to remain seized of this matter” – remains on SC agenda – allows to ramp up measures later
  - (vii) Particular act not specified, but broad categories of acts eg not “this bank account” – goes beyond particular countries and groups, eg “**All** states shall”.
  - (viii) Between art 41 (measures not invoking force) and 42 (measures invoking force): “art 41 and a half”, for forceful implementation of sanctions
  - (ix) Legal Effects?
    - (aa) Maintenance of peace and sec – but built around conflicts of states, rather than non-state actors – **now a declaration of law** – includes terrorism as contrary to methods/practices of terrorism.
    - (bb) Promoting and enforcing law by encouraging ratification
    - (cc) Decides = mandatory, call upon = persuasive. Eg “directs Committee”
    - (dd) Preamble: para 5 “need to combat, with all means... in accordance with Charter” – making a **declaration** about peace and sec, that terrorism is a threat to it.
    - (ee)

8. Security Council Resolution 2249, S/RES/2249 (2015)

- (a) Context: ISIL aka Da'esh
  - (b) **Interpreting/Defining threat to international peace and security:** Ramped up language: "terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security... any acts of terrorism are criminal and unjustifiable **regardless of their motivations [DECLARATION??]**, whenever and by whomsoever committed," – "unprecedented threat"
  - (c) Condemnation of acts of terror abroad (Beirut, Paris) – breaches of HR and humanitarian law, destruction and looting of cultural heritage
  - (d) Act in accordance with IL, UN Charter, refugee law (at 5) – calls on action to stem flow of terrorist fighters to Iraq/Syria and stop financing.
  - (e) Commentary from Lecture:
    - (i) Ramped up language: "need to act" – terrorism in all forms
    - (ii) **Specific reference:** Beirut and Paris – acute threat to Iraqi people –
      - (aa) Mention of ISIL (preamble para 5 and 8) – [L]: through Ch 7, and use of force, SC have ability to recognise threat to peace and security -
    - (iii) **Promoting and enforcing** Condemnation and doubling efforts: "in compliance with IL and Charter"
    - (iv) **Authority:** threats to peace – Does not use "Acting under Chapter 7" – only "calling" and "urging"
    - (v) **Declaration:** "terrorism in all forms" – "one of the most serious threats" – any acts of terrorism "are criminal"
    - (vi) Context: lessening sympathy of US – suspicious of War in Iraq and Libya – possible softening of language, around Syria – move away from authorising use of force (last para in preamble).
    - (vii) "All necessary measures" in para 5: starts with "calls upon" (language used in art 40 in Charter of provisional measures) and no reference to Chapter 7 [**usual signal of authorising armed force**] – "all necessary measures" reflects art 42 (use of force article), used in measure for Gulf War – **odd mix of language. "Constructive ambiguity"** – allows different member states to interpret the resolution as they wish. Allowed France, Germany, UK to use armed force against ISIS (and relied on resolution) – however, does not give Chapter 7 authorisation, to say "this is infringement of Syrian sov", another unlawful act.
9. Security Council Resolution 2395, S/RES/2395 (2017) [*Skim*]
- (a) Mention: "collective efforts" – need to address "conditions conducive to the spread of terrorism" (not merely military, law enforcement of intelligence – but things like HR, rule of law, good governance, inclusiveness and alternatives to avoid radicalisation).
  - (b) Cooperation of other Ios: CTED (counterterrorism executive directorate), ICAO, UNODC, INTERPOL
  - (c) Ide
  - (d) **Commentary from lecture**
    - (i) Preamble para 7: odd use of authority for the SC (stating what is and is not associated with any religion).
    - (ii) Q: resolutions so broad, could they be used in other contexts? It's concerning
10. Alvarez:
- (a) IMF Conditionality:
  - (b) ICAO Standards and Recommended Practices (at p 254)
  - (c) IAEA Standards (at 231/CM138)
  - (d) FAO and UNEP Prior Informed Consent Regime (at 231/CM138)

## Notes from Readings (Validity and Review (Unit 7))

11. **Summary:**
  - (a) If limits, then can exceed: what is recourse?
  - (b) Applicability of **ultra vires** and **judicial review**
  - (c) Examples: limits on UN, ILO, World Bank
    - (i) Procedure of ultra vires claim against SC in ICJ?
    - (ii) Consequences/enforcement?
    - (iii) Review in less direct manner with a multiplicity of actors?
12. Relevant provisions:
  - (a) UN Charter:
  - (b) ILO:
  - (c) IBRD:
  - (d) Statute of ICJ:
13. Thomas M. Franck 'The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?' (1992) 86 *American Journal of International Law* 519-523
14. *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, Advisory Opinion [1962] ICJ Rep 151
15. *Legality of the Use by a State of Nuclear Weapons in an Armed Conflict*, Advisory Opinion [1996] ICJ Rep 226 (summary)
16. Conor Gearty 'In Praise of Awkwardness: Kadi in the CJEU' (2014) 10 *EuConst* 15

## Notes from Lectures

1. **Reflection** from earlier lectures: #BigThemesBigIdeas
  - (a) ~~Fight the power—big states using soft powers—#executivebodies~~
    - (i) ~~Power of soft power/soft law (Alvarez)~~
    - (ii) Structural tensions between organs
  - (b) Origins of Legal personality: consent v customary IL
  - (c) Sovereignty of states v functioning of IOs: eg voting systems,
  - (d) Transparency? Eg decision being made in SC Res before it happens.
  - (e) ~~Treaty interpretation: strict (Text of treaties) v imaginative (how powers are implied/interpreted)~~
    - (i) ~~Not a strict adherence to constituent instruments~~
    - (ii) ~~Eg some strict interpretation of them as contracts—then opposing view of “not Ks”, but ability to grow/living instrument, a move toward create dynamism and constitutional interpretation.~~
    - (iii) ~~Imagined IO to “last forever”—a need to then transform and adapt—~~
    - (iv) ~~Loop to power: who interpret—to what end? Power to change serves to reflect power changes, but also to replicate power structures.~~
  - (f) ~~Historical foundations/context: Post-WWII of UN, ILO on “chief industrial importance” rise of communism ILO—A moment of change~~
    - (i) ~~Some struggle between members and organs eg UN GA holding power of the purse.~~
  - (g) Diversity among IOs:
  - (h) What problems stretch across all IOs – how do IOs differ from one another and why do they differ?
2. **SC Resolutions and International Law**
  - (a) From last lecture: IOs and international lawyers use SC Resolutions for interpretation (among treaties, writing of publicists etc), yet no charter basis for doing so. Only basis that UN SC is binding and mandatory, but nothing about SC making law – **declaration, interpret, promote** and **enforce** the law
  - (b) Context: “Turn to legislation”

- (i) Some SC Res underwent “qualitative shift” (moving away from what it is meant to do) – sometimes **directed to all member states** (not too unusual) – however, also couched in **general and abstract - Not limited to particular situations/actors, - not limited in time.**
  - (ii) Created a legislative quality
  - (iii) Issue: only states can make binding international law – respecting state sov – through treaties, customary IL and recognition of general principles of IL. – states become world legislature, IOs making recommendations (with some exceptions eg payment of assessed contributions, hard decisions of IOs make) – but there were some rules that states could opt out – IOs could make soft law, codifiable into treaties – SC can make binding resolutions under Charter, but only through **particular conflicts**, rather than unlimited in space and time.
  - (iv) Resolution falls within this period of time when SC takes turn to legislation, where making legislative resolutions made within context of **War on Terror.**
  - (c) Normative question: is this a good thing?
  - (d) Breakdown: preamble (however, **no legal force, non-binding** – however, may have declarative/interpretive) – actions – reference to latter eg “acting under Chapter VII” –
  - (e) Discussion of resolutions above under readings: [2001](#), [2015](#), [2017](#)
3. Issues and concerns with Resolutions:
- (a) Definition of “threat”, “terrorism”, - issue of concept creep, start with something (or not even have a starting point) and continue growing
    - (i) “one person’s terrorist is another person’s freedom fighter” –
    - (ii) Ambiguity: ability to expand – allow more states to sign up – but eye of the beholder: states can target who they want or see as a “threat”, under “any means necessary”.
  - (b) Due process/rule of law/ human rights: omitted from 2001 resolution – returned in later resolutions. Earlier resolutions silent on these rights and due process.
    - (i) Res 1267: (early anti-terror), “notwithstanding rights under any international agreements” – seem to exclude.
    - (ii) Later res looked at HR, refugee and immigration law.
  - (c) Using SC to make/interpret law? Precedents?
  - (d) “Hegemonic IL”: SC creates IL to further big powerful states’ interests – establishing hegemony – not based on reciprocity/sovereignty –
    - (i) Criticism of SC in 1990s and 2000s: that the US is controlling the world, post Cold War.
    - (ii) Iraq and Libya – no authority to use force, US did so anyway – P5 members suspicious
  - (e) [L]: Authority? Not treaty, custom, general principle? How is it IL?
    - (i) Formal sources of IL reflect state consent eg treaty, or customary IL is where people seem to have consented (opinio juris)
    - (ii) This is highly politicised: created by small membership, lack transparency, purport to create law (and lawyers use SC Resolutions to interpret shit).
    - (iii) Discussion: given up at signing 1950?
      - (aa) Can we consent to the black box? Anything? – TWE? No one back then or now would have consented to P5 now legislating?
      - (bb) “sovereign equality”? Was it realised that P5 is real?
      - (cc) Political dimension a given – states consent to in any IO?
      - (dd) Guy’s commentary: two issues – A) whether sign-up gives SC binding authority over certain issues? Yes, to some extent.

Members sign up knowing there is a P5 with a veto, not all equal in the world, there is a political dimension. B) terms of Charter interpreted so broadly, now what states signed up to, is now different – “what is threat”? SC confined to set of issues, was fine. But too wide a set, through practice, not consented to. C) did states ever agree to give SC power to make IL? (different from binding decisions). The more SC legislates, the more its resolutions are presented in general declaratory terms, the more concern. SC not an institution to represent state consent.

(ee) As international lawyers, how far do we consent to this mission creep.

4. **Other IOs’ acts and instruments** (not obvious from the constituent instruments)

- (a) Context: Looking beyond UN, ILO, World Bank to see breadth of practice.
- (b) ILO Office opinions – however people tend to acquiesce opinion, and it becomes binding. Not technically
- (c) IMF Conditionality: “letters of intent” – intrusive obligations. –“product of state
  - (i) Regulation most from developing to developed world, conditional loans such as regulation, anti-bribery, corruption and fraud – ceding sov
  - (ii) IMF supporters: deny this, protect investors eg recourse if expropriated, anti-discrimination, ensure international arbitration such as ICSID.
- (d) Obligations harden, attached to SC resolutions – IAEA
- (e) WTO: some normativity/authority
- (f) ICAO Standards and Recommended Practices (at p 254)
  - (i) Become binding through practice – customary
  - (ii) Not necessarily political (seen as technical) – but with political
- (g) IAEA Standards (at 231/CM138)
- (h) FAO and UNEP Prior Informed Consent Regime (at 231/CM138) – pesticides and shit – made by these IOs, but pulled into Convention, at which point, soft law already widely accepted.
- (i) UNCLOS and IMO: IMO creates guidelines, soft law – while UNCLOS incorporates them, generally accepted international rules.
- (j) *Commentary: focus on themes on bindingness*
- (k) **Features and trends:**
  - (i) A variety instruments with different legal effects and qualities: some hard-law involving treaties, formally binding regulations eg UN SC resolutions. Also, “soft law” – do not purport to be binding, eg recommendations, codes of conduct, guidelines, advisory materials, opinions.
    - (aa) A spectrum of hardness in hard-law instruments eg Codex Alimentarius is obligatory, but can withdraw acceptance at any time, eg IMO Facilitation Committee Standards are binding unless states opts out, eg WMO technical regs binding for members to do utmost to comply and have some mandatory rules and conduct but also long term goals of flexible adoption.
    - (bb) A spectrum of soft-law: ISO standards (produced by hybrid PPP/NGO-GO), ILO office opinions (non-binding but developed an authority), interpretations by WHO’s Director General, ICAO’s SARPs, ILO Recommendations (recommendations which elucidate/elaborate/provide options/high level of compliance different to conventions), World Bank (operational policies, “good practices”: policies binding on World Bank employees, good practices are not but inspection panel treat good practices as binding).

- (ii) Interaction between IOs and their outputs makes some soft law instruments harder.
    - (aa) WHO Assessments → schedules to Convention on Psychotropic Substances. UN requires such sch
    - (bb) UNCLOS incorporates IMO codes
    - (cc) FAO Guidelines (packing/storing pesticides), World Bank Guidelines incorporate FAO. WB also incorporate, by reference, hard law instruments eg ILO Convention on Indigenous Peoples
    - (dd) **[See Slide]**
  - (iii) IOs develop mechanisms that harden or judicialize soft-law eg WB inspection panel (with internal policies), judicializing internal policies)
  - (iv) Complex web of norms/instruments of different kinds of legality, enforcement mechanisms – many originating from IOs or interactions between IOs.
    - (aa) “Global Administrative Law”, or “Transnational legal process”, “Global constitutionalism/constitutionalism”, “Regime complexes”, “judicialisation/legalisation”, “International Public Authority”, “new governance”, “Global experimentalist governance”.
    - (bb) Not Treaty, not Customary IL – so what is it?
5. **Summary: a lot of shit is happening – different bindingness, different governance, a web of stuff**
- (a) What happens if fall outside of scope? Does *Ultra Vires* apply and if so, how to enforce?

## Unit 6: Doctrinal Foundations of Powers

6. Overview:
- (a) Attributed powers
  - (b) Implied powers
  - (c) *Reparation for Injuries* advisory opinion
  - (d) *Certain Expenses* advisory opinion
7. **Attributed powers:** powers attributed to IOs, attributed from/by states (through treaties). These form constituent instruments. IOW, *IOs have the powers expressly given to them in their constituent instruments*
- (a) [See slide for case of Danube River].
    - (i) [I]: scope of European Commission’s powers
    - (ii) [Held]: not a state, but institution with special purpose - only has functions through definitive statute (constituent instrument) – has power to exercise functions to full extent.
    - (iii) Similar case: *SS Lotus* – rule of IL derive from sovereign states, infringement should not be lightly assumed.
  - (b) Reflected in constituent instruments eg FAO Art XV para 1: capacity of legal persons to, eg OAS Art 1: no powers other than expressly conferred in the Charter, eg OAS art 54: “GA power accord with Charter and inter-American treaties”.
    - (i) Similarity with UN Charter: art 25, art 104 (broader), art 2(7): to not intervene in domestic jurisdiction, art 24(2): broader, but specific SC powers are laid down.
    - (ii) Amendments: possible, but difficult (especially with veto)
8. **Implied powers:** IOs have powers implied, not expressly stated in constituent instruments.
- (a) Different versions:
    - (i) “effet utile” Implied Powers necessary to give full effect to express provisions:

- (aa) 1928 Case on *Greco-Turkish* agreement (mixed member commission). When no agreement, then could resort to arbitration – rests with
- (ii) Derive powers from functions and purposes of organisation – needn't look to power eg of SC, but look to preamble.
  - (aa) 1954: power to establish tribunal – whether UN could administer binding tribunal – [O]: yes, power to do stuff, essential to, needed to give effect to efficiency/competence/integrity. Tied back to aims of UN – to provide justice etc.
- (iii)

## LECTURE 6:

Dated:

### Notes from Lecture

1. Implied v Attributed Powers:
  - (a) Both stem from the intention of the drafters
  - (b) In implied powers, stems from instrumentalist/functional sensibilities ie laws have a purpose we need to interpret powers of IOs as such. Also, implied stems from internationalist sensibilities – ie importance of State Sov

#### ***Reparations for Injuries Case***

2. Context: assassination of head of UN mission – person also head of Swedish House –
  - (a) First issue about whether case can be brought against a member – second issue about whether a case can be brought against non-member (Israel was not a member).
  - (b) Count Folke: saved tens of thousands of Jews – appointed by UN to mediate between Arabs and Jews in Palestine – then assassinated.
3. [I]: CM51/RH: focus on first two issues.
  - (a) Can UN bring a claim for loss suffered in loss of its agent?
  - (b) Can UN bring a claim in respect of damage to the victim?
4. [O]: Yes to both – based on legal personality issue.
5. **[R: Issue (a)]**: CM54/LH&RH – has capacity, needed otherwise could not discharge – a breach on international obligation, therefore give claim an international character. Breached by a member of international obligations, IO that suffers claim must have capacity, rather than have all other members (save defendant) stand together to then bring claim
  - (a) *Commentary: not the deepest reasoning, repetitive.*
6. **[R: Issue (b)]**: CM55/LH – Charter does not expressly give power, **but could be implied**
  - (a) “Does not expressly confer” power to bring a claim on behalf of victim – therefore begin by inquiring functions of organisation and parts played by its agent implies a limited protection.
  - (b) “Under IL, organisation must have powers while, not expressly... are conferred upon it by necessary **implication** as being essential to the performance of its duties”
  - (c) CM55/RH: entrust agents to perform important missions in “disturbed parts of the world” – to ensure efficient and independent performance, UN must afford effective protection.
  - (d) CM56: “Upon examination of the character of the functions entrusted to the Org and the nature of the missions of its agents it becomes clear that the capacity of the Org to exercise a measure of function protection of its agents arises by **necessary intent** out of the Charter”.



- (e) *Commentary: why can't we entrust home state of agents to bring claim and protect the agents?*
- (i) Independence would be undermined, contrary to Charter – “not in sympathy” with agent – eg UN mandate to act is contrary to home state’s interests, less likely to act.
  - (ii) Difference in powers of state: can still perform equally as well, with full confidence in protection.
  - (iii) Person may be stateless.
7. *Commentary about principle of implied powers from this case:*
- (a) Arises from **functions and purposes**. Can imply powers from purposes if it is **necessary** to perform those purposes. IOW, a nexus of necessity. Powers not only to fulfil the purposes – but a stronger link: necessary for those purposes to be fulfilled.
8. **Dissent by Judge Hackworth:** rejected this point on commentary – implied powers must be implied from specified powers. Could reach same conclusion but must look to specified powers.
- Certain Expenses Case**
9. Context: GA organised two peacekeeping operations – one in Congo, one in Middle East.
10. [I]: whether expenditures for these purposes were expenses of “expenses” of org.
- (a) Why was this an issue?
  - (b) Soviet Union and France had an issue: refusing to pay their contributions to UN: argued not expenses under art 42 – that peacekeeping not ordained by SC, therefore illegal under Charter.
11. [O]: they were under art 17
12. [R]:
- (a) Court responding to narrow interpretation argument (that expenses should be narrowed to regular/administrative expenditure): court says nothing in “budget” to support narrow reading + prior practice means expenditure can include shit for peace and security.
  - (b) **Techniques of interpretation:** [CM157]
    - (i) Context: looked to “administrative”, appeared in earlier section where different budgets were discussed (eg “administrative budget”). However, this distinction not made here in art 17(2). Would have been consistent – as not, made a deliberate choice not to make distinction
    - (ii) Textualist: look to ordinary meaning of terms.
    - (iii) Purpose: [earlier in opinion] – could simply look to whether expense fulfil these purposes.
  - (c) On international law (art 43) [CM159/LH&RH]: art 43 raised as possible objection:
    - (i) Possible objection because –
    - (ii) Court’s response: “uniting for peace” argument confirmed here – agreements between members of SC and UN will include funding for forces.
    - (iii) Another objection: Include special expenditures authorised by SC – separate from regular budgeting under art 17. Furthermore, this was never done (agreements never entered into – art 43 agreements never signed off) – therefore, cannot include expenditure of this kind, intended for this purpose, into the regular budget:
    - (iv) Court responds – non-signing of agreements does not leave [CM166-167] SC impotent to act. Nothing in art 43 that limits SC.
13. **[L]: Key Test:**
- (a) [CM160]: comparison to purpose of the UN

- (b) “such expenditures must be tested by their relationship to the purposes of the UN in the sense that if an expenditure were made for a purpose which is not one of the **purposes of the UN**, it could not be considered an ‘expense’ of the Org’.
  - (c) While purposes broad, not unlimited. When Org takes actions that it believes action necessary to fulfil purpose, then action is not ultra vires.
  - (d) “Negative functional test”
  - (e) *Commentary*: What if correct action within purposes, but wrong organ to initiate (GA not SC)?
    - (i) Binding – p168 – if action taken by wrong organ as matter of internal, does not follow that expense incurred is not expense of Org. IOW, a problem for internal structure of Org. Externally – wrt to third parties – still an expense of Org.
14. **Doctrinal takeaway**: functions and purposes – similar to previous case but framed as the negative. A broader test than *Reparations*, as framed in the negative. Also, language of necessity out of the picture: “**appropriate**” for the fulfilment of one of the stated purposes of the UN.
- (a) Some argue this goes beyond implied powers to “inherent” powers – once IO established, can do w/e to fulfil its purpose.

## Unit 8: Validity and Review

15. Assumption of limits in both implied and inherent powers: how to curtail and review?
16. Overview:
- (a) *Ultra vires*: kinds, consequences, what’s involved
  - (b) Opinions addressing validity and ultra vires
  - (c) Judicial Review and the ICJ
  - (d) Other forms of “review”
  - (e) *Kadi* case.
17. **Ultra Vires: Kinds, consequences and what’s involved**
- (a) Two kinds:
    - (i) Substantive (eg instrument adopted by organ which lacks requisite power to adopt that instrument/measure – an act outside scope of organ or IO).
    - (ii) Procedural: organ possesses power to pass measure/do act but does not follow prescribed procedure.
  - (b) Consequence of a finding of *ultra vires*: act becomes invalid... from when?
    - (i) Temporal issue:
      - (aa) void/invalid *ab initio*: as if never legally effective eg treaty under duress or violates *jus cogens*
      - (bb) invalid from the time of the finding going forward, without retroactive effect.
      - (cc) partial invalidity: sever defective part of the act, the rest continues. More applicable to substantive than procedural violations.
      - (dd) voidable: curable through acceptance, acquiescence or estoppel – if no one objects, decision could stand.
      - (ee) *Commentary*: **unsettled doctrine in IL**. Different scholarship on which views.
  - (c) What is involved?
    - (i) What is the “act” in question? Eg resolution, decision, recommendation, report, guideline [reflect on “acts and instruments” lecture].
    - (ii) Who committed the act? Eg an organ of the Org [reflect on organs lecture].

- (iii) Where are the powers? Eg implied powers, look to instruments [lecture on “constituent instrument” and “interpretation”]
  - (iv) What kind of excess/violation? Ie substantive or procedural.
  - (v) *Commentary: difference between **legal validity of acts** (is act within power of IO/was correct procedure followed) and **legality/illegality** (where IO breaches obligations under IL, duty to make reparations, duties under “responsibility” lecture).*
  - (vi) Effect on rights and obligations of others eg organ may act ultra vires which affects other organ within IO.
- (d) Cases involving act of IO/organ is *ultra vires*?
- (i) *Advisory opinion on IMCO Maritime Safety*: held decision on composition of IMCO failed IMCO’s constituent instrument – IMCO misinterpreted the term “largest ship-owning nation”
  - (ii) **Act**: decision on membership
  - (iii) **Actor**: Maritime Safety Committee
  - (iv) **Power to carry out act**: constituent instrument
  - (v) **Kind of *ultra vires***: procedural – within their authority to do so, but followed the wrong procedure.
  - (vi) **Consequences??** Unclear.
  - (vii) In aftermath of opinion, IMCO Assembly dissolved (that was wrongly appointed) and reconstituted the Committee, pursuant to Court’s interpretation of “larger ship owning nation” – readopted measures the Committee took. *Commentary: possibility that ultra vires finding of Court had effect ab initio, rendering formation of committee, therefore must be reconstituted and all decisions by the original committee needed to be redone as all acts by the original committee/assembly were invalid.*
18. *Nuclear Weapons (WHO) Opinion*
- (a) Context: WHO asked ICJ on legality of nukes – used function of health and environmental effects – but was it outside its scope to be asking these questions? Politically, court may wish to avoid this question
  - (b) [O]: did not want to answer the question – WHO constitution did not give it jurisdiction to ask questions of legality – WHO was health organisation rather than one concerning itself with IL – its remit is effects of nukes on health, not the legality of them. “None of the functions of the WHO is dependent on the legality of the situations upon which it must act”.
  - (c) [R]: [CM173] – **interpretation** – begin with text:
    - (i) “Principle for speciality” (seen as synonym for attributive powers) – have particular powers for certain purpose – should not go out beyond those powers. CM174/LHS: “express powers” v “implied powers” – powers usually from express, but to achieve objectives, must have powers not expressly provided for to fulfil its activities.
    - (ii) Look to practice: [CM173]:
    - (iii) UN to WHO relationship: that WHO should stay in their lane – WHO is specialist – not to encroach on activity of other organs.
19. Case of acts not being *ultra vires*:
- (a) *Certain Expense*: [I]: w/n GA acts were *ultra vires*?
  - (b) Context: the fiscal crisis not solved by this advisory opinion – debate over legality of peacekeeping continued – led to suspension of voting proceedings in 1964 – objections raised
  - (c) Special UN committee established – formula for future proceedings tried.
  - (d) Political solution: US conceded possibility fo making exceptions to principle fo collective financing of UN activities, IOW, not all UN activities need to be

collectively financed. USSR agreed to make contributions to avert – made clear it was *ex gratia* and voluntary, and not required.

- (e) **Acts not being *ultra vires*, still consequences are unclear (let alone, being found *ultra vires*).**

## REVISION SESSION

20. Overview:
- (a) Instructions
  - (b) Past exam
21. **Instructions:**
- (a) 50 minutes **time allowed**
  - (b) Instruction: closed book
  - (c) 5 questions: make sure you answer ALL questions
  - (d) 7 marks for each question, 35 marks in total
  - (e) **Recommended: 10 minutes on each question.**
22. Statement given – state:
- (a) Agree/disagree
  - (b) Explain
  - (c) Reference examples discussed in class: accurate articles/cases help marginally.
23. Each question will have some “wrinkle” – answer should bring out the complexity. Target the answer to the question
24. “Whether or not an international organisation possess international legal personality depends entirely on the will of the founders of the organisation”
- (a) [L]: *Reparations* – exists for UN.
  - (b) **Definitions:** of ILP – separate from membership, reflects will of the organ – has practice confirmed the character? (see list of **factors**)
  - (c) Objective theory (IOs have ILP as a matter of IL) and “will theory” (in the question)
  - (d) “Presumptive personality” – can only be explained by having ILP.
  - (e) *Commentary:* what is ILP? Two theories, will and objective – settled on presumptive personality: a pragmatic compromise, reflected in *Reparations for Injuries* case.
    - (i) How far could *Reparations* extend beyond UN?
25. Question 2:
- (a) Yes, to a large extent – P5 and Veto – IBRD voting shares – “industrialised nations” – IMF from Europe, World Bank from US.
  - (b) Not all lead to undermining Sov Equality:
  - (c) Depends on “most powerful states”, not all reflected (although more so than others), eg France
  - (d) Voting: eg GA
  - (e) *Commentary: focus beyond executive organs – admin and plenary organs – many organs in UN incl ICJ, ECOSOC, Trusteeship Council,*
26. Question 3:
- (a) 9/11 Resolutions
  - (b) Danger:
  - (c) **Define: [then cogent persuasive]**
    - (i) “To legislate”: what do we mean by this? “Turn to legislation” – problems – challenge it. Or maybe it has not yet started to legislate.
    - (ii) Hegemonic or imperial IL
  - (d) Context: Syria, Libya, - greater Russian and Chinese influence, moving away from US.
27. Question 4:
- (a) Alvarez Reading:

- (b) **Need examples and counter-examples: some that are binding and enforceable are X – and others that are not are Y.**
28. Question 5:  
 (a) IMCO Advisory, *Certain Expenses, WHO Nuclear Weapons*.

## LECTURE 7: JUDICIAL REVIEW

Dated: 4 December 2018

### Notes from Readings

1.

### Notes from Lecture

1. **Recap:** with powers come limits – with limits comes possibilities of going beyond and therefore *ultra vires* – procedure for *ultra vires* – cases on Committee and WHO. Also, case of no *ultra vires* (Advisory Panel on GA).
2. **Introduction:** review and validity is meaningless unless there is a judicial body to make finding with some consequence.
  - (a) Definition: a judicial body can invalidate a decision, act or law.
  - (b) United States: JR extends to legislation.
  - (c) Argument: acts by SC could be *ultra vires* and ICJ could judicially review and overturn them.
3. **Libya Case (“Lockerbie”) 1992.**
  - (a) [F]: aircraft explosion over Scotland 1998 – US and UK demanded Libyan extradition – Libyan refused then subject to sanctions (mandatory commercial and diplomatic sanctions). Claimed to ICJ that sanctions subrogated rights and obligations under art 5 of Montreal Convention.
    - (i) [L]: Montreal Convention – can try nationals in own courts – Libya argued sanctions undermined this right. Therefore, unlawful.
    - (ii) Prelim [CC]: this was possibly state-sponsored – cannot trust national courts.
    - (iii) Libya wanted own courts to find legality of ICJ [discuss later].
  - (b) [O]: unsuccessful ... or were they? (Tom Frank)
4. **Bosnia Case 1993.**
  - (a) [F]: Yugoslavian Crisis – dissolution of states and “membership” issue [see above]. SC imposed arms embargo on all entities involved during this. Argued: with embargo, will lead to genocide and inability to protect – *jus cogens* rule, breached?
  - (b) [O]: unsuccessful
5. *Commentary: both questions raise an issue of JR – could ICJ review acts of IOs (especially the SC) – growth of SC actions, in wake of Cold War – context of new form on imperialism.*
  - (a) Tom Frank: court found resolution stood above Montreal Convention, however **article argues mere fact court undertook investigation into legality** means that ICJ has power to review.
  - (b) [L]: Article 103: conflicting obligations between Charter and other Agreement, Charter shall prevail. Article must be read with other art’s, including members obliging to SC resolutions. Read together, trump other agreements.
  - (c) Frank compares this with US case of JR – makes an analogy on modes of interpretation. Recap on interpretation: international lawyers employ other modes of interpretation, comparing constituent instruments to constitutions. Here, Frank looks like US constitution, this case is like *Marbury v Madison*.<sup>3</sup>

<sup>3</sup> A question about could ICJ be *ultra vires* – JR not provided for. But neither was US SC, with power of review “discovered” in *Marbury*. (with exception of current US AG Whittaker stating *Marbury* incorrect).

- (i) Alvarez criticises this approach about analogy.
  - (ii) Frank argues about the non-legal implications of having no checks.
- (d) Reasons **for** ICJ having powers of review:
- (i) Silence about immunities at international level, might mean that review is available;
  - (ii) ICJ as “principal judicial organ” (based as constitutional argument) – implied powers, cannot function without such power.
  - (iii) FP: checks and balance on SC being too powerful
  - (iv) SC was wide discretion, but not unlimited discretion.
  - (v) Limits could be inferred/implied, which SC should be held to.
    - (aa) [L]: Art 24(2): SC shall act in accordance with principles and purposes of the UN – art 25: members agree and carry out decisions of SC in accordance with principles/purposes of UN (imply licence/limit for review)
    - (bb) Fundamental norms should not be violable by the SC – in Bosnia case, referred to *jus cogens*, might add customary law norm of self-defence – arguably, laws of war (SC resolutions authorise actions, but in accordance with IHL, intrn ref law (“IRL”)).
  - (vi) Frank’s “need for last resort defender for system’s legitimacy”: gives SC legitimacy by having restraints – a Charter of limited/enumerated powers – if no limit, there would be cause for concern. ICJ is one body able to affirm and uphold rule, as “principal judicial organ”.
  - (vii) Charter does not explicitly establish hierarchy of SC over the ICJ – SC has political function, ICJ has legal function. ICJ should be allowed the JR power.
- (e) Reasons **against** ICJ having powers of review:
- (i) Only give advisory opinions – states are only (art 34) parties – IOs can request advisory opinions (art 96) and ICJ statute (art 65-68) – however, organs cannot be party and not subject.
  - (ii) No specific reference to ICJ being only authoritative body of interpretation. (San Francisco meeting – considered ICJ have binding authority of interpretive power, but **rejected this possibility**, to be kept flexible). Bodies will interpret Charter in day-to-day activities, if dispute, there are options, ICJ is only one.
  - (iii) Contentious cases, ICJ binding only between parties (statute art 59) – unlikely that direct challenge of legality of SC action comes to court through advisory opinion.
  - (iv) Issue of enforcement: if ICJ finds an SC act “unlawful” – only way to enforce, go to SC to do so (art 94). [how does this match up to JR of executive branch – multiple branches to enforce].
  - (v) Issues of **effect of decision**: is it void – retroactive effect? Court could choose, but this creates another complexity.
- (f) Conclusion: ICJ review is somewhat attractive – support within UN Charter to some extent – but other problematic provisions.
- (g) In 1990s, JR of SC was exciting prospect – argued a good thing to restrain power of SC. This waned.
- (h) *Commentary: need to think more broadly about JR – think it beyond a domestic court finding of invalidity. Are there **other forms of review** we can think of more broadly?*
- (i) Non-binding advisory opinions – SC could seek opinion. However, like in WHO case, might reject it, as no jurisdiction to bring a case.

- (ii) A review of *implementation* of SC decisions [will come back to this later, *Kadi Case*].
  - (iii) A body to review act of SC.
  - (iv) Office/organ to undertake internal review (Ombudsperson)
  - (v) Other UN Organs – HR Council, subsidiary bodies created by SC), GA to pass resolution – creates an indication about how majority feels. Not binding, not JR, but have persuasive force.
  - (vi) Role of national courts: could “review” implementation of SC resolution, creating an indirect review (Libya case??). Eg k for supply of security – court might look to competency of IO.
  - (vii) “Resistance in action” – if courts follow, but in practice do not properly enforce.
- (i) [See Slides].
6. **Kadi Case**
- (a) [F]: SC Resolution empowers and orders members to freeze assets and sanctions – EU does this (on behalf of members), passes regulation – catches Kadi. Identified as supporter of Al Qaeda – Kadi attacks regulation in EU Courts.
  - (b) [Proc Hist]:
    - (i) General Court: refuses to review regulation – to do so would amount to reviewing act of SC – has no authority (in Charter, members bound to acts of SC, trumping everything else). But Court still looks at whether SC respects *jus cogens* and found no infringement. **Commentary: this is a sort of review (Frank argument) and found it had.**
    - (ii) On Appeal in Grand Chamber: certain EU fundamental rights (conflict of laws) – two sources of norms, from Charter and within EU – foundational to EU order, must consider both. Held, Kadi has opportunity to be heard – eg being informed about inclusion of the list and the grounds to do so (otherwise contrary to norms of natural justice). Without knowledge, cannot have ability to review. **Commentary: able to review SC act because, in enacting regionally, no longer talking about the UN system (“technical basis”). IOW, not reviewing SC measures, only looking at lawfulness of EU reg.**
  - (c) Connor Geirty Commentary: did not go far enough to protect procedural rights (pg 25/mid para). Overall, cheerleading, very heroic judges, defending rights of individuals.
    - (i) Critiqued as attempt to carve out jurisdiction from a unified UN system.
7. Final thoughts:
- (a) JR normally about direct review of international court/tribunal, finding something *ultra vires*.
  - (b) Need to think beyond domestic set-up (like Frank’s analogies, shows pitfalls in this hopeful comparison) – review comes in different forms:
    - (i) *Kadi* is a review through review implementing measure – and in first instance, there was a “direct review” of sorts, looking to breach of *jus cogens*.
    - (ii) Judicial v non-judicial, or direct/indirect dimension – eg GA, passing strong resolution, opposing SC resolution.
    - (iii) Problem of consequences/enforcement.
    - (iv) Politicisation of review (with so many bodies) [CC: it is all political – a global legal pluralism – horizontal with many actors, no hierarchy – at least this provides some opportunity for resistance. The alternative is SC sitting on top] and undermines the very idea of review – lack of consistency of results – a fragmentation of intrn legal system. Powerful

states shop for best forum/organ, empowering those organs that favour them.

## Unit 8: Responsibility for Wrongful Acts

8. Overview:
  - (a) Problems of responsibility
  - (b) Meanings of “responsibility”
  - (c) Applying international resp to IOs
  - (d) Draft Articles on Responsibility of IOs (2011)
  - (e) [A]: DARIO applied: the UN, Haiti and cholera
9. **Problems of responsibility**
  - (a) Context: IOs increasingly scrutinised – previously thought as positive thing, doing no wrong, working toward a big global cosmopolitan world. Pressure in areas such as UN Peacekeeping in Balkans and Africa – sexual abuse, human trafficking. World Bank funded projects, leading to resettling populations including indigenous peoples and widespread environmental degradation.
  - (b) Issues: do IOs need to comply with IHL, intn labour standards in treatment of own employees, individual rights (economic and social).
  - (c) UN in Haiti as a case-study.
  - (d) [F]: earthquake leading to widespread disaster – UN peacekeepers (there in 1990s, arrived also pre-earthquake when democratically-elected President exiled so Peacekeepers went to stabilise and bring law and order) arrived.
    - (i) Did not take proper measures to stop spread of cholera – UN did not properly screen Nepalese peacekeepers (Nepalese Cholera outbreak earlier).
    - (ii) Haiti Cholera outbreak in 2010 – traced to UN peacekeepers. Thousands died - cholera not present in Haiti before.
    - (iii) “Mission Minustah”.
10. **Different meanings:**
  - (a) What does it mean for UN to be “responsible” for the cholera outbreak? Breach of obligation/duty – reparations – state-responsibility on Nepal (critical: poor countries provide peacekeepers, rarely wealthy states). **Other responsibilities: moral responsibility or political consequences.**
  - (b) Moral
  - (c) Political
  - (d) Legal
    - (i) Municipal/domestic
    - (ii) Under international law
  - (e) **“international responsibility”**
    - (i) Violation of IL entail responsibility and obligation to make reparation in one form or another (*Chorzow Factory Case*, 1927).
    - (ii) Applies to states, but how does it apply to IOs?
    - (iii) Issues of **“who” is an IO?** Yes, doctrine of ILP – but how do we view them? Sum of their members? So should members carry responsibility for their act?
    - (iv) Subquestions:
      - (aa) Can IO be responsible for wrongful acts?
      - (bb) If so, whose acts qualify?
      - (cc) Upon whom does responsibility rest?
  - (f) Context: 1980s only when these questions arose – issue about tin market – in 1985, IO ran out of money, debt of millions of pounds over responsibility. No clause in International Tin Council's constituent instrument on responsibility. Following questions below arose.



- (g) **What is required to assign legal responsibility to IOs?**
  - (i) Legal agency: distinct separate ability to deliberate and act – ILP.
  - (ii) Agent had something to do with matter – what counts? Clear actions would be command responsibility. In IOs, unclear where the IO begins and where members ends. Eg NATO bombing Serbia 1990s – if in breach of IL, who is to blame?
    - (aa) NATO as it is a NATO mission,
    - (bb) Most influential member of NATO being US making ultimate decision,
    - (cc) All member states: acted and acquiesced?
    - (dd) The most active members: US planes and pilots, along with the French.
  - (iii) **“Discretion” dimension** – sometimes discretion necessary – high-level authority delegating issues to people on ground. Difficult to hold superior responsible (unless in cases of improper oversight) for actions taken on ground.

11. **International Law Comm’s Draft Articles [Cm43]<sup>4</sup>**

- (a) Attempt by International Law Commission (“ILC”) to promote unity in IL, created by GA. For “... promotion of the progressive development of IL and its codification”. (ILC Statute, art 1(1)). Mirrors UN Charter art 13(1).
- (b) Commentary on Draft Articles (Secondary rules): Articles are “secondary rules” (meaning, not to do with primary rules of IL such as obligations IOs have). They are “trans-substantive rules” eg “under **what conditions** are IOs responsible?” or “what are the **consequences?**”.
- (c) Status of ILC Draft:
  - (i) form basis of treaties – but these ones on responsibility submitted to GA to be noted but not proceeded into treaty.
  - (ii) Non-binding
  - (iii) Evidence of custom? Somewhat. But where a lacuna, Draft Articles used to argue.
  - (iv) Controversial: based heavily on responsibility of states, but IOs.
- (d) **Basic Ideas in Draft Articles:**
  - (i) Basic principles of international responsibility of IOs: art 3 – any wrongful act breaching IL entails responsibility
  - (ii) Logic of DARIO: No act is unaccounted for. Every act done in international stage, there is a responsible body behind it. Avoid a vacuum. IOs have obligations under IL - should be responsible for violations of those obligations.
    - (aa) If IOs not responsible for violations, then either member states are responsible, this is problematic: contradicts ILP. Has personality but not responsible. Duties and rights.
    - (bb) If IOs not responsible, then no one is.
  - (iii) **“Elements of internationally wrongful act” [see slide]**
    - (aa) **[L]: Omissions and actions. Attributable – constitutes a breach.**
    - (bb) [A]: Dutch failed in a mission. Failed also in Rwanda.
- (e) Application to Haiti:
  - (i) Nature of Conduct: improper sanitary practices (act) and failure to screen (omission). Failure to conduct accurate water tests – allowing testing equipment to fall into disrepair. IOW, failure to take proper measures against outbreak of cholera. Allegation of obstructing investigation.

<sup>4</sup> Looked before at international definitions of IOs.

- (ii) Attributable conduct to UN:
  - (aa) [L]: art 6 – yes – peacekeepers part of UN – as organs.
  - (bb) [L]: Organs and agents at disposable – exercisable “effective control” over conduct.
  - (cc) [L]: If not under art 6 or 8, attributable if the IO adopts and accepts the conduct as their own
  - (dd) [L]: Art 8: if organ or agent acts as official or to carry out actions of IO ... even if contravenes instruction or goes beyond.
  - (ee) [A]: Art 7: Nepalese peacekeepers under effective control of UN. Lack of screening for cholera.
- (f) *Commentary: should Nepal be blamed instead of/in addition to UN?* **Sharing responsibility.**
- (g) **Test continued:** [L]: **what legal obligation** apply to IOs? From where do they arise?
  - (i) From Draft: Art 10: breach of intn obligation when act not in conformity that is required by that obligation (regardless of origin (?) of obligation).
  - (ii) Dimensions: treaties and customary IL – difficulties in recognising which obligations apply to IOs? Point of debate: is it up to states to uphold HR or is it customary?
  - (iii) [L]: IOs subject to general rules in IL, subject to Customary IL, their constitutions and international agreements to which they are parties [*WHO and Egypt, Advisory Opinion, 1980*].
  - (iv) IOs bound by *jus cogens*, but this is a limited set of cases (art 41-42 in DARIO references breaches of *jus cogens*).
  - (v) Difficulties:
    - (aa) “General rules in IL” is very abstract – hard to apply and say they form specific obligations
    - (bb) If IOs not party to HR rights or intn environmental laws then hard to infer obligations. Possibly could infer from the states, but then this brings in problems with ILP.
  - (vi) [A: Haiti]: Agreement with Haiti – “accept responsibility for personal harms”. All peacekeeping leads to Agreement with Host Country called Status of Forces Agreement (“SOFA”) – adhere to Haiti rules and act in accordance with intn conventions. Claims against UN based on SOFA and violation of fundamental HR and breaches of environmental IL. (part of agreement mandates Tribunal – never set up)
- (h) Other articles of note: art 13-14 (issues of aids and assistance, coercion and control over other states or other IOs).
  - (i) Art 20-27: circumstances precluding wrongfulness, including self-defence, consent, counter-measures, force majeure, distress, necessity, compliance with tribunal measures.
- (i) Other points to add to the **legal test:**
  - (i) **[L]: legal consequences of wrongful Acts?** – what would UN be required to do?
    - (aa) Chapter 2: reparation (restitution, satisfaction and compensation, “cessation and non-repetition”. These are broad secondary rules.
    - (bb) Issues: who calculates these reparations?
  - (ii) **[L]: Invocation – who can bring a claim?** Art 43 – injured states and IOs can bring claim. Excluded are individuals or NGOs.
    - (aa) [A]: Haiti does not want to bring a claim against UN – too reliant on UN. Would not want to bite the hand that feeds.

12. Summary:
- (a) What and whose conduct raise questions of responsibility? Who is the actor/agent – IOs vs their members.
  - (b) What are primary rules of IL which apply? What obligations – HR, environmental IL obligations etc. How do we know they apply to IOs? (Treaty, customary IL, IO's constitution, general principles of IL).
  - (c) Who bears responsibility where questions of causation and discretion arise?
  - (d) What are the consequences? Who decides? (who measures damages, which court or tribunal is the correct forum for these claims).
  - (e) Where can responsibility of IOS be **effectively** invoked?
  - (f) Can other entities (not states or IOs) invoke the responsibility of an IO?
  - (g) *Commentary: many criticisms of Draft Article, moving onto secondary rules when many primary rules unsettled.*
- (h) Can there be other means of trying IOs and their responsibilities in domestic courts? [see privileges and immunities]

### Unit 9: Privileges and Immunities

13. Context: IOs have responsibility for acts attributable and breaches an “international obligation” (to be defined – see above). Definitely, certain circumstances needing to hold IOs to account. Controversial and unsettled area. Even where IO held responsible under IL, **who will do so?**
- (a) Internationally, no governing third-party disputes settlement system/mechanism (see ICJ issues above in Judicial Review).
  - (b) **In domestic cases, issues of privileges and immunities.**
  - (c) There is a broader picture to keep in mind, but is not the focus.
14. Outline:
- (a) Law of immunity generally
  - (b) Why extend to IOs?
  - (c) 1946 General Convention
  - (d) [Skipped]: Advisory opinion of General Convention
  - (e) US-UN Headquarters Agreement
  - (f) Limits to IO Privileges and Immunities
  - (g) Application of Privileges and Immunities to Haiti.
15. **Law of Immunity Generally**
- (a) Claimed by and usually apply to leaders and heads of states in diplomatic mutual relationships. “In general, privileges are exemptions to otherwise applicable law of states while immunities are exemptions to adjudicatory or executive powers of a state”.
  - (b) **Who is covered under IL (generally)?** Diplomats – cannot be sued, exempt from certain taxation, civil duties – Diplomatic missions, belongings. Consulates/embassies considered territory of the State.
  - (c) **Rationale:** functional (otherwise diplomats might not be able to do work) – comity – equality of states/sovereignty – “unencumbered politics” (not interfered by law, act without legal ramifications as far as possible, but with limits).
    - (i) Waivable: eg Malaysian diplomat extradited back to NZ after fleeing.
16. **Extending to IOs:**
- (a) Avoiding interference from a state, promoting independence.
  - (b) Taxation: does not create a windfall for states hosting IOs
  - (c) Reinisch Article: “Theory of Functional Necessity”. Unlike states, not because of sovereign status of IOs.
  - (d) Examples in:

- (i) UN: art 104 (legal capacity) and 105 (Org privileges/immunities necessary for fulfilment of its purposes). Includes places and people.
    - (aa) *Commentary: limited immunity to purpose of UN. "Functional necessity". For "independent exercise of its functions".*
  - (ii) ILO: art 40 – subs (1) identical wording to UN Charter art 105.
  - (iii) IBRD: art 7 (8) – immune from acts within "capacity".
- (e) Next lecture: issues with "functional immunity".

- 17. **1946 General Convention**
- 18. **US-UN Headquarters Agreement**
- 19. **Limits to IO Privileges and Immunities**
- 20. **[A]: Privileges and Immunities in Haiti Case**
- 21.

## LECTURE 8:

Dated: 6 December 2018

### Notes from Readings

1.

### Notes from Lecture

1. **Recap about privileges and immunities**
  - (a) "functionality" and "necessity" might be in the eye of the beholder. [See Slide]
  - (b) Laws of immunities biased in favour of IOs – what about other considerations eg victim's harm in cases of traffic accident, where victim had no idea of IO – note there are *ex gratia* payments and waiver of immunity (particularly by UN) [to be discussed later].
2. **Law of immunities (and where to find it)**
  - (a) Starting point: constituent instrument. Also, multilateral agreements, Draft Articles on immunities - domestic legislation – customary IL – court decisions (two advisory opinions from ICJ).
    - (i) "General Convention" (1946)
    - (ii) 1947 Convention on the Privileges and Immunities of Specialised Agencies ("Special Convention")
    - (iii) Headquarters agreements eg. 1947 US-UN
    - (iv) Status of Forces Agreements ("SOFAs")
    - (v) Domestic law: Incorporates IOs status on immunities in domestic law. Eg NZ Diplomatic Immunities and Privileges Act 1957, Diplomatic Privileges (United Nations) Order 1959
3. **General Convention (1946)**
  - (a) That UN has juridical personality (art 1) – cited as evidence of practice, supporting ILP of UN (in *Reparations*).
  - (b) Types of privileges and immunities ("priv/imm") available to UN:
    - (i) "Archives of UN are inviolable": states cannot seize documents that may be confidential. (s 3)
    - (ii) Properties and assets not subject to national laws.
    - (iii) Exempt taxation, customs duties (s 7)
    - (iv) Article 3: UN status – couriers have diplomatic immunity.
  - (c) Priv/Imm to officials and agents:
    - (i) Attributed to UN/official capacity (role) not the individual – "not for the personal benefit of the individuals themselves" (s 14, 20 and 23).

- (ii) Section 18 gives specifics: no legal sanction for communications, national service obligations, extends to family, no import taxes for furniture and stuff.
  - (iii) Section 21: requires cooperation with member state authorities to administer justice, curtail any “abuse” (undefined).
  - (iv) Article 6: expert on mission for the UN – limited to period of performance of duties – and another case stating, whether expert on mission is in process of performance of duties is to be determined by Secretary-General of UN [case to be discussed later].
  - (d) Why priv/imm to member states? Section 14: for the independent exercise of functions of UN. Not for personal benefit. Note on membership: entities with *observer status* have same degree of protection.
  - (e) Section 29 requirements: UN to provide for dispute settlements between UN (or its agents) and other, for disputes in private law character – contract and tort.
  - (f) **[See Slides for General Convention Advisory Opinions].**
4. **UN-US Headquarters Agreement (1947)**
- (a) Read against 1946 General Convention.
  - (b) US Law (Federal, State and Local) continues to apply in the headquarters district (UN territory) however UN priv/imm provide exceptions from US jurisdiction. IOW, carve-outs expected to be interpreted **restrictively**.
  - (c) Section 8: UN can make regulations operative in HQ district, within necessity of full execution of functions – to exclusion of US Law inconsistent.
  - (d) US police and law enforcement cannot enter without consent of Sec-Gen (s 9).
  - (e) US not restrict travel to/from HW of various categories of persons, including those US have not recognised (s 11) – **see film “The Interpreter”**.
5. **Limits of Priv/Imm of IOs?**
- (a) “Functional necessity”, the rationale for priv/imm, implies a limit – however scope of priv/imm of IOs are thought to be absolute.
  - (b) [L]: Compare art 105 UN Charter (as necessary for fulfilment) with Art 1(3), 55 and 56 of Generation Convention s 2 (“from any form of legal process”).
  - (c) Priv/imm might be subject to HR requirements, art 1(3), 55 and 56.
  - (d) Context: Previously a belief in absolute immunity to UN, and therefore applies by extension to other IOs. Recently, seen as problematic. [Link to responsibility of IOs – IOs no longer viewed as “good”]. Their agents (eg UN in Haiti), core functions (eg World Bank lending for development projects) can negatively affect the world.
  - (e) **Reinisch** on limits on IOs’ Priv/Imm:
    - (i) Concern through HR of access to justice.
    - (ii) Checks and balances: where inability to take to domestic courts, UN must provide justice (reference to above, s 29).
    - (iii) Where IO does not provide a mechanism for claims settlement, then jurisprudence (though not universal), some other access of justice must be provided. FP: cannot leave a victim without a remedy, access to justice must be effective. [L]: national cases from Belgium/France.
    - (iv) **Commentary: unsettled but emerging trend. Still limited to European jurisdiction, domestically or EU court of HR. Growing in persuasiveness.**
  - (f) *Commentary of “duty to waive” so to not obstruct justice (does this contradict the idea of absolute immunity?): priv/imm necessary to uphold functions – concerns of states encroaching on actions of IOs. Historically, priv/imm to protect against states controlling/interfering with IOs.*
6. **[A]: Haiti**
- (a) [L]: SOFAs are a source of priv/imm – as subsidiary of organ of UN, MINUSTAH enjoys privileges and immunities of the UN under the General Convention (art 15).

- (i) On dispute settlement: “third party claims” on property loss, personal injury, illness or death – except arising from “operational necessity” which cannot be settled through internal UN procedures – “shall be settled by the UN” (art 54).
  - (ii) Any private law claim, not resulting from “operation necessity” – where Haiti courts have no jurisdiction – “shall be settled by a **standing claims commission** to be established for that purpose” (art 55): three-member commission, one appointed by Haitian Govt, one appointed by UN Sec-Gen, one appointed jointly (Mirrors General Convention art 29).<sup>5</sup>
  - (iii) **Commission never established.** Haitian govt did not call for its establishment – political reasons due to Haitian govt’s dependence on UN and MINUSTAH for stability.
- (b) NGO “petition for relief” presented to MINUSTAH and Sec-Gen.
- (i) Claimed:
    - (aa) Breach of SOFA obligations;
    - (bb) Breach of international environmental standards; and
    - (cc) Violation of Haitian victims’ fundamental rights.
  - (ii) Sought:
    - (aa) Establishment of claims commission;
    - (bb) Financial compensation;
    - (cc) Establishment of comprehensive sanitation and medical programme in Haiti to prevent further spread of cholera; and
    - (dd) Public acknowledgement by UN of responsibility.
- (c) [F]: Sec-Gen rejected petition, arguing consideration of claims not receivable under s 29 because:
- (i) It “would necessarily include a review of political and policy matters”;
  - (ii) UN practice to consider s 29(a) excludes claims that are “based on political or policy-related grievances against the [UN]...”; and
  - (iii) 29(a) refers to “disputes arising out of contracts or other disputes of a private law character to which the [UN] is a party”.
  - (iv) *Commentary: claims are frameable as private law claims eg negligence. Unclear where line is drawn between political and policy and claims. Best Sec-Gen’s arg: that peacekeepers sent has risk. Beyond the line might be criminal activity – this does not reach the standard (shit argument).*

## 7. **Delama Georges v UN**

- (a) Filed in Southern District of UN: against UN, MINUSTAH and Sec-Gen – class action on behalf of all residing in Haiti or those in US been/will be injured by those contracting cholera in Haiti.
  - (i) First instance court: dismissed based on well-established UN immunity and of its officials for actions taken in its “official capacity”
  - (ii) Court of Appeals 2<sup>nd</sup> Circuit (Aug 2016): dismissed again on same reason.
- (b) Memorandum by *amicus curiae*: mirror Reinisch article on HR – need for remedy – forms a claim of a “private law nature” – longstanding practice of remedying private law claims, particularly wrt peacekeepers.
  - (i) Core arg: UN does not have immunity – limited by art 29. Purpose of “functional immunity” to stop compromise independence. Wrongful deaths not covered here. (improper disposal of waste not connected to mandate)
  - (ii) Under HR, need right to effective remedy. Longstanding practice to remedy when no other remedy available.

<sup>5</sup> Context: UN historically does pay compensation to families – eg peacekeeping missions and collateral damage, those injured/wrongfully killed bystanders.

- (iii) Agreeing to providing for set-up of standing claims commission evidences not full immunity. Funding also set aside for possible third-party claims [reliance on practice, techniques of **interpretation**].
  - (iv) Section 29 is precondition for immunity.
  - (v) “Justice not only done but seen to be done”: UN in broader jurisprudence and powers, public law – link to case: GA has power to create administrative body, needed to set up recourse to justice, peace and security.
- (c) Other remedies – organ (possibly GA) could request ICJ have an advisory opinion on this matter.

8. **Concluding remarks:**

- (a) Rich and complex area of law – illustrates theme of **IOs and members**
- (b) Rationale of priv/imm: “functional necessity” is complicated – limits are unclear
- (c) Can serve to shield IOs and their officials from responsibilities
- (d) Positive moves in this direction, undermining the broad/absolute interpretation: grounded in rights of access to justice. Somewhat a broader public law considerations.

**Unit 10: Accountability and Reform in Practice**

9. Context: in terms of court cases, end of journey. However, other non-legal procedures.
- (a) IOs have broad, attributed and implied powers. Little scope of review – few third-party binding dispute res, and consequences/ultra vires unclear – questions of conduct and attributability
  - (b) Who/where can a claim be invoked re: responsibility? DARIO does not provide rules but evidences difficulties.
  - (c) Priv/imm a further bar to actions.
  - (d) Concl: difficult to create legal accountability of IOs.
  - (e) Moving forward: how have IOs reacted to accountability?
10. Outline:
- (a) Meanings of “accountability”
  - (b) Examples of internal/external accountability
  - (c) Factors precipitate reform
  - (d) Constraints on reform (political, legal and others)
  - (e) “Slogans” of reform: principles and drivers of reform
  - (f) Example: *Kadi* and SC sanctions process reform
  - (g) Ongoing reform programmes.
11. **Meanings of “Accountability”**
- (a) Legal (seemingly a dead-end)
  - (b) Moral accountability –
  - (c) Need for legitimacy through accountability –
  - (d) Financial/fiscal accountability: organs – paying reparations – forced payment would be moral accountability, but non-admittance, might be seen only as a gift. Eg “we don’t accept moral or legal accountability, but this is an *ex gratia* payment” – is this really accountability?
  - (e) Accountability to IOs own members: eg “we don’t like what you’re doing, we’re not paying” – France and USSR in *Certain Expenses*. Could be a similar concern in Haiti: floodgates of claims, with many members holding back dues to UN.
12. **Internal/External accountability processes?**
- (a) Claims brought by bodies/actors outside IOs – but who is inside/out? Are member states outside IOs? More clearly, individuals and other IOs are external to the main IO. Contrast, officeholder/organ within the IO bringing the claim.

- (b) External accountabilities:
    - (i) Eg NGO campaign re: UN accountability for Haiti cholera might be external (not within a standing-claims commission).
    - (ii) Eg **social movements** against WB projects eg Polonoroeste (Brazil: mass development plan for highway into Amazon covering the area of California – WB stopped payments), Narmada Dam in India (would lead to tens of thousands displaced – ended project).
  - (c) Internal accountability processes:
    - (i) In UN (Chesterman & ors, incl Tom Frank, CM221): Rwandan Genocide, “Srebrenica” case, sexual exploitation in Kosovo.
    - (ii) *Commentary on key points:*
      - (aa) Public airing of facts – however, hindered by selective information
      - (bb) Apologies – Bill Clinton (only P5 member in Srebrenica case).
13. **Examples on accountability process: Chesterman Article**
- (a) Key questions:
    - (i) How and by whom were each of these processes initiated?
    - (ii) Who carried them out?
    - (iii) What were their conclusions, and to what extent were they effective as accountability mechanisms?
  - (b) Rwandan Genocide (???): Sec-Gen investigation – very internal
    - (i) Account-rendering: **[who is the account giver and who is the account receiver]**: is this effective? Is it an independence inquiry? Some say very opening to investigation is an accountability measure. BUT, is it enough?
    - (ii) *Commentary:* future-proofing does not address the issue – some acceptance of wrongdoing but insufficient. Delay is bad – does not stop.
  - (c) Srebrenica [CM225]: independent inquiry – an “eminent person”: former PM and former foreign minister – more external. (Similar to CM228)
  - (d) **Internal accountability processes:** World Bank panel: Created as a result of Brazil and India cases and mounting international pressure
14. [A]: ‘Internal’ accountability: UN in Haiti
- (a) Special Rapporteur on extreme poverty and HR – [CM216] – timeline of special procedures – five special rapporteurs write to Sec-Gen – then:
    - (i) Office of High Comm of HR makes reports public.
    - (ii) Deputy UN SG replies in June 2016.
    - (iii) Draft report by Special Rap on 8 August 2016 – Philip Alston: “morally unconscionable, legally indefensible, politically self-defeating” – criticising lack of response.
    - (iv) 18 August “admittance” – vague AF. Accepts it played a role in outbreak.
    - (v) October 2016: acknowledgement of moral responsibility has no legal effect – no acceptance that UN responsible, no apology or recognition of legal responsibility – Office of Legal Affairs (“OLA”) advises UN not to accept responsibility in this or similar cases. Alston links to OLA dominated by Americans – avoiding responsibility for fear of litigation.
  - (b) UN Press Release December 2016 - Ban-Ki Moon’s apology: “Sec-Gen Apologizes for UN Role”.
    - (i) Does not mention outbreak, only look to response to disaster. “We simple did not do enough with regard to the cholera outbreak and its spread in Haiti. We are profoundly sorry for *our role*”
    - (ii) No commitment to change in the future. Unclear of what was UN’s role.
  - (c) *Commentary: priv/imm undermines legal/external accountabilities. Internal accountability of special rapporteurs moves more quickly.*
    - (i) Want to apologise without taking on legal responsibility.



- (ii) Issues about financial problems.

**Reform: legal (amending constituent instruments) and informal change**

15. What factors precipitating reform?
- (a) Failures, mistakes, disasters – Rwanda 1994, Srebrenica 1995, Sexual exploitation/abuse → reforms, doctrines, reports for peacekeeping.
  - (b) Crises: 9/11, War on Terror, invasion of Iraq.
  - (c) Pressure from civil society, NGO;
  - (d) Financial pressure;
  - (e) Internal bureaucratic reform/within - #DeepState;
  - (f) Globalisation – a change of global context (Post-WWII, Cold War, 21<sup>st</sup> Century) – cultural and population movements, technological advancements;
  - (g) New norms – human rights (global movement in 1970s, increase in Special Rapporteurs established in 80s).
  - (h) New treaties, concerns (environmental concerns), new IOs (eg EU, AIIB).
  - (i) Political shifts:
    - (i) Decolonisation
    - (ii) [see slide]
16. Reports in Reform
- (a) **“High Level Panel on Threats, Challenges and Change” (2004)**
    - (i) What are concerns expressed in the report? What was the context?
    - (ii) What were the reform proposals?
    - (iii) What do you think of the proposals?
  - (b) “Sec-Gen Report “In Larger Freedom”
  - (c) [See Slide for third report”
  - (d) **“Commission on Global Security, Justice and Governance” – “Confronting the Crisis of Global Governance” (2015)**
    - (i) See three questions above.
17. Next Lecture:
- (a) Finishing off this unit
  - (b) Approaches to study IOs
  - (c) Next Unit on Establishment of new IOs
  - (d) **Note on Part B: style of discussions change – student-driven. What are key themes emerging from readings? How do they relate to Part A.**

## **LECTURE 9:**

Dated: 7 December 2018

### **Notes from Readings**

1.

### **Notes from Lecture: Finishing Reforms**

1. **Panel Report:**

- (a) Context for reports – Middle East wars and War on Terror. Transnational terrorism – compliance with IL – that UN failing its fundamental peacekeeping mandate – WMDs (after dissolution of USSR), Bush’s “Axis of Evil” → “New Consensus for Security”.
  - (b) From Report:
    - (i) SC needed more participation, especially from larger states
    - (ii) Need more credibility, legitimacy and representation
    - (iii) More legitimate HR Commission.
    - (iv) *Commentary: normative and institutional recommendations (reforming processes to enhance legitimacy and organs and their interactions with one another).*
  - (c) Report used in 2005 Summit. Ideas watered down (after states start committing)
2. **Commission Report (2015):**
- (a) Millennium Development Goals – globalisation – shifting from states and contributions to global governance. Specific reforms proposed eg UN Parliamentary Network,
  - (b) Climate change becoming a central theme.
  - (c) *Commentary on both Reports: look to differences/similarities of only 10 years apart.*
3. **Constraints on Reform**
- (a) Lack of will on states to reform – lack of consensus between states (of whether to reform or *how-to* reform)
  - (b) Diverging norms
  - (c) Lack of funding:
  - (d) Changes of domestic politics
  - (e) States pulling out: [CC] but this can lead to a backlash to embolden reform eg US pulling out of Paris vs global response.
  - (f) Bargaining on issues are difficult because IR issues are **interconnected in reality**: eg climate change, migration, peace and security.
  - (g) Political constraint: “is there a problem?”, “how severe/urgent is it?”, “which problem(s) take priority?”, “whose fault is it?”, “what’s the solution(s)?”, “who should pay for them?”.
  - (h) Legal issues: “what is required to amend constituent instruments?”
4. **“Slogans” of reform: principles and drivers of reform**
- (a) **Representation**: eg reformation of SC, what “theory of representation?” (eg by power, or finances, or population, rotational/permanence). Eg reforming Sec-Gen, Executive Heads of IMF/World Bank.
  - (b) **Participation**: only states or NGOs and other reps of civil society etc.
  - (c) **Rule of law**: in *Kadi*, due process, judicial review, natural justice.
  - (d) **Transparency**: inevitability with backroom negotiations, pre-negotiations and pre-pre-negotiations. eg Sec-Gen once appointed in secret, balancing security concerns vs openness vs media, spin and politics.
  - (e) **Accountability**
  - (f) **Efficiency/effectiveness**: economically driven
  - (g) **Good governance**: reciprocal when often demanded by some states who do not have good governance themselves.
5. **Example: *Kadi* and SC sanctions process reform**
- (a) Timeline:
    - (i) “*Kadi I*” (2008): CJEU Gran Chamber annulled EU regulation listing *Kadi*
    - (ii) 2008: SC introduced narrative summaries of reasons – changing process around sanctions – ensure every listing accompanied with narrative summaries of reasons.

- (iii) 2009: SC creates office of independence Ombudsperson
  - (iv) 2011: SC strengthened Ombudsperson's powers.
  - (v) **Since 2011:** Omb can make recommendation to delist in principle: "*is there sufficient information to provide a reasonable and credible basis for the listing*"?
    - (aa) Effective if not rejected by *consensus* [voting] within 60 days.
    - (bb) Delisting only avoided if a Committee member requests referral to SC, then requires votes of 9/15 SC members, no veto.
  - (b) Practice: from July 2011-May 2012: 27 cases examined by Omb, 13 applicants delisted – one delisting denied – one request for delisting withdrawn.
  - (c) **"Quasi-judicial function"?** Political process becoming judicialized, ideas of due process, transparency entering. [Link acts and instruments]. While no official sanctions or bindingness, it can become so, through other processes. Not precedents, but *act* like precedents.
  - (d) *Kadi II* (2013) – [F]: Kadi relisted, given narrative summary of reasons and opportunity to comment. But CJEU General Court unsatisfied.
    - (i) European Commission did not expect departure from Sanction Committee's finding.
    - (ii) Kadi didn't have access to the evidence, just a summary; could not challenge allegations.
    - (iii) *Obiter*: creation of Omb insufficient.
6. **Ongoing reform programmes:**
- (a) IOs are reforming continuously – "Reform" major theme in Part B.
  - (b) UN
  - (c) UN peacekeeping
  - (d) World Bank
  - (e) IMF
7. Note on studying for test: need to learn a bit about all three IOs – eg when answering a question on is X true, need to say yes for UN but different for ILO.

## ----- PART B -----

### Unit 11: Historical and Socio-legal Approaches to studying IOs

8. What are "historical and socio-legal approaches"?
- Kia whakatōmuri te haere whakamua ('I walk backwards into the future with my eyes fixed on my past').
- (a) Connection to social-environment – product of people and interactions with one another, changing over time.
  - (b) How socio-historical norms affect the law
  - (c) **Note there are different methods:** can include, **ethnography** (sitting within the group, describe the practice), **archival** (drawing on primary documents produced by IOs, eg memos)
9. Difference to "doctrinal approach" – "objective", a set of ideas and whether it applies, "black letter". Socio-legal is "subjective".
- (a) *Commentary: an arbitrary distinction. What one is applying, is informed by historical-socio-legal approach.*
  - (b) Hurd article [\[see Lecture 1\]](#) – differing IR approaches – how to they map upon this doctrinal/historical-socio-legal distinction?

- (i) Liberalism (aka institutionalism): connection between groups, including non-states, civil society
  - (ii) Constructivism: values, identity and their change over time. Not merely realising mutual interests, but construct and change identities.
10. Pros and cons of other non-“doctrinal” approaches:
- (a) They are describing different things – doctrinal is “what law can I apply?”, whereas other is “*why* is the law?”. Not necessarily know history but expect to find it.
  - (b) Artificial distinction – common lawyers, we “look to history”? (questionable: not the *context*, who is missing from the law?).
  - (c) Eg Vienna Convention, art 32 – look to supplementary means, look to travaux, which looks to history. Context includes historical and subsequent practice. Even in hard-law of interpretation, there is historical-socio-legal approach.
  - (d) IOW: **not a hard distinction, but not to say no distinction.**
11. **19<sup>th</sup> Century International Bodies**
- (a) What socio-legal insights does this article offer?
    - (i) Conventionally thought that IOs created by states, article argues that IOs also influences the creation and continuation of states (colonisation period).
    - (ii) Eg even independent states, never colonised (Thailand, China), still influenced by colonised by values through IOs.
  - (b) In what ways to early IOs of 19<sup>th</sup> Century established a pattern followed into the 20<sup>th</sup> century?
  - (c) Timeline:
    - (i) Congress of Vienna (1815)
    - (ii) Danube Commission – Treaty of Paris (1956).
  - (d) **Argument:**
    - (i) IOs helped prop up liberal political economy in 19<sup>th</sup> century – in 20<sup>th</sup> century, addresses social q and colonial q –
    - (ii) Issues continue today.
    - (iii) Exercising influence: not necessarily colonial, but “imperial” influence – a relationship of domination. AIIB - WB, IMF, WTO (neo-liberal policies, subjugate developing states, similar to 19<sup>th</sup> century machine – “evil trinity”).
    - (iv) Today: greater social issues: labour rights, extreme wealth inequality,
  - (e)
12. Question: does ICJ have a marginal appreciation principle for IOS?
- (a) Yes, for states – rationale to some extent is because states have sovereignty. In HR jurisprudence, this is about making applying HR rules with recognition of states and state capacities. For lack of sovereignty, Guy does not think this principle applied to IOs.

## Unit 12: Establishing the ILO and other IOs after WWII

13. ILO: placate the working class – look to prevent outbreak of war – avoiding revolution
- (a) Marxist critique: this is a bandage to the problem – ILO does not change inequalities, but maintain the social order and
  - (b) US drawn into European politics – out reach programmes of LON failed, carried into UN. Not only ideas but carried by will of many people.
14. **League of Nations:**
15. Role of Woodrow Wilson: professor → president.
- (a) Different to Taft and Roosevelt – initially legalistic, having an international court to which states could submit disputes.

- (b) Wilson's ideas about global order: no legal structure without a political will – needed a parliamentary body to discuss issues as equals.
  - (c) Issues of the day: limits to a global governance, restrictions on voting, avoiding a super-state → LON
  - (d) Critiques of LON with no sanction power, yet Wilson argued for sanctions.
16. LON Creation: People: Wilson, Lenin, General Smuts (of South Africa).
17. Creation of ILO: international labour commission drafting, led to ILO.
- (a) CM23/25: Smuts and Wilson created a structure, thought was reflective of powers of parliamentary democracy – council of powerful states – a GA with all members with one vote and a general-secretary.
  - (b) This might challenge Alvarez's objections, about unwarranted analogies to domestic institutions. Alvarez still holds – not all is a copy and paste- but there is a historic link between what was planned, and analogies made today.
  - (c) Moderate socialist and liberal reformers thought “let's find a way through the mess” eg lawyers putting processes and rules in place.
18. Who worked for ILO when created? Who worked in Secretariat?
- (a) Irish Secret Service and an Englishperson from SS – brought in, English ideas. Spies! or something. Someone sympathised with workers?
  - (b) British elite – founders and shapers – Eric Drummond dude
  - (c) 30 CM – some diversity – ILO Archives, appointment fo people all over the world. Instrument also looks to appointment of women.
  - (d) Secretariats: Raymond Fosdick, Arthur Sweetser, Arthur Salter, Jean Monnet: very young
  - (e) In International Labour Office: Harold Butler, Edward Pheland, Royal Meeker.
19. “Constitutional Growth” at p 39-40 (Sinclair). Similarity to Wilson – a need for it to grow and change, needn't prescribed everything. Sociological view of law, reflection of society.
- (a) Compare ideas of “civilisation” in ILO and LON.
  - (b) Similarities between theological ideas, Wilson and ILO.
- 20.

## LECTURE 10:

Dated: 13 December 2018

### Notes from Readings

1.

### Notes from Lecture: The ILO and Technical Assistance (Unit 13)

1. History Lesson: Post WWI – new nations out of empires – migration across borders (to fit within the “right” states) – post-war Depression – Spanish Flu – genocide/ethnic cleansing – mass movement of refugees – revolutions and uprisings (Belgium, Bulgaria, Canada, China, Estonia, Finland, Georgia, Germany, Hungary, Italy, Mongolia, Netherlands, Persia, Poland, Russia, Slovakia)
  - (a) ILO (creating peace between classes), Versailles and other peace treaties, LON – all toward peace between nations.
  - (b) ILO meetings began: International Labour Office etc
2. **Class contribution:** Socio-historical approaches – doctrinal.
3. Pushback against the ILO: Arguments against ILO
  - (a) **Competency of ILO** – acting beyond remits and its powers –

- (b) **Legal arguments:**
4. Pushback against ILO: Forums in which these arguments were made: Permanent Court of International Justice.
  5. *PCIJ 1922 (Agriculture)*
    - (a) [F]: “industry” – does that extend to agriculture or manufacturing
      - (i) Swiss Govt, difficulties implementing regulations in agriculture sectors – French gov’t, for agriculture to be removed from agenda
      - (ii) Gov’t arg: “most important industrial nations”
    - (b) [I]: Competency of ILO over agriculture issues
    - (c) Held: Yes – wide encompassing.
    - (d) [R]:
    - (e) Doctrinal approaches:
      - (i) Textualist Language of the Treaty [24] – cannot derive meaning from phrase if detached from context CM39/half way down
      - (ii) English and French – “work people” and “travailleurs” – [31]
      - (iii) Interpret treaty as whole [CM39/23] – “which if detached from context may be interpreted in more than one sense”.
      - (iv) “Comprehensive character” of Part XIII, “Express terms” CM40/RHS
      - (v) Purposive approach – broad-ranging etc. maritime issues – “subsequent practice” argument. IOW, ILO have competency over other specific industries, so it should include agriculture.
      - (vi) Other arguments: does not matter if certain parts of treaty applicable to agriculture [at CM41/RHS]
      - (vii) Response to “not the most important industrial nations” – rejected, agriculture most important.
      - (viii) State sovereignty - [CM39/RHS] – arg: unless explicitly stated, should be read narrowly to maintain, to the largest possible way, state sov (context: French dislike agriculture dictated by IOs) – court response: but should be based on text of agreement, which states already signed up to (to limit state sov). Based on “what terms of the Treaty actually mean”, sidestepping big political question.
      - (ix) “Nothing in preparatory work”
    - (f) Linking to other ideas of course:
      - (i) Early “implied powers:
    - (g) Further context: ??
  6. *PCIJ 1926 (no. 13)*
    - (a) [F]: meant to protect working class – issue about employers not working
    - (b) [I]: can ILO regulate employers incidentally to regulate conditions of workers?
    - (c) [O]: CM48
    - (d) [R]:
      - (i) Reframing question: is not about bakers, but about competence (CM48/RHS) – reframing the question, setting aside other question (similar approach like *Reparations*). –
      - (ii) Big question: might be assumed “incidentally” might be involved, IOW: Part XIII as a whole should be read to infer ability (as a framework question) – intended to give broad power – IOW: when looking at purposes/broad powers of cooperation and powers intended, must have power to draw regulation that indirectly impinge on employers (so long as effect on wage earners)
      - (iii) Specific issues:
    - (e) “Doctrinal approaches”: looks to overall purpose, but more explicit (broad powers) – move toward “implied powers” idea. Treaty not specifically given power, but read

Treaty as broad framework, then not surprising. “If such limitation intended, would have been expressed in Treaty”.

- (i) [CM52/RHS]: destroying line
- (ii) “Inference” that it is not excluded – “may be assumed that incidental...” closer language to implied powers.
- (iii) *Reparations* cites this case about implied powers. Sinclair: unlikely that this case actually implied powers, rather a close reading of Part XIII.
- (iv) (CM54/RHS) – idea of *intra vires*, link to *ultra vires* discussion.
- (v)

7. Labour Identity and Symbolism in old ILO building – now WTO occupies.

8. Idea of Labour Idea – ILO and Law, ILO and Moral Ideas – effect on the ILO

- (a) Tech, efficiency,
- (b) Lead of elites – helping
- (c) Great Gatsby – American Capitalist –
- (d) IP → starts to creep in.
- (e) Increased involvement – in compliance sector,
- (f) Aiding set-up of organisations, efficiency
- (g) Protestant ideas – no work on Sundays. Link technical work and underpinnings of moral ideas.
- (h) Balancing state sov: push-back against ILO regulations – a lot done by tacit agreement, justified by “living organisation that is good”.
- (i) Frederick Winslow Taylor: influenced heaps of stuff – more and more efficiency, view work as a science.

9. **New International Civil Service:** discussion [Phelan Article]

- (a) Ideas of IOs: realist view of ship metaphor, multiple actors, kept together within a system and a convoy.
  - (i) [CC]: random shit happens – civil servants sometimes feel like there are convoys within states themselves.
- (b) Think of the meanings: “government”, “authority”, “legislation”, “administration”, “constitution”, “law”, “civil servant”
- (c) “impartiality and responsibility” – put heavier burden on civil service – “functions of civil service altered as role of government altered”. IOW, govt is responding to changes, like in technology.
- (d) Ideas of public administration founded through Taylorism
- (e) Painting metaphor: cannot compartmentalise – must look holistically.
- (f)

10. Creative responses: “can’t regulate what’s illegal” – compared one painting with Whistler painting – painting it all when it is all wet. IOW, how we perceive/analyse the world: need to take historical view, how things changed over time, rather than a snapshot.

## Unit 14: ILO and Development – 1930s and 1940s.

11. Overview of History: depression – rise of authoritarian regimes – civil wars (Chinese, Spanish) – international conflicts (Japan invading Manchuria, Italy invades Ethiopia) → WWII. Sense of deterioration of international system, intn commitments, intn institutions.

12. A universal mission:

- (a) Idea: centred in Geneva, officials interested in labour rights.
- (b) TWE was universal mission by ILO and embedded into constituent instruments? Ability to join if in LON. India not independent – not included – **universal mission v universal membership v personnel.**
  - (i) Not universal because anti-communist, excluded communist revolutionary states (ILO overcame with difference between employers, state and employees – issues with double rep if employers are states).

- (ii) Idea: changing practices of other states – give European countries an advantage, stop other states being ultra competitive. **Interest convergence.** (interesting counter-point question: why would Brits want better rights in India if Indian is still colony and cheap labour would benefit Brits?).
  - (c) In what was ILO centred on Europe and European issues? Personnel largely European in top echelons/officials. , however diverse down below.
    - (i) Employer + state + worker reps: *who are the worker reps?* Trade unionists – building on the trade union movement. Weaker unions historically, eg in agriculture sector. Think subsistence.
    - (ii) Assumptions about the society behind the structure – assumes a certain type of society.
  - (d) What are pros/cons of universalism in IOs?
13. Next lecture: expanding outside of Europe – changes in practices – move into economics.

## LECTURE 11:

Dated: 14 December 2018

### Notes from Readings

1.

### Notes from Lecture

1. **ILO moving to the East**
  - (a) Periphery into governing body – resistance from SA and
  - (b) Opening ILO with case about agriculture (many being outside of Europe)
  - (c) Q: effect of territories and members? Effect then on ILO?
  - (d) A: Indian membership – encourages trade union to make rep attending ILO – these unions play role in independence movement.
2. **To the West**
  - (a) John Winant dude – wrote a book and shit – Roosevelt Administration –
  - (b) US wanted to be part of ILO – something about federalism –
    - (i) Roosevelt’s “New Deal”, navigating out of Depression – “Lockean” issues about freedom of K and employment, being able to employ to whatever conditions agreeable by employer/employee: not freedom, exploitation, no other choice – Social Security as part of New Deal. All of this influence the ILO and labour rights.
    - (ii) ILO seen as instrument of democracy – not seen as applicable in Europe (democracy seemed aight or something) – increasingly looking further afield in Americas.
  - (c) Factors leading ILO to greater role in economics, planning and development?
    - (i) Expansion and management of economies, due to Depression. Move toward greater deficit, stimulating the economy – rather than shrink it/impose austerity/be fiscally conservative. (Pioneers ahead of Keynes).
    - (ii) Connection to development: driving idea of post-WWII period, centred idea **on development/modernisation** of societies.
    - (iii) Difficulties include lowering tariffs from empires (GATT involvement), creation of markets, opening up markets of developing states, moving away from communism.
    - (iv) Issue of a **new imperialism**: built on narrative on “civilised v uncivilised” – justification for empire. Arguably, different – becomes part of “common sense” of how the world works



- (d) Movement of ILO: moved out of Europe to Montreal during War.
- 3. **End of WWII:**
  - (a) Declaration of Philadelphia signed –
- 4. **“Constitutional Questions”**
  - (a) ILO practice and US experience – wide-interpretation of constitution.
  - (b) Mirror Alvarez critique – issues of the domestic analogy. Possibly, ILO analogised to constitution to a democratic nation works better here, than UN.
  - (c) Q: why were US cases specified? *McCullock v Maryland*, noted in Frank’s article also, a point about Judicial Review. Idea: nothing in Constitution states power of courts but eventuates in practice. Note, the development of US being centred and greater influence – so possible draft a Constitution in line with US values (US growing in influence, when earlier they were not).
  - (d) “Amendment”, “practice” and “interpretation”: notes change possible without amendment and changes that do require amendment eg cannot pass laws and implemented instantly,
  - (e) [10] interactions with other IOs, [11] on development of convention system, [12] recommendation makeable without amendment, at [14] requires amendment. If it takes a strict approach to interpretation, needs amendment, if vibey approach required, able to do without amendment.
- 5. **Anghie Article:**
  - (a) Issues of abuse of minorities in new nation states –
  - (b) Argument used both ways: Hitler concerned about Germans persecuted in Czechoslovakia
  - (c) **“Mandate System”**: states control other states through mandates –
  - (d) Nationalism and connection with “civilisation” – linked to mandate story. Become a nation state once when “civilised”, will help you along the path – support technologically, **link to development**.
  - (e) Bigger discussion – nationalism, statehood.

## LECTURE 12:

Dated: 18 December 2018

### Notes from Readings

1.

### Notes from Lecture

- 1. **Questions of Method:**
  - (a) What kinds of IOs were established at the end of WWII? Warsaw Pact, Commi-Con (question of their status as IOs given strong USSR dominance), UNICEF, World Bank and IMF (as subsidiaries of UN, but become more independent).
  - (b) How were they intended to relate to one another? Through cooperation agreements.
  - (c) Creation of UN: Aug 1941 (Atlantic Charter, Roosevelt and Churchill) .... Many other events. Then San Fran meeting. Other conferences include conference of food and agriculture (leads to Agriculture IO), also in 1943, FAO, WHO, ICAO.
  - (d) **Charter as a “living constitution”** – [see slide]: Truman, Brierly and Hambro. Note the livingness of it, the ever-changing precedents and conventions.
    - (i) Idea begins in ILO. Now applied to UN Charter.
- 2. **Creation of IO law**

- (a) What practices, disputes, and scholarship shaped IOs after WWII? Scholarship tended to look back till 1919, however Sinclair argues it has been around for a shorter time and it is less stable – “IOs” were used either as a world order or specific institutions and included private organisations, rather than used in the “IO” sense today (which is meant in a much more “crystallised” way, which has a meaning that comes together post-WWII) .
- (b) What is at stake in the argument over origins? Legitimacy, foundation of powers (implied and applied), scope and review of powers,
- (c) How does IOs law have a “post-colonial imaginary”? Saviour, decolonisation, neo-colonisation.
  - (i) Rejecting hegemony and empire – move toward nation states (and idea of “nation” and “state” is dangerous to combine, also) – interpret implied powers more widely – IOs as “midwives of new nation states”. Eg FAO working to transition states in a decolonising world.
  - (ii) **“Expansionism” and “functionalism”**: started as expand, but some restrictions of functions as a result of post-col imaginary... functionalism: breakdown IOs into certain functions only eg FAO and World Bank does only x,y,z. Rather than “world org will come in and do everything”. Contrast LON which had multiple committees under LON – rather, in UN, these functions are split between different IOs, with different powers.
- (d) What other narratives could make sense of the evolution of IO law? Great powers seeking powers through new means (perpetuation of powers: wealthy attain wealth, poorer in peacekeeping forces. Initially began as a means of bringing developing states on board.), economic (Marshall Plan), arms races (militarism, proxy wars, Cold War), Eurocentric.

## Unit 16: World Bank and Development

3. Prelim notes:
  - (a) Geography – structure, close ties with Washington DC Bureaucracy
  - (b) World Bank (IBRD + International Development Association) v World Bank Group (includes all five)
  - (c) Very large remit: includes discussion of healthcare, climate action plan, energy policies, financial products and **technical assistance**.
4. Creation of World Bank: planning for WB coincided with IMF and UN (1942), led to Bretton-Woods Agreement (1944) – a year before the UN.
  - (a) Keynes repped UK (big on welfare state thinking in econ); Harry Dexter White for US. See “Keynes on Lawyers”.
  - (b) Two purposes: reconstruction post-war economies and development.
  - (c) Activities: lending money and guaranteeing loans, for projects of “reconstruction and development” – buildable with an economic purpose and in which the outcome was visible eg ports, powerplants.
  - (d) Other activities (beyond reconstruction): Marshall Plan dwarfs WB ability to provide funds, WB then moves into projects of development and beyond Europe. Loaning for importing goods from US (to France, Netherlands in first loan) – a “non-project” loan.
    - (i) Moving technical assistance, giving ideas about reform (to govt – including projects which require further Bank loans).
    - (ii) **“Tutoring” govts about how to govern** – looking at small-scale practice, through small projects.
    - (iii) Resolving conflicts/crises eg mediating Iran and UK over nationalisation of UK company, India and Pakistan over irrigation, post-Suez Crisis settles claims for expropriation, in Congo.

- (e) Eugene Black's "**Development Diplomacy**": modernisation as a counter-measure to the spread of communism. WB to stimulate development, avoiding fragile states engulfed in communism. IOW, engagement of developing states through development in areas states seem to be slipping into dispute (eg Indus Valley between India and Pakistan), turning disputes into productive efforts of development, to depoliticise the situation.
- (i) [CC]: very selective forms of development, pushing for political ends (despite articles of IBRD stating to only consider economic considerations).
  - (ii) [CC]: an arbitrary distinction between politics and economics.
  - (iii) Americans believed this was a "neutral" thing and becoming communist would mean not being neutral.

5. Broches in the Fourth Committee

- (a) Context: backlash over bank loans to SA (apartheid state) and Portugal (having an empire – Angola, East Timor, Cape Verde – fighting very bloody wars). 1960 Declaration of Independence by GA to crystallise decolonisation, a special Decolonisation Committee of 1961 and a Fourth Committee of GA: WB, lending to SA and Portugal, GA passes resolution for all states and bodies of UN to stop assisting SA and Portugal, and a specific call-out against IMF and WB. WB then makes more loans.
- (b) What legal and political arguments were made against the Bank's position?
- (c) How did Broches defend the Bank?

Arguments against WB	Broches' Response
1. Specialised agency. Must adhere.	1. Charter says "no political considerations". Hands tied unless formal changes made.
2. Zambia re Portuguese budget:	2. Obligations about protecting self-determination are for states – WB is based on constituent instrument.
3.	3. Not taking UN actions as a directive, but as a "first notice" to invite further discussion, through the Relationship Agreements. IOW, this is consultation.

- (d) What do you think?
- (e)

## LECTURE 13:

Dated: 20 December 2018

### Notes from Readings

6.

### Notes from Lecture

1. **Types** of arguments being made by spokespersons of countries:

Argument to Broche	Broche's Response
1. Zambia – questions scope of WB. //Ghana (at 99), no such thing as a purely "political" matter. Core question: where does one draw the line between	2. Corruption a relevant consideration – then make a conclusion. Broche's argument rests on "only economic, not political considerations".

economic and political questions?	
3. Issue of defence spending (40%), in practice, violence against states seeking independence. IOW: where is the money going?	4. Portuguese building infrastructure in Mozambique. So, allgood. Muddies the distinction between political and economic. 5. Recourse to expertise: those are good points, economists must have taken those economic questions in mind – but not my role, here to espouse legal principles.
6. Ghana: “Siamese Twins”, cannot be divorced. This is genocide – not politics, but a matter of international <b>criminal</b> law. Consistent with “welfare of mankind” goals? (moral and first-principles). 7. Russia: moral aspect (p 102)	8. Sometimes fall short – cannot be swayed by public opinion. – Exec Directors, repping nations, already made decision. Link to <b>members</b> of WB. 9. “aims are limited”, not free to pursue aims of UN (p 104): different IOs, principle of speciality. 10. Whole IO interpreting its own ambit.
11. <b>UN Legal Counsel – (and “uniting for peace”)</b> , responding to Broche on politics: same members, should have same objectives. [p 108]. IOW, politics refers to internal politics of country – but Bank cannot refer to international politics; SA and Portugal and international actions. (from SA and P’s perspectives, they would argue these matters are domestic).  ( CC : contrary to doctrine of speciality; IOs are separate from members, governed by constituent instruments; WB are different to UN in function, governance etc).	

- (a) In 1980s, Bank held corruption being a political question, unaddressable by the Bank. When Woolfensen addressed corruption, called this a “scandal”, noted a push-back by the Council.
- (b) Yet, in 1966, Broche accepts that corruption has an economic aspect of it and could be taken into consideration.
- (c) **“Fungibility”**, another issue that faced the Bank: the immediacy/directness of the funding to the project. IOW, the interchangeability of cash. (Issues 3 and 4). Bank is funding for X project, but this frees up money by the state to put toward anything – projects or military spending.
  - (i) Regulate too much, encroach on sovereignty.
  - (ii) Regulate too little, fungibility issue.
- (d) Other context: Vietnam War. Chile loan denied (hypocrisy given non-interference stance here?).
  - (i) Possible economic reason for Chile: socialist system of nationalising will not work, this is an economic question.

## Unit 17: The World Bank and Global Governance

- 2. McNamara’s Bank (1968-1981):

- (a) Context: Previously, Secretary of Defence in US – face of US intervention in Vietnam – memoirs stated he argued against Vietnam, archival evidence proved this wrong.
  - (b) McNamara’s vision and factors influencing his vision:
    - (i) Desire to increase lending –
    - (ii) Taylorism influenced, used during US Administration. Focus on planning, measurables, stats, restructuring, centralising control.
    - (iii) Moving away from projects and GDP-centred – **population** and absolute poor become important, population growth, need to slow down population growth.
    - (iv) Brings in China to the WB – China begins opening-up.
  - (c) “High Modernist” State Building Approaches by Bank:
3. **Push to New International Economic Order (“NIEO”)**: declining trade – West paying little for raw products – built on imperialist exploitation.
- (a) Issue: too much of a focus on technological progress.
  - (b) Context: 1970s, bulk of decolonisation of states – Vietnam War winding down, other Indo-Chinese Wars – apartheid in SA. Despite political independence, a need for economic independence (liberated from imperial economic powers), leading to economic interdependence.
  - (c) Still rests on a “**modernising vision**” – technological reliance, the West still has most of the progress/the model.
  - (d) Principles in resolution:
    - (i) 1970s: a time of crises and sense of hope. 1980s is a reversal.
4. **From projects to policy (1980s)**
- (a) Defaulting on national debt, eg Mexico – a question of how WB will respond. **A counter-revolution**: 1940s had a Keynesian welfare state (enough industrialisation, for enough wealth, for the govt to provide enough social safety nets and public goods). Shifting in 1980s, a **neoliberal/conservative** set of policy ideas. Rationale: states saddled with massive debt. Roll back state, reform civil service, reduce public-good expenditure, require balanced govt budgets, avoiding debts, privatise state services, unleash the “productive power of the public sector”, (**the problematic assumption**) deregulate markets, reduce barriers to trade. In WB terms, more stringent terms, as well as IMF, all on developing states: conditionalities. Loans to facilitate this reform.
  - (b) People: Hayek, Friedman. Politically: Reagan and Thatcher. Germany and Japan, Rogernomics in 1984 Labour Govt.
  - (c) Social problems: health, education, reaction against govt, resistance,
  - (d) Problem-solution gap: developing states do not emerge. All social problems continue.
5. **1990s – the WB and Governance:**
- (a) Looking at policy and process – WB looks to how govt implements policies.
  - (b) Imposition of US model on other states –
  - (c) Focus on corruption: throwing money, not the solution.
  - (d) Use of “governance” term – tackling issues of how govt is run without seeming to interfere with politics of the country.
6. **Ibrahim Shihata:**
- (a) Background: from Cairo to Harvard – *kompetenz-kompetenz* – headed WB legal department.
  - (b) Characterising process: “does it serve purposes (which are broad)?”, “does it contravene any provisions?” – a big playing field. Draws on implied powers – similar to Broche, links to *Reparations* and *Certain Expenses*, stating these cases apply to WB. – not an interference in politics.
  - (c) Opens door to “**governance**” – grows as idea through 1990s.

7. **World Bank as a “global governor”**
- (a) Reimagining the state in the 80s and 90s?
    - (i) Wolfensen + Stiglitz: bring some welfare ideas – welfare plus market flourishing techniques (Clinton era). Intervention in states: Wolfensen interested in corruption and “comprehensive development framework”.
  - (b) More broadly, other ways the Bank becoming a ‘global governor’?
8. **Inspection Panel**
- (a) Two or more individuals can bring complaint to IP against WB – must be act/omission leading to harm. IP filed report of complaint, executive directors then makes call if full investigation be carried out. IP members go and interview if approved. Self-refers “independent complaints body”.
  - (b) See [cases](#) of panel – although no official rule of precedent.
  - (c) What principles underly the inspection panel:
    - (i) Accountability eg public reports.
    - (ii) Act/omission by Bank breaching “responsibilities”. Must prove “material detriment” – **fungibility**.
    - (iii) Consultation/Respect for state sovereignty: when IP wants investigation, state can choose to block.
  - (d) TWE is it an effective accountability mechanism?
    - (i) NGO blocked from taking action unless fall in one of the few exceptions.
    - (ii) States can choose to block investigations: issues of blocking in many ways, China-Weston noted the problems of govt spying on investigators.
    - (iii) No appeal/follow-up processes.
    - (iv) Influence limited to state needing money eg Chinese govt undertaking project with rejection from Tibetan state – rejected the need for money, Chinese govt went ahead. (China-Weston poverty-reduction project). A claim made by Tibetan rights lobby group, on behalf of people of Tibet. Issue of Standing? Attached letters/reports.
  - (e) TWE is inspection panel a *legal* mechanism?
    - (i) Investigatory – accountability mechanism. Not binding.
    - (ii) Participation – legal or managerial?
    - (iii) WB can begin acting before the Report released – WB can say “we got on to it”. Cannot solve a problem without knowing the problem – trade-off of efficiency. **Lack of consultation.**
  - (f) What can the WB be bound by? Not UNDRIP or any IL – only a breach/anticipated breach of WB’s own policies/procedures. Some policies/procedures developed, taking into account HR – eg Bank’s indigenous policies created from consultation with ILO (which in turn, taken from UNDRIP).
  - (g) Then an issue of interpretation: when reading, are broader indigenous rights obligations considered?
  - (h) ^is this a legal process?
  - (i) Issue: no enforcement – China can DIY, and not use WB’s money. Which is better? China doing it itself or under WB (where there might be some control). Some think if WB has stamp of approval, creates legitimacy. Others respond that China-Weston is about helping farmers in poverty.
  - (j) **Judicialisation of a non-binding policy document.** Legalistic techniques of interpretation – purposive interpretation, ordinary meaning, context etc. Judicial ideas brought into interpretation of policy. Bank argues: only guidance, need leeway for officials to do stuff. IP: need to protect people and environment.
  - (k) **“Boomerang Effect”**: civil soc and NGOs bring claim through WB, to hold states to account.
  - (l) Theme: accountability mechniasm – affects how IO works.

## Unit 18: Conclusion and Themes

9. Evolutionary approaches to law: interpretation  
(a)
10. Power:  
(a)  
(b) How it flows – global order, influenced by states – IOs influencing states.  
(c) How can it be constrained? Review and Accountability.
11. Politics v Law? – economics.
12. Historical Context:  
(a) Post WWI and WWII  
(b) Cold War  
(c) Neo-liberalism
13. Popular sentiment: moved from optimism of IOs' good to the bad they have done.

## Final Assessment

14. Read and follow the instructions.
15. Marked as an essay:
  - (a) **Content:** Critical analysis (of question and the material in the course), arguments (and backed by subsidiary arguments), originality (go beyond surface of what is read/discussed – **going beyond the obvious, a deeper engagement**);
  - (b) **Use of sources:** variety (judicious use – **for and against**) and referencing (do not make statements without supporting them).
  - (c) **Writing:** expression, structure (should follow logically – probs five to seven sections incl intro/conclusion), style guide compliance.
    - (i) Internal paragraph structure – topic sentences etc.
    - (ii) Should be able to read the first sentence of every para in the entire essay.
    - (iii) Between 100-200 words (per paragraph)

## THEMES AND MUSINGS

1. **Summary**
2. My interest in the course: shifting power dynamics on global scale (rise of China – Trump's isolationism) – how this affects Aotearoa – how IOs can prevent or mitigate such changes.
  - (a) Case study: Singapore and balancing of Chinese v Western interests during LKY.
3. A moment of change.
4. Legal Personality is central → What are IOs? Actor or sum of its memberships? Is it itself? Can it have claims brought against it?
5. Constituent Instruments v Treaties
6. See Reflection from [Lecture 5](#).
7. Interpretation: analogy with constitution or Alvarez's criticisms of these approaches.
8. Complex relationship: IOs and memebtrs