

# AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW

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**CAMBRIDGE**  
UNIVERSITY PRESS

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PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE  
The Pitt Building, Trumpington Street, Cambridge CB2 1RP, United Kingdom

CAMBRIDGE UNIVERSITY PRESS  
The Edinburgh Building, Cambridge, CB2 2RU, UK  
40 West 20th Street, New York, NY 10011-4211, USA  
477 Williamstown Road, Port Melbourne, VIC 3207, Australia  
Ruiz de Alarcón 13, 28014 Madrid, Spain  
Dock House, The Waterfront, Cape Town 8001, South Africa

<http://www.cambridge.org>

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First published 2002

Printed in the United Kingdom at the University Press, Cambridge

*Typeface* Adobe Minion 10.5/13.5 pt    *System*  $\TeX$  2 $\epsilon$  [T $\mathbf{B}$ ]

*A catalogue record for this book is available from the British Library*

ISBN 0 521 81774 9 hardback  
ISBN 0 521 52093 2 paperback

# AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW

International organizations are unusual creations: generated by and for their member-states, at the same time they often have to compete with those very states that created them. This complicated relationship frequently leads to some uncertainty in the law relating to international organizations: the legal argument of an organization will often be counterpointed by an equally valid argument from a member-state. Professor Jan Klabbers is mindful of this complex relationship in his comprehensive analysis of international institutional law. As well as describing the law as it applies to legal institutions in chapters that cover dispute settlement, financing and treaty-making, Klabbers looks forward to a re-appraisal of the status of international organizations. This is a key textbook for advanced-level students of law and of international relations.

**JAN KLABBERS** is Professor of International Law at the University of Helsinki and also works as a consultant for international organizations. His publications include *The Concept of Treaty in International Law* (1996).

**'You are my creator, but I am your master; obey!'**  
**Mary Shelley**

## PREFACE

It was in the autumn of 1992, or perhaps the spring of 1993, when I received a phonecall from a former student of mine at the University of Amsterdam, now working for a solicitor's firm in London. After the usual expressions of surprise and politeness, he asked me what I knew about the responsibility of international organizations under international law.

The short answer was: nothing. Teaching international law in Amsterdam, one was not supposed to inquire into the law of international organizations beyond the merest basics (personality, the legal status of General Assembly resolutions, collective security, that sort of thing); after all, we had a separate department (or section, rather) to cover international institutional law.

The one thing I did remember from my student days was that the law of international organizations was taught to us as a seemingly endless enumeration of facts ('The Council of Europe was established in whenever'), numbers ('The European Parliament has umpteen members'), abbreviations ('IRO stands for whatever') and generally incomprehensible phrases ('Specialized agencies?' Specialized in what? Agencies of and for whom?).

Indeed, leafing through the textbooks I had to read as a student, it becomes clear that general legal issues relating to international organizations had no priority. One of our textbooks addressed such issues, but in the part that was not compulsory reading for our exams.<sup>1</sup> The other general textbook was more in the nature of a comparative review of internal provisions some organizations may have had in common, without emphasizing

<sup>1</sup> This book was D. W. Bowett, *The Law of International Institutions* (4th edn, London, 1982). Recently, a new edition appeared: Philippe Sands & Pierre Klein, *Bowett's Law of International Institutions* (London, 2001). Unfortunately, I received it too late to be able to do much with it.

general legal issues.<sup>2</sup> In short, I had to tell my former student that on points of detail my knowledge displayed, er, a slight deficiency, but that I was sure the professor of international law at the London School of Economics at the time could be of more assistance to him.<sup>3</sup>

Nonetheless, the episode got me thinking that there might be more to the law of international organizations than I had always been accustomed to, and in particular when I started teaching EC law some years later (which involved, at the time, yet another department at the University of Amsterdam), I was forced to look a bit more closely into such notions as implied powers, ultra vires, legal personality, treaty-making by organizations, and judicial protection. So, when in 1996 I switched to the University of Helsinki and found out that there was no separate department for the law of international organizations, I readily volunteered to set up a course.

The one problem I encountered was that few of the textbooks available would address the issues I found to be important, with the exception of Amerasinghe's recent textbook.<sup>4</sup> Amerasinghe's excellent book, however, came with two drawbacks: not only was its retail price prohibitive, I also found myself often admiringly disagreeing, in particular when it came to the general outlook on international organizations.<sup>5</sup> While I could appreciate Amerasinghe's scholarship, I still felt that his textbook did not explain things in the way I would. And so, I figured, there was only one thing I could do, and that was to write my own textbook.

The famous (if controversial) philosopher Richard Rorty once wrote that education ought first to socialize people into the customs and ideas that make up the society they are a part of, after which at colleges and universities the happy few should be allowed and stimulated to question and debate all the things they have learned in the past: socialization first, followed by individualization.<sup>6</sup>

<sup>2</sup> This was the synoptic Dutch version of H. G. Schermers's famous *Internationale Institutionale Law*, condensed to some 300 pages under the title *Inleidende tot het internationale institutionele recht* (2nd edn, Alphen aan den Rijn, 1980).

<sup>3</sup> I did not know half how fortunate that suggestion was: Professor (now Judge) Rosalyn Higgins was at the time preparing a report for the Institut de Droit International on the very topic of the responsibility of international organizations and their member-states.

<sup>4</sup> C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge, 1996).

<sup>5</sup> I have set this out more broadly in a review of Amerasinghe's book (1997) 66 *Nordic JIL*, 553–55.

<sup>6</sup> Richard Rorty, 'Education as Socialization and as Individualization', reproduced in his *Philosophy and Social Hope* (London, 1999), 114–26.

It is with both goals simultaneously in mind that the present book is written. All too often perhaps, textbooks and courses on the law of international organizations remain limited to socialization: introducing newcomers to the particular rites of international institutional lawyers. While that is a valuable goal in its own right (and indeed this book contains much socialization as well), my ultimate aims are to get people to think about the law of international organizations, and help the reader understand how interesting it can be as long as one does not insist on approaching the topic as a mere gathering of numbers, dates, abbreviations and incomprehensible phrases. As my students have convinced me, it might actually be worth the effort of treating them not as mere receptacles for bits and pieces of information – useful only to impress tuition-fee-paying parents and for boosting their chances of victory at Trivial Pursuit – but as intelligent adults with critical faculties.

Admittedly, after reading this book, the reader may still not know how many seats the European Parliament has, or whether the IAEA is properly to be considered a Specialized agency, or in what year the Council of Europe was established, or what the name of the WTO's plenary body is. Instead, the reader will hopefully have come to an understanding of why seemingly simple legal questions (May organization X engage in activity Y? May state A become a member of organization B? May state F withhold its contribution from organization G?) usually seem to defy easy answers and become the stuff of politics.



## ACKNOWLEDGEMENTS

A number of people have, directly or indirectly, contributed to this book. Much of what follows has benefited from discussions with Catherine Brölmann, Veijo Heiskanen, Martti Koskeniemi, Anja Lindroos, Inger Österdahl, Jarna Petman and Richard Wouters. Brief discussions with Martin Björklund, Balakrishnan Rajagopal and Chanaka Wickremasinghe helped convince me that the book might be of some interest.

Anja Lindroos and Jarna Petman have read and commented upon the entire manuscript, as have the anonymous referees for Cambridge University Press. Their comments have done much to improve the quality of the text.

I have also benefited enormously from being able to participate in an interdisciplinary research project undertaken by the United Nations University, on the legitimacy of international organizations (directed by Veijo Heiskanen and Jean-Marc Coicaud: thanks, guys), in which some of the best minds of various disciplines participated. Without our free-flowing discussions at meetings in New York and Geneva, this book would have looked very different indeed.

My thanks go also to the organizations, both intergovernmental and non-governmental, that have over the years asked me to advise them on the law of international organizations. As is so often the case, the main benefit of acting as consultant accrues to the consultant: the insights gained from drafting a constituent document or an agreement on privileges and immunities, as well as from attending international meetings and being able to observe what goes on and how the process works, are invaluable.

As usual, however, the deepest professional gratitude is owed to my students, present and past, and both in Helsinki and Amsterdam as well as (during a few visiting stints) in Addis Ababa. They have listened with patience, swallowed what they felt could be deemed plausible, and rejected some of the nonsense that made its way through to the classroom.

At home, thanks to Marja-Leena for her love, guidance, patience and support. Our son Johan feels he has an inherent power to monopolize his father's time and attention, and that any decision to the contrary is simply a decision *ultra vires*. He has a point, of course: it is difficult to imagine those concepts being put to better use.

Helsinki, June 2002.

The publisher has used its best endeavours to ensure that the URLs for external websites referred to in this book are correct and active at the time of going to press. However, the publisher has no responsibility for the websites and can make no guarantee that a site will remain live or that the content is or will remain appropriate.

## A NOTE ON DOCUMENTATION

In writing this book, two compilations of source materials have proved immensely helpful. Many of the more current constitutional documents are brought together in Louis B. Sohn (ed.), *International Organisation and Integration: Student Edition* (Dordrecht, 1986); additional documents can be found in the tremendously useful eight-volume collection compiled by a number of Dutch scholars: P. J. G. Kapteyn *et al.* (eds.), *International Organization and Integration: Annotated Basic Documents and Descriptive Directory of International Organizations and Arrangements* (2nd rev. edn, The Hague, 1981–4).

More recent documents have sometimes been drawn from publications stemming from the relevant organization itself. Thus, the UN Charter is since time immemorial published by the UN Department of Public Information in a small blue vest-pocket version. In a more updated version, many organizations host websites which invariably produce the organization's constituent document. The names of those sites generally follow the same pattern: the abbreviated name of the organization plus a dot and either the letters 'org' or 'int'. Thus, the Asian Development Bank can be found at [www.adb.org](http://www.adb.org); the OECD at [www.oecd.org](http://www.oecd.org); the Council of Europe, at [www.coe.int](http://www.coe.int), and Interpol also has 'int' in its name: [www.interpol.int](http://www.interpol.int). Sometimes there is a surprise, in that an abbreviation in a language other than English is chosen. Thus, the OAS can be found [www.oea.org](http://www.oea.org). A useful set of links to a number of organizations is maintained by the University of Bologna in Italy, at [www.spfo.unibo.it/spolfo/INTORG.htm#oio](http://www.spfo.unibo.it/spolfo/INTORG.htm#oio).

For the text of the EC and EU treaties I have used the consolidated version published in (1998) 37 ILM 56, while more recent documents (the Treaty of Nice comes to mind) have been culled from the EU's official website, at [europa.eu.int/eur-lex](http://europa.eu.int/eur-lex). Here one can also find decisions of the EC courts which have not been published in the European Court Reports just yet.

Finally, the UN maintains a number of important sites for information. One of these, very useful but, alas, accessible only at a fee, is the treaty collection, at [untreaty.un.org/English/treaty.asp](http://untreaty.un.org/English/treaty.asp). When looking for Security Council and General Assembly materials, probably the quickest source nowadays is the UN's Documentation Service, at [www.un.org/documents/index.html](http://www.un.org/documents/index.html).

My approach has been that constituent documents have not been repeatedly cited in footnotes, in light of their widespread and relatively easy availability. They can be found with the help of the few guidelines set out above. Other treaties have generally been listed with a place where they can be found.

## ABBREVIATIONS

AD	<i>Annual Digest of Public International Law Cases</i>
AFDI	<i>Annuaire Français de Droit International</i>
AJIL	<i>American Journal of International Law</i>
AMF	Arab Monetary Fund
APEC	Asia Pacific Economic Co-operation Forum
ARIEL	<i>Austrian Review of International &amp; European Law</i>
ASEAN	Association of South East Asian Nations
Australian YIL	<i>Australian Yearbook of International Law</i>
BGBI	<i>Bundesgesetzblatt</i>
BIS	Bank for International Settlements
BISD	Basic Instruments and Selected Documents
Brooklyn JIL	<i>Brooklyn Journal of International Law</i>
BYIL	<i>British Yearbook of International Law</i>
Can YIL	<i>Canadian Yearbook of International Law</i>
CDE	<i>Cahiers de Droit Européen</i>
Chicago JIL	<i>Chicago Journal of International Law</i>
CMLRev	<i>Common Market Law Review</i>
Conn JIL	<i>Connecticut Journal of International Law</i>
COREPER	Comité des Représentants Permanents
Cornell ILJ	<i>Cornell International Law Journal</i>
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
ECR	European Court Reports
ECSC	European Coal and Steel Community
EIB	European Investment Bank
EJIL	<i>European Journal of International Law</i>

ELR	<i>European Law Review</i>
EU	European Union
FAO	Food and Agriculture Organization
FRG	Federal Republic of Germany
FYIL	<i>Finnish Yearbook of International Law</i>
GaJICL	<i>Georgia Journal of International &amp; Comparative Law</i>
GATT	General Agreement on Tariffs and Trade
GDR	German Democratic Republic
GYIL	<i>German Yearbook of International Law</i>
Harvard ILJ	<i>Harvard International Law Journal</i>
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICES	International Council for the Exploration of the Sea
ICJ	International Court of Justice
ICLQ	<i>International &amp; Comparative Law Quarterly</i>
ICTY	International Criminal Tribunal for the former Yugoslavia
IDA	International Development Association
IFAD	International Fund for Agricultural Development
ILA	International Law Association
ILC	International Law Commission
ILM	<i>International Legal Materials</i>
ILO	International Labour Organization
ILR	<i>International Law Reports</i>
IMCO	Intergovernmental Maritime Consultative Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
ITU	International Telecommunication Union
JCMS	<i>Journal of Common Market Studies</i>
JIEL	<i>Journal of International Economic Law</i>
JWT	<i>Journal of World Trade</i>
Leiden JIL	<i>Leiden Journal of International Law</i>
LIEI	<i>Legal Issues of European Integration</i>
Michigan JIL	<i>Michigan Journal of International Law</i>

NATO	North Atlantic Treaty Organization
Neth ILR	<i>Netherlands International Law Review</i>
Neth YIL	<i>Netherlands Yearbook of International Law</i>
Nordic JIL	<i>Nordic Journal of International Law</i>
Nordisk TIR	<i>Nordisk Tidsskrift for International Ret</i>
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organization for Economic Co-operation and Development
OEEC	Organization for European Economic Co-operation
ONUC	Opération des Nations Unies au Congo
OPEC	Organization of Petroleum Exporting Countries
OSCE	Organization for Security and Co-operation in Europe
ÖZöR	<i>Österreichische Zeitschrift für öffentliches Recht</i>
ÖZöRV	<i>Österreichische Zeitschrift für öffentliches Recht und Völkerrecht</i>
PAU	Pan-American Union
PCIJ	Permanent Court of International Justice
RBDI	<i>Revue Belge de Droit International</i>
RdC	<i>Recueil des Cours de l'Académie de Droit International</i>
RGDIP	<i>Revue Générale de Droit International Public</i>
RTDE	<i>Revue Trimestrielle de Droit Européen</i>
SWAPO	South West Africa People's Organization
TEU	Treaty on European Union
UN	United Nations
UNAT	United Nations Administrative Tribunal
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEF	United Nations Emergency Force
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
UNIDO	United Nations Industrial Development Organization
UNJY	<i>United Nations Juridical Yearbook</i>
UNRIAA	<i>United Nations Reports of International Arbitral Awards</i>

UNRRA	United Nations Relief and Rehabilitation Administration
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UPU	Universal Postal Union
VaJIL	<i>Virginia Journal of International Law</i>
Vanderbilt JTL	<i>Vanderbilt Journal of Transnational Law</i>
WEU	Western European Union
WHA	World Health Assembly
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WMO	World Meteorological Organization
WTO	World Trade Organization
Yale JIL	<i>Yale Journal of International Law</i>
YbILC	<i>Yearbook of the International Law Commission</i>
YEL	<i>Yearbook of European Law</i>
ZaöRV	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i>
ZöR	<i>Zeitschrift für öffentliches Recht</i>



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## Introduction

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Whatever activity one wishes to engage in at the beginning of the twenty-first century, be it the sending of a postcard to a friend abroad or the purchase of a television set produced in a foreign country, it is more than likely that the activity is in one way or another regulated by the activities of an international governmental organization. Indeed, there are few, if any, activities these days which have an international element but which are not the subject of activities of at least one (and quite often more than one) international organization. International organizations have developed into a pervasive phenomenon, and according to most calculations even outnumber states.<sup>1</sup>

Wherever human activity is organized, there will be rules of law, as expressed in the ancient adage *ubi societas, ibi jus*. Social organization without rules is, quite literally, unthinkable. Hence, the activities of international organizations are also subject to law, and give rise to law. Each and every international organization has a set of rules relating to its own functioning, however rudimentary such a set of rules may be. Moreover, as international organizations do not exist in a vacuum, their activities are also bound to exercise some influence on other legal systems, and absorb the influence of such systems. While it is by no means impossible for international organizations to be influenced by, and exert influence on, the law of individual nation-states (the law of the European Community is an excellent

<sup>1</sup> Brownlie's estimate of 170 organizations appears somewhat conservative. See Ian Brownlie, *Principles of Public International Law* (4th edn, Oxford, 1990), p. 680. Others, such as Peter Bekker, mention a figure of some 350. See his *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of their Legal Status and Immunities* (Dordrecht, 1994), p. 4. Possibly speaking from the top of his head, Jeremy Carver went so far as to suggest the figure of 7,000. See his intervention at the Taipei meeting of the International Law Association's Committee on Accountability of International Organisations, in ILA, *Report of the Sixty-eighth Conference* (London, 1998), p. 614.