Alison Duxbury

CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW

The Participation of States in International Organisations

The Role of Human Rights and Democracy

CAMBRIDGE

THE PARTICIPATION OF STATES IN INTERNATIONAL ORGANISATIONS

The admission of a state to membership is an important decision for an international organisation. In making this determination, organisations are increasingly promoting the observance of human rights and democratic governance as relevant principles. They have also applied the same criteria in resolving the question of whether existing members should be excluded from an organisation's processes. Through a systematic examination of the records, proceedings and practice of international organisations, Alison Duxbury explores the role and legitimacy of human rights and democracy as membership criteria. A diverse range of examples is discussed, including the membership policies and practice of the League of Nations and the United Nations; the admission of the Central and Eastern European states to the European Union; developments in regional organisations in Africa, Asia and the Americas; and the exclusion of members from the UN specialised agencies.

ALISON DUXBURY is an associate professor at the Melbourne Law School, University of Melbourne, where she teaches International Law, International Humanitarian Law and International Institutions.

CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW

Established in 1946, this series produces high quality scholarship in the fields of public and private international law and comparative law. Although these are distinct legal sub-disciplines, developments since 1946 confirm their interrelation.

Comparative law is increasingly used as a tool in the making of law at national, regional and international levels. Private international law is now often affected by international conventions, and the issues faced by classical conflicts rules are frequently dealt with by substantive harmonisation of law under international auspices. Mixed international arbitrations, especially those involving state economic activity, raise mixed questions of public and private international law, while in many fields (such as the protection of human rights and democratic standards, investment guarantees and international criminal law) international and national systems interact. National constitutional arrangements relating to 'foreign affairs', and to the implementation of international norms, are a focus of attention.

The Board welcomes works of a theoretical or interdisciplinary character, and those focusing on the new approaches to international or comparative law or conflicts of law. Studies of particular institutions or problems are equally welcome, as are translations of the best work published in other languages.

General Editors

James Crawford SC FBA
Whewell Professor of International Law, Faculty of Law, and Director, Lauterpacht Research Centre for International Law, University of Cambridge

John S. Bell FBA
Professor of Law, Faculty of Law, University of Cambridge

Editorial Board

Professor Hilary Charlesworth
Australian National University

Professor Lori Damrosch
Columbia University Law School

Professor John Dugard
Universiteit Leiden

Professor Mary-Ann Glendon
Harvard Law School

Professor Christopher Greenwood
London School of Economics

Professor David Johnston
University of Edinburgh
Professor Hein Kötz
Max-Planck-Institut, Hamburg
Professor Donald McRae
University of Ottawa
Professor Onuma Yasuaki
University of Tokyo
Professor Reinhard Zimmermann
Universität Regensburg

Advisory Committee

Professor D. W. Bowett QC
Judge Rosalyn Higgins QC
Professor J. A. Jolowicz QC
Professor Sir Elihu Lauterpacht CBE QC
Judge Stephen Schwebel

A list of books in the series can be found at the end of this volume.

THE PARTICIPATION OF STATES IN INTERNATIONAL ORGANISATIONS

The Role of Human Rights and Democracy

ALISON DUXBURY

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Tokyo, Mexico City

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521192002

© Alison Duxbury 2011

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2011

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data
Duxbury, Alison, 1970– The participation of states in international organisations :
the role of human rights and democracy / Alison Duxbury.
p. cm. –
(Cambridge studies in international and comparative law ; 71)
Includes bibliographical references and index.
ISBN 978-0-521-19200-2 1. International agencies – Membership. 2. Human
rights. 3. Democracy. I. Title.
JZ4850.D89 2011
341.2–dc22
2010030511

ISBN 978-0-521-19200-2 Hardback

Cambridge University Press has no responsibility for the persistence or
accuracy of URLs for external or third-party internet websites referred to
in this publication, and does not guarantee that any content on such
websites is, or will remain, accurate or appropriate.

CONTENTS

FOREWORD

It is a pleasant task to be asked to write a foreword to this work, which is a comprehensive yet critical appraisal of the role of human rights, legitimacy and democracy in the practice of international organisations. It is the product of a doctoral research, departing from the 1995 suspension of Nigeria's Commonwealth membership after a coup d'état put in question respect for human rights and democratic government in the country and ending with the 2009 suspension of Fiji's rights as a member. A feature of the work is that it puts the legally significant events into a broader political and historical perspective, thus establishing links between international law and international relations, the two interacting in the day-to-day operation of intergovernmental organisations. It is also a remarkably thorough account of membership practice.

The study is structured in six chapters. Chapter 1 sets out the institutional framework in light of the human rights movement and the concept of legitimacy. Chapter 2 addresses the developing principle of universality in the League of Nations and the United Nations, and the tension between universality and other goals, including the promotion of democracy and human rights. Chapters 3 and 4 cover a broad range of regional organisations, addressing the respective differences in their membership criteria and practice in Europe (Chapter 3) and in 'closed' organisations such as ASEAN, the Commonwealth and the CSCE (Chapter 4). Professor Duxbury concludes that suspension or exclusion from membership in cases such as Zimbabwe and Fiji have had little effect 'at least in the short term'; the proviso is important. Chapter 5 tackles the complex interaction between the human rights aspirations of specialised organisations (the WTO, regional economic communities and the UN specialised agencies) and the functional limitations of their mandates as set out in the constituent instruments. Finally, Chapter 6 draws some conclusions on the practical implications of upholding democracy and human rights as membership criteria both for concerned states and for the international organisations in question.

Discussion of the role of global values and of that vague notion of 'legitimacy' in the operation of international institutions is important, given the continued expansion of the roles intergovernmental organisations play, from managing sanctions programmes to governing territory. Among many other things, international organisations have become a platform for coordinated responses to undemocratic and oppressive governments. However, as Duxbury rightly observes, whether applying 'democratisation from above' through membership criteria or exclusion mechanisms could help solve the democratic deficit within international organisations themselves is at best an open question.

Last but not least, it is a particular pleasure to note the author's comment that 'much of the work was undertaken while resident at Cambridge', in the Lauterpacht Centre for International Law. For twenty-five years the Centre has been a forum for discussion of responses to the various challenges at the international level, and to the role of law in meeting those challenges. I am sure the present work will foster further exchanges on the institutional aspects of the promotion of democracy and respect for human rights.

James Crawford
Whewell Professor of International Law
Director, Lauterpacht Centre for International Law
University of Cambridge
16 May 2010

ACKNOWLEDGEMENTS

In 1995 the Commonwealth suspended Nigeria from membership following the installation of military rule in that country and, consequently, the violation of one of the organisation's constitutional documents, the Harare Declaration. The decision to suspend Nigeria provided the basis for my interest in the role of human rights and democracy in determining the participation of states in international organisations and led me to investigate the practice of other institutions. Given the starting point for this research, it is appropriate that one of the most recent examples discussed in this book is the Commonwealth's decision to suspend Fiji on 1 September 2009.

Many people have assisted me with my interest in this topic over the years. This book is based on my doctoral thesis, submitted to the University of Melbourne in 2008. Importantly, I would like to thank my two supervisors, Professors Tim McCormack and Gerry Simpson. Their invaluable advice and constructive criticism enabled me to retain my enthusiasm for this research throughout the life of the original thesis. The two examiners, Professors Nigel White and Robert McCorquodale, made a number of very useful suggestions for converting the thesis into a book. My colleagues at the University of Melbourne, John Tobin, Bruce Oswald and David Brennan, generously agreed to read parts of the manuscript at various stages in its formation. Professor Brad Roth also provided helpful comments on a number of chapters.

I benefited enormously from two periods of research and writing at the Lauterpacht Centre for International Law at the University of Cambridge in 2004 and 2006. The Lauterpacht Centre provides a unique environment for international law research and much of this work was undertaken while resident in Cambridge.

My thanks are extended to Finola O'Sullivan, Nienke van Schaverbeke and Richard Woodham at Cambridge University Press for their assistance with publication. I would also like to thank Rebecca Hughes and

Sara Dehm for their work on formatting the manuscript and compiling the bibliography. Librarians in a number of international organisations and research institutions provided access to the necessary documents.

Aspects of this book have previously been published as 'Bigger or Better? The Role of Human Rights and Democracy in Determining Membership of the European Institutions' (2004) 73 *Nordic Journal of International Law* 421. I have examined the Commonwealth's membership practice in 'Rejuvenating the Commonwealth: The Human Rights Remedy' (1997) 46 *Int'l & Comp. L.Q.* 344; and 'Reviewing the Commonwealth's Rights Record: From Recognition to Realisation' (2003) 19 *South African Journal on Human Rights* 636 (published by Juta and Co Ltd). Material on Austria and the European Union appears in 'Austria and the European Union – The Report of the "Three Wise Men"' (2000) 1 *Melbourne Journal of International Law* 169. The Pacific Islands Forum has previously been discussed in 'Moving Towards or Turning Away from Institutions? The Future of International Organizations in Asia and the Pacific' (2007) 11 *Sing. Y.B. Int'l L.* 177. I am grateful to the editors and publishers of these journals for allowing me to reproduce parts of these articles.

This book is dedicated to my parents.

TABLE OF CASES

TABLE OF TREATIES

LIST OF ABBREVIATIONS

AEC	African Economic Community
Afr. Sec. R.	*African Security Review*
AHSG	Assembly of Heads of State and Government (of the Organization of African Unity)
Akron L.R.	*Akron Law Review*
Am. J. Int'l L.	*American Journal of International Law*
Am. J. Pol. Sci.	*American Journal of Political Science*
APRM	African Peer Review Mechanism
ASEAN	Association of Southeast Asian Nations
ASIL Insights	*American Society of International Law Insights*
ATS	Australian Treaty Series
AU	African Union
Aust. Y.B. Int'l L.	*Australian Yearbook of International Law*
Austrian J. Pub. & Int'l L.	*Austrian Journal of Public and International Law*
Austrian Rev. Int'l & Eur. L.	*Austrian Review of International and European Law*
Baltic Y.B. Int'l L.	*Baltic Yearbook of International Law*
Boston Coll. Int'l & Comp. L.R.	*Boston College International and Comparative Law Review*
Brit. Y.B. Int'l L.	*British Yearbook of International Law*
Cal. W. Int'l L.J.	*California Western International Law Journal*
CAN	Comunidad Andina/Andean Community
CARICOM	Caribbean Community
Case W. Res. J. Int'l L.	*Case Western Reserve Journal of International Law*
CHOGM	Commonwealth Heads of Government Meeting
CMAG	Commonwealth Ministerial Action Group
Colum. L.R.	*Columbia Law Review*
Common Mkt. L.R.	*Common Market Law Review*
Comp. & Int'l L.J. Sth Af.	*Comparative and International Law Journal of Southern Africa*
CSCE	Conference on Security and Co-operation in Europe
CSO	Committee of Senior Officials of the Conference on Security and Co-operation in Europe

Duke L.J.	*Duke Law Journal*
EC	European Community
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECOMOG	Economic Community of West African States Monitoring Group
ECOSOC	Economic and Social Council of the United Nations
ECOWAS	Economic Community of West African States
EEC	European Economic Community
EU	European Union
Eur. J. Int'l L.	*European Journal of International Law*
FAO	Food and Agricultural Organization
Far East. Eco. R.	*Far Eastern Economic Review*
FRY	Federal Republic of Yugoslavia
G.W. Int'l L.R.	*George Washington International Law Review*
GAOR	General Assembly Official Records
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
Glob. Gov.	*Global Governance*
Harv. Asian-Pac. R.	*Harvard Asian Pacific Review*
Harv. Int'l L.J.	*Harvard International Law Journal*
Hast. Con. L.Q.	*Hastings Constitutional Law Quarterly*
Hum. Rts. L.J.	*Human Rights Law Journal*
IAEA	International Atomic Energy Agency
IAIILS	Inter-American Institute of International Legal Studies
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILA	International Law Association
ILM	International Legal Materials
ILO	International Labour Organization
ILR	International Law Reports
IMF	International Monetary Fund
Ind. Int'l & Comp. L.R.	*Indiana International and Comparative Law Review*
Int. Org.	*International Organization*

Int'l Org. L.R.	*International Organizations Law Review*
Int'l & Comp. L.Q.	*International and Comparative Law Quarterly*
Int'l Concil.	*International Conciliation*
Int'l Sec.	*International Security*
Int'l Soc. Sci. J.	*International Social Science Journal*
Israel Y.B. Hum. Rts	*Israel Yearbook on Human Rights*
ITU	International Telecommunication Union
J. Common Mkt Stud.	*Journal of Common Market Studies*
J. Dem.	*Journal of Democracy*
J. Hist. Int'l L.	*Journal of the History of International Law*
J. Int'l Eco. L.	*Journal of International Economic Law*
J. World Trade L.	*Journal of World Trade Law*
John Marsh. L.R.	*John Marshall Law Review*
Latin Am. Pol. & Soc.	*Latin American Politics and Society*
L.N. Off. J.	*League of Nations Official Journal*
Leiden J. Int'l L.	*Leiden Journal of International Law*
Liv. L.R.	*Liverpool Law Review*
Loyola LA Int'l & Comp. L.J.	*Loyola LA International and Comparative Law Journal*
MAP	Membership Action Plan (of NATO)
Melb. U. L.R.	*Melbourne University Law Review*
MERCOSUR	Mercado Común del Sur/Southern Cone Common Market
MFN	Most-favoured nation
Mil. L.R.	*Military Law Review*
Mod. L.R.	*Modern Law Review*
N.Y. J. Int'l L. & Pol.	*New York Journal of International Law and Politics*
N.Z. Int'l R	*New Zealand International Review*
NATO	North Atlantic Treaty Organization
NEPAD	New Partnership for African Development
New Eng. L.R.	*New England Law Review*
OAS	Organization of American States
OAU	Organization of African Unity
OSCE	Organization for Security and Co-operation in Europe
Phil. Pub. Aff.	*Philosophy and Public Affairs*
PNTR	Permanent Normal Trade Relations
PRC	People's Republic of China
PSC	Peace and Security Council of the African Union
PTA	Preferential Trade Agreement
REC	Regional Economic Community

SADC	Southern African Development Community
SCOR	Security Council Official Records
Sec. Dialogue	*Security Dialogue*
SFRY	Socialist Federal Republic of Yugoslavia
Sing. Y.B. Int'l L	*Singapore Yearbook of International Law*
SLORC	State Law and Order Restoration Council (of Burma)
SPDC	State Peace and Development Council (of Burma)
SPF	South Pacific Forum
Stan. J. Int'l L.	*Stanford Journal of International Law*
TEU	Treaty on European Union
Transnat'l L. & Contemp. Probs.	*Transnational Law and Contemporary Problems*
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
U. Miami Inter-Am. L.R.	*University of Miami Inter-American Law Review*
U.N. Jurid. Y.B.	*United Nations Juridical Yearbook*
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCIO	United Nations Conference on International Organization
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNTS	United Nations Treaty Series
UPU	Universal Postal Union
USA	United States of America
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties
WEOG	Western European and Others Group (of the United Nations)
WHO	World Health Organization
Wis. L.R.	*Wisconsin Law Review*
WIPO	World Intellectual Property Organization
WMO	World Meteorological Organization
WTO	World Trade Organization
Y.B. Eur. Conv. Hum. Rts.	*Yearbook of the European Convention on Human Rights*
Y.B Int'l L. Comm	*Yearbook of the International Law Commission*
Y.B. Int'l Orgs.	*Yearbook of International Organizations*
Y.B.U.N	*Yearbook of the United Nations*
Yale J. Int'l L.	*Yale Journal of International Law*

Introduction

International organisations are increasingly promoting human rights and democratic governance as principles relevant in deciding applications for admission by non-member states. In the 1990s the importance of these standards was underlined by suggestions that a state's membership of institutions such as the United Nations and its involvement in regional security measures should be based on adherence to certain fundamental values, including democracy.[1] Not only have human rights and democracy norms been utilised in determining the admission of a potential member to an international organisation, but they have also been taken into account in resolving the question of whether existing members, or their representatives, should be excluded from an organisation's processes. Such determinations have been made in the Commonwealth, the Organization of American States and in decisions to deny accreditation to delegations in the General Assembly of the United Nations. When organisations have ignored these principles in their membership policies, their choices have been criticised – as was the case when the Association of Southeast Asian Nations admitted Burma in 1997.[2]

In listing these examples, the impression may be given that the practice of requiring potential applicants, as well as existing members of an organisation, to fulfil certain human rights and democracy criteria is a recent development. However, it would be a mistake to regard this practice as a phenomenon of the last decade of the twentieth century and the first decade of this century exclusively. Significant debates at the Commission on the League of Nations dealt with the question of whether future members of the League should be endowed with democratic or representative institutions.

[1] Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *Am. J. Int'l L.* 46 at 91; Gregory Fox, 'The Right to Political Participation in International Law' (1992) 17 *Yale J. Int'l L.* 539 at 603; Fernando Tesón, 'The Kantian Theory of International Law' (1992) 92 *Colum. L.R.* 53 at 100.

[2] Mark Baker, 'Welcome to the Authoritarian Club', *The Age* (Melbourne, Australia), 3 June 1997, p. 15.

The Council of Europe, the first European institution to be established following the Second World War, included human rights and fundamental freedoms in its admission criteria.[3] In 1962 the Organization of American States (OAS) excluded Cuba on the basis that the policies of the Castro government were incompatible with the principles and objectives of the inter-American system, including respect for human rights and democracy.[4] Thus, it would appear that international organisations have embraced the notion that a state's democratic and human rights record should determine its participation, whether that organisation's purpose is the maintenance of peace and security, the promotion of human rights or economic integration.

Many welcome this explicit link between admission to international organisations and human rights and democracy. Kant's proposal for a permanent alliance of 'republican' states in order to prevent war and stop the spread of 'unjust and inhuman passions'[5] in *Perpetual Peace* has been revived to support the idea that only democratic states should be accepted as new members of the United Nations (UN).[6] In these accounts the adjective 'republican' is replaced with either 'liberal'[7] or 'democratic' or both.[8] The process for accreditation of representatives to the General Assembly of the UN has been linked positively to the results of monitored elections.[9] A number of commentators have tested recent admissions to the Council of Europe against the membership criteria located in the organisation's Statute to determine whether its practice has lived up to established standards.[10] The Commonwealth's policy of suspending members subjected to an unconstitutional change of government illustrates that organisation's stance towards military coups. Other commentators have suggested the creation of a new global body, the 'Concert of

[3] Statute of the Council of Europe, opened for signature 5 May 1949, 87 UNTS 103 (entered into force 3 August 1949), Arts. 3–4.

[4] 'Final Act', Eighth Meeting of Consultation of Ministers of Foreign Affairs, Punta del Este, Uruguay, 22–31 January 1962, OEA/Ser.C/II.8 at 'Resolution VI – Exclusion of the Present Government of Cuba from Participation in the Inter-American System'.

[5] Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (1795), in Nicholas Murray Butler [prefaced], *Perpetual Peace* (Los Angeles: US Library Association, 1932), p. 35.

[6] Tesón, 'Kantian Theory' at 100.

[7] Anne-Marie Burley, 'Toward an Age of Liberal Nations' (1992) 33 *Harv. Int'l L.J.* 393 at 398.

[8] Tesón, 'Kantian Theory' at 61.

[9] Fox, 'Right to Political Participation' at 597–604.

[10] Peter Leuprecht, 'Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?' (1998) 8 *Transnat'l L. & Contemp. Probs.* 313 at 329; Manfred Nowak, 'Is Bosnia and Herzegovina Ready for Membership of the Council of Europe?' (1999) 20 *Hum. Rts. L.J.* 285.

Democracies', to strengthen cooperation amongst liberal democratic states.[11]

Consequently, both commentators and the practice of organisations when admitting and excluding states appear to support the trend towards what Simpson has termed 'liberal anti-pluralism' – the idea that a state's internal characteristics should determine its status in the world, including its membership of an international organisation.[12] But, despite writers' 'hopes'[13] for a future international order dependent upon democracy, there are doubters and critics. In envisaging alternatives to the contemporary state system, Bull imagined a system of 'ideological homogeneity' characterised by a 'determination to uphold a single kind of political, social and economic system'.[14] While acknowledging the possible advantages of this approach, Bull concluded that any endeavour to 'remould a states [sic] system on principles of ideological fixity and uniformity' is more likely to be a source of disorder than order.[15] Attempts to impose such uniformity on states within international organisations have been criticised in the past as reviving the idea of an 'ill-fated Holy Alliance'.[16] In the same vein, the promotion of any one version of democracy or human rights in an organisation's membership policy could result in charges of a new form of imperialism.[17] The exclusion of states from universal organisations such

[11] G. John Ikenberry and Anne-Marie Slaughter, 'Forging a World of Liberty under Law – US National Security in the 21st Century – Final Report of the Princeton Project on National Security', Report, 2006, p. 25. The US led the creation of the 'Community of Democracies', an informal group of states that have met biannually since 2000. The group formed the democracy caucus at the UN. However, the group has been criticised due to the inclusion of a number of undemocratic countries: see Tod Lindberg, 'The Treaty of the Democratic Peace: What the World Needs Now' (2007) 12(21) *The Weekly Standard*.

[12] Gerry Simpson, 'Two Liberalisms' (2001) 12 *Eur. J. Int'l L.* 537; Gerry Simpson, *Great Powers and Outlaw States – Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004), pp. 76–83.

[13] Burley, 'Toward an Age of Liberal Nations' at 403. See also 'Final Report of the Phillimore Committee', reproduced in Florence Wilson, *The Origins of the League Covenant – Documentary History of its Drafting* (London: Leonard and Virginia Woolf, 1928), pp. 137–8.

[14] Hedley Bull, *The Anarchical Society – A Study of Order in World Politics* (New York: Columbia University Press, 1977), p. 247. See also Martin Wight, 'Western Values in International Relations', in Herbert Butterfield and Martin Wight (eds.), *Diplomatic Investigations – Essays in the Theory of International Politics* (London: Allen & Unwin, 1966), p. 89.

[15] Bull, *The Anarchical Society*, p. 248.

[16] David Mitrany, *The Progress of International Government* (New Haven, CT: Yale University Press, 1933), p. 131.

[17] Martti Koskenniemi, '"Intolerant Democracies": A Reaction' (1996) 37 *Harv. Int'l L.J.* 231.

as the UN for failing to meet certain standards might be regarded as 'a retrograde step' by newly independent countries.[18]

This book examines the role of human rights and democracy in determining the participation of states in international organisations against the backdrop of the fundamental principles and purposes espoused by different organisations, such as universality, regional integration and sovereignty. This exploration of the membership practice is not only concerned with the results of membership decisions (that is, whether a state is admitted to or excluded from an organisation), but also with the discussions and processes leading to particular outcomes. The central argument revolves around the concept of legitimacy and has a number of elements. First, it is argued that a range of international organisations have utilised human rights and democracy in their membership policies for a variety of different reasons. Second, it is suggested that the practice may be questioned when viewed in the light of three indicia of legitimacy: an organisation's functions, the provisions of its constitutional instrument, and the clarity and coherence of the criteria applied. Third, this book contends that the practice raises questions as to the way in which democracy is incorporated into the procedures of international organisations, in particular their procedures for determining membership.

These arguments give rise to a number of associated issues. The terms 'human rights' and 'democracy' are notoriously difficult to define and translate in the international legal sphere. Given possible differences in definition and approach to these principles, it would appear desirable to allow a degree of latitude in determining whether states have fulfilled the necessary criteria. But if the membership conditions are too flexible, then states falling short of the required standards could be admitted. If the criteria are too rigid, then they will fail to take into account the special circumstances faced by new democracies. The use of human rights and democracy as membership criteria may be a method of promoting the purposes and functions of an international organisation or, as Claude suggested, it may be seen simply as an inappropriate 'moralization of the membership question'.[19] The relationship between the aspirations and functions of an organisation and the role of human rights and democracy as membership criteria

[18] Gerry Simpson, 'Imagined Consent: Democratic Liberalism and International Legal Theory' (1994) 15 *Aust. Y.B. Int'l L.* 103 at 121.

[19] Inis L. Claude, *Swords into Plowshares – The Problems and Progress of International Organization*, 4th edn (New York: Random House, 1971), p. 95.

will be an underlying theme in this study. In exploring these issues, this work reveals a number of tensions with the practice of including human rights and democracy criteria in admission and exclusion decisions, but nevertheless concludes that, in most cases, the practice can be regarded as a legitimate use of an organisation's membership policies.

Scope and methodology

This work explores these issues in the context of the membership practice and processes of a number of international organisations at both the admission and exclusion stages. It is based on the premise that the membership criteria of international organisations are important as they not only inform us about the extent of membership, but also the organisation's aspirations.[20] The importance of membership criteria in international institutional law is underlined by Claude's suggestion that if students seeking to understand the UN had to choose between scanning the list of members and reading the Charter, they would be better served by undertaking the former task.[21] Fundamentally, membership criteria are not only about establishing the values of an organisation and the commonality amongst state parties, but are also about putting in place conditions in order to ensure that members can participate in the organisation's activities and fulfil its purposes.[22] Thus, '[s]tates should be accepted, or excluded, sought after as members, or left alone, on the basis of judgment as to whether their participation is essential to, or incompatible with, the realization of the aims of the organization'.[23] The organisations studied in this book display a diverse range of aims and functions, while at the same time adopting remarkably similar membership policies.

Sohn has described the 'science of international organizations' as a branch of political science with an increasing element of international constitutional law.[24] As with any study concerning the activities of

[20] Clive Archer, *International Organizations*, 3rd edn (New York: Routledge, 2001), p. 45.
[21] Claude, *Swords into Plowshares*, p. 100.
[22] See comments by Cremona in the context of the EU's admission criteria: Marise Cremona, 'Regional Integration and the Rule of Law: Some Issues and Options', in Robert Devlin and Antoni Estevadeordal (eds.), *Bridges for Development: Polices and Institutions for Trade and Integration* (Washington, D.C.: Inter-American Development Bank, 2003), p. 152.
[23] Claude, *Swords into Plowshares*, p. 86.
[24] Louis B. Sohn, 'The Growth of the Science of International Organizations', in Karl Deutsch and Stanley Hoffman (eds.), *The Relevance of International Law – Essays in Honor of Leo Gross* (Cambridge, MA: Schenkman Publishing, 1968), p. 251.

international organisations, the difficulty in separating the legal and political aspects of the membership process is acknowledged. It has been stated that '[t]he interplay between law, politics and ideology appears to be more in evidence in admission to international organizations than in any other area of international law'.[25] The relationship between political and legal criteria is examined more fully in Chapter 1. At this stage it should be noted that this study supports the view, articulated in the International Court of Justice (ICJ), that decisions regarding membership are part of the international legal process.[26] As Henkin has stated in the context of recognition issues, '[l]aw does not determine the policy of the governments on these issues, but it directs whatever actions might be taken and limits the choices available to governments'.[27] Consequently, this book is essentially a study of international law or, more precisely, of international institutional law. Law matters, as the range of decisions available is ultimately subject to an international treaty – an organisation's constituent instrument.

Given the number of international institutions operating in the world today, it is important to define the scope of this work. The starting point is the membership criteria located in the constituent instruments of the international organisations chosen for study. As recognised by Sohn, the constitutions of such organisations are only the beginning: '[t]here is no easy substitute for the tremendous job of investigating the actual practice of international organizations in applying these constitutions, and for the grimy task of sifting through thousands of volumes of official records of a great variety of international organizations.'[28] In selecting the organisations for study, two issues have been kept in mind. First, as this book is concerned with the role of human rights and democracy as membership criteria, only those organisations where such principles have produced an impact on admission and exclusion are included. It is recognised that this work is self-selecting in terms of the organisations studied, although the diversity of the organisations engaging in the

[25] Ebere Osieke, 'Admission to Membership in International Organizations: The Case of Namibia' (1980) 51 *Brit. Y.B. Int'l L.* 189.

[26] *Conditions of Admission of a State to Membership in the United Nations (Advisory Opinion)* [1948] ICJ Rep. 57 ('*First Admissions Case*'). See also Konstantinos Magliveras, *Exclusion from Participation in International Organisations – The Law and Practice behind Member States' Expulsion and Suspension of Membership* (The Hague: Kluwer Law International, 1999), p. 2.

[27] Louis Henkin, *How Nations Behave*, 2nd edn (Columbia University Press, 1979), p. 16.

[28] Sohn, 'Growth of the Science', p. 267.

practice suggests that more general conclusions can be drawn. Second, in choosing amongst these organisations, attention has been paid to the major methods of classifying international organisations. International institutional law distinguishes between organisations based on their purpose or function, their membership or their powers.[29] Classification is not simply a method of labelling institutions, as it may indicate fundamental differences. This study adopts a classification based on two broad distinctions: universal versus closed organisations (organisations seeking to have all states as members, as distinct from those that are closed to a particular, usually regional, group) and general versus specialised organisations (organisations with general political functions as distinct from organisations established to perform a specific task). It is recognised that in some sense these divisions are artificial – no organisation has achieved complete universality, just as it is sometimes difficult to distinguish between broader political roles and more technical functions.

Taking into account this method of classification, this book explores the membership practice of the two most significant universal organisations, the League of Nations and the UN, the major regional organisations in Europe, the Americas, Asia, Africa and the Pacific, and two other entities with broad political functions: the Commonwealth and the Organization for Security and Co-operation in Europe (OSCE). In choosing amongst the many specialised organisations operating in the world, this work concentrates on the specialised agencies of the UN as a distinct group of organisations with both technical functions and aspirations to universal membership. It also examines the practice of another group of specialised bodies where human rights issues have increasingly been found to have a role to play: global and regional free trade organisations. By arranging the material on the basis of the distinction between universal, closed and specialised organisations, one of the aims is to determine the extent to which these differences are important in determining the role played by human rights and democracy in membership policies. Furthermore, although this system of classification has been adopted, in a sense this book is also an historical study, as events in the

[29] Michel Virally, 'Definition and Classification: A Legal Approach' (1977) 29 *Int'l Soc. Sci. J.* 58 at 64–5. See also Abdullah El-Erian, 'Relations between States and Inter-Governmental Organizations' [1963] 2 *Y.B Int'l L. Comm.* 159 at 167–9; Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, 4th edn (Boston: Brill Academic Publishers, 2003) at paras. 48–63; Archer, *International Organizations*, Chapter 2.

League of Nations paved the way for the UN, and the establishment of the European institutions preceded similar developments in Africa, Asia and the Americas.

Chapter 1 examines two developments in international law since 1945 of fundamental significance to this book: the rise of institutions and the expansion of international human rights law. It explains the growth of international institutional law and sets out the way in which membership of an organisation may be gained or lost. Additionally, it outlines the range of definitions of human rights and democracy adopted in international instruments and the problems that may be encountered in using these criteria in membership decisions. Most significantly, Chapter 1 introduces the framework for exploring the role of human rights and democracy in determining the membership of organisations: the concept of legitimacy. The term 'legitimacy' has been subject to a number of different meanings in political and legal theory in relation to both national and international society. In this work three aspects of legitimacy are adopted as a lens through which to view the membership policies and practice of international organisations: the compatibility of the practice of attaching conditions with the constituent instrument, the consistency of the criteria with the organisation's functions, and the clarity and coherence of the human rights and democracy criteria employed.

In accordance with the approach to classification outlined above, Chapter 2 explores the membership practice of two universal organisations: the League of Nations and the UN. Both organisations were established following world wars with the stated aim of securing peace. To varying degrees they have used their membership criteria as a method of legitimising a state's place in the international community, while at the same time moving towards the goal of universal membership. The chapter begins by reviewing the relationship between the principles of peace, democracy and universality. It examines the drafting of the admission provisions in the Covenant of the League of Nations and the relevance of human rights and democratic principles to the interpretation of those provisions during the life of the League. The analysis then moves to the UN and its admission decisions in three key periods: in the early years, when a number of applications were stalled due to the East-West divide; in the 1960s and 1970s during the period of decolonisation; and, most recently, when admitting states from the Soviet Union and the former Yugoslavia. Subsequently, the relevance of human rights and democratic principles to the practice of excluding members from the

League of Nations and United Nations is examined. The analysis in this chapter focuses on the way in which the two organisations have reconciled their restrictive membership criteria with the goal of universality and their primary function of securing international peace.

Outside the universal organisations, some of the most significant developments in international institutional law have occurred in regional organisations. Chapter 3 commences the study of regional bodies by concentrating on the membership practice of three European organisations established after the Second World War: the European Communities/European Union (EU), the Council of Europe and the North Atlantic Treaty Organization (NATO). All three organisations were established to pursue the task of regional integration, albeit with different functions. As part of the ongoing project to integrate Europe, the European institutions have introduced increasingly detailed human rights and democracy conditions into their admission criteria. The discussion of the membership practice focuses mainly on admission and is divided into three periods: pre-1990s, early 1990s, and late 1990s to 2004. The chapter assesses the appropriateness of using rights as a method of integrating Europe, taking into account the way in which the criteria have been applied within individual organisations and across the three organisations, as well as the functions fulfilled by each organisation.

In Chapter 4 attention is turned to the practice of other international organisations with a restricted membership. The organisations examined in this chapter include regional organisations with broad-ranging political functions established in the Americas, Africa, Asia and the Pacific, as well as forums of cooperation such as the Commonwealth and the OSCE. Whereas the discussion of human rights and democracy conditions in the membership practice of the European institutions is for the most part concerned with the admission of new members, in these organisations the issue has arisen at the other end of the process – when suspending an existing member. The organisations have pursued this practice despite the fact that their constitutional instruments share a common concern with upholding sovereignty and non-intervention in the affairs of member states. The chapter concludes by defining the democratic principles given precedence in decisions to exclude states from membership, and evaluating the suitability and efficacy of suspension as a sanction for violating an organisation's principles.

Chapter 5 moves away from the discussion of international organisations designed to perform general political functions to examine the membership practice of organisations with specialised or technical goals.

These organisations are divided into the specialised agencies of the UN and international trade organisations. First, the analysis centres on the practice of the specialised agencies in excluding states from membership for breaches of democratic or human rights principles in apparent contradiction to the principle of universality, the agencies' technical mandates and, perhaps most importantly, the absence of a provision allowing for suspension or expulsion. The chapter then discusses the admission practice of the World Trade Organization (WTO) and the exclusion provisions of the regional economic communities to determine the way in which the linkage between the economic and trading purposes of an organisation and the promotion of human rights and democracy standards has been tackled in membership criteria.

Chapter 6 draws together a number of threads regarding legitimacy, democracy and membership, focusing on the different roles played by human rights and democracy criteria in determining participation in international organisations and the problems with the practice that may undermine its legitimacy. One key issue dominating recent discussion of international institutions is the potential 'democratic deficit' in their practices and procedures. In light of this criticism, it will be argued that changes need to be made to the process for determining membership in a number of organisations to increase accountability and transparency. Finally, although it is not the purpose of this work to examine whether membership conditionality results in improvements to a state's internal situation, this book will provide some comments on the consequences of the practice from the perspective of the promotion and protection of human rights and democracy.

Before commencing this study of the membership provisions and practice of international organisations, it is important to recognise that this book does not purport to deal with all aspects of participation in international organisations and their organs. This work is concerned with the participation of states in international organisations through membership, rather than other types of association. Although the various institutions discussed acknowledge different forms of participation, for example, associate membership or observer status,[30] the focus here will be on the means of acquiring full membership through admission, and the termination of membership, notably by suspension or expulsion.

[30] For a description of other forms of membership, see Schermers and Blokker, *International Institutional Law* at paras. 166–79.

Similarly, this book will not deal with membership questions arising in particular organs of international organisations (for example, the Human Rights Council of the UN). In addition, the primary focus will be on the role of human rights and democracy as criteria conditioning membership, rather than other factors that might influence an entity's bid to join an international organisation. Therefore, the membership applications by the Palestinian Liberation Organization and Taiwan to a variety of organisations will not be considered, as their exclusion has resulted from their particular international status and their relationship with existing members, rather than their human rights and democratic records.[31]

Finally, this book is concerned with international organisations and international human rights law, arguably the two greatest challenges to the idea of state sovereignty since the Second World War. But it does not seek to challenge the fundamental place of the state in the international legal system more broadly or within international organisations.[32] Thus, this work does not consider whether non-governmental organisations, corporations or entities such as national liberation movements should be accorded the same rights of access as states. This is not to suggest that states are the only actors in international law or that others may not have a claim to representation in international organisations. Indeed, in February 1919 the South African representative at the Commission on the League of Nations, Smuts, suggested that a body of delegates should comprise representatives from the legislative assemblies or political parties of the states, as well as official representatives.[33] The proposal was defeated, but the idea of diversifying representation in international organisations is certainly enticing from the point of view of promoting

[31] For a discussion of these two situations, see: Frederic Kirgis, 'Admission of Palestine as a Member of a Specialized Agency and Withholding the Payment of Assessment in Response' (1990) 84 *Am. J. Int'l L.* 218; Mark S. Zaid, 'Taiwan: It Looks Like It, It Acts Like It, Is It a State? The Ability to Achieve a Dream through Membership in International Organizations' (1998) 32 *New Eng. L. Rev.* 805; Andrew Serdy, 'Bringing Taiwan into the International Fisheries Fold: The Legal Personality of a Fishing Entity' (2004) 75 *Brit. Y.B. Int'l L.* 183.

[32] For a discussion of a more inclusive approach to the role of non-state actors in the international legal system, see Robert McCorquodale, 'An Inclusive International Legal System' (2004) 17 *Leiden J. Int'l L.* 477.

[33] 'The League of Nations – A Practical Suggestion by Lieut-General The Rt Hon JC Smuts PC', in David Hunter Miller, *The Drafting of the Covenant* (New York: G. P. Putnam's Sons, 1928), vol. II, pp. 23, 41 ('Miller, vol. II'); 'Ninth Meeting (13 February 1919), Minutes of the Commission of the League of Nations', in Miller, vol. II, p. 300.

greater democracy. The prospects for encouraging democracy within international organisations will be analysed in Chapter 6, but this discussion takes place in the context of the existing boundaries of international institutional law, which gives priority to the membership of states. With this in mind, this book will concentrate on the participation of states in international organisations and will explore the increasing role played by principles of human rights and democracy in deciding the membership or otherwise of states.

1

The move to institutions in the age of rights

I Introduction

The second half of the twentieth century was marked by both a 'move to institutions'[1] and the internationalisation of the idea of human rights.[2] In a period in which the number and range of international organisations increased, there was a parallel rise in the breadth and depth of international human rights law. Klabbers has recognised that 'it is no coincidence that historically the "move to institutions" coincided with the heyday of man's attempts to create an ever more perfect world'.[3] Both the establishment of international organisations and the articulation of international human rights principles challenge the traditional notion of state sovereignty and the concept that states have an area of internal activity, or domestic jurisdiction, free from external influence and intervention. On the one hand these trends can be seen as an aspect of the declining power of the state, but on the other hand it is also recognised that the state system and the ability of states to freely enter into international obligations are an intrinsic part of the development of both international organisations and international human rights law.[4]

This chapter deals with three related issues – the role of membership criteria in international institutional law, the application of the concept of legitimacy to international organisations, and the relationship between human rights, democracy and membership issues. Part II sets

[1] David Kennedy, 'The Move to Institutions' (1987) 8 *Cardozo L.R.* 841.

[2] Louis Henkin, *The Age of Rights*, 2nd edn (Columbia University Press, 1990), p. 13; Norbetto Bobbio, *The Age of Rights*, Allan Cameron (trans.) (Cambridge: Polity Press, 1996), p. 32.

[3] Jan Klabbers, 'The Changing Image of International Organizations', in Jean-Marc and Veijo Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo: United Nations University Press, 2001), p. 225.

[4] Koskenniemi argues that '[b]y establishing and consenting to human rights limitations on their own sovereignty, states actually define, delimit and contain those rights, thereby domesticating their use and affirming the authority of the state as the source from which rights spring'. Martti Koskenniemi, 'The Future of Statehood' (1991) 32 *Harv. Int'l L.J.* 397 at 406.

the scene for the study of the membership criteria and practice of the organisations selected for consideration by locating the place of membership criteria in international institutional law. It briefly describes the development of the law of international organisations and explains the meaning of admission, exclusion and representation in relation to membership decisions. Part III analyses various approaches to legitimacy in international law and the way in which the concept has been employed in the context of international organisations. It draws on these approaches to explain the elements of legitimacy that will inform this work. In the context of the definitions adopted at the international level for human rights and democracy, Part IV examines some of the potential problems that international organisations may encounter in utilising these principles to determine participation. These three issues will provide the context for the subsequent discussion of the membership policies and practices of a wide range of international organisations.

II The move to institutions: international institutional law

A The development of international institutional law

This study concerns an element of international institutional law: the bases upon which organisations determine whether a state will be admitted or excluded. As this work involves an examination of the founding documents and practices of a number of different organisations, it is a basic assumption that there is a common body of law providing a framework for analysing international organisations. The study of international organisations has been distinguished from public international law on the basis that it is grounded in a series of historical events.[5] Prior to the formation of the League of Nations, international legal literature only dealt sporadically with the problem of international organisations, usually from the perspective of international administration.[6] The establishment of the League of Nations saw both a qualitative as well as a quantitative change in the literature on international institutions: not only did writing on international institutions expand, but also work began to focus specifically on the problems of that one organisation.[7]

[5] Kennedy, 'Move to Institutions' at 842–3.

[6] For a comprehensive survey of the literature on international organisations, both before and after the formation of the League of Nations, see Louis B. Sohn, 'The Growth of the Science of International Organizations', in Karl Deutsch and Stanley Hoffman (eds.), *The Relevance of International Law – Essays inHonor of Leo Gross* (Cambridge, MA: Schenkman Publishing, 1968), p. 251.

[7] *Ibid*., pp. 255–8.

Thus, 1918 has been described as a 'break between a preinstitutional and an institutionalized moment'.[8]

If the establishment of the League of Nations can be regarded as 'one of the great flurries of creativity in the historical development of international organization',[9] then the formation of the UN in 1945 was the consolidation of that development. Many writers have noted that since 1945 the number of international organisations has proliferated.[10] The figures quoted range from 37 organisations in 1909 to 263 organisations in 1994, and 247 'conventional inter-governmental organisations' in 2008.[11] While there has been recent discussion of a move away from formal international institutions to more informal forms of cooperation,[12] despite a small decrease in numbers recorded in 2008, the statistics suggest that it is rather too early to speak of the demise of such entities. In fact, it will be seen that in some organisations, particularly in Asia and Africa, there has been a move to implement more formal mechanisms and arrangements.

The increasing type and range of international organisations has led the same writers to ask the question whether there can in fact be 'a law' of international institutions.[13] In their seminal study *International*

[8] Kennedy, 'Move to Institutions' at 844.

[9] Inis L. Claude, *Swords into Plowshares – The Problems and Progress of International Organization*, 4th edn (New York: Random House, 1971), pp. 41–2.

[10] For example, Mosche Hirsch, *The Responsibility of International Organizations towards Third Parties – Some Basic Principles* (Dordrecht: Martinus Nijhoff Publishers, 1995), p. 1; Niels Blokker and Henry Schermers (eds.), *Proliferation of International Organizations – Legal Issues* (Dordrecht: Martinus Nijhoff Publishers, 2001), p. 1; Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press, 2002), p. 1.

[11] See Hirsch, *Responsibility of International Organizations*, p. 1; 'Overview of Number of International Organizations by Type: 2008' (2009–10) 5 *Y.B. Int'l Orgs*. at 33. One of the features of a conventional intergovernmental organisation is that it must have aims that are 'genuinely international in character, with the intention to cover operations in at least three countries': see 'Appendix 4: Types of Organization' (2009–10) 5 *Y.B. Int'l Orgs*. at 409. Writers frequently rely upon the *Yearbook of International Organizations* as a basis for their claim that the number of international organisations has increased since the Second World War. For an analysis of the numbers appearing in the *Yearbooks* and other aspects of the proliferation of international organisations, see Blokker and Schermers, *Proliferation of International Organizations*, pp. 2–14.

[12] Jan Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law' (2001) 70 *Nordic J. Int'l L.* 403; José E. Alvarez (Panel), 'The Move from Institutions?' (2006) 100 *A.S.I.L. Proceedings* 287.

[13] Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, 4th edn (Boston: Brill Academic Publishers, 2003) at para. 22; Elihu Lauterpacht, 'The Development of the Law of International Organizations by the Decisions of International Tribunals' (1976) 152 *Recueil des Cours* 377 at 396. Cf. Jan Klabbers, 'The Paradox of International Institutional Law' (2008) 5 *Int'l Org. L.R.* 5.

Institutional Law, Schermers and Blokker (perhaps unsurprisingly) answer this question in the affirmative. In their view, although organisations differ in a number of respects, they also have a range of common features.[14] Elihu Lauterpacht arrives at a similar conclusion after examining the decisions of international tribunals in interpreting the constituent instruments of such organisations.[15] Included within organisations' shared characteristics are the rules governing the way in which they are organised. These rules can be distinguished from the substantive legal principles made by the organisation to regulate the conduct of member states.[16] The membership policy and practice of particular organisations has been placed in the category of institutional law[17] as the issue of the admission and exclusion of states arises in all organisations, with similar questions and difficulties being encountered.

B The role of membership criteria

Membership is a fundamental constitutional question for an international organisation[18] and has been described as 'one of the most hotly contested issues in recent years'.[19] The study of membership criteria in international institutions concerns both the internal and external policies of an organisation. A constitutional instrument requiring existing members to comply with certain standards and subjecting those members to monitoring procedures regulates members' relations with each other and with the organs of the organisation. In its external aspect, a constitution may impose strict admission criteria on applicants (non-members), determining if, and when, they will be invited to join the club.[20]

[14] Schermers and Blokker, *International Institutional Law* at paras. 22–3.

[15] Elihu Lauterpacht, 'Development of the Law of International Organizations' at 402.

[16] Schermers and Blokker, *International Institutional Law* at para. 25. See also Klabbers, *An Introduction to International Institutional Law*, p. 2.

[17] Nigel White, *The Law of International Organisations*, 2nd edn (Manchester University Press, 2005), Chapter 4; Klabbers, *An Introduction to International Institutional Law*, Chapter 6; Felice Morgenstern, *Legal Problems of International Organizations* (Cambridge: Grotius Publications, 1986), Chapter 2; C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd edn (Cambridge University Press, 2005), Chapter 4.

[18] Claude, *Swords into Ploughshares*, p. 85.

[19] Barbara Koremenos, Charles Lipson and Duncan Snidal, 'The Rational Design of International Institutions' (2001) 55 *Int'l Org.* 761 at 770.

[20] In the context of the EU, Cremona has commented that '[e]very enlargement has an external dimension . . . affecting not only those candidate countries immediately involved in the process but other states in the region and further afield'. Marise Cremona, 'Introduction', in Marise Cremona (ed.), *The Enlargement of the European Union* (Oxford University Press, 2003), p. 7.

The two aspects cannot be easily separated as constitutions may provide both detailed admission criteria and also establish sanctions for failure to abide by such standards. While decisions on membership may fall within the category of 'house keeping arrangements', such arrangements can involve important issues of policy for states and the organisation.[21]

The study of membership policies and practice by international lawyers has resulted in a number of different approaches. For the most part, analyses have focused on the articles of the constituent instruments enabling an organisation to terminate a state's membership.[22] Other commentators have explored the admission practice of individual organisations, such as the UN or the EU,[23] or they have focused on the impact of constitutional provisions for admission and exclusion in the light of particular case studies.[24] More recent scholarship has examined the question whether human rights treaty regimes and institutions should condition their membership provisions on human rights criteria. In the context of human rights treaties, Hathaway has suggested that '[c]ountries might ... be required to demonstrate compliance with certain human rights standards before being allowed to join a human rights treaty ... Or treaties could include provisions for removing countries that are habitually found in violation of the terms of the treaty from membership in the treaty regime'.[25] Goodman and Jinks have explored the potential for human rights conditions in the membership policies of human rights regimes to influence state practice through the mechanisms of coercion,

[21] Louis Henkin, *How Nations Behave*, 2nd edn (Columbia University Press, 1979), p. 16.

[22] For example, C. Wilfred Jenks, 'Expulsion from the League of Nations' (1935) 16 *Brit. Y.B. Int'l L.* 155; Nagendra Singh, *Termination of Membership of International Organizations* (London: Stevens and Sons, 1958); Konstantinos Magliveras, *Exclusion from Participation in International Organisations – The Law and Practice behind Member States' Expulsion and Suspension of Membership* (The Hague: Kluwer Law International, 1999).

[23] Manfred Nowak, 'Human Rights "Conditionality" in relation to Entry to, and Full Participation in, the EU', in Philip Alston with Mara Bustelo and James Heenan (eds.), *The EU and Human Rights* (Oxford University Press, 1999), p. 687; Roger O'Keefe, 'The Admission to the United Nations of the Ex-Soviet and Ex-Yugoslav States' (2001) 1 *Baltic Y.B. Int'l L.* 167. A comprehensive account of UN admission practice is provided in Thomas D. Grant, *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization* (Boston: Martinus Nijhoff Publishers, 2009).

[24] For example, Ebere Osieke, 'Admission to Membership in International Organizations: The Case of Namibia' (1980) 51 *Brit. Y.B. Int'l L.* 189; Ursula Wasserman, 'WIPO: The Exclusion of South Africa' (1980) 14 *J. World Trade L.* 79.

[25] Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale L.J.* 1935 at 2024.

persuasion and acculturation.[26] Such research is concerned with the most appropriate method of designing human rights institutions to maximise compliance with human rights obligations. This book takes a step back from this scholarship to examine the interpretation of human rights conditions in the existing membership criteria of a wide range of organisations in order to evaluate the relevance of such criteria to the membership processes and, consequently, the legitimacy of the practice.

This brief description of the role of membership policy and practice, and approaches to the study of membership provisions appears to be predicated on a basic division between the organisation and its members. Such a distinction fails to take into account the extent to which an international organisation is dependent upon its members, although a constituent instrument may read as if the organisation is relatively autonomous from its member states.[27] Translated into the field of membership criteria, this means that members still control their organisation and the admission and exclusion of states from that organisation.[28] For Klabbers, this results in a lack of clarity in the law relating to membership and a reliance on 'policy preferences'.[29] After setting out the legal principles relating to admission and termination of membership, the relationship between political and legal factors in membership decisions will be re-examined.

1 Admission to an international organisation

Few organisations, whether regional or universal, allow states to become members merely upon application.[30] Establishing membership is a

[26] Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 *Duke L.J.* 621. Goodman and Jinks define coercion as the use of 'material rewards and punishments' in order to induce conformity (633). Persuasion refers to the use of arguments and deliberation with the result that actors 'redefine their interests and identities accordingly' (635). Acculturation is concerned with 'the general process of adopting the beliefs and behavioural patterns of the surrounding culture' (638).

[27] Klabbers, *An Introduction to International Institutional Law*, p. 40; Klabbers, 'The Changing Image of International Organizations' at 227.

[28] Klabbers, *An Introduction to International Institutional Law*, p. 127, referring to Daniel Vignes, 'Law participation aux organisations internationales', in René-Jean Dupuy (ed.), *Manuel sur les organisations internationales*, 2nd edn (Dordrecht: Martinus Nijhoff Publishers, 1998), pp. 61–87.

[29] Klabbers, *An Introduction to International Institutional Law*, p. 127.

[30] As an example of a provision where admission does not require the approval of the organisation, Schermers and Blokker point to Article X(2) of the International Convention for the Regulation of Whaling, opened for signature 10 November 1948,

bilateral and voluntary act, requiring approval from both the state and the organisation.[31] This emphasis on the voluntary nature of the act of joining an international organisation belies the fact that although a state has the option of choosing to participate in an organisation, in some fields of cooperation this choice is really an 'illusion', as failure to participate will prevent a state from being involved in a particular area of international endeavour.[32] This fact needs to be kept in mind when discussing whether admission criteria should be interpreted flexibly or more rigidly.

In distinguishing between universal organisations and closed organisations, Schermers and Blokker note that the former group necessarily has a heterogeneous membership with 'large political, socio-economic, and cultural differences' between member states,[33] whereas the latter group may be more homogeneous with closer economic and cultural connections.[34] The problem of whether an organisation should open its doors to all states (or indeed all states within a region) is not new. In the context of admission to the League of Nations, Schwarzenberger distinguished between a number of different universalities, including homogeneous universality (where the organisation only 'comprises communities of a certain constitutional structure'), and heterogeneous universality (where uniform standards are not applied).[35] As closed organisations, or organisations subscribing to homogeneous universality, do not aim to include all states, they can afford to be more selective and decide whether their membership policies should be inclusive or exclusive. For example, a regional organisation must evaluate whether an individual applicant

161 UNTS 73 (entered into force 10 November 1948). It provides that '[a]ny Government which has not signed this Convention may adhere thereto after it enters into force by a notification in writing to the Government of the United States of America'. This Convention establishes the International Whaling Commission. Schermers and Blokker, *International Institutional Law* at para. 90. See also Konrad G. Bühler, *State Succession and Membership in International Organizations – Legal Theories versus Political Pragmatism* (The Hague: Kluwer Law International, 2001), pp. 23–6.

[31] Schermers and Blokker, *International Institutional Law* at para. 100.

[32] Jerzy Makarczyk, 'Legal Basis for Suspension and Expulsion of a State from an International Organization' (1982) 25 *German Y.B. Int'l L.* 476.

[33] Schermers and Blokker, *International Institutional Law* at para. 52.

[34] *Ibid.* at para. 57.

[35] Georg Schwarzenberger, *The League of Nations and World Order* (Westport, CT: Hyperion Press, 1936), p. 4 (emphasis removed). In Chapter 5 of his book, Schwarzenberger documents the movement from homogeneous to heterogeneous universality in the membership practice of the League of Nations.

state will contribute to the fulfilment of its functions or will diminish its collective goals.[36]

2 Membership and representation

A distinction must also be drawn between membership and representation in an international organisation. Membership questions are concerned with the admission or exclusion of a state from an organisation. Representation presupposes membership and deals with the question of which persons or entities are permitted to represent a particular state.[37] Issues concerning representation often arise where there are two rival authorities claiming to represent the legitimate government of a member. Representation is usually effected through a process whereby a particular delegate's credentials are accepted by the organisation. The decision to withhold such credentials may indicate the attitude of the organisation's members towards that government, although technically the state remains a member of the organisation unless it is excluded by another means. This was evident in the controversy following the seating of Nationalist China from 1949 to 1971 in the UN rather than the People's Republic of China (PRC), despite the PRC's effective control of mainland China following the communist revolution in that country.[38] While representation and membership are distinct concepts, where a failure to seat a state's representative leads to the effective exclusion of that state, it will be treated as tantamount to suspension or expulsion.[39]

3 Termination of membership

A state's membership of an international organisation may be terminated in a number of ways. First, a state may withdraw from an organisation. This is relatively uncontroversial (in a legal sense) provided it is accomplished within the provisions laid down by the constitution. However, not all constituent instruments allow for withdrawal by a member – such provisions are notably absent from the Charter of the

[36] C. Wilfred Jenks, 'Due Process of Law in International Organizations' (1965) 19 *Int'l Org*. 163 at 166.

[37] Amerasinghe, *Principles of the Institutional Law of International Organizations*, pp. 125–6; Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions*, 6th edn (London: Sweet & Maxwell, 2009), p. 557.

[38] See Singh, *Termination of Membership*, Chapter 9; below Chapter 2, p. 115.

[39] See Magliveras, *Exclusion from Participation*, p. 205.

United Nations and also the North Atlantic Treaty.[40] The right of a state to withdraw from an organisation may be controversial if a state attempts to leave in the absence of a provision allowing for withdrawal,[41] or where the withdrawal is effectively forced upon a state by the actions of the organisation.[42] Difficult questions can arise when a state is not formally excluded, but nevertheless ceases to participate due to a decision of the organisation. Such a situation occurred following the break-up of the Socialist Federal Republic of Yugoslavia (SFRY) in the early 1990s when Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia declared independence.[43] One question for the UN was whether the remaining republics, Serbia and Montenegro (the Federal Republic of Yugoslavia), could continue the SFRY's membership. The Federal Republic of Yugoslavia (FRY) described itself as 'continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia' and declared that it would 'strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally'.[44] Contrary to this position, the Security Council and General Assembly passed resolutions in which they determined that that the FRY could not automatically continue the UN membership of the former SFRY.[45] In the opinion of the Security Council, the SFRY had 'ceased to exist'.[46] The General Assembly decided that the FRY 'should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly'.[47] In the discussions that followed these resolutions the

[40] In relation to the UN, an interpretative declaration was adopted at the San Francisco Conference indicating that a member may withdraw from the organisation: see below Chapter 2, p. 123.

[41] For example, the 'partial withdrawal' of France from NATO in 1966. See E. Stein and D. Carreau, 'Law and Peaceful Change in a Subsystem: "Withdrawal" of France from the North Atlantic Treaty Organization' (1968) 62 *Am. J. Int'l L.* 577.

[42] Louis B. Sohn, 'Expulsion or Forced Withdrawal from an International Organization' (1964) 77 *Harv. L.R.* 1381.

[43] For a discussion of these events, see Marc Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 *Am. J. Int'l L.* 569.

[44] 'Letter Dated 6 May 1992 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations Addressed to the Secretary-General', UN GAOR, 46th session, Agenda Item 68, UN Doc. A/46/915, 7 May 1992, Annex II, 'Declaration', para. 1.

[45] 'Resolution 777', SC Res. 777, UN SCOR, 47th session, 3116th meeting, UN Doc. S/RES/777, 1992; 'Resolution 47/1', GA Res. 47/1, UN GAOR, 47th session, 7th plenary meeting, UN Doc. A/RES/47/1, 1992.

[46] 'Resolution 777'.

[47] 'Resolution 47/1', para. 1.

Under-Secretary-General and Legal Counsel of the UN drew a distinction between the FRY's participation in the General Assembly and related bodies and its membership of the organisation – Yugoslavia's membership had not been terminated or suspended, but it could not participate in the work of the General Assembly.[48] In reality, such a conclusion would suggest an example of forced exclusion as (similar to the situation described in the previous section) it left the state unrepresented in the UN's plenary organ.[49]

The second method by which an organisation may terminate membership is to suspend a state from participation in its organs. This does not terminate membership *per se*, but may prevent a member from contributing to and voting in decision-making processes. Suspension is one method by which an international organisation may attempt to compel a state to comply with its rules. It is often used as a sanction for failure to fulfil the financial obligations of membership,[50] although it may also be used for failure to abide by the organisation's standards. For example, the Commonwealth has developed a procedure for suspending a member from participation on the basis that the state has not abided by principles articulated by the organisation's main decision-making body, the Commonwealth Heads of Government Meeting.[51]

The final and most controversial method of terminating membership in an international organisation is expulsion. Enforcement techniques in international organisations can range from non-coercive mechanisms involving international exposure to formal sanctions, the most severe being expulsion.[52] The extent to which international institutional law recognises a right of expulsion in the absence of a provision in the

[48] 'Letter Dated 29 September 1992 from the Under-Secretary-General, the Legal Counsel, Addressed to the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations', UN GAOR, 47th session, Agenda Item 8, Annex, UN Doc. A/47/485, 30 September 1992.

[49] See discussion below at Chapter 2, pp. 112–14.

[50] For example, Convention of the World Meteorological Organization, opened for signature 11 October 1947, 77 UNTS 143 (entered into force 23 March 1950), art. 31 ('WMO Convention'); Treaty of the Southern African Development Community, opened for signature 17 August 1992 (entered into force 30 September 1993), Art. 33(1)(c). In certain circumstances, '[a] Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly': Charter of the United Nations, Art. 19.

[51] See CHOGM, 'Harare Commonwealth Declaration', Harare, Zimbabwe, 20 October 1991; CHOGM, 'Millbrook Commonwealth Action Programme on the Harare Commonwealth Declaration', Millbrook, New Zealand, 12 November 1995.

[52] Schermers and Blokker, *International Institutional Law* at para. 1475.

organisation's constitution is the subject of debate.[53] Even where such a clause is provided, it is rarely used. Many commentators deny the effectiveness of expulsion as a method of sanctioning wayward behaviour by a member state, as it removes the state from the strictures of the organisation.[54] In 1935 Jenks described expulsion as a crude device 'quite incapable of achieving any lasting result in a community the units of which are states and one of the characteristics of which is therefore a very low rate of mortality'.[55] Sixty years later, Chayes and Chayes also doubted the efficacy of coercive sanctions such as expulsion, on the basis that they disrupt the organisation's work and generate dissatisfaction amongst members, resulting in greater costs than benefits.[56] Regional organisations are more likely to envisage expelling a wayward member due to their concern with maintaining the common standards of their members.[57]

As expulsion is one of the most far-reaching sanctions that an international organisation can threaten, its ability to compel compliance with an organisation's rules is directly proportional to the benefits to be gained from membership.[58] Such benefits may range from political, diplomatic or cultural links to economic or military privileges. A question arises as to whether there must be a relationship between the benefits that membership of a particular organisation bestows and the criteria used to determine admission and exclusion from membership. Can organisations which do not include human rights standards within their fundamental principles feasibly use such criteria to expel a member that fails to live up to those standards? This question will be explored further in Chapter 5 in light of the practice of the UN specialised agencies.

4 Political or legal criteria?

In focusing on the provisions in constituent instruments of international organisations, the impression may have been given that although the

[53] *Ibid*. at para. 148; Singh, *Termination of Membership*, p. 75.

[54] See Morgenstern, *Legal Problems of International Organizations*, p. 53; Amerasinghe, *Principles of the Institutional Law of International Organizations*, p. 123; Jenks, 'Expulsion from the League of Nations'.

[55] Jenks, 'Expulsion from the League of Nations' at 157.

[56] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty – Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995), p. 85.

[57] Sohn, 'Expulsion or Forced Withdrawal' at 1416.

[58] Frederic L. Kirgis, *International Organizations in their Legal Setting*, 2nd edn (St Paul, MN: West Group, 1993), p. 585.

formation of such organisations is the result of political processes, the analysis of constitutional instruments and practice is essentially a legal procedure. However, the resolution of membership issues is a result of both political and legal factors. While the founding document of an international organisation may define the legal criteria to be fulfilled by applicant states, political factors, including ideology and the recognition policies of existing members, have a role to play in determining states' voting behaviour in membership decisions.[59] As membership decisions are rarely, if ever, subject to judicial review, there is little jurisprudence on the interpretation of membership provisions and the interplay between legal and political factors. Three cases that stand out in this respect are the ICJ's advisory opinions in the *Admissions Cases* and its 2004 judgment in the *Legality of Use of Force Case*. In the *First Admissions Case*, the General Assembly requested an advisory opinion on the question whether UN members were juridically entitled to make their consent on an admission decision dependent on conditions not expressly mentioned in Article 4(1) of the UN Charter.[60] In particular, it was asked whether UN members could subject their vote on a potential member to a condition that other applicant states were admitted at the same time. The Court's decision reveals two views of the interpretation of Article 4 and consequently the admission process. On the one hand, the majority affirmed that the membership conditions laid down in Article 4 must 'be regarded not merely as necessary conditions, but also as the conditions which suffice'.[61] Although not excluding relevant political factors (those connected with the admission criteria), in their view to import other requirements into the Charter would give members a 'practically unlimited power of discretion' to impose new conditions.[62] In his individual opinion, Judge Alvarez supported this view in part by referring to the UN's mission of universality and the 'right' of a state to membership once the conditions in Article 4 had been fulfilled.[63] But he also recognised that there may be exceptional circumstances where 'the admission of a State is liable to disturb the international situation', or the life of the organisation itself.[64] In such situations the question becomes political rather than legal and the Court should refuse jurisdiction.[65]

[59] Osieke, 'Admission to Membership' at 189. Similarly, White has written of the 'immense political problems that emerge in dealing with issues of membership': see White, *Law of International Organisations*, p. 121.
[60] *First Admissions Case* at 58.
[61] *Ibid.* at 62. [62] *Ibid.* at 63. [63] *Ibid.* at 71. [64] *Ibid.* [65] *Ibid.*

The dissenting judges concentrated on the fact that admission decisions are made by the political organs of the UN – the General Assembly and the Security Council.[66] In their view, members could legally take political considerations into account in determining whether a state should be admitted.[67] However, the differences between the two opinions may be less remarkable than the similarities: the majority acknowledged the possibility of political factors being relevant to a legal decision; the minority suggested that although the decision to admit a state was essentially political, it was subject to both the purposes and principles of the UN and an obligation of good faith.[68]

The majority in the *First Admissions Case* confirmed that the substantive requirements in the constitution of an international organisation are legal provisions (even if subject to relevant political criteria). In the *Second Admissions Case* the Court considered whether the General Assembly could admit a member to the UN in the absence of a recommendation by the Security Council (as required by Article 4(2) of the Charter). The Court held that the procedural mechanisms for admission could not be supplanted by an alternative procedure; the Security Council's recommendation was a fundamental requirement.[69] Although the prospects for judicial review of membership decisions in organisations outside the UN are limited,[70] the two *Admissions Cases* indicate that the constitutions of international organisations are to be interpreted as normal treaty provisions and that any deviation from a treaty's terms should be strictly construed. The majority's desire to exclude extraneous considerations in determining applications for membership was echoed by Osieke when he wrote in 1980 that 'it is now essential to find an exclusively legal criterion for purposes of admission and membership in these bodies'.[71]

Fifty-four years after the *Second Admissions Case*, the difficulty in reconciling the legal and political factors in membership questions was

[66] *Ibid.* at 85 (Joint Dissenting Opinion of Judges Basdevant, Winiarski, McNair and Read).
[67] *Ibid.*
[68] *Ibid.* at 91–2 (Joint Dissenting Opinion). See Hersch Lauterpacht, *The Development of International Law by the International Court* (New York: Praeger, 1958), p. 150.
[69] *Competence of the General Assembly for the Admission of a State to the United Nations* [1950] ICJ Rep. 4 at 9 ('*Second Admissions Case*').
[70] For example, in the EU non-member states do not have standing before the Court of Justice of the EU to review decisions pursuant to Article 49 (the admission provision) of the Treaty on European Union: Consolidated Version of the Treaty on European Union [2008] OJ C 115/13, Art. 19. See Nowak, 'Human Rights "Conditionality"', p. 697.
[71] Osieke, 'Admission to Membership' at 229.

again brought to the fore in the *Legality of Use of Force Case*.[72] Following the passage of resolutions in the General Assembly and the Security Council deciding that the FRY could not continue the UN membership of the SFRY, in two decisions the ICJ described the FRY's status vis-à-vis the UN as '*sui generis*'[73] and 'not free from legal difficulties'.[74] However, this characterisation had to be revisited in 2004 when the Court was faced with the question whether Serbia and Montenegro was a party to the Statute of the International Court of Justice in 1999, the date it instituted proceedings against ten NATO countries.[75] Serbia and Montenegro claimed to be a party to the Statute in 1999 by virtue of its UN membership,[76] despite the fact that it applied for and was accepted as a new UN member eighteen months later in 2000. In arriving at the conclusion that Serbia and Montenegro was not a UN member when it instituted proceedings on 29 April 1999,[77] the members of the Court grappled with the political and legal issues arising from the FRY's uncertain status. The judgment indicated that the Court's earlier use of the term *sui generis* was not prescriptive and did not give rise to 'defined legal consequences'.[78] On that basis, the Court was able to characterise Serbia and Montenegro's application for UN membership in 2000 as a new development with the effect of clarifying the 'amorphous legal situation'.[79]

[72] *Legality of Use of Force (Serbia and Montenegro* v. *Netherlands) (Preliminary Objections)* [2004] ICJ Rep. 1011 ('*Legality of Use of Force Case*').

[73] *Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia) (Preliminary Objections) (Yugoslavia* v. *Bosnia and Herzegovina)* [2003] ICJ Rep. 7 at 31 ('*Application for Revision of the Judgment of 11 July 1996*').

[74] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)) (Provisional Measures, Order of 8 April 1993)* [1993] ICJ Rep. 3 at 14.

[75] *Legality of Use of Force Case* at 1040. Serbia and Montenegro argued that in undertaking a bombing campaign in the Federal Republic of Yugoslavia (FRY) in 1999, NATO members had violated a number of international law obligations, including the prohibition on the use of force. On 4 February 2003, after the FRY had instituted proceedings, the parliament adopted the Constitutional Charter, in which the country was renamed as Serbia and Montenegro: Constitutional Charter of the State Union of Serbia and Montenegro, entered into force 4 February 2003, Art. 1.

[76] *Legality of Use of Force Case* at 1032. Article 93(1) of the UN Charter provides that '[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice'.

[77] *Legality of Use of Force Case* at 1042. [78] *Ibid*. at 1040. [79] *Ibid*. at 1042.

Not all judges were convinced of the Court's reasoning on this point. Judge Higgins was concerned that the Court's clarification of the situation in the period 1992–2000 was contrary to the desire of the UN's political organs (the General Assembly and the Security Council) to leave the situation as legally ambiguous.[80] In another separate opinion, Judge Elaraby concluded that the main judgment lacked a 'solid legal basis'[81] in deciding that the FRY was not a UN member. He distinguished between the actions of the Security Council and the General Assembly in their 'political capacity' and the need for the Court to apply the law.[82] Judge Kréca also drew a distinction between the 'pragmatic political considerations' forming the basis for the actions of international organisations and their members and 'considerations based on international law' in determining the legal character of Yugoslavia.[83] Noting that the Charter bestows on the General Assembly the ability to make decisions (as distinct from recommendations) on matters of membership, Judge Kréca detailed the 'legal consequences' of those decisions.[84] Thus, the judgments demonstrate differing opinions on the political and legal implications of the decisions of the UN's organs on the question of Yugoslavia's membership, and indeed the propriety of resolving the uncertain legal status of Yugoslavia after 1992. Whereas Judge Higgins perceived advantages in the Court taking into account the opinion of the UN's political organs in arriving at a legal decision, Judge Elaraby demonstrated a concern with preserving a distinction between the legal and political processes. The opinions in the *Legality of Use of Force Case* demonstrate that the friction between the role of legal and political factors in the process for determining membership did not end with the judgments of the Court in the *Admissions Cases*, but instead is an ongoing issue in admission and exclusion decisions.

III International organisations and the concept of legitimacy

In contrast to developments in international law more generally, the field of theoretical approaches to the law of international organisations has been described as 'somewhat immature'.[85] This is distinct from the study of international organisations in political science, where there is

[80] *Ibid.* at 1073 (Separate Opinion of Judge Higgins).
[81] *Ibid.* at 1088 (Separate Opinion of Judge Elaraby). [82] *Ibid.*
[83] *Ibid.* at 1120 (Separate Opinion of Judge Kréca). [84] *Ibid.* at 1121–2.
[85] Klabbers, *An Introduction to International Institutional Law*, p. 3.

a rich literature on international integration.[86] Much of the legal literature is concerned with an analysis of the texts of international organisations (the 'details of institutional design on paper')[87] and the common problems of such organisations. Some writers have rectified this lacuna – for example, White and Alvarez commence their respective books on international organisations with a discussion of a number of different international law and international relations theories, including realism, functionalism, rationalism and critical theory.[88] Klabbers underscores his work on international organisations with the idea (he disclaims the title of 'theory') that the law of international organisations is the result of an underlying tension between the members and the organisation that they have created.[89]

A Approaches to legitimacy in international law

In this book the concept of legitimacy is used as a framework through which to view the constitutional provisions and membership practice of international organisations. Discussions of legitimacy are usually associated with relationships within a state, including the right to rule, rather than international society or international law.[90] Increasingly, international relations and international legal scholars are discussing the legitimacy of international society (or legitimacy in international society), as well as the legitimacy of actors within that society, such as international organisations. In defining what is meant by legitimacy in the international sphere, writers have drawn on dictionary definitions (what is 'lawful, regular, proper')[91] and concepts such as legality,

[86] For example, Stephen Krasner (ed.), *International Regimes* (Ithaca, NY: Cornell University Press, 1983); Lisa L. Martin and Beth A. Simmons (eds.), *International Institutions – An International Organization Reader* (Cambridge, MA: MIT Press, 2001); Robert O. Keohane, *After Hegemony – Cooperation and Discord in the World Political Economy*, 2nd edn (Princeton University Press, 2005); John J. Mearsheimer, 'The False Promise of International Institutions' (1994) 19 *Int'l Sec.* 5. The volumes of *International Organization* contain a wealth of articles on theoretical approaches to international organisations.

[87] Kennedy, 'Move to Institutions' at 843.

[88] White, *Law of International Organisations*, pp. 2–14; José E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005), pp. 17–57.

[89] Klabbers, *An Introduction to International Institutional Law*, p. 39.

[90] John Williams, *Legitimacy in International Relations and the Rise and Fall of Yugoslavia* (Basingstoke: Macmillan, 1998), p. 2. For a discussion of legitimacy in the national context, see Alan Hyde, 'The Concept of Legitimacy in the Sociology of Law' (1983) *Wis. L.R.* 379.

[91] Williams, *Legitimacy in International Relations*, p. 2.

morality and constitutionalism.[92] In international legal scholarship the foremost writer in this area, Franck, defines the concept of legitimacy as follows:

> Legitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.[93]

In Franck's view the legitimacy of international law is important as it determines 'the power to pull toward compliance those who cannot be compelled'.[94] He outlines four features of legitimacy: determinacy (referring to a rule's clarity), symbolic validation (the communication of authority, signalling the rule's significance in the system of social order), coherence (indicating consistency in application) and adherence (the vertical nexus between a primary rule of obligation and a hierarchy of secondary rules).[95] In his view law creates obligations in the international community because it operates like the 'house rules of a club'.[96] Membership of the community is akin to membership of a club, conferring a 'desirable status, with socially recognized privileges and duties'. It is the desire to be a club member that 'is the ultimate motivator of conformist behaviour' for states.[97] The community can legitimate 'its members, institutions, rules and modes of conduct, thereby affecting both the rights and duties of members and institutions, as well as the rules' capacity to obligate and secure the community's compliant behaviour'.[98] This final comment highlights that by granting membership to a state, an international organisation can itself confer legitimacy on its members.[99]

Franck's writing on legitimacy (and indeed his four-part definition) is principally concerned with the legitimacy of the rules of international law, although he also acknowledges that legitimacy can be accorded to

[92] Inis L. Claude, 'Collective Legitimization as a Political Function of the United Nations' (1966) 20 *Int'l Org.* 367; Ian Clark, *Legitimacy in International Society* (Oxford University Press, 2005).

[93] Thomas Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990), p. 24.

[94] *Ibid.*

[95] For these four features, see generally *ibid.* and Thomas Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1995), Chapter 2.

[96] Franck, *Power of Legitimacy*, p. 38. [97] *Ibid.* [98] *Ibid.*, p. 39.

[99] *Ibid.*, pp. 122–3. See also Claude, 'Collective Legitimization'.

institutions.[100] In dealing specifically with institutions, Keohane and Nye suggest that international institutions are under challenge due to their lack of legitimacy.[101] Similarly, Junne has asserted that '[t]he legitimacy of international organizations has never been undisputed'.[102] In making this statement, Junne views legitimacy as largely a subjective notion on the basis that different governments and indeed groups within a society may have divergent views on the way in which an organisation is performing.[103] Coicaud believes that one of the most important factors in determining the legitimacy of an international institution is its ability to 'go beyond the limitations of each member state' and fulfil its mandate.[104] Additionally, Coicaud indicates that the legitimacy of international organisations derives from states as '[a]n organization that no state would want to join would be in no position to be legitimate or even to exist'.[105] Consequently, the legitimacy of an organisation can be connected to its functions or membership and may be a subjective (linked to a particular viewpoint) or an objective notion (dependent on the fulfilment of certain criteria, albeit also subject to individual assessments).

The idea of applying the concept of legitimacy to international organisations is not without danger, given the lack of a close connection between international organisations and ordinary citizens.[106] Heiskanan suggests

[100] Franck, *Fairness in International Law*, p. 26.

[101] Robert O. Keohane and Joseph S. Nye Jr, 'Democracy, Accountability and Global Governance', Working Papers on International Relations, John E. Kennedy School of Government, Harvard University, 2001, p. 1.

[102] G. C. A. Junne, 'International Organizations in a Period of Globalisation: New (Problems of) Legitimacy', in Coicaud and Heiskanen (eds.), *Legitimacy of International Organizations*, p. 189.

[103] Junne, 'International Organizations in a Period of Globalisation', pp. 190–1. On the subjective nature of the term legitimacy, see also David D. Caron, 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87 *Am. J. Int'l L.* 552 at 557. The difficulty in obtaining data on whether an international organisation is perceived as legitimate by different groups is highlighted by Jerome Slater in 'The Limits of Legitimization in International Organizations: The Organization of American States and the Dominican Crisis' (1969) 23 *Int'l Org.* 48 at 50.

[104] Jean-Marc Coicaud, 'International Organizations, the Evolution of International Politics, and Legitimacy', in Coicaud and Heiskanen (eds.), *Legitimacy of International Organizations*, p. 523.

[105] *Ibid.* See also Jean-Marc Coicaud, 'Reflections on International Organisations and International Legitimacy: Constraints, Pathologies and Possibilities' (2001) 53 *Int'l Soc. Sci. J.* 523, where he states that '[t]he legitimacy of international organisations derives originally from states' (523).

[106] Veigo Heiskanen, 'Introduction', in Coicaud and Heiskanen (eds.), *Legitimacy of International Organizations*, p. 6.

that asking the 'legitimacy question' is based on the assumption that the role of a state is to communicate the opinions of its people to international fora (and this in turn suggests that the 'people' can be characterised as a cohesive group).[107] Franck attempts to resolve this conundrum by linking the legitimacy of an international organisation with the democratic record of its member states. He regards the entitlement to democratic government as already having achieved a large measure of legitimacy in international law.[108] For the most part Franck is concerned with the question of whether various international instruments and initiatives can amount to a legal right to democratic government, but he also ties democracy to the legitimacy of international institutions, particularly in an era where their law-making powers are expanding. In his view it is to an international institution's advantage that its initiatives appear legitimate, and '[t]his cannot be achieved if any significant number of the participants in the decision-making process are palpably unresponsive to the views and values of their own people'.[109] In this way the legitimacy of an international organisation is tied to the democratic record of its membership in a more substantive form.

It is also possible that an organisation's legitimacy is based on the extent to which the exercise of its decision-making powers accords with democratic values. White states that the legitimacy of international organisations 'in dealing with issues of international concern will be increased if their decisions have been achieved democratically'.[110] The alleged 'democratic deficit' within the EU and the WTO has been the subject of much discussion and controversy.[111] However, not all agree that legitimacy should be tied to democracy, particularly as international

[107] *Ibid.*, pp. 6–7. [108] Franck, *Fairness in International Law*, p. 138.

[109] *Ibid.*, pp. 90–1.

[110] White, *Law of International Organisations*, p. 201. See also Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *Am. J. Int'l L.* 596 at 623.

[111] For example, Wolfgang Merkel, 'Legitimacy and Democracy: Endogenous Limits of European Integration', in Jeffrey Anderson (ed.), *Regional Integration and Democracy – Expanding on the European Experience* (Lanham, MD: Rowland & Littlefield, 1999); Andrew Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' (2002) 40 *J. Common Mkt Stud.* 603; Jeffery Atik, 'Democratizing the WTO' (2001) 33 *G.W. Int'l L.R.* 451; James Bacchus, 'A Few Thoughts on Legitimacy, Democracy, and the WTO' (2004) 3 *J. Int'l Eco. L.* 667; Robert Howse, 'How to Begin to Think about the "Democratic Deficit" at the WTO', in Stefan Griller (ed.), *International Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order* (New York: Springer, 2003), p. 79; Eric Stein, 'International Integration and Democracy: No Love at First Sight' (2001) 95 *Am. J. Int'l L.* 489.

organisations will never match the institutions of national society and do not possess a *demos*.[112] Whether international organisations should act in accordance with democratic principles will be analysed in Chapter 6. The focus will be on the extent to which the legitimacy of an admission or exclusion decision may depend on the democratic make-up of an organ or procedure used by an organisation.

B The application of legitimacy to membership criteria

This summary of the various approaches to legitimacy and international law indicates that the term 'legitimacy' can be used in a number of ways. Legitimacy may be accorded to international organisations and to their decisions or practices, and in turn an international organisation may confer legitimacy on a state by granting it membership. This work is concerned primarily with the legitimacy of the practice of employing human rights and democracy as membership criteria, but it is recognised that by adopting these conditions in its admission policies, an organisation may be conferring legitimacy on a state. The legitimacy of the organisation itself would appear to be enhanced if it can be demonstrated that one of its most important decisions has the hallmarks of legitimacy.

Extracting elements of each of the approaches outlined above, in this book the legitimacy of the practice of employing human rights and democracy as criteria impacting on membership decisions is assessed against three indicia: compliance with the constituent instrument, the ability of the organisation to fulfil its functions, and the clarity and consistency of the criteria employed. These three indicia are not necessarily the only determinants of legitimacy – some writers distinguish between legitimacy and the notion of functionalism,[113] or recognise different types of legitimacy, including formal, social and adjudicative

[112] Joseph H. H. Weiler, *The Constitution of Europe – 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press, 1999), pp. 268–9; Keohane and Nye, 'Democracy, Accountability and Global Governance', p. 3; Robert A. Dahl, 'Can International Organizations Be Democratic? A Sceptic's View', in Ian Shapiro and Casiano Hacker-Cordón (eds.), *Democracy's Edges* (Cambridge University Press, 1999), p. 19.

[113] See, for example, Efraim's discussion of legitimacy and functionalism in Athena D. Efraim, *Sovereign (In)equality in International Organizations* (The Hague: Martinus Nijhoff Publishers, 2001), p. 28.

legitimacy.[114] These components of legitimacy are also heavily influenced by the fact that this is primarily a study of international institutional law. The aim in this section is not to give a complete account of legitimacy, but rather to establish indicia to assess the role of human rights and democracy in determining membership of international organisations and to indicate the reason for selecting particular facets of legitimacy.

1 Legality and the interpretation of constituent instruments

Many accounts of legitimacy include a discussion of legality.[115] Legality cannot be separated from the other two indicia of legitimacy utilised in this study, but this section is concerned specifically with the methods of interpreting the powers in a constituent instrument. The starting point for determining the legality of the practice of using human rights and democracy as membership criteria is the organisation's constitutional instrument and the express and implied powers contained in that document. Where the constitutional instrument expressly grants an organisation the power to admit, suspend or expel a state, then there would appear to be few problems (at least legally) with such a course of action, provided that the organisation abides by the criteria or procedures conditioning the exercise of the power. In line with the reasoning of the ICJ in the *First Admissions Case*, where a charter lists the criteria for admission, then these conditions would appear to be definitive – other factors may be taken into consideration, but they must be connected to the listed criteria.[116]

In some circumstances the conditions for admission or expulsion laid down in an organisation's constituent instrument may be very specific; however, in most cases they will be flexible and therefore open to interpretation. The principles to be applied in interpreting the powers

[114] For a description of formal (legal) and social (empirical) legitimacy, see Weiler, *The Constitution of Europe*, p. 80; Deborah Z. Cass, *The Constitutionalization of the World Trade Organization – Legitimacy, Democracy and Community in the International Trading System* (Oxford University Press, 2005), p. 45. On adjudicative legitimacy, see Robert Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence', in Joseph H. H. Weiler (ed.), *The EU, the WTO and the NAFTA – Towards a Common Law of International Trade* (Oxford University Press, 2000), p. 35.

[115] Clark, *Legitimacy in International Society*; Hans Kelsen, *General Theory of Law and State*, Anders Wedberg (trans.) (Cambridge, MA: Harvard University Press, 1946), p. 117.

[116] See *First Admissions Case* at 62.

contained in a constituent instrument are located in the Vienna Convention on the Law of Treaties, the provisions of which are regarded as declaratory of custom.[117] Article 31(1) of the VCLT provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'. The Article specifies that the context of a treaty includes its text, the preamble and annexes, and agreements between the parties in connection with the treaty.[118] Article 31(3) lists a number of other sources to assist in interpretation, including 'subsequent agreement between the parties regarding the interpretation of the treaty', 'subsequent practice in the application of the treaty' and relevant rules of international law. The VCLT also refers to supplementary guides to treaty interpretation, such as the *travaux préparatoires* and the circumstances of a treaty's conclusion.[119] The ICJ has considered the interpretation of the constituent instruments of international organisations on a number of occasions, giving weight to the 'natural and ordinary meaning' of textual provisions in the context in which they occur.[120] The Court has also referred to the need to consider the purposes contained in a founding document,[121] the intention of the parties,[122]

[117] Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Arts. 31–2 (VCLT). The ICJ has stated that Article 31 of the VCLT is custom in a number of cases, including *Territorial Dispute (Libyan Arab Jamahiriya* v. *Chad*) [1994] ICJ Rep. 6 at 21–2; *Maritime Delimitation and Territorial Questions (Qatar* v. *Bahrain) (Jurisdiction and Admissibility)* [1995] ICJ Rep. 6 at 18; *Kasikili/Sedudu Island (Botswana* v. *Namibia)* [1999] ICJ Rep. 1045 at 1059. The same rules of treaty interpretation are contained in Articles 31–2 of the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, opened for signature 21 March 1986 (not yet in force).

[118] VCLT, Art. 31(2).

[119] VCLT, Art. 32. Recourse may be made to the preparatory work and the circumstances of a treaty's conclusion to 'confirm the meaning resulting from the application of Article 31' or where the interpretation according to Article 31 '(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable'.

[120] *Second Admissions Case* at 8; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (Advisory Opinion)* [1960] ICJ Rep. 150 at 159 ('*Constitution of Maritime Safety Committee Case*'). The ICJ has conceded that a purely grammatical interpretation may not be sufficient: see *Anglo-Iranian Oil Company (Preliminary Objections)* [1952] ICJ Rep. 93 at 104.

[121] *Constitution of the Maritime Safety Committee Case* at 160–71; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter) (Advisory Opinion)* [1962] ICJ Rep. 151 at 167–8 ('*Expenses Case*').

[122] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ

the organisation's subsequent practice[123] and the principle of effectiveness.[124]

Not all members of the Court were convinced that these elements are of equal value when interpreting the charters of international organisations. For example, Judge Alvarez in the *Second Admissions Case* stated his preference for looking to the 'exigencies of contemporary life' rather than the intentions of the framers.[125] In the *Expenses Case* Judge Spender pointed to the difficulties in relying upon the intention of the original members in an organisation with aspirations of universal membership and agreed that the framers' intentions were only important to the extent to which they were revealed in the text.[126] Reference to the practice of an organisation as an aid to interpretation is also not without its critics. In the *Expenses Case* the majority referred to the practice of the General Assembly and the Security Council in order to interpret Article 17 of the Charter. The *Expenses Case* is not the only time that the ICJ (or the Permanent Court of International Justice) has referred to an organisation's practice to interpret a treaty provision[127] and, indeed, the frequency with which such practice has been invoked by international courts has led Elihu Lauterpacht to write that:

> [i]t is probably necessary to recognize that recourse to the practice of international organizations now stands on an independent legal basis; that is to say, that there exists a specific rule of the law of international organization to the effect that recourse to such practice is admissible and that States, on joining international organizations, impliedly accept the admissibility of constitutional development in this manner.[128]

Judge Spender cast doubt on the propriety of using the practice of an organ of the UN to interpret the Charter in the *Expenses Case* on the basis that such practice could not be equated with the subsequent conduct of a

Rep. 16 at 31 ('*Namibia Advisory Opinion*'). On the importance of the search for the intention of the parties, see Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 *Brit. Y.B. Int'l L.* 48 at 83.

123 *Expenses Case* at 160, 165.

124 *Reparation for Injuries Suffered in the Service of the United Nations Case (Advisory Opinion)* [1949] ICJ Rep. 174 at 183 ('*Reparations Case*').

125 *Second Admissions Case* at 18 (Dissenting Opinion of Judge Alvarez).

126 *Expenses Case* at 185 (Separate Opinion of Judge Spender).

127 For a discussion of relevant case law, see Salo Engel, '"Living" International Constitutions and the World Court (The Subsequent Practice of International Organs under their Constituent Instruments)' (1967) 16 *Int'l & Comp. L.Q.* 865; Elihu Lauterpacht, 'Development of the Law of International Organizations' at 448–65.

128 Elihu Lauterpacht, 'Development of the Law of International Organizations' at 460.

contracting party (a recognised aid to treaty interpretation).[129] In his view the fact that members act through an organ where a majority can prevail over a minority cannot have 'probative value either as providing evidence of the intentions of the original Member States or otherwise a criterion of interpretation',[130] otherwise the Charter could be altered by a majority decision.[131] The judgments in the *Expenses Case* highlight the contrasting opinions on using the subsequent practice of an organisation as an aid to interpretation, particularly where the decisions of the relevant organ are determined by a majority vote. Both Elihu Lauterpacht and Judge Spender's comments also point to the necessity for determining the legal basis for relying upon the practice of organs. In the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict Case* the ICJ referred to Article 31(3)(b) of the VCLT before outlining various practices of the World Health Organization (WHO) relevant to the interpretation of the Constitution of the WHO.[132] In referring to Article 31(3)(b), the ICJ suggested it provided a legal foundation for relying upon the WHO's practice. However, Schermers and Blokker emphasise that paragraph (b) refers to the 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation', indicating that the subsequent practice of states, rather than the organs of an organisation, is relevant for the purposes of this paragraph.[133] This leaves Article 31(3)(b) as an uncertain basis upon which to found reliance on the practice of the organisation.[134]

The problem in identifying the legal basis for relying upon an organisation's practice in interpreting its founding document demonstrates the difficulties in applying general principles of treaty interpretation to constitutional instruments. The ICJ has asserted the relevance of such principles when interpreting the charters of international organisations,

[129] *Expenses Case* at 192 (Separate Opinion of Judge Spender). [130] *Ibid.* at 195.

[131] *Ibid.* at 196–7. On the utility of relying on the practice of an organisation, see also the separate opinion of Judge Fitzmaurice in the *Expenses Case* at 201–2.

[132] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion of 8 July 1996)* [1996] 1 ICJ Rep. 66 at 75 ('*WHO Advisory Opinion*').

[133] Schermers and Blokker, *International Institutional Law* at para. 1347; Niels Blokker, 'Beyond "Dili": On the Powers and Practice of International Organizations', in Gerard Kreijen (ed.), *State, Sovereignty, and International Governance* (Oxford University Press, 2002), p. 317. Gardiner highlights that the VCLT does not actually specify whose practice is relevant: Richard K. Gardiner, *Treaty Interpretation* (Oxford University Press, 2008), p. 246.

[134] Schermers and Blokker, *International Institutional Law* at para. 1347; Blokker, 'Beyond "Dili"', p. 317.

but at the same time has recognised that charters are 'treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals'.[135] When interpreting the express powers contained in a constitutional instrument, a question arises as to whether there is a limit to the range of considerations that an organisation is entitled to take into account. In answering this question the ICJ's decision in the *WHO Advisory Opinion* provides some assistance, albeit in a different context. The ICJ was asked to determine whether the WHO had the power to request an advisory opinion on the question of the legality of the use of nuclear weapons under international law, including the Constitution of the WHO.[136] There was no doubt that the WHO had the power to seek an advisory opinion – the issue for the ICJ was whether the request was within the ambit of the express power in the UN Charter and the Constitution of the WHO. The obvious restraint was that the opinion had to relate to an issue 'within the scope of [WHO's] activities'.[137] In defining the sphere of the WHO's activities, the Court concentrated on the founding document, emphasising that when interpreting the constitutions of international organisations, it is necessary to examine the organisation's objectives as detailed by its founders, the 'imperatives associated with the effective performance of its functions', as well as its practice.[138] In the *WHO Advisory Opinion* the Court decided that the request was outside the scope of the WHO's activities, as the organisation's responsibility to deal with the effects on human health of nuclear weapons was not dependent on the legality of the use of such weapons.[139] The majority confirmed this approach by relying upon the 'principle of speciality'. According to this principle, organisations 'are invested by the states which create them with powers, the limits of which are a function of the common interests whose promotion those states entrust to

[135] *WHO Advisory Opinion* at 75.

[136] The full question was: 'In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?': *ibid.* at 68.

[137] Charter of the United Nations, Art. 96(2). Article 76 of the Constitution of the WHO provides that:

> Upon authorization by the General Assembly of the United Nations or upon authorization in accordance with any agreement between the Organization and the United Nations, the Organization may request the International Court of Justice for an advisory opinion on any legal question arising within the competence of the Organization.

[138] *WHO Advisory Opinion* at 74. [139] *Ibid.* at 76.

them'.[140] The *WHO Advisory Opinion* highlights that where a power is not conditioned by particular criteria, close attention must be given to the organisation's purposes as well as its place in the scheme of other institutions when determining the criteria which shape that power.

The above analysis of the *WHO Advisory Opinion* relates to the Court's interpretation of the WHO's express powers. However, the Court went further and denied the relevance of any implied powers in the case, once more invoking the principle of speciality.[141] Although most membership decisions are made pursuant to express powers contained in an organisation's charter, the doctrine of implied powers may be relevant where an organisation attempts to suspend or expel a state in the absence of an explicit power. In such a situation members have sometimes argued that a power of suspension or exclusion should be implied. In the *Reparations Case* the majority of the ICJ relied upon the concept of implied powers to declare that the UN 'must be deemed to have those powers which, though not expressly provided in the Charter, are conferred by necessary implication as being essential to the performance of its duties'.[142] The Court found that the 'effective working of the Organization' required the implication of a power to bring a claim for damages when one of its agents had been injured.[143] Relying upon the majority's approach in the *Reparations Case*, Judge Shahabuddeen in the *Land, Island and Maritime Frontier Dispute* suggested that implied powers must be 'required' or 'essential' to the fulfilment of the organisation's functions.[144] This 'liberal approach'[145] towards implied powers is based on the principle of effectiveness and indicates that powers may be implied in order to enable the organisation to fulfil its purposes, as well as to carry out its express powers.[146] Implying powers on the basis of the organisation's purposes is necessarily broader than basing an implication on express powers.[147] But the practice is not without its critics. Justice Hackworth argued in dissent in the *Reparations Case* that implied powers should be confined to those that 'flow from the grant of expressed

[140] *Ibid*. at 78. [141] *Ibid*. at 79. [142] *Reparations Case* at 182. [143] *Ibid*. at 183.

[144] *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras) (Application for Permission to Intervene)* [1990] ICJ Rep. 3 at 42.

[145] Mac Darrow, *Between Light and Shadow – The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford: Hart Publishing, 2003), p. 138. See also Alvarez, *International Organizations as Law-Makers*, p. 93.

[146] Alvarez, *International Organizations as Law-Makers*, p. 93; Schermers and Blokker, *International Institutional Law* at para. 233.

[147] Schermers and Blokker, *International Institutional Law* at para. 233.

powers ... and are "necessary" to the exercise of powers expressly granted'.[148] From this perspective, it is difficult to justify the implication of a power to suspend or expel a state in the absence of an express provision. In the *WHO Advisory Opinion* the Court appeared to accept that powers could be implied on the basis of the purposes assigned to the WHO via its Constitution, but denied the possibility of such an implication in that case.[149] White has criticised the ICJ's denial of an implied power in the *WHO Advisory Opinion*, and in particular the Court's invocation of the principle of speciality, on the basis that it represents a narrow reading of the *Reparations Case* and does not accord with previous decisions.[150] On the contrary, Klabbers has suggested that the case is part of a 'trend to interpret organizational powers rather more narrowly than in the past'.[151] If it is accepted that a power can be implied from an organisation's purposes, and a state is excluded on the basis of a power implied from those purposes, then the interpretation of the purposes listed in a constitutional instrument assumes added importance. As is noted by Schermers and Blokker, differences may then arise as to what is encompassed in the purposes of an organisation and what is necessary to fulfil its functions.[152]

While most case law concerns the interpretation of the UN Charter (admittedly in a unique position given its universal character),[153] many of the comments can be applied to the interpretation of constituent instruments more generally. In particular, the distinction between an interpretation concentrating purely on the words of the text versus an interpretation based on the purpose of an organisation, or indeed its current role, may determine whether an applicant state is admitted or whether an existing member is suspended or expelled.

[148] *Reparations Case* at 198. See also *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion)* [1954] ICJ Rep. 47 at 80 (Dissenting Opinion of Judge Hackworth).

[149] *WHO Advisory Opinion* at 79.

[150] Nigel White, 'The World Court, the WHO, and the UN System', in Blokker and Schermers (eds.), *Proliferation of International Organizations*, pp. 102–3. White refers to both the *Expenses* and the *Namibia* advisory opinions as evidence of the Court's more generous interpretation of implied powers.

[151] Klabbers, *An Introduction to International Institutional Law*, p. 80.

[152] Schermers and Blokker, *International Institutional Law* at para. 233.

[153] Ress has suggested that the Charter is unique due to 'its status as a constitution for the world community': G. Ress, 'The Interpretation of the Charter', in Bruno Simma and Hermann Mossler (eds.), *The Charter of the United Nations* (Oxford University Press, 1995), p. 27.

2 Membership and functions

Since an organisation's legitimacy is frequently assessed by reference to its ability to fulfil its functions,[154] the legitimacy of a membership practice requiring adherence to certain ideals may depend on the link between an organisation's functions and a membership policy necessitating an examination of a state's human rights record. In assessing the legitimacy of the practice of introducing human rights and democracy criteria into an organisation's membership decisions against the functions that it has been established to fulfil, the relevance of the theoretical approach of functionalism as it applies to international organisations is acknowledged. Functionalism is the theory most usually applied in the study of international organisations.[155] There are many forms of functionalism, from the sociopolitical theory on the one hand to the legal approach involving the interpretation of the constitutions of international organisations on the other.[156] The narrower legal concept of functionalism is of most importance to this analysis given its concern with the notion of function from within an organisation, but the sociopolitical theory is not without relevance.

Mitrany, regarded as the founder of the broader approach to functionalism, was concerned with the need to bring nations together through economic and social cooperation as a means of preventing political conflicts and war.[157] In his view 'sovereignty cannot in fact be transferred effectively through a formula, only through a function'.[158] In this way a 'web of international activities and agencies' would spread, allowing the interests and life of nations to be integrated.[159] The idea was not to create world government – instead, a number of different organisations would be formed, each dealing with particular problems (that is, having specific functions).[160] In extrapolating on this vision of functionalism, Mitrany dismissed the idea that member states should have

[154] See above n. 104 and accompanying text.
[155] Efraim, *Sovereign (In)equality*, p. 28.
[156] Peter Bekker, *The Legal Position of International Organizations – A Functional Necessity Analysis of their Legal Status and Immunities* (Dordrecht: Martinus Nijhoff Publishers, 1994), pp. 42–5.
[157] See Mitrany, *Progress of International Government*, Chapter 3; David Mitrany, *A Working Peace System – An Argument for Functional Development of International Organization* (London: Royal Institute of International Affairs, 1943). For the development of the functionalist theory by Mitrany, see David Mitrany, *The Functional Theory of Politics* (London: Martin Robertson, 1975).
[158] Mitrany, *Functional Theory of Politics*, p. 128.
[159] Mitrany, *A Working Peace System*, p. 6. [160] *Ibid.*, pp. 32–5.

uniform political and social structures.[161] In his view states should not have to wait for political uniformity before they cooperate, and in fact such uniformity may not even be desirable.[162] Thus, in his 1933 work, *The Progress of International Government*, he opined that:

> International co-operation need not prevent the genius of each people from working out its own local institutions; much less should it aspire to stereotype a particular form of society. That was the idea of the ill-fated Holy Alliance, and that clearly would be the bias of any grouping which regarded uniformity of political and social structure as essential among its members.[163]

On the one hand this statement supports the reasoning that a state's internal constitutional structure should not determine its participation in an international organisation, as this would subvert the ultimate result of functionalism – the integration of states for economic and social cooperation. Although Mitrany acknowledges in this passage that it is the 'genius of each people' to work out their own institutions (perhaps suggesting that citizens must be able to participate in their government), in his later work it is clear that he rejects any attempt to establish a community based on ideology.[164] His rejection of such a union is based on a number of factors, including the difficulty in determining democratic performance (both internally and externally) as distinct from professed democratic form, and the disruption caused by the need to revise the membership following changes in individual countries.[165]

Bekker distinguishes this wider notion of functionalism from the narrower legal concept on the basis that functionalism is concerned with the idea of international organisations and their value in society, whereas the legal concept of functional necessity is concerned with the notion of function from within an organisation.[166] All organisations are designed to fulfil particular functions, whether general or specific. The study of functions is a study of an organisation's activities, and also the purposes that an organisation has been established to accomplish.[167] The starting point for analysing an organisation's functions from a legal perspective is the organisation's founding document.[168] The Permanent Court of International Justice emphasised this point in the *European*

[161] Mitrany, *Progress of International Government*, pp. 130–1. [162] *Ibid.*, p. 131.
[163] *Ibid.* [164] Mitrany, *A Working Peace System*, pp. 13–17. [165] *Ibid.*, pp. 14–15.
[166] Bekker, *Legal Position of International Organizations*, p. 44. [167] *Ibid.*, p. 45.
[168] See for example the discussion in White, *Law of International Organisations*, pp. 23–5, although he notes the move away from the text as 'the sole source of information' (25).

Commission of the Danube Case when it stated that the European Commission was not a state, but an international institution established with a special purpose – 'it only has the functions bestowed upon it . . . with a view to the fulfilment of that purpose' – it could exercise the functions in its statute 'to their full extent', but only so far as restrictions were not imposed by that statute.[169] This approach is also embodied in the ICJ's decision in the *Reparations Case*, where the Court considered the capacity of the UN to bring a claim against a state for the death of one of its agents. The Court answered the question by focusing on the organisation's purposes and functions as located in the Charter and the subsequent practice of the organisation.[170]

A study of an organisation's functions can be illuminated by a study of requirements for admission and exclusion in the constitutional documents. The participation of a state in an international organisation 'should be designed to further the aims and purposes of the organization and the effectiveness of its work'.[171] Thus, '[m]embership policy offers significant evidence concerning operative assumptions as to the purpose of an institution, the type of functions expected from it, and the kind of future development envisaged for it'.[172] An organisation's decision on the states it chooses to admit indicates the functions that the organisation considers important as well as its underlying purposes. On this basis, Claude recognised that the functions an organisation sets out to accomplish should influence its membership policy. The rule of essentiality dictates that states should be admitted if they are necessary to realise the aims of the organisation, but should be excluded if their participation would hinder the ability of the organisation to fulfil its functions.[173] Furthermore, a study of the membership practice of an organisation can illuminate whether the organisation has altered its functions. In this way, an examination of an organisation's membership policies assists in answering the following questions: which states are part of the community, and what features are necessary for them to fulfil that community's functions?

[169] *European Commission of the Danube* [1927] PCIJ (ser. B) No. 14 at 64.
[170] *Reparations Case* at 178–80. See also White, *Law of International Organisations*, p. 43.
[171] Morgenstern, *Legal Problems of International Organizations*, p. 46.
[172] Claude, *Swords into Ploughshares*, p. 85.
[173] *Ibid*., p. 86. For applications of the functional concept of membership, see J. E. S. Fawcett, 'The Place of Law in an International Organization' (1960) 36 *Brit. Y.B. Int'l L.* 321 at 340–1; Bühler, *State Succession*, p. 309–12.

3 The clarity and coherence of the criteria employed

The third aspect of the legitimacy of the practice of employing human rights and democracy criteria is an examination of the clarity of the conditions adopted and the consistency of their application to potential and existing members of an organisation. Although there is much literature that critically appraises the principles of human rights and democracy, this book does not seek to examine the moral validity of claims for human rights or democratic government, but asks whether they provide clear and consistent guides for determining membership. In this sense, the elements of legitimacy discussed under this heading borrow from Franck's concept of procedural legitimacy – a concept separated from notions of 'justice' and 'fairness'.[174] The 'justice', 'fairness' and inherent good of human rights and democracy standards are assumed, rather than discussed, in this work. The range of meanings given to the terms 'human rights' and 'democracy' in international legal instruments and scholarship will be examined further in Part IV of this chapter. The aim in this section is to briefly explain the concepts of clarity and consistency (or, in the words of Franck, determinacy and coherence). The way in which these issues may arise in rights discourse and some of the problems with their application will also be explained in Part IV.

In Franck's view the notion of determinacy as an aspect of legitimacy can be equated with the clarity of a rule. This is usually achieved through textual clarity, although Franck acknowledges that it is not only a textual property.[175] The idea behind including determinacy as an element of legitimacy is that if the rules are clear, then states will know what is expected of them and therefore the rule will be more likely to induce compliance.[176] For Franck:

> Indeterminate normative standards make it harder to know what conformity is expected, which in turn makes it easier to justify non-compliance. Conversely, the more determinate the standard, the more difficult it is to resist the pull of the rule towards compliance and justify non-compliance. Since few persons or states wish to be perceived as acting in obvious violation of a generally recognized rule of conduct, they may try to resolve conflicts between the demands of a rule and their desire not to be fettered by 'interpreting' the rule permissively.[177]

[174] Franck, *Power of Legitimacy*, Chapter 13 (discussing the differences between legitimacy and justice).
[175] *Ibid*., pp. 52, 84. [176] *Ibid*., p. 52.
[177] Franck, *Fairness in International Law*, p. 31. See also Franck, *Power of Legitimacy*, pp. 53–4.

Decisions on the participation of states in international organisations are made on the basis that states have (or have not) fulfilled certain standards, so it would appear important to carefully define the standards to be attained. In turn, this would increase the likelihood that standards will be interpreted consistently in accordance with the principles of treaty interpretation explained previously. Authors also acknowledge the existence of situations where precision is not a virtue – for example, if there is no consensus to sustain such accuracy.[178] Goodman and Jinks have suggested that Franck's notion of determinacy 'emphasizes the penalties side of social pressures, rather than social rewards or cognitive impulses to conform'.[179] It may be that a degree of flexibility is desirable in defining membership criteria in order to allow the organisation some latitude in admitting and excluding states.

As well as the clarity of the rule itself, legitimacy depends on the consistency of its application. This element draws on (although does not precisely replicate) the third element of 'Franckian legitimacy':[180] coherence. Coherence implies that a rule must be consistently applied if it is to be viewed as legitimate. According to Chigara, '[i]t is difficult to imagine anything worse in a legal system, than the inconsistent application of its laws'.[181] Chayes and Chayes also suggest that an element of legitimacy is 'equal application without invidious discrimination' – treating like cases alike.[182] Translated into the field of membership criteria, this principle dictates the need for the consistent application of admission and exclusion conditions to aspiring members of an international organisation (in the case of admission) or existing members (when determining whether a member should be excluded). It also implies that applicants should be treated consistently with existing members – that is, rigorous principles should not be applied to potential members if existing members have not been required to meet such standards. Potential inconsistency may be justifiable if there are reasons for treating applicants differently or if the imposition of rigid standards would unfairly prejudice some applicants. As Franck states, 'a rule's inconsistent

[178] Chayes and Chayes, *New Sovereignty*, p. 11.
[179] Goodman and Jinks, 'How to Influence States' at 685.
[180] José E. Alvarez, 'Book Review Essay: The Quest for Legitimacy: An Examination of *The Power of Legitimacy among Nations* by Thomas Franck' (1991) 24 *N.Y. J. Int'l L. & Pol.* 199 at 223.
[181] Ben Chigara, *Legitimacy Deficit in Custom – A Deconstructionist Critique* (Aldershot: Ashgate, 2001), p. 112.
[182] Chayes and Chayes, *New Sovereignty*, pp. 127, 131.

application does not necessarily undermine its legitimacy as long as the inconsistencies can be explained to the satisfaction of the community by a justifiable (ie principled) distinction'.[183] He illustrates this element of legitimacy through the evolution of the principle of self-determination and its imperfect application since the First World War.[184] He believes that the failure to develop 'rationally defensible distinctions' between situations where self-determination applies and those where it does not has diminished the power of the rule as well as the mechanism for overseeing its implementation.[185] An issue that arises with the use of human rights criteria to determine membership is whether inconsistent applications can be explained on a defensible basis or whether they undermine the validity of the criteria themselves.

The principles of human rights and democracy may raise unique problems when viewed in light of the desirable goals of clarity and consistency. The potential problems will be examined in Part IV in light of the major critiques of these principles in international law, including the categorisation and prioritisation of rights, the indeterminacy and inflexibility of rights discourse, and the difficulties in coming to an agreed definition of democracy in international law. Such criticisms of rights and democracy may not necessarily result in a determination that they should never be used as membership criteria, but may nevertheless highlight problems needing to be addressed by international organisations when making one of their most important decisions.

IV The age of rights: international law, human rights and democracy

There is no shortage of literature on the role of international human rights law in providing one of the major challenges to the state-centric nature of the international legal order since the end of the Second World War.[186] Since the adoption of the Universal Declaration of Human Rights in 1948,[187] numerous international and regional treaties have

[183] Franck, *Power of Legitimacy*, p. 163. [184] *Ibid*., pp. 154–64. [185] *Ibid*., p. 165.

[186] See, for example, Jack Donnelly, *International Human Rights*, 2nd edn (Boulder, CO: Westview Press, 1998), p. 3; Javaid Rehman, *International Human Rights Law* (London: Longman, 2003), p. 1; Imre Szabo, 'Historical Foundations of Human Rights and Subsequent Developments', in Karl Vasak (ed.), *The International Dimensions of Human Rights* (Westport, CT: Greenview Press, 1982), vol. I, p. 26.

[187] 'Universal Declaration of Human Rights', GA Res. 217A, UN GAOR, 3rd session, 183rd plenary meeting, UN Doc. A/RES/217A (III), 1948 (UDHR).

declared the existence of civil and political rights, economic, social and cultural rights, peoples' rights and established mechanisms for evaluating the compliance of states. More recently, writers have critically analysed whether a right to democracy is recognised in international law and whether it should be subject to enforcement procedures. The relationship between human rights and democracy has also frequently been discussed. Traditionally, the two concepts were associated with separate spheres: democracy being concerned with matters of constitutionalism and institutional order, and human rights being equated with the protection of individual rights.[188] Most writers now favour a reconciliation of the role of majoritarian decision-making seemingly favoured by democracy, and the protection of the individual or minority from the power of the majority inherent in the idea of human rights.[189] '[H]uman rights constitute an intrinsic part of democracy'[190] and this includes not only civil and political rights, but also economic, social and cultural rights.[191] The Vienna Declaration, adopted at the World Conference on Human Rights, supports this conclusion by proclaiming that '[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing'.[192] However, there have also been warnings that the relationship between these concepts is not axiomatic and that the linkage between the three ideas should not be used to divert attention away from the protection of rights.[193]

This Part will examine the major issues arising in international legal debates concerning the concepts of human rights and democracy. Although this Part is divided into sections on both human rights and democracy, this should not lead to the conclusion that these concepts will be treated as separate or unrelated. In their membership policies, international organisations frequently refer to both, sometimes

[188] David Beetham, *Democracy and Human Rights* (Cambridge: Polity Press, 1999), p. 89.

[189] James Crawford, 'Democracy and International Law' (1993) 64 *Brit. Y.B. Int'l L.* 113 at 115; Julie Debeljak, 'Rights Protection without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights' (2002) 26 *Melb. U. L.R.* 285 at 295.

[190] Beetham, *Democracy and Human Rights*, p. 93.

[191] 'The most fundamental condition for exercising our civil and political rights is that we should be alive to do so, and this requires both physical security and access to the necessities of life': *ibid.*, p. 97.

[192] 'Vienna Declaration and Programme of Action', UN Doc. A/CONF.157/23, 12 July 1993 (as adopted by the World Conference on Human Rights, 1993) at para. 8.

[193] Jack Donnelly, 'Human Rights, Democracy and Development' (1999) 21 *Hum. Rts Q.* 608 at 631.

differentiating between the two concepts, but often conflating them. The purpose is not to give a definition of a human right or democratic government in international law (this has been attempted on many previous occasions), but rather to highlight the choices available to international organisations when determining their membership policy, as well as the problems that may be encountered given the international legal critiques of these concepts.

A International human rights law

While the period after the Second World War may be described as 'the age of rights' due to its association with the birth of the international human rights movement,[194] the idea of human rights is not exclusively a phenomenon of the second half of the twentieth century. Henkin traces the ideas of rights and constitutionalism back to the seventeenth and eighteenth centuries and the spread of the enlightenment, from the Glorious Revolution in England to the Constitution of the United States and the French Declaration of the Rights of Man.[195] Human rights now have a more prominent place 'than at any other time in modern history',[196] and although there may be resistance to the idea of rights in some quarters, no one (or hardly anyone) 'claims to favour arbitrary killing, or torture, or slavery'.[197] Indeed, human rights have been called the new 'civil religion',[198] an ideal that 'unites left and right, the pulpit and the state, the minister and the rebel, the developing world and the liberals of Hampstead and Manhattan'.[199] It is difficult to argue against this progress: the 'mushrooming'[200] of international instruments, the development of international and regional commissions, committees, courts and tribunals, to say nothing of the role of domestic courts in implementing bills of rights, have led to a growing sense that human rights are fundamental, universal and inalienable, despite evidence that the standards set out in international documents are frequently violated.

[194] Henkin, *Age of Rights*, p. 16.
[195] Louis Henkin, *International Law: Politics and Values* (Dordrecht: Martinus Nijhoff Publishers, 1995), p. 172.
[196] Donnelly, *International Human Rights*, p. 17. [197] Henkin, *Age of Rights*, p. 181.
[198] Shelley Wright, *International Human Rights, Decolonisation and Globalisation – Becoming Human* (London: Routledge, 2001), p. 12.
[199] Costas Douzinas, *The End of Human Rights* (Oxford: Hart Publishing, 2000), p. 1.
[200] Rehman, *International Human Rights Law*, p. 3.

The power of the language of human rights and the strength of the international human rights movement has meant that critiques of the system itself are often muted: 'it is almost as if this branch of international law were both too valuable and too fragile to sustain critique.'[201] Despite this lacuna, debates have continued over questions such as whether international law (and international human rights law) perpetuates the public and private divide,[202] whether rights are too individualistic and whether rights discourse unduly limits, rather than encourages, social change.[203] Two critiques are of particular relevance in the context of membership criteria: the first concerns the 'debate over the nature, categorisation and prioritisation of rights';[204] the second, and perhaps more fundamental, problem involves both the inflexibility of rights discourse and its indeterminacy.

1 Categorising and prioritising rights

(a) Debates concerning the 'generations' of rights and universalism and cultural relativism Traditionally, at the international level the major basis for categorising rights has been the generations of rights. Thus, the first generation of rights includes the civil and political rights located in the International Covenant on Civil and Political Rights and the European Convention on the Protection of Human Rights and Fundamental Freedoms.[205] The second generation encompasses the economic, social and cultural rights originally championed by the socialist world and, finally, peoples' rights, such as the right of self-determination, the right to development and the right to a safe environment, are included within the 'third generation'.[206] The

[201] Hilary Charlesworth, 'What Are Women's International Human Rights?', in Rebecca Cook (ed.), *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994), p. 59.

[202] Hilary Charlesworth, Christine Chinkin and Shelly Wright, 'Feminist Approaches to International Law' (1991) 85 *Am. J. Int'l L.* 613 at 625–9.

[203] For a discussion of these critiques, see Karl E. Klare, 'Legal Theory and Democratic Reconstruction: Reflections on 1989' (1991) 25 *U. Brit. Colum. L.R.* 69 at 95–102.

[204] Rehman, *International Human Rights Law*, p. 5.

[205] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR); European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) (ECHR) revised by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 11 May 1994, ETS No. 155 (entered into force 1 November 1998).

[206] Cees Flinterman, 'Three Generations of Human Rights', in Jan Berting *et al.* (eds.), *Human Rights in a Pluralist World – Individuals and Collectivities* (Westport, CT:

major debates in this area have concerned questions as to whether it is appropriate to divide rights in this way and whether all three generations of rights are susceptible to assessments concerning implementation.[207] More recently, references to the generations of rights have been discarded by international human rights lawyers in preference for declarations emphasising the advantages of a holistic approach and the integrated nature of all human rights.[208] The Vienna Declaration proclaimed that '[a]ll human rights are universal, indivisible and interdependent and interrelated'.[209] Such statements have the value of dispelling the idea that there is a hierarchy of rights. Although in an ideal world '[a]ny human rights package must comprehensively protect and promote all categories of human rights for it to be effective',[210] the fact remains that international enforcement mechanisms tend to concentrate on civil and political rights.

As well as the indivisibility of rights, the Vienna Declaration also upholds the universality of human rights. Universality supports the notion that rights are applicable to all societies and must be the same for all people in all places.[211] The universality of rights has also been used to confirm the idea that all humans have 'moral rights which no society or state should deny'.[212] Proponents of cultural relativism counter assertions of the universality of rights by claiming that human rights are dependent upon the political, economic and cultural circumstances of a particular country or region. For example, in Asian culture the concept of communitarian and family values, as well as the economic situation of

Meckler, 1990), p. 75. Flinterman believes that the term generations is not without relevance as it 'reflects the essential dynamism of the human rights tradition' (p. 76). See also Theo C. van Boven, 'Distinguishing Criteria of Human Rights', in Vasak (ed.), *The International Dimensions of Human Rights*, vol. I, p. 43.

[207] See, for example, Dianne Otto and David Wiseman, 'In Search of "Effective Remedies": Applying the International Covenant on Economic, Social and Cultural Rights to Australia' (2001) 7 *Aust. J. Hum. Rts* 5.

[208] For criticism of the generations approach, see Dianne Otto, 'Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law' (1997) 18 *Aust. Y.B. Int' L.* 1 at 19.

[209] 'Vienna Declaration and Programme of Action' at para. 5.

[210] Debeljak, 'Rights Protection without Judicial Supremacy' at 295.

[211] David Sidorsky, 'Contemporary Reinterpretation of the Concept of Human Rights', in David Sidorsky (ed.), *Essays on Human Rights – Contemporary Issues and Jewish Perspectives* (Philadelphia: Jewish Publication Society of America, 1979), p. 90. Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context – Law, Politics and Morals*, 3rd edn (Oxford University Press, 2008), p. 517. See also Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994), p. 97.

[212] Sidorsky, 'Contemporary Reinterpretation', p. 90.

Asian nations, have all been used to confirm a distinctive Asian perspective on human rights.[213] These claims undermine arguments by those who believe that the rights contained in international instruments are based on human dignity, a concept that is not dependent on cultural or regional perspectives. While there are adherents to radical relativism and radical universalism, supporters of relativist perspectives are themselves not unified – both strong and weak positions can be identified within the tradition. Strong cultural relativists 'hold that culture is the *principal* source of the validity of a moral right', whereas proponents of weak cultural relativism believe 'that culture may be an *important* source of the validity of a moral right'.[214] Relativists' perspectives can also operate at several levels – in the substance of lists of rights, the interpretation of those rights and also the form in which they are implemented.[215]

The development of regional human rights law both proves and disproves the claims of those supporting cultural relativism. Three regions, Europe, the Americas and Africa, have adopted their own human rights conventions with regional enforcement measures.[216] There are many similarities between the conventions and procedures – all three of the major regional conventions contain reference to civil and political rights, and all have established machinery for the implementation or enforcement of the rights elaborated. Indeed, the similarities amongst the three systems are even more marked with the commencement of work at the African Court of Human and Peoples' Rights.[217] There are also differences – European states recognise a diverse range of rights via treaties concluded under the auspices of the Council of Europe.[218] More significantly for those who claim that rights are subject to regional variations is the inclusion of economic, social and cultural

[213] Yash Ghai, 'Human Rights and Governance: The Asia Debate' (1994) 15 *Aust. Y.B. Int'l L.* 1.

[214] Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 *Hum. Rts Q.* 400 at 400–1.

[215] *Ibid.* at 401.

[216] On the development of a mechanism in Asia, see 'ASEAN Intergovernmental Commission on Human Rights (Terms of Reference)', 2009, www.aseansec.org/publications/TOR-of-AICHR.pdf.

[217] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, opened for signature 9 June 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (entered into force 25 January 2004).

[218] The ECHR is the most well known of the European treaties. For a list of other Council of Europe treaties, see Chapter 3, p. 127.

rights, and also peoples' rights in the African Charter. The African Charter stands out from the other regional instruments in its recognition of the right to the 'best attainable state of physical and mental health', the right to peace and the right to dispose freely of a peoples' wealth and natural resources.[219] The second major difference between the African Charter and other regional instruments is its recognition of duties.[220] Wright suggests that the inclusion of duties in the Charter highlights the difficulty in identifying 'human rights as universally binding in the light of culturally specific or regional needs'.[221]

(b) Potential consequences of debates for membership criteria These debates on the generations of rights and the universal versus the relative character of rights have two potential consequences for membership criteria. First, as a necessary corollary of the preference for statements emphasising the indivisibility of rights, it would appear that organisations subscribing to an admissions policy based on 'human rights' should be concerned with all aspects of applicants' rights records. This gives rise to an investigation as to the extent to which organisations have indeed assessed prospective and existing members' respect for economic, social and cultural rights as well as civil and political rights or, on the contrary, have promoted a particular definition of rights in their membership policies. Second, the debate between advocates of cultural relativism and universalism highlights one of the fundamental difficulties in using rights as a method of determining membership of an international organisation. Membership policy may provide a source of unification, a legitimating and integrating force which demonstrates the commonalities between members of an organisation.[222] Nevertheless, it must also be considered whether rights are a unifying factor. In the context of European Community (EC) law, de Búrca has indicated that the

[219] African [Banjul] Charter on Human and Peoples' Rights, opened for signature 27 June 1981, (1982) 21 ILM 58 (entered into force 12 October 1986), Arts. 15, 16, 21, 23.

[220] *Ibid.*, Art. 27.

[221] Wright, *International Human Rights*, p. 2. Similarly, Ghai argues that '[c]laims of universality and indivisibility of rights are hard to sustain in the face of the West's history of the oppression of its own people and of others, with slavery which once enjoyed religious approbation, abuse of child labour, the exploitation of the colonies and the other depredations of imperialism and racism'. Ghai, 'Human Rights and Governance' at 14.

[222] Gráinne de Búrca, 'The Language of Rights and European Integration', in Jo Shaw and Gillian More (eds.), *The New Legal Dynamics of European Union* (Oxford: Clarendon Press, 1995), p. 42.

language of rights may 'paper over deep national divisions and cultural differences'.[223] If differences are apparent in the relatively homogenous group of states that make up the EU, what hope is there for the ability of rights to provide a means of unification or integration in other regional, or indeed universal, organisations? For example, the concentration on civil and political rights in the membership criteria, at the expense of economic and social rights, is an issue that could divide rather than unite an organisation's members. These debates over universalism and cultural relativism have the potential to undermine the ability of both international and regional organisations to use rights as a method of deciding participation.

2 Indeterminacy and inflexibility in rights discourse

The second major critique of rights discourse concerns both the indeterminacy and inflexibility of rights. The first problem (indeterminacy) centres on the charge that many rights concepts are 'elastic' or 'open-ended', and are subject to a broad range of possibly conflicting interpretations.[224] This critique recalls Franck's first criterion of legitimacy in international rules and institutions – the need for clarity. The indeterminacy of rights means that it is very difficult to define a value as 'a right' and also to assess competing claims. Writers in the US frequently use the example of free speech to illustrate the problems with balancing conflicting demands – the right to freedom of expression on the one hand and issues raised by hate speech, libel and obscenity on the other.[225] At the international level, it has been suggested that the 'language used to define obligations in human rights treaties is notoriously vague compared with the language used in other legal domains'.[226]

Given the lack of clarity in rights standards, it would appear to be important to carefully define the conditions to be fulfilled in order to ensure that potential and existing members are aware of the standards expected. It could also prevent, or at least diminish, the likelihood of the

[223] *Ibid*., p. 52.

[224] Klare, 'Legal Theory and Democratic Reconstruction' at 99; Cass Sunstein, 'Rights and their Critics' (1995) 70 *Notre Dame L.R.* 727 at 731. For a detailed discussion of the indeterminacy critique, see Mark Tushnet, 'An Essay on Rights' (1984) 62 *Texas L.R.* 1363 at 1371–82.

[225] See Sunstein, 'Rights and their Critics' at 732.

[226] Goodman and Jinks, 'How to Influence States' at 676, referring to Louise Doswald Beck and Sylvian Vité, 'International Humanitarian Law and Human Rights Law' (1993) 293 *Int'l R. Red Cross* 94 at 106.

secondary problem of double standards (applicants and existing members being subject to differing criteria). But solving the problem of indeterminacy could give rise to another issue – the inflexibility of rights. The rigidity of rights has been criticised by commentators arguing that rights have been framed as absolutes, inhibiting 'the sort of dialogue that is increasingly necessary in a pluralistic society'.[227] These criticisms are often made in the context of the adjudication of constitutional rights in the US, but the associated problem of the rigidity of rights may also have implications when transposed to the international plane, and in particular when rights are used as membership conditions. If the criteria are defined too strictly, then other aims of the organisation may be undermined, such as security or economic goals, or indeed universality of membership. The exclusion of states which have failed to fulfil rigid human rights and democracy requirements will prevent them from coming within the sphere of influence of the organisation and will hinder the organisation's ability to place pressure on the state to improve its policies. Leino summed up this problem in the context of admission to the EU by stating that admission criteria can 'in principle be established so as to be indeterminate or determinate; open-ended or controlling'.[228] If the criteria are characterised as strict or determinate, applicant countries could be barred for failing to meet the conditions. If the standards are classified as open-ended, then there is more potential for flexibility (and also the danger of manipulation).[229] Such comments highlight the need to ensure that the way in which standards are defined for the purposes of admission or exclusion is compatible with the fundamental goals of the organisation.

B The right to democracy in international law

1 Definitions of democracy in international law

Some of the problems identified in the use of human rights as indicia of membership in an international organisation are equally applicable to democracy. Democracy has been described as a 'fuzzy and fussy

[227] Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991), pp. 44–5.

[228] Päivi Leino, 'Rights, Rules and Democracy in the EU Enlargement Process: Between Universalism and Identity' (2002) 7 *Austrian R. Int'l & Eur. L.* 53 at 55.

[229] *Ibid.* at 56.

concept'.[230] Since the early 1990s there has been much literature in international law on the meaning of democracy (whether there is an internationally recognised definition), the extent to which it constitutes a human right and the measures that should be taken to promote such standards.[231] Thus, questions concerning a state's form of government have moved beyond domestic constitutional law into the sphere of international law.[232] The internationalisation of democracy issues is reinforced by the UN General Assembly's proclamation of an International Day of Democracy on 15 September.[233] But just as writers disagree on the values that constitute human rights, not all writers agree on what is encompassed in a definition of democracy.[234] Some place heavy reliance on international efforts to monitor and evaluate the conduct of elections, while others envisage a more participatory form of democratic society.

Declarations and treaties such as the UDHR and the ICCPR protect the basic requirements for democratic government, including the provision of free and fair elections.[235] Regional organisations in Europe, the Americas and Africa have been effusive in their support for democratic

[230] Nsongurua J. Udombana, 'Articulating the Right to Democratic Governance in Africa' (2002–03) 24 *Mich. J. Int'l L.* 1209 at 1229.

[231] See, for example, Gregory Fox, 'The Right to Political Participation in International Law' (1992) 17 *Yale J. Int'l L.* 539; Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *Am. J. Int'l L.* 46. On the question of military enforcement action, see W. Michael Reisman, 'Coercion and Self-Determination: Construing Charter Article 2(4)' (1984) 78 *Am. J. Int'l L.* 642. Cf. Oscar Schachter, 'The Legality of Pro-Democratic Invasion' (1984) 78 *Am. J. Int'l L.* 645.

[232] Gregory Fox and Georg Nolte, 'Intolerant Democracies', in Gregory Fox and Brad Roth (eds.), *Democratic Governance and International Law* (Cambridge University Press, 2000), p. 391.

[233] 'Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies', GA Res. 62/7, 62nd session, 46th plenary session, Agenda Item 12, UN Doc. A/RES/62/7, 8 November 2007 at para. 6.

[234] Beetham gives the following possible meanings for 'democracy':

> rule of the people, rule of the people's representatives, rule of the people's party, majority rule, dictatorship of the proletariat, maximum political participation, elite competition for the popular vote, multi-partyism, political and social pluralism, equal citizenship rights, civil and political liberties, a free society, a civil society, a free market economy, whatever we do in the UK (or USA, or wherever), the 'end of history', all things bright and beautiful.

Beetham, *Democracy and Human Rights*, p. 1.

[235] UDHR, Art. 21; ICCPR, Art. 25.

government. Members of the Council of Europe, the EU, NATO and the OSCE have declared that democracy is a fundamental value.[236] The Inter-American Democratic Charter, adopted by members of the Organization of American States, lists the key characteristics of a democratic system as including respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law and the separation of powers, and independence of the branches of government.[237] Members of the African Union are '[d]etermined to ... consolidate democratic institutions and culture, and to ensure good governance and the rule of law'.[238] The Commonwealth, an organisation that transects all three regions, has placed democracy at the forefront of its purposes.[239]

While the regional bodies are quite detailed in their definitions of democracy, it has been suggested that the provisions of the International Bill of Rights reinforce the view that elections have emerged as a major indicator of a state's democratic credentials in international law.[240] The assumption behind a definition giving precedence to elections and election monitoring conducted by international organisations is that democracy is a process by which people choose those whom they entrust with power, rather than a more participatory process.[241] Writers often differentiate between two models of democracy – procedural and substantive. According to the first model, the 'democratic method' is primarily a set of procedures – in Schumpeter's definition – an 'institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the

[236] Statute of the Council of Europe, preamble; Treaty on European Union, preamble; North Atlantic Treaty, opened for signature 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949), preamble; 'Charter of Paris for a New Europe', adopted by the Heads of State or Government of the Participating States in the Conference on Security and Co-operation in Europe, Paris, France, 19–21 November 1990 at 'Human Rights, Democracy and the Rule of Law'.

[237] 'Inter-American Democratic Charter', adopted by the OAS General Assembly at its special session in Lima, Peru, 11 September 2001, Art. 3.

[238] Constitutive Act of the African Union, opened for signature 11 July 2000, OAU Doc. CAB/LEG/23.15 (entered into force 26 May 2001), preamble.

[239] 'Harare Commonwealth Declaration' at para. 4.

[240] Dianne Otto, 'Challenging the "New World Order": International Law, Global Democracy and the Possibilities for Women' (1993) 3 *Transnat'l L. & Contemp. Probs.* 371 at 382. See also Susan Marks, 'International Law, Democracy, and the End of History', in Fox and Roth (eds.), *Democratic Governance*, p. 532.

[241] Otto, 'Challenging the New World Order' at 371.

people's vote'.[242] Substantive democracy moves beyond this process and involves the creation of a society in which citizens enjoy certain fundamental rights, including the right to vote.[243] Writers who support a broader definition of democracy tend to emphasise two aspects. First, democracy must not only require the selection of a government, but must also include a 'vigorous' public sphere distinct from the institutions of the state.[244] The phrase 'deepening democracy' is often used to signify conversations about democracy focusing on these greater participatory processes for citizens.[245] Sakamoto has used this phrase to describe a process with four different dimensions. The first dimension involves deepening from 'formal political institutions to the level of political and social structures'.[246] The second dimension includes the exercise of equal rights on behalf of the marginalised, including ethnic and religious minorities, the aged and women. The third dimension involves deepening from the level of government to other areas of life, such as the workplace and school, and the final dimension involves deepening from the level of the state to global society.[247] There are two forms of deepening democracy within these phases: democratisation from above, in which initiatives, at least at the outset, are taken by those who hold power, and democratisation from below, involving a popular struggle for democracy.[248]

The second, and related, feature of these broader conceptions of democracy is the belief that democracy is not simply a one-off act achieved at the ballot box, but is 'an on-going process of enhancing the possibilities of self-rule and the prospects for political equality'.[249] Such political equality depends on the effective realisation of social, economic and cultural rights as well as civil and political rights.[250] In line with these

[242] Joseph Schumpeter, *Capitalism, Socialism and Democracy*, 6th edn (London: Routledge, 1987), p. 269.
[243] See discussion in Fox and Nolte, 'Intolerant Democracies', pp. 400–5.
[244] Susan Marks, *The Riddle of All Constitutions – International Law, Democracy and the Critique of Ideology* (Oxford University Press, 2000), p. 59. See also Udombana, 'Articulating the Right' at 1229–30.
[245] John Gaventa, 'Triumph, Deficit or Contestation? Deepening the "Deepening Democracy" Debate', Institute of Development Studies Working Paper No. 264, 2006. See also Archon Fung and Erik Olin Wright, *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (London: Verso, 2003).
[246] Yoshikazu Sakamoto, 'Introduction: The Global Context of Democratization' (1991) 16 *Alternatives* 119 at 121.
[247] *Ibid.* at 121–2. [248] *Ibid.* at 121. See also Otto, 'Challenging the New World Order' at 399.
[249] Marks, *Riddle of All Constitutions*, p. 59. [250] *Ibid.*

calls, international documents have provided broader definitions. For example, the Vienna Conference's definition of democracy is based on the 'freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives'.[251] The UN Secretary-General restated this definition in a 2009 Guidance Note setting out the UN framework for democracy.[252] The European Court of Human Rights has held that the features of a democratic society include respect for 'pluralism, tolerance and broadmindedness'.[253] The Commonwealth Secretary-General has stated that democracy is a process to be measured in terms of years and decades, rather than an event,[254] confirming that elections are but one component of the Commonwealth's democracy programme. While these broader descriptions of democracy are to be preferred, they may give rise to difficulties when applied in admission and exclusion decisions.

2 Democracy as a membership condition

At the outset it is possible to envisage two potential problems with the practice of using democracy as a guide to determine a state's participation in an organisation. The first concerns the definitional issue and the second relates to the method by which the criteria are implemented. In order that democracy may be used as a criterion for membership, the international norm must also have the 'indices of legitimacy'.[255] But, as is the case with definitions of human rights, variations in the term 'democracy' are discernable. Not only is it difficult to articulate the precise components of a right to democracy,[256] but many are critical of the form of democracy recognised by international lawyers. What matters is democratic performance rather than professed democratic form,[257] and this may be difficult to assess. If a broader definition of democratic government is adopted and democracy is seen as a process rather than an event, then difficulties may emerge on how best to monitor democratic

[251] 'Vienna Declaration and Programme of Action' at para. 8.
[252] UN Secretary-General, 'Guidance Note of the Secretary-General on Democracy', 2009, p. 2.
[253] *Handyside Case* (1976) 24 Eur. Court H.R. (ser. A), p. 23.
[254] Commonwealth Secretary-General Rt Hon. Don McKinnon, 'Address to the Commonwealth Parliamentary Conference', Speech delivered at Edinburgh, UK, 26 September 2000.
[255] Franck, *Fairness in International Law*, p. 91.
[256] Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford University Press, 1999), p. 422.
[257] Mitrany, *A Working Peace System*, p. 15.

progress in applicants and existing members of an organisation, particularly given that admission to membership is a single act. The second problem concerns the method of implementing democracy through membership criteria. The requirement that applicant states fulfil detailed standards of democratic government and human rights may be problematic from the perspective of the process of democratisation itself. It may be viewed as an aspect of the practice of exporting democracy, which has been criticised on the basis that it could be 'counter-productive' or divisive.[258] Koskenniemi has pointed to the difficulties in imposing a view of democracy that is essentially a product of a particular political community on others ('them').[259] In a similar vein, the UN General Assembly has proclaimed that there is 'no single model of democracy' and the Secretary-General has distanced the organisation from attempts to 'export' models of democracy across countries or regions.[260]

Finally, up until this point it has been assumed that democracy is an aspect of a nation's internal affairs. But in dismissing the idea of establishing 'ideological unions', Mitrany emphasised that when it comes to selecting participants, '[t]he performance which matters ... is that related to the purpose of the grouping and covering the extent of its mutual relationships'.[261] Consequently, he stated that:

> A democratic federation would not lead to peace if some of its members, while democratically governed, were in the wider sphere to break the rules of democratic conduct. Abyssinia was destroyed by fascist Italy, but it was democratic Italy that laid hands on Tripoli and the Dodecanese; and a presumably democratic Poland it was that seized Vilna. Some other countries, though not democratically governed, according to the correct definition, like Portugal, or Turkey under Kemal, may behave democratically in their international relations. Which of the two would make the better constituent of a democratic international system?[262]

[258] Gerry Simpson, 'Imagined Consent: Democratic Liberalism and International Legal Theory' (1994) 15 *Aust. Y.B. Int'l L.* 103 at 121.

[259] Martti Koskenniemi, '"Intolerant Democracies": A Reaction' (1996) 37 *Harv. Int'l L.J.* 231 at 234. More scathingly, Anghie believes that 'good governance' initiatives transferred from the European to the non-European world suggest 'that peoples in the non-European worlds are lacking in their own ideas as to how their societies should be structured, and what values they should prescribe and adopt': Antony Anghie, 'Civilization and Commerce: The Concept of Governance in Historical Perspective' (2000) 45 *Villanova L.R.* 887 at 910.

[260] 'Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies', GA Res. 62/7, 62nd session, 46th plenary session, Agenda Item 12, UN Doc. A/RES/62/7, 8 November 2007, preamble; UN Secretary-General, 'Guidance Note of the Secretary-General on Democracy', 2009, p. 2.

[261] Mitrany, *A Working Peace System*, p. 15.

[262] *Ibid.*

Leaving aside the examples, there are two points to be gleaned from this passage. First, Mitrany's desire that the membership criteria must be related to the organisation's functions – for example, in an organisation devoted to the peaceful resolution of disputes, the important issue is that participants solve their disputes through pacific means rather than armed conflict. Second, Mitrany's comment indicates that democratic states may not necessarily be 'democratic' in the practice of their international affairs. More recently, Simpson has distinguished between states which are illiberal in their external relations (threatening the international legal order), and states which are illiberal in their internal processes (undemocratic).[263] Should the latter or the former type of 'pathology'[264] be more important when deciding whether a state should participate in an international organisation's processes? For the most part, this book will be concerned with examining internal democratic processes, rather than external undemocratic behaviour. However, particularly in the context of the practice of the League of Nations and the UN, it will be seen that it is not always possible to separate the two aspects.

This chapter has sought to fulfil three aims. The first aim was to identify the major means of defining and classifying international organisations, and the methods for admitting and excluding states from such institutions. The second aim was to set out the elements of the concept of legitimacy to be used as a framework to examine membership practice and policies in this work. The aim of the final part was to provide an overview of the international legal approaches to human rights and democracy in order to contend that there are a number of choices available when employing these standards as membership conditions. International organisations may adopt broad definitions of human rights and democracy or they may focus narrowly on particular aspects of these principles. The choices implemented in their membership criteria may impact on the perceived legitimacy of such decisions. This chapter has highlighted both the importance of membership decisions to international organisations and argued that there may be problems with utilising criteria based on human rights and democracy. The next chapter will discuss the way in which two organisations with the twin aims of universality and the promotion of peace, the League of Nations and the UN, have confronted these issues in their membership policies and practice.

[263] Simpson, *Great Powers and Outlaw States*, p. 281. [264] *Ibid.*

2

The challenge of universality – the League of Nations and the United Nations

I Peace, democracy and universality

Given the experience of the previous five years and the events that were to unfold in the next two decades, perhaps the most melancholy words in international law are located in the preamble to the Covenant of the League of Nations adopted in 1919 at the Paris Peace Conference. Like the UN, the aim behind the creation of the League was to 'promote international co-operation and to achieve international peace and security'.[1] This was to be realised through the establishment of an organisation that would facilitate 'open, just and honourable relations between nations' and enable states to settle their disputes without recourse to war.[2] The main players at both Versailles and at the San Francisco Conference were the Great Powers (differently composed)[3] and their attitude towards the way in which a world organisation should be constructed varied between a belief that all (or at least most) states in the international community should be admitted and the conviction that conditions needed to be prescribed in the founding document. Both approaches were grounded in the belief that either an expansive or a restricted membership would be the best method of ensuring that each organisation could fulfil its primary function – the preservation of peace.

[1] Covenant of the League of Nations, preamble. [2] *Ibid*.

[3] The Great Powers at the Commission on the League of Nations were the USA, the British Empire, France, Italy and Japan: 'Minutes of the Commission on the League of Nations, Preliminary Peace Conference', in David Hunter Miller, *The Drafting of the Covenant* (New York: G. P. Putnam's Sons, 1928), vol. II, p. 229 ('Miller, vol. II'). At the end of the Second World War, the Great Powers were considered to be the US, UK, the USSR, China (and France): Robert C. Hilderbrand, *Dumbarton Oaks: The Origins of the United Nations and the Search for Postwar Security* (Chapel Hill: University of North Carolina Press, 1990), pp. 122–3. At the Dumbarton Oaks Conference, the Soviets agreed to a British proposal that France be given a permanent seat on the Security Council.

President Wilson was the most public adherent of the view that the composition of a post-War peace organisation should be limited and in particular be limited to states with democratic governments. In 1917 he firmly linked the 'principles of peace and justice' with a world of 'free and self-governed peoples',[4] and it was this ideal that permeated his vision of the League at the conclusion of the First World War. According to the Wilsonian world view, if a post-War organisation was to fulfil its function of promoting international peace, it must be composed of democracies. This link between peace and democracy dates from the writings of Kant in the eighteenth century and has now achieved a broad following amongst scholars.[5] Kant's theory, expounded in *Perpetual Peace*, comprises a number of different elements. For the purposes of this discussion, the two more salient are: first, that the civil constitution of every state should be republican; and, second, that the law of nations should be founded on a federation of free states.[6] In Kant's view it is natural that citizens in a republic would be cautious to declare war given that they are directly affected by the consequences.[7] The term 'republican' has been interpreted in a variety of ways by modern writers, including representative and liberal democracy.[8] The democratic peace theory is based on research indicating that while democracies go to war with non-democracies, democracies rarely fight each other. On this reasoning, as the number of democracies in the world increases, there will be fewer potential adversaries, resulting in a

[4] President Woodrow Wilson, 'Address to a Joint Session of Congress Calling for a Declaration of War', 2 April 1917, reproduced in Mario R. Di Nunzio (ed.), *Woodrow Wilson: Essential Writings and Speeches of the Scholar-President* (New York University Press, 2006), pp. 397, 400.

[5] For example, John Norton Moore, 'Solving the War Puzzle' (2003) 97 *Am. J. Int'l L.* 282; Michael L. Smidt, 'The International Criminal Court: An Effective Means of Deterrence?' (2001) 167 *Mil. L.R.* 156.

[6] Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (1795), in Hans Reiss (ed.), *Kant's Political Writings* (Cambridge University Press, 1970), 'First and Second Definitive Articles for Perpetual Peace', pp. 99–105.

[7] Kant, *Perpetual Peace*, 'First Definitive Article'.

[8] See Jörg Fisch, 'When Will Kant's Perpetual Peace Be Definitive?' (2000) 2 *J. Hist. Int'l L.* 125 at 127; Fernando Tesón, 'The Kantian Theory of International Law' (1992) 92 *Colum. L.R.* 53 at 61. Equating the term 'republican' in Kant's writing with modern democracy is not without difficulty given that Kant rejected direct democracy (calling it 'a despotism') and advocated a limited franchise: see Kant, *Perpetual Peace*, 'First Definitive Article', p. 101; Kant, *On the Common Saying: This May Be True in Theory, But It Does Not Apply in Practice* (1793), in Reiss (ed.), *Kant's Political Writings*, pp. 77–8.

widening of the zone of peace.[9] Thus, 'the best long-term solution to war is world democratization'.[10] Opinions on the reasons for this phenomenon vary – some writers argue that cultural or institutional factors prevent democracies from going to war against fellow democracies, while others posit that trade and/or liberalism are at the heart of the democratic peace.[11] But this tantalising prospect is not without its detractors – for example, Layne argues that this zone of peace 'is a peace of illusions' as there is a lack of evidence 'that democracy at the unit level negates the structural effects of anarchy at the level of the international political system'.[12] In his view the democratic peace proposition is without empirical basis and results in dangerous 'wishful thinking'.[13] Mansfield and Snyder present evidence demonstrating 'that states in the initial stages of democratization are especially prone to become involved in wars'.[14] Other authors have also questioned the democratic peace theory, arguing that the lack of war between democracies is a relatively recent phenomenon resulting from a variety of factors, for example, the Cold War.[15] Conversely, Tesón believes that the link between internal freedom on the domestic scene and peaceful behaviour internationally should lead to the practical result that only democratic states should be accepted as new members of the UN.[16]

[9] Bruce Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (Princeton University Press, 1993), p. 4. See also Michael Doyle, 'Kant, Liberal Legacies and Foreign Affairs' (1983) 12 *Phil. Pub. Aff.* 205; Tod Lindberg, 'The Treaty of the Democratic Peace: What the World Needs Now' (2007) 12(21) *The Weekly Standard*.

[10] Michael L. Smidt, 'The International Criminal Court: An Effective Means of Deterrence?' (2001) 167 *Mil. L.R.* 156 at 166.

[11] For a summary of these different views, see Erik Gartzke, 'Kant We All Just Get Along? Opportunity, Willingness, and the Origins of the Democratic Peace' (1998) 42 *Am. J. Pol. Sci.* 1 at 2–3. On the link between liberalism and peace, see John M. Owen, 'International Law and the "Liberal Peace"', in Gregory Fox and Brad Roth (eds.), *Democratic Governance and International Law* (Cambridge University Press, 2000), p. 343.

[12] Christopher Layne, 'Kant or Cant – The Myth of the Democratic Peace' (1994) 19(2) *Int'l Sec.* 5 at 48.

[13] *Ibid.*, p. 49. See also David E. Spiro, 'The Insignificance of the Liberal Peace' (1994) 19(2) *Int'l Sec.* 50 for an analysis of the statistics used in democratic peace literature. John Mearsheimer argues that as 'democracies have been few in number over the past two centuries . . . there have not been many cases where two democracies were in a position to fight each other': 'Back to the Future: Instability in Europe after the Cold War (1990) 15(1) *Int'l Sec.* 5 at 50.

[14] Edward D. Mansfield and Jack Snyder, 'Democratic Transitions, Institutional Strength, and War' (2002) 56 *Int. Org.* 297 at 330.

[15] Henry S. Farber and Joanne Gowa, 'Polities and Peace' (1995) 20(2) *Int'l Sec.* 123 at 145. See also Mearsheimer, 'Back to the Future'.

[16] Tesón, 'Kantian Theory' at 100.

This chapter examines the extent to which Kant's vision of an alliance of republican states permeated the discussions at the two conferences establishing the post-War organisations of the League of Nations and the UN, and their subsequent practice in admitting new states (Parts II and III) and excluding existing members (Part IV). It will be seen that the founding members had different conceptions of the way in which a post-War organisation should be formed, as well as the impact that the characteristics and policies of a particular state should have on the organisation's ability to fulfil its objectives. Supporters of limited membership believed that imposing admission requirements would enable the new organisations to fulfil their mandates of promoting international cooperation and peace. On the other side, many considered that universality rather than democracy should guide decisions on membership as it was only by ensuring a wide-ranging membership that peace could be assured. Therefore, at the outset it would appear that the concept of human rights and democratic conditionality is at odds with aspirations towards universality. But assumptions as to the incompatibility between human rights criteria and the principle of universality are complicated by the fact that the term 'universality' has been subject to different meanings and thus may not operate as a consistent guide in debates relating to admission and exclusion. Other issues also arise when determining the make-up of the international peace organisations, including the impact of recognition policies on the membership conditions and the role of democracy in the membership process itself.

II Admission to the League of Nations

A Wartime proposals for a League of Nations: Great Powers and small states

Well before the First World War was brought to a close by the armistice of 11 November 1918, various societies within both the belligerent and neutral nations were examining ways to prevent such hostilities occurring again. The inspiration underlying the development of these ideas was 'never again' – the War should not have been allowed to happen and such a catastrophe should never be repeated.[17] These schemes were variously described as practical (ensuring that states' sovereignty was

[17] Alfred Zimmern, *The League of Nations and the Rule of Law 1918–1935* (London: Macmillan, 1945), p. 162.

not diminished), utopian (a 'terrifying adjective'[18] sometimes associated with a world government) or falling somewhere between these two poles.[19] Although the proposed schemes did not prohibit recourse to war definitively, the central theme was to establish some form of entity to which states could turn in order to settle their disputes peacefully. On one side of the Atlantic, unofficial proposals included those of the British League of Nations Society, Lord Bryce's group and the Fabian Society, and on the other shore the main proponent was William Taft and his League to Enforce Peace. In 1917 Leonard Woolf identified two concerns regarding membership in these initial proposals: first, the possibility that the more numerous small states would be able to outvote the eight Great Powers; and, secondly, the participation of the Central Powers.[20] As will be seen, in the pre-conference proposals the problem of large versus small states dominated the agenda. By the time the Commission on the League of Nations met in Paris, it was clear that the second issue was of most concern to many Allied nations.

Of the non-governmental proposals adopted during the War, only the British League of Nations Society believed that a broad representation of states was needed in any future peace effort. In its five short articles advocating the adoption of a treaty in which states were willing to bind themselves to the peaceful resolution of disputes, the Society stated that 'any civilised State' that desired to join the League should be admitted to membership.[21] When it came to universal membership, Lord Bryce's group was more circumspect, suggesting that some limitations were necessary. In this group's view the Great Powers would be admitted as of right as well as 'some of the lesser European States' and the 'chief South American States'.[22] If this proved to be successful, then other states would be permitted to join.[23] While recognising that any limitation would be arbitrary, Lord Bryce's group was concerned that the admission of a large number of states would hamper the arrangement

[18] Leonard Woolf, 'An International Legislature', in Leonard S. Woolf (ed.), *The Framework of a Lasting Peace* (London: George Allen & Unwin, 1917), p. 57.

[19] See 'Proposals for the Prevention of Future Wars by Viscount Bryce and Others', reproduced in Woolf (ed.), *Framework of a Lasting Peace*, p. 68.

[20] Woolf, *Framework of a Lasting Peace*, pp. 55–7. The Central Powers were Germany, Austria-Hungary, the Ottoman Empire and Bulgaria.

[21] British League of Nations Society, *Project of a League of Nations* (1917), reproduced in Florence Wilson, *The Origins of the League Covenant – Documentary History of its Drafting* (London: Leonard and Virginia Woolf, 1928), pp. 144–5.

[22] 'Proposals for the Prevention of Future Wars by Viscount Bryce and Others', p. 70.

[23] *Ibid.*

from the beginning.[24] Despite the presence of the adjective 'civilised' in the draft of the British League of Nations Society, the internal policies of potential member states were not of serious concern to the advocates of either of these two plans.

The deliberations of a private study group initated by Theodore Marburg in the US reflected a desire to uphold an exclusionary approach to solving the problem of small states potentially outvoting the larger powers. Thus, it was suggested that the League should include the eight Great Powers and the 'secondary powers' – if only to ensure that it was not perceived as only representing large states.[25] It was proposed that smaller states with 'settled conditions' should be included in the organisation, but 'backward nations including Balkan States and Turkey' should not.[26] The idea of excluding certain states did not have as its rationale the promotion of democratic government, but rather the perceived need to prevent Latin American states from using their numbers as a voting block on important decisions. But by 1918 the US group somewhat ambiguously supported universality. The official platform of the League to Enforce Peace stated that the founding members of the League of Free Nations should be the 'nations associated as belligerents in winning the war',[27] but also acknowledged that the best method of preventing a war from reoccurring was to make the League 'as universal as possible'.[28]

The Fabian Society's plan, based on the work of Woolf, was the most developed of all these proposals. The Fabians sought to overcome the problem of the smaller states potentially outvoting the Great Powers by a combination of exclusion and a voting formula. In the Fabian's draft, very small states (with a population less than 100,000)[29] were not eligible

[24] *Ibid.*, p. 69.

[25] Theodore Marburg, *Development of the League of Nations Idea* (New York: Macmillan, 1932), vol. II, p. 725.

[26] *Ibid.*, pp. 725–6. See also 'Letter from Marburg to Lord Bryce', 21 April 1915, reproduced in *ibid.*, vol. I, p. 35, where Marburg proposed that the League should include 'the eight great Powers, all the secondary Powers of Europe (excluding the Balkans and Turkey), and . . . the "ABC" countries of South America'.

[27] '"Victory Program" adopted at a meeting of the Executive Committee (New York, 23 November 1918) of the League to Enforce Peace', reproduced in Horace E. Flack and Theodore Marburg (eds.), *Taft Papers on League of Nations* (New York: Macmillan, 1920), p. 2.

[28] *Ibid.*

[29] See discussion of Article 2 of the Fabian Committee's draft in Leonard S. Woolf, *International Government* (London: George Allen & Unwin, 1916), p. 235.

to join the new organisation. Additionally, complicated provisions for relative voting power in the International Council were set out.[30] Woolf was perhaps the only person who dealt with the question of whether democracy should be a condition of membership. He believed in the idea of democratic control of foreign policy, but foresaw difficulties in making democracy a criterion of admission, not least that it would lead to the exclusion of Russia.[31] Leaving aside the requirement that a potential member be 'independent' (a requirement that would lead to the exclusion of the Dominions such as Australia),[32] the Fabians rejected the idea that a state's internal arrangements should determine participation.

B Governmental proposals: democracy and rights introduced

The inclusion of a future association of nations in President Wilson's Fourteen Point Plan ensured that the League would be part of the peace settlement at the War's conclusion.[33] By the time that the Commission on the League of Nations met at the Paris Peace Conference in 1919, there were a number of official proposals prepared by bodies in Britain, the US and South Africa on the table. The British Committee on the League of Nations, the Phillimore Committee, made a strong link between peace and democracy in stating that the 'combination ... of strong popular feeling and a general adoption of a form of government in which the will of the people makes itself felt would seem to justify the hope that the history of the future may differ from the history of the past'.[34] But this 'hope' did not find its way into the Draft Convention presented in March 1918 to the British government. President Wilson was the most ardent proponent of the idea that a future collective

[30] See Article 7 of the Fabian Committee's draft: *ibid*., pp. 238–40; and Woolf's discussion at *ibid*., pp. 77–9.

[31] *Ibid*., p. 70.

[32] In Woolf's view Australia had yet to enjoy the 'mysterious and intangible privilege' of independence, despite his view that its independence was more secure than the frontiers of Belgium or France: *ibid*., p. 230.

[33] Point Fourteen provided that: 'A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike': Woodrow Wilson, 'The Fourteen Points', 18 January 1918, reproduced in Di Nunzio (ed.), *Woodrow Wilson*, p. 406.

[34] 'Final Report of the Phillimore Committee', reproduced in Florence Wilson, *Origins of the League Covenant*, p. 137.

security system needed to be founded on the basis of a League of democratic states.[35] Wilson's first draft suggested that states should be admitted to the League if their membership was 'likely to promote the peace, order, and security of the World'.[36] This was later revised to provide that only a state 'whose government is based upon the principle of popular self-government' could apply to the body of delegates to become a party to the treaty.[37] Furthermore, in Wilson's vision, states seeking League membership had to accord racial and national minorities the same treatment as the majority of their people, and ensure that their laws did not prohibit the free exercise of religion.[38] Finally, a new state's armed forces and armaments had to conform to League standards.[39] Thus, a distinction was drawn between original members of the League and the conditions required of those applying for membership after the Covenant had been adopted. The inconsistent application of membership criteria was written into the Covenant from the outset.

There were a number of other drafts prepared prior to the Commission on the League of Nations, but by the commencement of the intergovernmental negotiations, the schemes put forward by the British and American governments had been merged into the Hurst-Miller draft, which was used as a basis for discussions.[40] Although the Hurst-Miller draft included obligations to agree to labour standards and ensure religious freedom, these obligations were not explicitly included as membership conditions.[41] Despite Wilson's desire to include a self-governing condition within the membership provision, it was omitted in this draft. Thus, the membership article to be discussed by the Commission on the League of Nations provided that:

[35] Anne-Marie Burley, 'Toward an Age of Liberal Nations' (1992) 33 *Harv. Int'l L.J.* 393 at 398.

[36] 'Wilson's First Draft', Art. XII, in Miller, vol. II, p. 15.

[37] 'Wilson's Second Draft or First Paris Draft, January 10, 1919', Art. XII, in Miller, vol. II, p. 85; 'Wilson's Third Draft or Second Paris Draft, January 20, 1919', Art. XII, in Miller, vol. II, p. 103 ('Wilson's Third Draft'); 'Wilson's Fourth Draft or Third Paris Draft, February 2, 1919', Art. XII, in Miller, vol. II, p. 151.

[38] 'Wilson's Third Draft', Arts. VI, VII, in Miller, vol. II, pp. 98, 105.

[39] *Ibid*., Art. IV, pp. 98, 104.

[40] For a description of this stage of the negotiations, see Lord Robert Cecil, *A Great Experiment* (London: Jonathan Cape, 1941), pp. 68–70; David Hunter Miller, *The Drafting of the Covenant* (New York: G. P. Putman's Sons, 1928), vol. I, Chapters 6, 7 ('Miller, vol. I'). Miller and Hurst were the legal advisers to the US and British delegations respectively at the Peace Conference.

[41] See 'Draft Covenant, arts. 18 and 19, Annex I to the Minutes of the First Meeting, Minutes of the Commission on the League of Nations', in Miller, vol. II, p. 237.

> Admission to the League of States who are not signatories of this Covenant requires the assent of not less than two-thirds of the Body of Delegates.
>
> No State shall be admitted to the League except on condition that its military and naval forces and armaments shall conform to standards prescribed by the League in respect of it from time to time.

C Discussions at the Commission: peace through justice and peace through democracy

The Commission on the League of Nations was created by the Preliminary Peace Conference in January 1919 and comprised fifteen members: two from each of the Great Powers (the US, the British Empire, France, Italy and Japan) and a member each from Belgium, Brazil, China, Portugal and Serbia.[42] By the time the Commission first met, the united view was that some limitations needed to be placed on membership. For the most part the restrictions envisaged in both the governmental and non-governmental proposals were concerned with devising a way of preventing the smaller states from overwhelming the larger states in voting decisions. Only Wilson's draft firmly incorporated the promotion of democracy and the protection of a limited selection of human rights principles as membership conditions for future applicants. Wilson believed that the US entered the War in order to make the world 'safe for democracy'.[43] As an extension of this belief, in his proposals for future League of Nations' participants he took the view that the best method of achieving peace was through ensuring that the world was composed of democracies ('popular self-government').[44]

1 The character requirement

Discussions of Article 6 of the Hurst-Miller draft (the admission provision) commenced at the third meeting of the Commission, with Wilson's vision of a League of democratic states dominating the negotiations from the earliest. Wilson proposed to reinsert the adjective 'self-governing' into the text of Article 6 as a means of describing the states (and colonies)

[42] 'Minutes of the Commission on the League of Nations, Preliminary Peace Conference', in Miller, vol. II, p. 229.

[43] President Woodrow Wilson, 'Address to a Joint Session of Congress Calling for a Declaration of War', reproduced in Di Nunzio (ed.), *Woodrow Wilson*, p. 402.

[44] See above n 37 and accompanying text; Inis L. Claude, *Swords into Plowshares – The Problems and Progress of International Organization*, 4th edn (New York: Random House, 1971), p. 52.

to be admitted as members.[45] Both Wilson and Cecil (British Empire) equated self-government with 'democracy' or 'democratic institutions', with Wilson explicitly pointing out to delegates that this would be the only place where democracy would be recognised in the Covenant.[46] In elaborating upon his understanding of the principle, Wilson referred to 'substance rather than form' and the idea that 'governments derived their just powers from the consent of the governed'.[47] Wilson and Cecil acknowledged that it was not easy to define self-government (Wilson preferring the approach of 'I know it when I see it'),[48] but for Cecil the difficult questions came in relation to India. Cecil wanted to ensure that India and its contributions to the War were recognised by admission to the League – he believed that exclusion would be taken as a 'bitter insult'.[49] However, if self-government were to be equated with independence, then India's omission would appear to have been the natural consequence.

Other delegates used a variety of expressions to describe the qualities desired of potential members. Bourgeois (France) emphasised that the test should be concerned with the question whether the government is responsible to the people – a similar definition being found in France's 'Statement of the Principles to be taken as Basis of the League of Nations'.[50] When it was suggested that Japan did not have a responsible government, the Japanese delegate, Makino, replied that '[t]he Minister is responsible to the Emperor and to the people'[51] – whether the Minister represented the people was not raised. The idea of 'parliamentary' government was discarded by Orlando (Italy), as in his view not all nations which should be included within the League would fulfil this requirement.[52] The Italian delegation understood the character requirement, as found in their draft scheme, to mean that states should be guaranteed 'independent and autonomous development'.[53] At the Commission the idea of 'pays libres' was rejected as it

[45] 'Third Meeting (5 February 1919), Minutes of the Commission on the League of Nations', in Miller, vol. II, pp. 260–1. Miller notes that one of the problems encountered in the Commission was the difficulty in coming to a common understanding of the meaning of the term given that the debate was conducted in two languages: Miller, vol. I, p. 158.

[46] Miller, vol. I, pp. 164–5. [47] *Ibid*., p. 165. [48] *Ibid*., pp. 164–5. [49] *Ibid*., p. 164.

[50] See *ibid*., p. 166. The 'Statement of the Principles to Be Taken as Basis of the League of Nations' is located at Annex 2 to the 'Minutes of the First Meeting', in Miller, vol. II, p. 239.

[51] Miller, vol. I, p. 166. [52] *Ibid*.

[53] 'Draft Scheme for the Constitution of the Society of Nations (Submitted by the Italian Delegation)', Annex 3 to the 'Minutes of the First Meeting', preamble, in Miller, vol. II, p. 246.

did not take into account a country's external relations,[54] indicating that self-government may have both internal and external aspects. Therefore, although there was debate about the meaning of 'self-government', all delegates supported the need for some minimal democratic requirement when determining the admission of future members. Only Norway, in a separate meeting with the neutral powers, proposed that '[a]dmission to the League should be made as easy as possible', with membership being based solely on a state's ability to fulfil League obligations.[55] The fact that Wilson's requirement would be applied selectively (it would only be relevant for future applicants)[56] somewhat diminished, but did not totally eliminate, his vision of achieving peace through a League of democratic states.

If the US sought peace through democracy, the French and Italians were concerned with linking 'peace through justice'.[57] For the French, justice could be achieved through the establishment of a judicatore, whereas the Italians were more concerned with the concept of international equity.[58] During discussions regarding the membership criteria, another more punitive concept of justice was to emerge. The French delegates believed that future members 'should be without reproach'.[59] Self-government may have been one way of achieving the good character requirement, but another method was to include reference to 'those who have reparations to make'.[60] As far as the French representatives were concerned, Germany could not be admitted on the same terms as other states.[61] In order to reinforce culpability for the War, Bourgeois proposed an amendment to the Preamble expressing the 'common feeling of reprobation towards those who began the war'.[62] This was in sharp contrast to Cecil, who believed that the failure to include Germany in both negotiations for the Covenant as well as original membership was a 'grave error'.[63] In the end, France's amendment was withdrawn on the grounds that it was inappropriate to recall the conditions of the War in the Covenant and that it might cause problems for the neutrals.[64] But

[54] Miller, vol. I, pp. 166–7.
[55] 'Amendments to the Draft of the Covenant Proposed by the Neutral Powers', in Miller, vol. II, p. 635.
[56] For example, the problem of India's colonial status was passed over as it would be an original member; see discussion in Miller, vol. I, pp. 166–7.
[57] Zimmern, *League of Nations and the Rule of Law*, p. 259. [58] *Ibid.*
[59] Miller, vol. I, p. 158. [60] *Ibid.*, p. 167. [61] *Ibid.*
[62] *Ibid.*, p. 229. See also comments by Larnaude (France) in 'Minutes of the Ninth Meeting (13 February 1919), Commission on the League of Nations', in Miller, vol. II, p. 298.
[63] Cecil, *A Great Experiment*, p. 85. [64] Miller, vol. I, p. 230.

the dividing line was clearly drawn between those states that were occupied during the War and those that were not.[65] Cecil saw the inclusion of former enemy states as necessary to ensure that the League could fulfil its primary function as a peace organisation, whereas the French firmly linked the League's legitimacy with the war record of its members.

2 Conclusion of the Commission's discussions: Article 1 of the Covenant

After the redrafting of the Covenant, the membership conditions of the League were finally included in Article 1 – a provision differentiating between original members and future applicants, and imposing a number of conditions on those future applicants. A 'fully self-governing State, Dominion or Colony' could join the League on a two-thirds vote of the Assembly:

> provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments.[66]

There was no explicit definition of the meaning of the term 'self-government' in Article 1, but debates revealed that, at the very least, the principle was concerned with the organisation of a state's internal affairs rather than the conduct of its foreign relations. This reading of the membership provision accords with the views of Judge Anzilotti in his individual opinion in the *Free City of Danzig Case* where he stated that the right of self-government in Article 1 could 'only be a right relating to internal affairs, for otherwise the interpretation of this Article would lead to absurd or contradictory results'.[67] But an

[65] In his autobiography Cecil wrote that:

> To the French and the Belgians, who had suffered a German occupation of their country for four years with the inevitable humiliation and injustice which that involves, the idea that Germans should be forthwith asked to sit round a table and discuss world affairs on terms of mutual esteem was utterly repugnant. It was natural enough. Probably if the southern counties of England had passed under German rule in the same way as the northern parts of France, we should have reacted very much as did the French. (*A Great Experiment*, p. 85.)

[66] Covenant of the League of Nations, Art. 1.

[67] *Free City of Danzig and International Labour Organization (Advisory Opinion)* [1930] PCIJ (ser. B) No. 18 at 22.

interpretation focusing on internal rather than external behaviour is contrary to Mitrany's view that an organisation with the goal of securing peace should be more concerned with the international behaviour of its prospective members than their internal governance.[68] Mitrany's conception of an international organisation is supported by the decision of the Allied powers to exclude from the outset states that were regarded as having threatened the international order in the preceding years. While the principle of democracy finds some basis in the Covenant, more explicit human rights guarantees did not. Amendments proposed by Wilson (recognising religious equality) and Makino (advocating racial equality) were defeated in the Commission. The second amendment, suggested in an 'earnest, dignified, courteous and moderate'[69] statement by Makino, was quietly dropped at the tenth meeting of the Commission as a result of its 'highly controversial character' in the British Empire.[70] The religious equality amendment suffered the same fate.[71]

D Subsequent admission practice: the move to a universal peace organisation

Schwarzenberger summed up the position at the Paris Peace Conference by stating that participants 'intended to create a League of Nations based on the principle of universality, which was only restricted by moderate qualifications of constitutional homogeneity'.[72] Some form of democratic government was firmly linked to the success of this new peace organisation, but it was not defined in any substantive way. The Commission had given some guidance, but certainly not guidelines, on the test to be satisfied by future applicants. Additionally, a form of discrimination was built into the new system in two respects: first, original members were not subject to the membership criteria and thus India (and Japan) could be admitted from the outset; and, second, Germany, Austria, Hungary and Bulgaria were initially excluded despite their ability to fulfil the self-government standard.[73]

[68] See discussion at Chapter 1, pp. 57–9.
[69] Zimmern, *League of Nations and the Rule of Law*, p. 265.
[70] 'Minutes of the Tenth Meeting (13 February 1919), Commission on the League of Nations', in Miller, vol. II, p. 325 (Cecil).
[71] Miller, vol. I, pp. 267–9.
[72] Georg Schwarzenberger, *The League of Nations and World Order* (Westport, CT: Hyperion Press, 1936), p. 44.
[73] *Ibid.*, p. 43.

The ambiguity in the application of the membership criteria to the original members demonstrates that the importance of accommodating various viewpoints at the Peace Conference overcame a strict reading of the membership criteria. This section will examine the way in which the conditions were applied in practice to the admission of new members. Of course, the application of the membership criteria may not be as clear-cut as striving for the admission of all states on the one hand or including only countries with certain conditions (including human rights and democracy) on the other. Over a period of time, the membership criteria may display continuous movement along the spectrum between the two extremes of creating a truly heterogeneous society of states and a community requiring absolute adherence to a set of established conditions. This movement reflects two goals of the League: first, the goal to expand to include all states; and, second, the goal of ensuring that members fulfil certain conditions. Adherents of both approaches believed that their method was the appropriate way ensuring that the organisation could fulfil its primary function of ensuring peace.

1 The meaning of 'self-governing'

At the First Assembly sixteen states applied for League membership, ranging in 'size and status from Austria, recognized by all countries, to Azerbaidjan, recognized by none'.[74] These applications were referred to the Fifth Committee, which drew up the following questionnaire:

> (1) Was the application in order?
> (2) Was the government applying for admission recognised 'de jure' or 'de facto' and by which states?
> (3) Was the applicant a nation with a stable government and settled frontiers? What was its size and population?
> (4) Was it fully self-governing?
> (5) What had been its conduct with regard to: (i) its international obligations; and (ii) the prescriptions of the League as to its armaments?[75]

Two issues were of immediate concern to members of the Fifth Committee: first, did admission imply *de jure* recognition by every

[74] Lilian M. Friedlander, 'The Admission of States to the League of Nations' (1928) 9 *Brit. Y.B. Int'l L.* 84 at 89.

[75] 'First Assembly, Meetings of the Committees, Minutes of the Fifth Committee', in *League of Nations Records*, p. 159.

League of Nations' member;[76] and, second, should the legal principles be established from the beginning or should the applications be examined first, leaving the formation of legal principles to be determined after an examination of the cases?[77] The second issue was resolved in favour of commencing with the examination of the applications – this meant that the interpretation of the phrase 'self-government' in Article 1 was dealt with on a case-by-case basis, rather than on the basis of pre-established principles. The resolution of the first issue proved to be more difficult. Cecil (at this stage representing South Africa) took the view that the rules laid down in Article 1 did not affect the 'liberty of action of individual states', while Politis (Greece) thought that admission 'might imply *de jure* recognition by all Members of the League'.[78] The issue was sent to the Committee of International Jurists, who delivered differing views as to whether admission to the League involved recognition by all members.[79] The issue was never fully resolved by the Fifth Committee or by the delegates at the First Assembly.

When discussing the admission of particular states, the Fifth Committee of the First Assembly used a number of indicia to describe the self-governing requirement in Article 1. In answering the five questions listed above, the representatives referred to 'stable' government and well-defined frontiers (Austria and Bulgaria),[80] the inhabitants' 'desire to live under a democratic régime' (Austria),[81] a freely governed state (Luxembourg),[82] a government that was 'regularly elected . . . in conformity with the constitution' (Costa Rica)[83] and independence (Finland).[84] Countries unable to fulfil their obligations due to their size (Liechtenstein)[85] and not possessing a stable government or defined frontiers (Azerbaidjan and the Ukraine)[86] were denied membership. The self-government requirement was interpreted to require a combination of independence and stability, with substantive ideals of democracy being cited sparingly. In the First Assembly there was little attempt to undertake an indepth analysis of the meaning of the phrase when examining the operation of a state's political system. Those commentators who believed that any attempt to use democracy as

[76] *Ibid.*, p. 157 (van Karnebeek, The Netherlands).
[77] *Ibid.*, p. 161 (Cecil, South Africa; van Karnebeek, The Netherlands). [78] *Ibid.*, p. 157.
[79] *Ibid.*, p. 160. See also Manley O. Hudson, 'Membership in the League of Nations' (1924) 18 *Am. J. Int'l L.* 436 at 454.
[80] 'First Assembly, Meetings of the Committees, Minutes of the Fifth Committee', in *League of Nations Records*, pp. 163, 169.
[81] *Ibid.*, p. 167. [82] *Ibid.*, p. 184. [83] *Ibid.*, p. 220. [84] *Ibid.*, p. 185. [85] *Ibid.*, p. 172.
[86] *Ibid.*, pp. 173–4.

the yardstick of entry 'would have meant an intolerable interference with the internal affairs of the applicants' applauded the First Assembly's approach on this issue.[87]

Despite this modest interpretation of the self-government requirement, there were moves at the First Assembly to remove all substantive membership requirements from the Covenant. Argentina revived the prospect of a truly universal League by proposing that all sovereign states should be admitted 'in such a manner that if they do not become Members of the League this can only be the result of a voluntary decision on their part'.[88] The amendment was postponed and finally shelved by the Second Assembly, but the discussions as to whether it should be adopted revealed two very different ideas on the way in which a peace organisation should be constituted. Argentina's proposal was based on the belief that the best method of removing the threat of war was to ensure that all states were a part of the League, thereby preventing the non-member states from banding together against the organisation and endangering peace.[89] Although the amendment was rejected, a number of representatives were keen to see the gradual evolution of the League to a universal system. For example, Motta (Switzerland) emphasised that '[w]e may exist two years, three years, perhaps longer, without attaining this universal character, but if the League is condemned to remain too long a partial League, it will carry within itself the seed of a slow but fatal dissolution'.[90] On the other side, Murray believed that a preliminary examination was necessary before a state could become a member.[91] There was also concern that the phrasing of Argentina's proposal would result in the automatic admission of a state, despite the fact that three significant states were still outside the system: the US, Germany and the Soviet Union.[92] The US did not want to be a member, Germany was not ready to be a member in the eyes of many representatives, and there were doubts as to whether the members 'would regard the addition of

[87] C. K. Webster and Sydney Herbert, *The League of Nations in Theory and Practice* (London: George Allen & Unwin, 1933), p. 60.

[88] 'First Assembly, Meetings of the Committees, Minutes of the Fifth Committee', in *League of Nations Records*, p. 224.

[89] 'First Assembly, Plenary Meetings', in *League of Nations Records*, p. 279. See also Aleksander W. Rudzinski, 'Admission of New Members – The United Nations and the League of Nations' (1952) 480 *Int'l Concil.* 143 at 150.

[90] 'First Assembly, Plenary Meetings', in *League of Nations Records*, p. 573.

[91] 'Second Assembly, Meetings of the Committees, First Committee', in *League of Nations Records*, p. 7 (Murray, South Africa).

[92] *Ibid.*, p. 6 (Balfour, British Empire).

Bolshevist Russia as an improvement to the League of Nations'.[93] In rejecting the amendment, the Report of the First Committee of the Second Assembly described the proposal as 'scarcely compatible with the actual conditions of the world' and bluntly stated that 'the condition of some States renders them unfit for admission, even should they request it'.[94]

Although Argentina withdrew from the Assembly after the rejection of its amendment and did not return until 1933, its desire to establish a truly universal peace organisation was not completely unsuccessful. Over the years a number of states were admitted despite questions being raised as to their ability to fulfil the conditions of Article 1. Even at the First Assembly, the Article 1 requirements were less than strictly applied. In supporting the admission of Albania, Cecil acknowledged that its administrative machinery was 'in a rudimentary stage' and it was difficult to determine whether it was stable.[95] But he also described Albania as a 'perfectly constituted state', one which 'desired to live'.[96] Thus, notional independence, or a desire for self-determination, was considered to be the decisive criterion. The Sub-Committee charged with examining Abyssinia's status in 1923 similarly came to the conclusion that Abyssinia was self-governing, although the Sub-Committee was 'unable to determine exactly the extent of the effective control of the central authority over the provinces remote from the capital'.[97] Complete independence was also a flexible notion, as is evidenced by the recommendation that the Dominican Republic be admitted at the Fifth Assembly only two months after US troops had withdrawn.[98] In 1924 the President of the Assembly welcomed the Dominican Republic and reaffirmed the trend towards universality by recognising that 'the admission of a new State marks a further step towards the ideal of a world-wide League to which we all aspire and which is the final goal of our efforts'.[99] As is noted by Schwarzenberger, the League's practice in relation to the self-government requirement in

[93] *Ibid.* [94] *Ibid.*, p. 136.
[95] 'First Assembly, Meetings of the Committees, Fifth Committee', in *League of Nations Records*, p. 189.
[96] *Ibid.*, p. 191.
[97] 'Records of the Fourth Assembly, Meetings of the Committees, Minutes of the Sixth Committee, Report of the Second Sub-Committee of the Sixth Committee' (1923) *L.N. Off. J.*, Supp. 19, 34.
[98] 'Records of the Fifth Assembly, Meetings of the Committees, Report of the Sub-Committee to the Sixth Committee' (1924) *L.N. Off. J.*, Supp. 29, 24.
[99] 'Fifth Assembly, Plenary Meetings, Twenty-Third Plenary Meeting', in *League of Nations Records*, p. 2.

Article 1 indicated that sovereignty was *prima facie* evidence that a state was self-governing. A demonstration of sovereignty avoided a further inquiry into whether a state possessed representative institutions.[100]

2 The relevance of human rights standards

Although human rights protections were not included in the final draft of the membership provisions of the Covenant, the prospect of a state's admission being dependent on its human rights policies re-emerged in the First Assembly. In considering Bulgaria's application for membership, Bulgaria's attitude towards the prosecution of war criminals, the detention of minors following the war and the treatment of prisoners of war were raised as objections to immediate admission.[101] These objections were overcome and despite concern regarding Bulgaria's observance of its international engagements, it was admitted in 1920. The violation of humanitarian principles during the War was also raised in the Plenary Meeting of the First Assembly, when it was suggested by the Persian representative that states in breach of such principles should not be excluded from the League, but should be admitted in order that they might be assisted in redeeming themselves.[102] As these issues were raised in an ad hoc way, they appeared to have little impact on the decision to admit a state.

More significantly, Cecil proposed that admission to the League should be conditional upon states providing adequate guarantees regarding the protection of their minority populations.[103] Representatives debated whether the position of minorities was a specifically European problem and whether this would constitute an additional condition for membership beyond those already laid down in the Covenant.[104] Although in sympathy with a policy based on respect for minorities, the Swiss representative was concerned that the recommendation was at

[100] Schwarzenberger, *League of Nations and World Order*, pp. 91–2.

[101] 'First Assembly, Meetings of the Committees, Fifth Committee', in *League of Nations Records*, pp. 177–8, 215–16.

[102] 'First Assembly, Plenary Meetings', in *League of Nations Records*, p. 567 (The Emir Zoka-Ed-Dowleh, Persia).

[103] 'First Assembly, Meetings of the Committees, Fifth Committee', in *League of Nations Records*, p. 201; 'First Assembly, Plenary Meetings', in *League of Nations Records*, pp. 568–9.

[104] 'First Assembly, Meetings of the Committees, Fifth Committee', in *League of Nations Records*, pp. 201–6. Friedlander commented that it would be of 'doubtful legality under the Covenant' to fix a new condition for admission: Friedlander, 'Admission of States' at 98.

odds with state sovereignty,[105] thus demonstrating that human rights would not trump national jurisdiction. The motion was subsequently confined to the Baltic and Caucasian states (and later Albania),[106] and was passed as a recommendation, despite Cecil's desire that it should be passed as a resolution in order that it would be more than a 'pious hope'.[107] The three Baltic states gave assurances in relation to the protection of minorities upon their admission in the Second Assembly.[108]

The rights of minorities were not the only human rights issue raised in debates regarding the admission of new members. The League's concern with the problem of slavery resulted in questions being raised regarding Abyssinia's application at a time when it was known that the slave trade was thriving in that country. The Assembly considered Abyssinia's membership after the presentation of a report on slavery.[109] Abyssinia subsequently agreed to sign a declaration stating that it would fulfil its obligations under the 1919 Convention of St Germain-en-Laye (specifically in relation to the slave trade), as well as certain obligations relating to the importation of arms and ammunition. Upon admission, Abyssinia declared:

> herself ready now and hereafter to furnish the Council with any information which it may require, and to take into consideration any recommendations which the Council may make with regard to the fulfilment of these obligations, in which she recognises that the League of Nations is concerned.[110]

Once more, the issue of slavery was raised in an ad hoc way, rather than as a consistent part of the examination of all membership applications, suggesting a lack of clarity in the human rights issues relevant to admission. The practice demonstrates that while human rights and democracy conditions were a factor in membership decisions, they were not the decisive factor – the presence of a democratic government adhering to human rights did not mean that a state would automatically be admitted,

[105] 'First Assembly, Meetings of the Committees, Fifth Committee', in *League of Nations Records*, p. 203 (Motta, Switzerland).
[106] *Ibid*., p. 207; 'First Assembly, Plenary Meetings', in *League of Nations Records*, pp. 568–9.
[107] 'First Assembly, Meetings of Committees, Fifth Committee', in *League of Nations Records*, p. 210.
[108] 'Second Assembly, Plenary Meetings', in *League of Nations Records*, pp. 317–20.
[109] 'Fourth Assembly, Seventeenth Plenary Meeting', in *League of Nations Records*, p. 4.
[110] *Ibid*.

and its absence would not prevent a state's admission if other issues were considered to be more important.

3 The admission of Germany and the USSR

At least in the eyes of one representative, the prospective admission of Abyssinia was another example of the League recognising 'different degrees of civilisation': the use of admission as a method of promoting a country's gradual rise to 'the level of the other Members'.[111] Such sentiments, albeit dubiously expressed, indicate a movement towards a policy of heterogeneous universality. This move was completed with the admission of the former 'criminal' state of Germany[112] and the 'bad boy'[113] of Europe, the USSR. There were many similarities in the position of these two applicants: neither was represented at the Commission on the League of Nations, the membership of both states was originally opposed by other members, each expected and was granted a seat on the Council upon admission, and the withdrawal of one led directly to an invitation to the other. There were also differences: whereas Germany was initially open to joining the League, the USSR was hostile to the organisation. Germany could have fulfilled the principles of self-government at the time of the Peace Conference but was excluded on the basis of its former enemy status.[114] The USSR may have been self-governing if the phrase was interpreted to mean independence, but Wilson saw the principles of 'Bolshevik Russia' as directly contrary to its participation in a League of democratic states.[115]

The admission of Germany is interesting from the perspective of democratic and human rights conditionality, not because it could not fulfil the membership requirements, but because it satisfied the rather flexible test from the outset.[116] At the Commission on the League of

[111] 'Records of the Fourth Assembly, Meetings of the Committees, Minutes of the Sixth Committee' (1923) *L.N. Off. J.*, Supp. 19 at 15 (Cook, Australia).

[112] Cecil, an advocate for the admission of Germany to the League, wrote that Germany 'was excluded on the theory that she was a criminal country, not fit to associate with others – a fantastic exaggeration of the principle of national responsibility even if the war-guilt doctrine is fully accepted': Cecil, *A Great Experiment*, p. 107.

[113] Kathryn Davis, *The Soviets at Geneva: The USSR and the League of Nations, 1919–1933* (Westport, CT: Hyperion Press, 1977, reprint of 1934 edn), p. 5.

[114] Schwarzenberger, *League of Nations and World Order*, p. 43.

[115] See H. W. V. Temperley (ed.), *A History of the Peace Conference of Paris* (London: Henry Forde and Hodder & Stoughton, 1924), vol. XI, p. 579. The British Prime Minister Lloyd George also saw the League as an 'antidote' to Bolshevism (p. 580).

[116] For a discussion of Germany's institutions, see Doyle, 'Kant, Liberal Legacies and Foreign Affairs' at 216.

Nations, Cecil referred to the Reichstag as a democratic institution ('on paper') – one that could have transformed Germany into a constitutional government.[117] But the French firmly rejected the idea that Germany was a 'pays libre'.[118] In reality Germany was excluded on the basis of its former external policies, to use the words of Mitrany – because it broke the rules of democratic conduct – rather than its internal constitution. Indeed, the Sub-Committee charged with examining Germany's application in March 1925 unanimously concluded that 'no doubt' could be entertained as to the German government's stability and self-governing status.[119] The feeling of antipathy towards Germany continued to prevail in some quarters but, with the Assembly moving towards a policy of universal membership, German participation in the League became a reality. Significantly, the German government also viewed its admission as essential to the League:

> The universality of the League of Nations must be regarded as an essential condition without which it cannot reach a state of complete efficiency. Only when universality has been established will the true spirit of democracy, the spirit of reconciliation and goodwill . . . preside over the solution of all those problems which still divide the peoples.[120]

At the time, Germany's admission was described as 'more than ripe; it is much over ripe'.[121] In his welcome to the German delegation in September 1926, the President of the Assembly linked the admission of this 'great European power' with both the universality of the organisation and the peaceful future of Europe.[122] Thus, from both the German and the League's perspectives, the admission of Germany was seen as fundamental to the organisation's international legitimacy.

The USSR was admitted to the League by invitation, thus circumventing a rigorous examination of its ability to fulfil the Article 1 requirements. This procedure had been used in relation to Mexico and Turkey, and given such precedents 'no great power could be expected to submit

[117] Miller, vol. I, p. 164. [118] *Ibid*., p. 167.
[119] 'Records of the Special Session of the Assembly, Minutes of the First Committee' (1926) *L.N. Off. J*., Supp. 42, 46.
[120] 'Letter from German Government to the Secretary-General of the League, 12 December 1924' (1925) *L.N. Off. J*. 326.
[121] 'Seventh Assembly, Plenary Meetings, Fourth Plenary Meeting', in *League of Nations Records*, p. 2 (Motta).
[122] 'Seventh Assembly, Plenary Meetings, Seventh Plenary Meeting', in *League of Nations Records*, p. 1.

an application in the old way'.[123] As was indicated by Balfour's comments in 1921, many members were sceptical about the prospect of the USSR's admission. The compliment was returned – it was reported that the Soviet Foreign Commissar, Chicherin, had informed Wilson that the USSR would not participate in the League unless the other powers were prepared to adopt 'the expropriation of the capitalists of all countries ... as another of the basic principles of the League of Nations'.[124] The prospect of a democratic Russia joining the League was raised in 1919 at a time when it was thought that Admiral Kolchak could establish a government; however, when events moved in the other direction, this possibility faded.[125] But in the face of possible aggression from both Japan to its east and Germany to its west, Soviet hostility towards the League began to thaw, as did League hostility towards the USSR.[126]

As it was thought that some members would vote against admission, the invitation to the USSR came from a number of existing members rather than the Assembly as a whole. The contents of the invitation repeated the now accepted refrain that a peace organisation required the cooperation of all nations. The USSR responded positively, noting in its reply that it would undertake to fulfil 'all the international obligations and decisions binding upon Members in conformity with Article 1 of the Covenant'.[127] During the debate in the Sixth Committee, the Portuguese and Swiss representatives spoke against admission of the USSR, arguing that its government had not been recognised *de jure* by a number of League members, that its basic principles were incompatible with those of the League and other members, and that it suppressed religious freedom.[128] These last features were dwelt upon by Motta in the Sixth Committee and de Valera (Irish Free State) in the Plenary Meeting.[129]

[123] F. P. Walters, *A History of the League of Nations* (Oxford University Press, 1952), vol. II, p. 581.

[124] Davis, *Soviets at Geneva*, p. 16. See further Schwarzenberger, *League of Nations and World Order*, p. 81.

[125] Davis, *Soviets at Geneva*, p. 18. Davis writes that 'by the time Kolchak's reply reached Paris, he was a fugitive before the victorious Red Army'.

[126] *Ibid*., p. 5; Walters, *A History of the League* , vol. II, pp. 579–80.

[127] The text of the invitation and the Soviet's reply is reproduced in Annex 1, 'Records of the Fifteenth Assembly, Sixth Committee' (1934) *L.N. Off. J*., Supp. 130 at 97–8.

[128] 'Records of the Fifteenth Assembly, Sixth Committee' (1934) *L.N. Off. J*., Supp. 130 at 17–20.

[129] See 'Fifteenth Assembly, Plenary Meetings, Ninth Plenary Meeting', in *League of Nations Records*, pp. 2–3.

When arguing for the USSR's admission, Barthou (France) suggested that it would be easier to ensure respect for religious liberty if the USSR was inside rather than outside the League.[130] Those opposing the USSR's admission focused on other objectionable parts of the Soviet system, in particular its external policies, Motta asking whether 'an expansive and militant' communist regime could fulfil the admission conditions.[131] Whatever the merits of this argument, the discussions reveal that a combination of both internal factors and external policies were considered, but ultimately rejected, as reasons to prevent admission. If Wilson's vision of a League of democratic states designed to counter the threat of Bolshevism was ever a determining factor in admission decisions, by 1934 it held little sway over the majority of the Assembly.

E Peace through universality

Despite some representatives' concerns about the admission of the USSR, when the Sixth Committee examined the issue in 1934, no one doubted that the organisation's mission would be best served by universal membership. As the League's practice developed over the years, its admission policy supported neither peace through justice nor peace through democracy, but rather peace through universality. The representative from Canada best summed up the position when he stated that:

> While believing firmly in the long run, the League can succeed only by the application in the international sphere of these ideals of liberty and democracy, we recognise that, for the present we must agree to differ and that we cannot require other States to conform to such principles, or reject their collaboration in the League, so long as they share in the one indispensable condition of readiness to work together for the peace of the world.[132]

In practice, democracy was never an attribute for League membership, and while human rights were certainly relevant in discussions of various membership applications, such standards were not applied in any consistent manner. But lack of consistency does not negate the fact that existing members did not shy away from discussing such issues during the membership processes, despite the desire to increase the League's ranks. The members found that it was difficult 'to set up exacting

[130] 'Records of the Fifteenth Assembly, Sixth Committee' (1934) *L.N. Off. J.*, Supp. 130 at 22.
[131] *Ibid.* at 19. [132] *Ibid.* at 25.

standards of domestic government for the admission of new members, if only because there was no practical means available for testing the eligibility of existing members for continuance in the League'.[133] Universality remained a goal despite the many notable absences from the League and despite successive withdrawals over the years.[134] The rationale behind Argentina's proposal in the First Assembly was finally realised – it was better to admit a state to the 'peace club', whatever its internal policies, than leave it on the outside, free to engage in war-like activities.

III Admission to the UN

'The League is dead; long live the United Nations!'[135]

The failure of the League of Nations to prevent the Second World War did not result in a rejection of the concept of an international peace organisation; rather, even as the War progressed there were renewed efforts to build a new and improved institution.[136] Ideas ranged from President Roosevelt's vision of an international force composed of the four major powers (China, Great Britain, the US and the USSR) charged with keeping the peace to a revitalised League of Nations comprising large and small nations alike.[137] Importantly, it was thought that the new organisation must have teeth – this was translated into an increased role for the UN's executive organ, the Security Council. Efraim has emphasised that the Security Council's limited membership and concentrated power were designed to enhance its functionality on the basis that decision-making is more expedient within a smaller group of states.[138]

Commentators who make the link between membership or accreditation in an international organisation and a state's democratic and human rights record usually do so in the context of the UN.[139] If the connection

[133] Zimmern, *League of Nations and the Rule of Law*, p. 442.
[134] For example, the US never joined, Argentina did not attend between 1920 and 1933, the admission of Germany and its seat on the Council led to the withdrawal of Spain and Brazil, and the entry of the USSR was only possible after Germany and Japan had left.
[135] Lord Robert Cecil, 'Final Assembly of the League at Geneva, 8 April 1946', as quoted in Robert Cecil, *All the Way* (London: Hodder & Stoughton, 1949), p. 174.
[136] Rudzinski, 'Admission of New Members' at 188.
[137] Hilderbrand, *Dumbarton Oaks*, pp. 2–3.
[138] Athena D. Efraim, *Sovereign (In)equality in International Organizations* (The Hague: Martinus Nijhoff Publishers, 2001), p. 125.
[139] Gregory Fox, 'The Right to Political Participation in International Law' (1992) 17 *Yale J. Int'l L.* 539 at 603; Tesón, 'Kantian Theory' at 100.

between peace and democracy failed to find adherents amongst members of the League when determining admission, it is to the UN that these neo-Kantians turn in order to fulfil their vision of an organisation deriving its legitimacy directly from the people through its membership of democratic states. This section is divided into the debates concerning the establishment of the organisation, the role of the Security Council, and the UN's practice in admitting new members. It examines the extent to which the democratic and human rights records of particular states have influenced their admission to the UN.

A The establishment of the UN

1 From Moscow to Dumbarton Oaks

Prior to the San Francisco Conference the major discussions on the creation of a new post-War institution took place at talks held by the Allied powers during the Second World War. The challenge was to create an organisation giving the major powers the key role in matters affecting international peace and security, but also allowing the smaller nations to participate in accordance with the idea of the League of Nations.[140] In keeping with these ideals, during the wartime discussions it was agreed that the organisation established at the conclusion of hostilities would be open to all 'peace-loving states'.[141] However, in accordance with the belief that the League of Nations had failed due to its lack of enforcement power, the four major powers decided that they (together with France) would play a critical role in the peak body for maintaining peace, the Security Council.[142] In these discussions two membership issues were significant: first, whether the Soviet Republics would be admitted as separate members of the organisation; and, second, the voting power of the respective members of the Security Council.

The USSR, keen to increase its relative strength in an organisation that it perceived would be dominated by the West, proposed at the Dumbarton Oaks Conference in 1944 that all sixteen Soviet republics should be represented in the General Assembly.[143] This 'bombshell' (as it

[140] Hilderbrand, *Dumbarton Oaks*, p. 3.
[141] 'Joint Four-Nation Declaration', The Moscow Conference, October 1943 at para. 4; 'Proposals for the Establishment of a General International Organization', Dumbarton Oaks, 7 October 1944, ch. III at para. 1 ('Dumbarton Oaks Proposals').
[142] See Hilderbrand, *Dumbarton Oaks*, pp. 122–3; 'Dumbarton Oaks Proposals', ch. VI, s. A.
[143] Hilderbrand, *Dumbarton Oaks*, p. 95.

was later described by Stettinius, the US Under-Secretary of State and member of the US delegation)[144] was designed to counter the move towards an organisation that, in the eyes of the Soviets, was placing too much emphasis on small powers. It was also seen as a method of assuaging 'strong nationalist sentiments in the Soviet republics'.[145] The US opposed the idea and even suggested that it could lead to membership for the individual states of the US and Brazil.[146] In the end it was agreed at the Yalta Conference in 1945 that the US would support the representation of two of the Soviet Republics, Byelorussia and the Ukraine, in the General Assembly despite their lack of sovereignty.[147]

The second major membership issue in these pre-San Francisco discussions concerned the distribution of permanent and non-permanent seats in the Security Council and the voting power of various members. The proposals put forward by the US for a permanent seat for Brazil and a general provision for the addition of permanent members in the future were rejected by the UK and the USSR at the Dumbarton Oaks Conference.[148] Instead, it was accepted that the Council should consist of five permanent members and six non-permanent members, the latter group being given a two-year term on a rotating basis.[149] The decision-making procedure in the Security Council proved to be a more fraught issue, with the Dumbarton Oaks Conference unable to resolve questions as to whether the use of the veto power should be qualified, and the majority needed when a vote was taken.[150] This deadlock at the Soviet phase of the Dumbarton Oaks Conference was broken at the Yalta Conference, when it was agreed that seven out of eleven votes were needed for a decision to be passed, and that the permanent members of the Security Council would have the veto power on all matters. However, in questions relating to the peaceful settlement of disputes and the use of regional arrangements in local disputes, a party to a dispute should abstain.[151] As a result of these negotiations, three issues relevant to membership were decided prior to San Francisco. First, all peace-loving

[144] *Ibid.* [145] *Ibid.*, p. 99. [146] See *ibid.*, pp. 97, 100.

[147] See 'Protocol of Proceedings of Crimea Conference' ('Yalta Conference') at para. I 2(b), available from *The Avalon Project*, www.yale.edu./lawweb/avalon; 'Statement by Secretary of State Stettinius on Representation in the Assembly of the Proposed United Nations Organization, April 3, 1945', available from *Ibiblio (University of North Carolina)*, www.ibiblio.org/pha/policy/1945/450403a.html.

[148] Hilderbrand, *Dumbarton Oaks*, p. 127. [149] 'Dumbarton Oaks Proposals', ch. VI, s. A.

[150] For a discussion of the voting issue at the Dumbarton Oaks Conference, see Hilderbrand, *Dumbarton Oaks*, ch. 8.

[151] Yalta Conference, 'C. Voting' at para. 3.

states could join the new organisation. Second, despite the use of the word 'states' in Chapter III of the Dumbarton Oaks Proposals, not all original members of the organisation could be accorded that status. Third, inequalities of voting power within the organisation, instead of 'pseudo-democratic' ideals of the equality of states,[152] were built into the decision-making process from the outset. Democratic ideals were not considered appropriate for the peak body of the new organisation.

2 The San Francisco Conference

In some respects the discussions at the San Francisco Conference on the membership provision of the Charter were a repeat of the debates at the Commission on the League of Nations. The proposals placed on the table at the beginning of the Conference had been drafted by the major powers prior to the conclusion of the War. An invitation to the Conference, issued by the US, was dependent upon a state either being a member of the 'United Nations' (those countries subscribing to the principles of the Declaration by the United Nations of 1942), or having declared war on 'the common enemy' by 1 March 1945.[153] Once more, many representatives revealed concerns about the possibility of the ex-enemy states being admitted to the new organisation. These concerns may not have been expressed so virulently as in 1919, but Mexico summed up the mood of many delegates with the following interpretative declaration:

> It is the understanding of the Delegation of Mexico that [the admission provision] cannot be applied to the states whose regimes have been established with the help of military forces belonging to the countries which have waged war against the United Nations, as long as those regimes are in power.[154]

To admit the Axis powers and their supporters was viewed as 'an offence against the memory of our dead'[155] – in effect, original membership would be over the Allies' dead bodies. Particular attention was focused on the impossibility of Franco's Spain joining the organisation from the outset. As was the case at the Commission of the League of Nations, the

[152] Hilderbrand, *Dumbarton Oaks*, p. 99 (referring to remarks by the Soviets).
[153] Yalta Conference at para. 2.
[154] 'Verbatim Minutes of the Third Meeting of the Commission, June 19, 1945', Doc. No. 1167 I/10, 19 June 1945, UNCIO Documents, vol. VI, p. 20. This declaration was supported by a number of other delegations, including France, Australia, Belgium, the US and Uruguay. It was inserted into the records of the Commission as having the approval of the Commission.
[155] *Ibid*., p. 24 (Dehouse, Belgium).

delegates of Committee I/2 (tasked with membership issues) revealed a preference for retaining a distinction between original members (acquiring membership as of right) and future members (attaining membership upon the fulfilment of certain conditions).[156] Consequently, any admission criteria would not be consistently applied to all states.

One of the significant points where the discussions at Paris and San Francisco diverged is that the Wilsonian vision of an organisation of democratic states was not a major topic of debate in Committee I/2. One reason for this lacuna may have been the preference for including the word 'states' rather than 'nations' in the final draft, thus ensuring that future members would have some level of independence.[157] This requirement did not appear to mean statehood as traditionally understood in international law (or at least it did not apply to original members), as the Philippines, the Ukraine and Byelorussia were admitted at the San Francisco Conference.[158] A number of delegations argued for a more onerous requirement than simply statehood. In commenting on the Dumbarton Oaks Proposals, France proposed that the membership conditions should 'ensure a community of political principles' between existing and future members of the organisation.[159] The Netherlands also made a link between a state's institutions and its international behaviour,[160] while Chile was more explicit in stating that membership should be open to 'all States that love peace and the democratic system'.[161] The Committee felt that the inclusion of a condition requiring democratic institutions 'would imply an undue interference with internal

[156] 'Report of the Rapporteur of Committee I/2 on Chapter III (Membership)', Doc. No. 1178 I/2/76, 24 June 1945, UNCIO Documents, vol. VII, p. 325.

[157] During discussions, the delegate from the Philippines expressed a preference for the term 'nation' rather than 'state' on the basis that a statehood requirement would prevent the Philippines becoming a member of the organisation at that time. See 'Summary Report of the Fourth Meeting of Committee I/2, 10 May 1945', Doc. No. 242, I/2/11, 11 May 1945, UNCIO Documents, vol. VII, p. 25.

[158] Leland M. Goodrich, Edvard Hambro and Anne Patricia Simons, *Charter of the United Nations – Commentary and Documents*, 3rd edn (New York: Columbia University Press, 1969), pp. 84–5.

[159] 'Proposal from Ministry of Foreign Affairs, French Republic', Doc. No. G/7/(o), 21 March 1945, UNCIO Documents, vol. III, pp. 377–8.

[160] 'Amendments to the Proposals for the Maintenance of Peace and Security Agreed to at the Four Powers Conference of Dumbarton Oaks Supplemented as a Result of the Conference of Yalta, Submitted by the Netherlands Delegation to the San Fransico Conference', Doc. No. G/7(j)(1), 1 May 1945, UNCIO Documents, vol. III, p. 324.

[161] 'Comments by the Chilean Government on the Dumbarton Oaks Proposals', Doc. No. G/7(i), 2 May 1945, UNCIO Documents, vol. III, p. 284.

arrangements' or a breach of the principle of non-intervention.[162] This sentiment is enshrined in Article 2(7) of the UN Charter, which provides that the organisation is not authorised 'to intervene in matters which are essentially within the domestic jurisdiction of any state'. The rejection of democracy conditions did not prevent the Committee from expressing the view that the membership criteria should be flexible, thus enabling 'considerations of all kinds' to be brought to bear in admission decisions.[163]

Universality was suggested, but rejected, as a guiding principle in determining future admission to the organisation at San Francisco. In the same vein as Argentina's proposals at the First Assembly of the League of Nations, Uruguay argued that participation in the new community of nations should be universal and permanent.[164] Although some delegations recognised that universality was a goal to which the organisation should strive,[165] the Committee was keen to preserve the 'peace-loving' criterion in the Charter, despite concern that it might be open to uncertainty.[166] It was stressed that this in itself was not a sufficient criterion for membership, and that a state would have to be able to prove that it was both ready and willing to accept the obligations of the Charter and that it was capable of fulfilling them.[167] Universality at all costs may have been rejected, but the indeterminacy of the character requirement meant that in reality it was a relatively weak membership condition.

Finally, delegates at the San Francisco Conference retained the procedure outlined in the Dumbarton Oaks Proposals enabling the General Assembly to admit new members upon a recommendation of the Security Council. In doing so, they confirmed that membership issues were a matter of international peace and security. This effectively transferred the site of

[162] 'Summary Report of Meeting of Committee I/2', Doc. No. 314, I/2/17, 14 May 1945, UNCIO Documents, vol. VII, p. 36; 'Report of the Rapporteur of Committee I/2 on Chapter III (Membership)', Doc. No. 1178 I/2/76(2), 24 June 1945, UNCIO Documents, vol. VII, p. 326.

[163] 'Report of the Rapporteur of Committee I/2 on Chapter III (Membership)', p. 326.

[164] 'New Uruguayan Proposals on the Dumbarton Oaks Proposals', Doc. No. G/7(a)(1), 5 May 1945, UNCIO Documents, vol. III, p. 36; 'Summary Report of the Second Meeting of Committee I/2', Doc. No. 169, I/2/5, 9 May 1945, UNCIO Documents, vol. VII, p. 12.

[165] 'Report of the Rapporteur of Committee I/2 on Chapter III (Membership)', pp. 325–6.

[166] See comments by the Dominican Republic in 'Memorandum Submitted by the Delegation of the Dominican Republic concerning the Dumbarton Oaks Proposals for an International Organization', Doc. No. G/14(o), 6 May 1945, UNCIO Documents, vol. III, p. 565; and the Australian delegate in 'Summary Report of the Second Meeting of Committee I/2, 8 May 1945', Doc. No. 169 I/2/5, 9 May 1945, UNCIO Documents, vol. VII, p. 12.

[167] 'Report of the Rapporteur of Committee I/2 on Chapter III (Membership)', p. 326.

membership issues from the Assembly in the League of Nations to the less representative Security Council. It was emphasised that the Security Council's responsibility in this respect was in accordance with its role as the primary organ for preserving international peace and security.[168] But the description of the procedure as a 'kangaroo court',[169] to say nothing of the problems relating to the misuse of the veto during the early years of the UN, illustrates that the procedure was not without its problems. The process also highlights one of the democratic deficits within the organisation – the concentration of power in the hands of the five permanent members – an issue that will be explored below.

B The role of the Security Council and the purposes and principles of the UN

Article 4(1) of the Charter reads:

> Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

It is commonly accepted that this Article, and Rule 60 of the Security Council Rules, contain five separate conditions – an applicant must '(1) be a state; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out those obligations; and (5) be willing to do so'.[170] While democratic institutions and the protection of human rights were not included in the membership criteria established in Article 4, fundamental human rights and the right of self-determination feature prominently in the Charter. The purposes of the UN include 'the principle of equal rights and self-determination' and the promotion and encouragement of 'respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.[171] A link is often made between the responsibility of the Security Council to act in accordance with the purposes and principles of the UN in discharging

[168] 'Report by the Rapporteur of Committee II/1', Doc. No. 666, II/1/26(1)(a), 30 May 1945, UNCIO Documents, vol. VIII, pp. 451–2.
[169] Rudzinski, 'Admission of New Members' at 178.
[170] *First Admissions Case* at 62. See also James Crawford, *The Creation of States in International Law*, 2nd edn (Oxford University Press, 2006), p. 179.
[171] Charter of the United Nations, Art. 1(2)–(3).

its duties in Article 24(2) and the organisation's human rights mandate. This is part of a wider debate concerning the extent to which the Security Council is constrained by legal norms when it takes action. On one view, the Security Council is an executive organ of the UN and must have a wide margin of discretion when seeking to maintain or restore international peace and security.[172] On another reading of the Charter, the fact that the Security Council is created by an international treaty means that it is subject to 'certain constitutional limitations'.[173] These constraints are found in Article 24(2) of the Charter and include the promotion of human rights in Article 1. In support of this approach the ICJ has referred with approval to a 1947 statement by the Secretary-General to the effect that '[m]embers of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter'.[174]

Arguments about limitations on the Security Council's powers usually occur when discussing actions under Chapter VII of the Charter, such as the conduct of peace operations and the adoption of economic sanctions.[175] These arguments also have relevance for other powers of the Security Council. In the context of admission to the UN (a decision falling within Chapter II), the ICJ has highlighted that '[t]he political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment'.[176] In this passage the Court was referring to the procedural aspects of admission contained in Article 4(2); however, O'Keefe has argued that post-Cold War admission practice has indicated that the Security Council has 'felt bound to have

[172] Hans Kelsen, *The Law of the United Nations – A Critical Analysis of its Fundamental Problems* (London: Stevens, 1950), p. 735; Gabriel Oosthuizen, 'Playing the Devil's Advocate: The United Nations Security Council is Unbound by Law' (1999) 12 *Leiden J. Int'l L.* 549 at 562.

[173] *Prosecutor* v. *Tadić*, Case No. IT-94–1-AR72, 2 October 1995 at para. 28 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction); August Reinisch, 'The Obligation of the Security Council to Respect Human Rights and Humanitarian Law in Adopting Economic Sanctions' (2001) 95 *Am. J. Int'l L.* 853 at 856.

[174] *Namibia Advisory Opinion* at 52. See also Reinisch, 'Obligation of the Security Council' at 857.

[175] Reinisch, 'Obligation of the Security Council'; Anna Vradenburgh, 'The Chapter VII Powers of the United Nations Charter: Do They "Trump" Human Rights Law?' (1991–92) 14 *Loyola LA Int'l & Comp. L.J.* 175.

[176] *First Admissions Case* at 64.

regard to the Purposes and Principles when considering applications for membership, and to have regard especially to the effect admission might have on the maintenance of international peace and security'.[177] In making this point, O'Keefe highlighted the statement of the President of the Security Council upon the admission of the Baltic States:

> The independence of [the Baltic States] was regained peacefully, by means of dialogue, with the consent of the parties concerned, and in accordance with the wishes and aspirations of the three peoples. We can only welcome this development, which obviously represents progress in respecting the principles of the Charter of the United Nations and in attaining its objectives.[178]

The President's speech can be viewed as an affirmation of the beneficial impact of admission to the organisation on the maintenance of international peace and security.[179] It can also be read as a statement of the importance of the UN's objectives of both achieving self-determination (the aspirations of the people) and the promotion of fundamental human rights in the admission process. The validity of the second interpretation is heightened by the President's proclamation when admitting the Baltic States that '[t]he wheels of history have been turning. The winds of freedom have been blowing down old structures'.[180] However, it is one thing for the Security Council to act in accordance with human rights and democratic principles, or at least not to explicitly violate them, when deciding to admit a new state. It is another thing altogether for those principles to be explicitly adopted as criteria in admission decisions. In examining the Security Council's approach to these issues, two caveats should be added at this stage. First, as the records of the proceedings of the relevant Security Council and General Assembly meetings have often been thin in recent years, it is difficult to ascertain the precise reasons for admission and to derive relevant principles.[181] It is therefore necessary to rely upon the fact of admission itself.[182] Second, 192 states are now members of the UN and thus from the outset it may be claimed that the goal of universal membership has been reached. But of interest here is the extent to which human rights and democracy have featured

[177] Roger O'Keefe, 'The Admission to the United Nations of the Ex-Soviet and Ex-Yugoslav States' (2001) 1 *Baltic Y.B. Int'l L.* 167 at 170.
[178] 'Note by the President of the Security Council', UN Doc. S/23032, 12 September 1991.
[179] This reading is supported by O'Keefe, 'Admission to the United Nations' at 170.
[180] 'Note by the President of the Security Council'.
[181] O'Keefe, 'Admission to the United Nations' at 170–1.
[182] *Ibid.* at 171.

in the decisions and debates to admit new members, and the way in which the admission process has accommodated these principles with the goal of universality. Three periods in the organisation's history will be examined: the controversy surrounding admission in the period prior to 1955, the admission of a number of ex-colonies and the principle of self-determination, and finally the membership of the ex-Soviet and ex-Yugoslav Republics in the early 1990s.

C The interpretation and application of Article 4 of the Charter

1 The East–West divide and admission in the early years

In the early years of the UN one of the major issues confronting the organisation was the difficulty in solving the deadlock between the Soviet Union and the Western powers over the admission of new members. At the Potsdam Conference of August 1945, the USSR, the UK and the US agreed that they would support the admission of Bulgaria, Hungary, Romania and Finland upon the conclusion of peace treaties with these four countries and the establishment of democratic governments.[183] However, when the applications were considered by the UN's organs, the Western powers charged the first three countries with failing to carry out their obligations under the peace treaties with respect to the observance of fundamental human rights and objected to the way in which their governments were created.[184] As a result, it was not possible to obtain the required seven votes in the Security Council. The USSR responded by blocking the entry of Italy and Finland until the Eastern European states were admitted.[185] The stalemate encompassed not only these five countries, but also Albania and Mongolia and a number of states vetoed by the USSR but supported by the West.[186] Over the years a range of

[183] 'Berlin Conference, July 17 – August 2, 1945, Protocol of the Proceedings, 1 August 1945, Part IX' ('Potsdam Conference'), available from *The Avalon Project*, www.yale.edu./lawweb/avalon.

[184] 'Observance in Bulgaria, Hungary and Romania of Human Rights and Fundamental Freedoms', GA Res. 294 (IV), UN GAOR, 4th session, 235th plenary meeting, UN Doc. A/RES/294 (IV), 22 October 1949. This led to the ICJ's advisory opinion in *Interpretation of Peace Treaties with Bulgaria, Romania and Hungary (Advisory Opinion)* [1950] ICJ Rep. 65.

[185] Goodrich, Hambro and Simons, *Charter of the United Nations*, p. 90; John Dugard, *Recognition and the United Nations* (Cambridge: Grotius Publications, 1987), p. 58.

[186] See 'Admisison of New Members', GA Res. 113 (II), UN GAOR, 2nd session, 118th plenary meeting, UN Doc. A/RES/113 (II), 17 November 1947; Leo Gross, 'Progress towards Universality of Membership in the United Nations' (1956) 50 *Am. J. Int'l L.* 791 at 792.

options were investigated in order to break the impasse, including the passage of 'package deal' resolutions in the Security Council encompassing candidates from both blocs.[187] Attempts to circumvent the deadlock led the General Assembly to ask the ICJ for the two advisory opinions discussed in Chapter 1: the first opinion concerned the substantive conditions set out in Article 4 of the Charter and the second involved the correct procedure for admitting a new member. As noted previously, the ICJ responded with a restrictive reading of the provisions of the Charter. The majority of the Court viewed the criteria in Article 4(1) as the only relevant admission conditions and held that the procedure set down in Article 4(2), involving both the General Assembly and the Security Council, was compulsory. In the end the problem of non-admission was finally resolved on 14 December 1955 when 16 new members were admitted to the organisation.[188]

The result of the years of haggling is of less concern for the purposes of the present discussion than the debates in the General Assembly and the Security Council leading to the resolution. Two traits were noteworthy. First, throughout the debates between 1946 and 1955 many representatives were keen to promote the principle of universality. Increasing the number of states in the organisation was seen as a method of demonstrating the UN's legitimacy by enabling it to fulfil its main function of preventing war.[189] Statements in support of the ideal of universality were sometimes tempered by the desire to ensure that applicants were peace-loving and willing and able to fulfil the obligations in the Charter.[190] As the General Assembly became increasingly frustrated by the queue of applicants, it passed a number of resolutions supporting the principle of

[187] The US first proposed the idea of a package deal in 1946; however, it was rejected by the Soviet Union. In 1955 it was the Soviets that sponsored a resolution to admit a number of states into the organisation, it finally being passed in December 1955. For a discussion of the various options, see 'Report of the Special Committee on the Admission of New Members', UN GAOR, 8th session, Annexes, Item 22, UN Doc. A/2400, 1953.

[188] 'Admission of New Members to the United Nations', GA Res. 995 (X), UN GAOR, 5th session, 555th plenary meeting, 14 December 1955; 'Resolution 109', SC Res. 109, UN SCOR, 10th session, 705th meeting, UN Doc. S/RES/109, 14 December 1955. The 16 new members were Albania, Jordan, Ireland, Portugal, Hungary, Italy, Austria, Romania, Bulgaria, Finland, Ceylon, Nepal, Libya, Cambodia, Laos and Spain.

[189] See comments of the representatives of the US, Brazil and Mexico and the Secretary-General, UN SCOR, 1st session, 2nd series, 54th meeting, 28 August 1946, pp. 43–5.

[190] The Australian representative said '[w]e respect the doctrine of universality . . . having said that we do not think that universality means that you admit any applicant at any time': *ibid.* See also 'Report of the Special Committee on the Admission of New Members', UN GAOR, 8th session, Annexes, Item 22, 13, UN Doc. A/2400, 1953.

qualified universality. Therefore, in 1953 the General Assembly linked 'the aims of the Charter' with the need to attain universal membership 'subject only to the provisions of the Charter'.[191] The major qualification that a state be 'peace-loving' was not onerously applied – it was thought that in the atomic age 'the notion that any State would prefer war to peace was ludicrous'.[192]

The progressive support shown for the principle of universality was at odds with a desire to require the fulfilment of extra conditions. The second and related aspect of membership discussions in this period was the tension between those members desiring to take factors outside the Charter into account and those members supporting a strict adherence to the Article 4 criteria. The view of the first camp was apparent in discussions relating to the USSR's candidates. Human rights issues were cited as the reason for non-admission of Bulgaria, Hungary and Romania, despite the fact that these requirements were found in the Potsdam Declaration rather than the UN Charter.[193] In later debates in both the General Assembly's Ad Hoc Political Committee and the Security Council, the US phrased these concerns in terms of the peace-loving character requirement in Article 4 or the states' lack of independence.[194] Religious persecution, the violation of labour standards and the farcical nature of elections were mentioned by other delegations (in particular the representative of Nationalist China) as reasons for denying

[191] 'Admission of New Members', GA Res. 718 (VIII), UN GAOR, 8th session, 453rd plenary meeting, UN Doc. A/RES/718 (VIII), 23 October 1953. See also 'Admission of New Members Including the Right of Candidate States to Present Proof of the Conditions Required under Article 4 of the Charter', GA Res. 506 (VI), UN GAOR, 6th session, 369th plenary meeting, UN Doc. A/RES/506 (VI), 1 February 1952; 'Admission of New Members to the United Nations', GA Res. 817 (IC), UN GAOR, 99th session, 501st plenary meeting, UN Doc. A/RES/817 (IC), 23 November 1954.

[192] UN GAOR, 10th session, Ad Hoc Political Committee, 31st meeting, Agenda Item 21, UN Doc. A/AC.80/SR.31, 7 December 1955, p. 144 (Peru). See also 'Report of the Special Committee on the Admission of New Members', UN GAOR, 8th session, Annexes, Item 22, UN Doc A/2400, 1953, p. 13: 'An applicant State should ... be deemed to be peace-loving so long as it was not actually engaged in aggression against another State' (Philippines).

[193] 'Report to the Security Council', Committee on the Admission of New Members, UN SCOR, 2nd session, Supp. Special No. 3, 1947, pp. 21–5, 51; UN SCOR, 2nd session, 190th meeting, 21 August 1947, pp. 2119, 2131–2. On the Potsdam Conference, see above n 183.

[194] UN GAOR, 9th session, Ad Hoc Political Committee, 19th meeting, Agenda Item 21, UN Doc. A/AC.76.SR.19, 2 November 1954, p. 71; UN GAOR, 10th session, Ad Hoc Political Committee, 31st meeting, Agenda Item 21, UN Doc. A/AC.80/SR.31, 7 December 1955, p. 146; UN SCOR, 10th session, 701st meeting, 10 December 1955, p. 18.

membership to one or all of 'the people's democracies'.[195] One representative firmly placed human rights conditions at the forefront of admission decisions in asking: 'should the United Nations admit the satellite States to membership and thus disregard the provisions of the Charter and of the Universal Declaration of Human Rights?'[196] In asking this question it was assumed that human rights considerations were implicit requirements for admission to the organisation.

This desire to attach human rights conditions to Article 4 or to reshape the peace-loving requirement to include non-security aspects of a state's record was not shared by all delegations. For example, the Australian representative in the Security Council expressed the view that 'the true criteria' were contained in the Charter. Contrary to the position adopted by the representatives of the UK and US, human rights obligations were perceived as outside the security aspects relevant for determining whether a state was peace-loving.[197] The Chilean representative was more sanguine in stating that it was wrong to isolate a country with human rights problems from the community of nations, particularly given that not all existing members had a perfect record.[198] By 1955 the UK had partly relented from its seemingly strict opposition to the Soviet bloc countries in stating that countries with different political and social systems should not be excluded from membership.[199] Perhaps the support by Western powers for the admission of Franco's Spain,[200] previously an international pariah, meant that opposition to the Soviet's candidates had become somewhat muted.

The Australian delegation's comments are in accordance with the majority view in the *First Admissions Case* in suggesting that extraneous considerations should not determine UN membership.[201] Equally, it is perhaps consistent with the majority's opinion to interpret the peace-loving character requirement in Article 4 as encompassing human rights considerations. This is particularly the case if human rights violations could affect the security situation. From this perspective, human rights

[195] UN SCOR, 7th session, 595th meeting, 3 September 1952, pp. 14–16. See also statement of the representative of Greece on Albania in SCOR, 1st session, 2nd series, 55th meeting, 28 August 1946, pp. 71–2.

[196] UN GAOR, 10th session, Ad Hoc Political Committee 27th meeting, Agenda Item 21, UN Doc. A/AC.80/SR.27, 5 December 1955, p. 120 (Cuba).

[197] UN SCOR, 2nd session, 190th meeting, 21 August 1947, p. 2122 (Australia).

[198] UN SCOR, 7th session, 567th meeting, 8 September 1952, p. 12 (Chile).

[199] UN SCOR, 10th session, 701st meeting, 10 December 1955, p. 11.

[200] *Ibid.*, p. 17 (USA).

[201] *First Admissions Case* at 62.

principles are not illegal additions to the admission criteria. Indeed, the ICJ's advisory opinion recognised that factors connected with the Article 4 criteria could be taken into account.[202] The admission process in this period reveals differing views on the legitimacy of human rights as membership conditions. But in admitting 16 states *en masse* in 1955, the practice of the Security Council and the General Assembly demonstrated that democratic and human rights considerations were, if not outside the ambit of the term 'peace-loving', of secondary importance when faced with the necessity of obtaining a political compromise and promoting the principle of universality.

2 Self-determination and the process of decolonisation

Cold War hostilities and the implementation of package deals still played a role in membership policy after December 1955. However, of greater importance in subsequent practice in the 1960s and 1970s was the decolonisation process. One principle which more or less unified UN members in this period was the linkage between the right of self-determination of the former colonies and admission to the organisation. As a result of proposals put by the Soviet delegation at the San Francisco Conference, the right of self-determination was given a fairly prominent place in the Charter.[203] Article 1(2) provides that one of the purposes of the UN is:

> To develop friendly relations among nations, based on the respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen international peace.

Self-determination is also found in Chapter IX of the Charter, which deals with economic and social cooperation.[204] At San Francisco, self-determination was identified as an objective of the post-War peace organisation, although the ambit of the principle was not precisely defined.[205] Subsequently, the political principle has developed into a legal right, articulated in General Assembly and Security Council resolutions, the two human rights covenants and by the ICJ in the *Western*

[202] *Ibid*. at 63.
[203] See M. K. Nawaz, 'The Meaning and Range of the Principle of Self-Determination' (1965) *Duke L.J*. 82 at 89.
[204] Charter of the United Nations, Art. 55.
[205] See 'Report of Rapporteur of Committee 1 to Commission I', Doc. No. 885 I/1/34, 9 June 1945, UNCIO Documents, vol. VI, p. 396; Antonio Cassese, *Self-Determination of Peoples – A Legal Appraisal* (Cambridge University Press, 1995), p. 38.

Sahara and *Namibia* advisory opinions.[206] More recently, the right has been considered under the auspices of international human rights law in recognition of the fact that both self-determination and human rights law aim to empower people by protecting them against oppression.[207]

Self-determination is often described as having both external and internal aspects.[208] In its external form the right is found in a number of General Assembly resolutions dealing with the status of former colonies and is concerned with a new state's international or external relations with other states.[209] Practice indicates little controversy with the application of the principle to non-self-governing territories and trust and mandated territories.[210] Although General Assembly Resolution 1514(X) outlined three options for colonies when exercising their right of self-determination, such entities overwhelmingly chose to become independent states.[211] Internal self-determination is an ongoing right involving 'the right of peoples within a State to choose their political status, the extent of their political participation and the form of their government'.[212] At the San Francisco Conference, the Committee responsible for drafting Article 1 of the Charter recognised that an essential element of self-determination 'is a free and genuine expression of the will of the people'.[213] Although

[206] 'Declaration on the Granting of Independence to Colonial Peoples and Countries', GA Res. 1514(XV), UN GAOR, 15th session, 947th plenary meeting, 14 December 1960 ('GA Res 1514(XV)'); 'Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter', GA Res. 1541 (XV), UN GAOR, 15th session, 948th plenary meeting, 15 December 1960 ('GA Res. 1541 (XV)'); ICCPR, Art. 1; International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), Art. 1; *Western Sahara (Advisory Opinion)* [1975] ICJ Rep. 12 at 31; *Namibia Advisory Opinion* at 31. On the development of self-determination from political principle to legal right, see Crawford, *Creation of States*, pp. 108–10.

[207] Robert McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 *Int'l & Comp. L.Q.* 857 at 872.

[208] *Ibid.* at 863; Cassese, *Self-Determination of Peoples*, p. 5; *Reference re Secession of Quebec* [1998] 2 SCR 217 at 273; 'General Recommendation 21: The Right to Self-Determination', Committee on the Elimination of Racial Discrimination, 48th session, 1147th meeting, UN Doc. A/51/18, 8 March 1996 at para. 4.

[209] McCorquodale, 'Self-Determination' at 863. See 'GA Res. 1514(XV)'; 'GA Res. 1541 (XV)'.

[210] Crawford, *Creation of States*, p. 116.

[211] Dugard, *Recognition and the United Nations*, p. 65. GA Res. 1514(XV) includes three methods of exercising the right of self-determination: emergence as a new state, free association with an independent state and integration with another state.

[212] McCorquodale, 'Self-Determination' at 864.

[213] See 'Report of Rapporteur of Committee 1 to Commission I', Doc. No. 885 I/1/34, 9 June 1945, UNCIO Documents, vol. VI, p. 396.

this may suggest popular participatory rights, in the context of the debates surrounding the adoption of the Charter, Cassese warns against conflating this passage with the right of peoples to choose their governments by democratic elections.[214] Instead he suggests that the right of self-determination has 'little to say about possible modes of implementing democratic governance'.[215]

The period of decolonisation was the catalyst for a substantial increase in UN membership. Upon achieving independence, the new states of Africa and Asia rapidly applied for membership and with a few exceptions were readily accepted.[216] The attainment of statehood by these territories was the primary quality recognised by members of the Security Council in the discussions surrounding the applicants' suitability for membership. '[I]ndependence' (Sudan, the Federation of Malaya and Guinea Bissau), 'complete independence' (Sierra Leone), 'full sovereignty' (Cameroon) and the process of UN plebiscites as a means of determining the inhabitants' wishes (for example, the joining of Togoland and the Gold Coast to form Ghana) were roundly approved as appropriate factors in deciding membership.[217] The right of self-determination and the struggle against colonialism were also frequently cited in statements by the USSR representative, as well as by other delegates to the Security Council.[218] Given the place of statehood in Article 4, it is not surprising that external self-determination was of paramount importance in these decisions.

The external self-determination of these states was not the only quality recognised by Security Council members. The debates on admission often commenced with the former colonial power extolling the virtues of the applicant under discussion. As these colonial powers were usually

[214] Cassese, *Self-Determination of Peoples*, pp. 40–2. [215] *Ibid*., p. 332.

[216] For example, Ghana applied to become a UN member on 6 March 1957, the day on which its independence was recognised by the British Commonwealth. The Security Council considered its application the next day: UN SCOR, 12th session, 775th meeting, 7 March 1957, p. 2.

[217] See UN SCOR, 11th session, 716th meeting, 6 February 1956 (Sudan); UN SCOR, 12th session, 786th meeting, 5 September 1957 (Federation of Malaya); UN SCOR, 29th session, 1791st meeting, 12 August 1974 (Guinea-Bissau); UN SCOR, 16th session, 969th meeting, 26 September 1961 (Sierra Leone); SCOR, 15th session, 850th meeting, 26 January 1960 (Cameroon); SCOR, 12th session, 775th meeting, 7 March 1957 (Ghana).

[218] For example, UN SCOR, 15th session, 850th meeting, 26 January 1960, p. 17 (Statement of the USSR on the Admission of Cameroon); UN SCOR, 16th session, 971st meeting, 25 October 1961, pp. 28–31 (Statement by the Ivory Coast on the Admission of Mauritania); UN SCOR, 29th session, 1791st meeting, 12 August 1974, pp. 7–8 (Statement of China (PRC) on the Admission of Guinea-Bissau).

one of Belgium, France or the UK, it is not surprising that listed amongst an applicant's virtues were its democratic characteristics. An early example of positive references to democratic conventions can be found in the consideration of Sudan's application, where democracy was linked to both its manner of attaining independence and its new constitution.[219] The implementation of democratic processes was also marked with approval in the new Commonwealth countries of Ghana and Malaya, with the US noting its pleasure that Ghana, 'another nation with a parliamentary government and democratic procedures has been recommended for membership in the United Nations'.[220] The French representative was particularly effusive when detailing the characteristics of the Republic of Togo and Mali, endorsing the establishment of new governmental institutions, the separation of powers, universal adult suffrage, responsible government and, in the case of Mali, a constitutional system recognising political freedoms and economic and social rights.[221] When eight African states were admitted in July 1960, the Italian representative focused on two traits: 'the imprint of political and democratic concepts which France has everywhere left behind, and secondly a desire to travel the road of freedom and independence in respect of the law'.[222] However, in the Security Council records there is little evidence that existing members actively discussed the conditions on the ground in these applicant countries.

While the presence of a democratic constitution was frequently cited by the Western powers as a positive feature in these new states, its absence was not necessarily detrimental. During the period in which the colonies were rapidly admitted, countries such as Mongolia were still waiting on the sidelines. This situation was rectified in 1961 when Mongolia and Mauritania were both recommended for admission as a result of private negotiations.[223] Interestingly, despite the fact that democracy was not a

[219] UN SCOR, 11th session, 716th meeting, 6 February 1956, p. 4 (statement of France), p. 6 (statement of Iran).

[220] UN SCOR, 12th session, 775th meeting, 7 March 1957, p. 14. See also UN SCOR, 12th session, 786th meeting, 5 September 1957 (Federation of Malaya).

[221] UN SCOR, 15th session, 864th meeting, 31 May 1960, p. 3 (Republic of Togo); UN SCOR, 15th session, 869th meeting, 28 June 1960, p. 3 (Mali).

[222] UN SCOR, 15th session, 891st meeting, 23 August 1960, p. 7. The eight new members were Benin, Niger, Burkina Faso, Ivory Coast, Chad, Congo, Gabon and the Central African Republic.

[223] UN SCOR, 16th session, 971st meeting, 25 October 1961. The President of the Security Council began the meeting by referring to the 'private consultations' that had taken place before the meeting commenced.

formal criterion for membership, in its memorandum to the President of the Security Council, Mongolia listed amongst its attributes the conduct of elections and its citizens' enjoyment of democratic rights, political liberties, the right to work and their access to public education.[224] In the end, whether Mongolian citizens did in fact enjoy these rights was not the decisive factor. Similarly, Mauritania's exercise of the right of self-determination and its independent status enabled it to apply for membership, but did not ensure a positive result. Rather, it was the implementation of a package deal between the Western powers and the USSR which ensured that the Security Council recommended the admission of both Mauritania and Mongolia.[225]

Following the admission of the British, French and Belgian colonies in the 1950s and 1960s, the 1970s saw the first former Portuguese colony being accepted into the UN. Once more, the exercise of the right of external self-determination proved to be the most important criterion.[226] Although there may have been doubts as to whether all the former colonies truly fulfilled the Article 4 requirement of statehood at the time that they were admitted to the UN, there was little inclination amongst the major powers to question their formal status too closely.[227] Membership for the former colonies was in effect 'automatic',[228] provided that they had in fact exercised their right of self-determination and indicated their choice to become independent. More recently, this has been confirmed by the admission of Timor-Leste in 2002[229] following its vote for independence and the withdrawal of Indonesian troops. The President of the Security Council and the US representative in the General Assembly noted with satisfaction the establishment of

[224] 'Telegram Dated 1 September 1957 from the Foreign Minister of the Mongolian People's Republic to the President of the Security Council', UN SCOR, 12th session, Supp, UN Doc. S/3873, 1957.

[225] UN SCOR, 16th session, 971st meeting, 25 October 1961, p. 11.

[226] See comments by the Iraqi representative upon the admission of Guinea-Bissau: UN SCOR, 29th session, 1791st meeting, 12 August 1974, p. 7.

[227] Dugard, *Recognition and the United Nations*, p. 67. Cf. Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, 1963), p. 54. See also Denys P. Myers, 'Contemporary Practice of the United States relating to International Law' (1961) 55 *Am. J. Int'l L.* 697. Myers notes that a factor in the US's compliant recognition policy in relation to the newly-independent states' pending UN membership was the need to anticipate the Soviet Union (717–8).

[228] Dugard, *Recognition and the United Nations*, p. 67.

[229] 'Admission of the Democratic Republic of Timor-Leste to the Membership in the United Nations', GA Res. 57/3, UN GAOR, 57th session, 20th plenary meeting, Agenda Item 20 UN Doc. A/RES/57/3, 27 September 2002.

Timor-Leste's democratic government.[230] But in truth it was the achievement of sovereign statehood that resulted in Timor-Leste's admission. Practice indicates that the transformation of a colony to a state and recognition of this process through UN membership is one of clearest examples of the use of the admission procedures to promote and secure the right of external self-determination. In this process a democratic government was frequently cited as a desirable, but not essential quality.

3 The admission of states from the Soviet Union and the former Yugoslavia

The UN's admission practice during the period of decolonisation demonstrated the importance of the right of external self-determination as evidence of an entity's statehood. But for the Western states at least, self-determination was never only about achieving statehood for former colonies.[231] Instead, over the years they have supported the internal aspect to self-determination as 'the ongoing right of all citizens within the state to participate in periodic elections which result in a representative government'.[232] In accordance with the principle of *uti possidetis*, this right applies to the state or territory as a whole.[233] The more thorny issue concerning the recognition of secessionist claims of ethnic groups has been left largely unresolved in international law.

In the early 1990s the international community was faced with the break-up of both Yugoslavia and the USSR. Many issues arose as a result of these events, including the USSR's Security Council seat, Serbia and Montenegro's ability to continue the UN membership of the former SFRY and the controversy surrounding Macedonia's name. One of the most vexing questions at the outset was the recognition of the new entities formed as a result of the break-up. The EC promulgated a number of guidelines to determine whether the entities emerging out of both the USSR and Yugoslavia would be recognised. Included within the Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union were respect for the provisions of the UN Charter, respect for commitments relating to the rule of law, democracy and human rights, and guarantees of the rights of ethnic groups and

[230] (2002) *Y.B.U.N.* 323 (President of the Security Council); UN GAOR, 57th session, 20th plenary meeting, UN Doc. A/57/PV.20, 27 September 2002, p. 6 (USA).

[231] Thomas Musgrave, *Self-Determination and National Minorities* (Oxford University Press, 1997), p. 96.

[232] *Ibid.*, p. 99. [233] *Ibid.*, p. 152.

minorities.[234] These extensive conditions went well beyond the traditional criteria for statehood as outlined in the Montevideo Convention on the Rights and Duties of States[235] (as well as the UN's admission criteria). The recognition of the ex-Soviet republics and their subsequent admission to the UN in 1991 (the Baltic States) and 1992 (the other republics) was relatively uncontroversial given that the break-up occurred as the result of agreement.[236] Although human rights and democracy were not explicitly mentioned as membership criteria in the sparse records of the discussions leading to the admission of the ex-Soviet Republics, at least in the case of the Baltic States it would appear that it was important that 'the wishes and aspirations' of the peoples were respected.[237]

The initial response of the international community to the dissolution of Yugoslavia was to deny the individual republics the right to unilaterally secede. The US Secretary of State James Baker encapsulated this sentiment when he indicated his preference for the principle of internal self-determination within an existing territorial unit by expressing support for both 'democratic development and [the] territorial integrity of Yugoslavia'.[238] When attempts to resolve the crisis failed, an Arbitration Commission was established as part of the European Political Cooperation's Conference on Yugoslavia in order to resolve the 'differences' arising out of the negotiations and to make recommendations to the EC.[239] In its first opinion the Commission held that the SFRY was 'in a process of dissolution' and hinted strongly that democracy should have a role in that process by stating that 'it is up to those Republics that so wish, to work together to form a new association endowed with the democratic institutions of their choice'.[240] When it came to recognising the new entities arising out of

[234] *EC Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union*, 16 December 1991 (1993) 92 ILR 173 at 173–4.

[235] Montevideo Convention on the Rights and Duties of States, signed 26 December 1933, 135 LNTS 19 (entered into force 26 December 1934), Art. 1; Marc Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 *Am. J. Int'l L.* 569 at 588.

[236] James Crawford, 'State Practice and International Law in relation to Unilateral Secession', Report to Government of Canada regarding Unilateral Secession by Quebec, 1997.

[237] 'Provisional Verbatim Record of the 3007th Meeting', UN SCOR, 46th session, 3007th meeting, UN Doc. S/PV.3007, 12 September 1991.

[238] Quoted in Weller, 'International Response' at 570 (citation omitted).

[239] The Arbitration Commission was known as the Badinter Commission. See 'Declaration on Yugoslavia', issued by European Political Cooperation Procedure Extraordinary Ministerial Meeting, Brussels, 27 August 1991: (1993) 92 ILR 162 at 162–3.

[240] Conference on Yugoslavia, Arbitration Commission, Opinion No. 1, 29 November 1991 (1993) 92 ILR 163.

the dissolution of Yugoslavia, as with the EC Guidelines on Recognition, the Commission placed emphasis on respect for human rights, and in particular the rights of minorities and ethnic groups.[241] The EC subsequently recognised Slovenia and Croatia on 15 January 1992, and Bosnia and Herzegovina on 6 April 1992.[242] Following these acts of recognition, all three new states were admitted to the UN on 22 May 1992.[243] The records of the Security Council on Bosnia and Herzegovina's admission merely note the President's welcome and refer to the new member's commitment to uphold the purposes and principles of the Charter.[244] Although the discussions on membership of the ex-Yugoslav republics give away relatively little as to the precise reasons for admission, without EC recognition it is unlikely that the UN would have admitted Bosnia so readily. As EC recognition depended upon at least notional respect for human rights and the rule of law, indirectly these principles played a role in determining admission to the UN.

Up until this point it has been assumed that if human rights and democracy are to have a role in determining UN admission, then it must be the case that respect for these principles is a factor in favour of admission, whereas the absence of these conditions indicates non-admission. However, in the cases of Bosnia and Herzegovina and Croatia,

[241] See for example, *Opinion No. 5 on the Recognition of the Republic of Croatia by the European Community and its Member States*, 11 January 1992 (1993) 92 ILR 179, and the follow-up to this opinion in *Observations on Croatian Constitutional Law (Comments on the Republic of Croatia's Constitutional Law of 4 December 1991, as Amended on 8 May 1992)*, 4 July 1992 (1993) 92 ILR 209.

[242] 'Statement by the Presidency [of the European Community] on the Recognition of the Yugoslav Republics', 15 January 1992, reproduced in Snežana Trifunovska (ed.), *Yugoslavia through Documents: From its Creation to its Dissolution* (Dordrecht: Martinus Nijhoff Publishers, 1994), p. 501; 'EC Declaration on Recognition of Bosnia and Herzegovina', 6 April 1992, reproduced in Trifunovska, *Yugoslavia through Documents*, p. 521. See also Peter Radan, *The Break-Up of Yugoslavia and International Law* (Harlow: Pearson Education, 2002), Chapter 6.

[243] 'Admission of the Republic of Slovenia to Membership in the United Nations', GA Res. 46/236, UN GAOR, 46th session, 86th plenary meeting, Agenda Item 20, UN Doc. A/RES/46/236, 22 May 1992; 'Admission of the Republic of Bosnia and Herzegovina to Membership in the United Nations', GA Res. 46/237, UN GAOR, 46th session, 86th plenary meeting, Agenda Item 20, UN Doc. A/RES/46/237, 22 May 1992; 'Admission of the Republic of Croatia to Membership in the United Nations', GA Res. 46/238, UN GAOR, 46th session, 86th plenary meeting, Agenda Item 20, UN Doc. A/RES/46/238, 22 May 1992. Due to controversial issues relating to its name and potential territorial claims on the neighbouring province in Greece, the former Yugoslav Republic of Macedonia was not admitted until April 1993.

[244] 'Provisional Verbatim Record of the 3079th Meeting', UN SCOR, 47th session, 3079th meeting, UN Doc. S/PV/3079, 20 May 1992.

human rights criteria, or rather human rights violations, arguably had another role. As the situation in both countries deteriorated, recognition was used both as 'leverage to influence the course of the peace negotiations' and 'a tool to regulate and suppress the armed conflict'.[245] Germany (in the case of Croatia) and the US (in the case of Bosnia and Herzegovina) believed that by granting international personality to the new entities, their borders would fall within the protection of international law.[246] Given that UN membership effectively certifies an entity's statehood,[247] admission to the organisation would confirm the international borders of the new states in response to Serbian aggression. Thus, the violation of human rights and international humanitarian law principles occurring on their respective territories as a result of aggressive action by the Yugoslav People's Army contributed to the UN's decision to admit. Problems regarding the lack of governmental control over Bosnian territory and the refusal of a large proportion of the population to recognise independence following the referendum in March 1992[248] were swept aside when considering the greater importance of international action to halt the armed conflict and the human rights violations occurring therein. In this respect, the timing of Bosnia's admission was designed to implement UN principles relating to international peace and security by confirming Bosnia's international borders and conferring upon it the legal protection of the Charter.[249] The decision confirmed that peace, and not democratic control, was the fundamental objective of the organisation in determining whether to admit a new entity.

IV Exclusion from membership and the two principles of universality

The admission practice of both the League of Nations and the UN reveals that both organisations aspired to universal membership. Particularly

[245] David Marcus Cox, 'The Making of a Bosnian State: International Law and the Authority of the International Community', Unpublished thesis submitted to the Degree of Doctor of Philosophy, Faculty of Law, University of Cambridge, 31 August 2001, p. 82.

[246] *Ibid*., pp. 82–3.

[247] Dugard, *Recognition and the United Nations*, p. 126; Martin Dixon, *Textbook on International Law*, 6th edn (Oxford University Press, 2007), p. 113. See also *Opinion No. 8*, 4 July 1992, para. 3 (1993) 92 ILR 199 at 200.

[248] Radan, *Break-Up of Yugoslavia*, p. 187; Weller, 'International Response' at 593.

[249] O'Keefe, 'Admission to the United Nations' at 176. Of course, '[i]nternational recognition changed the legal characterisation of the Bosnian conflict, but failed to suppress it': Cox, 'Making of a Bosnian State', p. 88.

in the case of the UN, a simple scan of the membership roster indicates that many members could barely be described as peace-loving, let alone democratic, highlighting that universality, whether or not it had been a goal at San Francisco, has now been achieved. Despite the goal of universal membership, members have not shied away from using human rights and democracy principles at various points to indicate their approval or disapproval of an applicant during the admission process.

The idea that the two organisations should strive for the admission and retention of all or most states in the international community would appear to sit uncomfortably with the existence of expulsion or suspension clauses in their constitutional instruments. This potential inconsistency has manifested itself in two conflicting ideas of universality. The first view, predominant in the admission practice of the two organisations, equates universality with attaining and retaining the membership of a broad collection of states – Schwarzenberger's 'heterogeneous universality'. This interpretation has been criticised on the basis that 'universality' is only concerned with the prospect that all states have the opportunity to apply and be admitted to an organisation provided that they have satisfied the admission conditions, and not the actual number of members at any given time.[250] From this perspective, a universal organisation may have an exclusion clause in its founding document.[251] In examining the admission of potential members, states' representatives appear to have adopted the first meaning in promoting the 'universal' membership of the organisations. But in dealing with exclusion, the organisations have fluctuated between the two meanings in an effort to reconcile the presence of expulsion and suspension clauses with the principle of full membership.

[250] Konstantinos Magliveras, *Exclusion from Participation in International Organisations – The Law and Practice behind Member States' Expulsion and Suspension of Membership* (The Hague: Kluwer Law International, 1999), p. 35. The International Law Commission's special rapporteur on the relations between states and intergovernmental organisations, El-Erian, appeared to favour the first view in his 1963 report when he wrote that: 'A universal organizations [sic] is one which includes in its membership all the States of the world. This is not the case of any past or present international organization yet.' However, he also acknowledged that organisations may tend towards complete universality: Abdullah El-Erian, 'Relations between States and Inter-Governmental Organizations' [1963] 2 *Y.B Int'l L. Comm*. 159 at 167. See discussion in Grant, *Admission to the United Nations*, pp. 72–4.

[251] Magliveras, *Exclusion from Participation*, p. 35.

A *The exclusion clauses in the Covenant and Charter*

Article 16(4) of the Covenant of the League of Nations, enabling the Council to expel a member in the event that it had 'violated any Covenant of the League', was added as an afterthought. Although an expulsion clause was included in the proposals put forward by the Italian delegation at the Commission on the League of Nations, such a provision was not found in the original drafts produced by either Wilson or the Phillimore Committee.[252] This failure to include an exclusion clause in later proposals may be attributed to the belief that it would be more appropriate to subject a recalcitrant state to a greater degree of international control, rather than expel it from the organisation.[253] Indeed, the ability of expulsion to achieve its aim of improving a member's behaviour has been doubted. For example, Toynbee argued that as the League was a compulsory association, it 'does not aim at keeping people *out*; its object is just the opposite. It is to keep people you do not like *in*, just because they are not law-abiding and you want to put the screw on them'.[254] This ambivalence towards the place of an exclusion provision in the Covenant was reflected in Wilson's comments when presenting the concluded text to the Peace Conference in stating that Article 16(4) would only operate in 'certain extraordinary circumstances'.[255]

Discussions at the San Francisco Conference on the question of whether an exclusion clause should be included in the Charter were more detailed and also more animated. At the insistence of the USSR, the power to expel a state for persistent violations of the Charter's principles was included in the UN's founding document. Those representatives in favour of an exclusion provision stated that peace and security, not universality, were the ultimate aims of the organisation and therefore it was necessary to give the UN the power to act against 'incorrigible member states'.[256] Such statements suggest that many representatives thought that universal membership would be incompatible with the organisation's goals. Delegates in favour of omitting reference

[252] See 'Wilson's First Draft', in Miller, vol. II, pp. 12–15; 'The Phillimore Plan', in Miller, vol. II, pp. 3–6.

[253] C. Wilfred Jenks, 'Expulsion from the League of Nations' (1935) 16 *Brit. Y.B. Int'l L.* 155 at 155–6.

[254] Royal Institute of International Affairs, *The Future of the League of Nations* (Oxford University Press, 1936), p. 10.

[255] 'Plenary Session of the Peace Conference, 28 April 1919', in Miller, vol. II, p. 700.

[256] 'Report of the Rapporteur of Committee I/2 on Chapter III (Membership)', Doc. No. 606 I/2/43, 26 May 1945, UNCIO Documents, vol. VII, p. 123.

to expulsion believed that it would be inconsistent with universality, it would remove a member from the UN's supervision and it would release that member from its Charter obligations.[257] In conclusion, those in favour of a more limited view of universality won the day, with the Charter including reference to both suspension (where preventative or enforcement action has been taken against a member) and expulsion (in the event that a member has persistently violated the Charter's principles).[258]

B Expulsion from the League

Only one state, the USSR, was successfully expelled from the League. An early UK suggestion that Liberia was liable to exclusion pursuant to Article 16(4) for various human rights violations was not taken up by members of the Council. The UK, together with a number of other countries, alleged that Liberia had violated the rights of its indigenous tribal people and was complicit in the operation of 'a system hardly distinguishable from slavery'.[259] At the Council meeting a proposal to withdraw the plan of assistance offered to Liberia was discussed, with the UK also suggesting that Liberia's failure to observe obligations under Article 23(b) to secure the just treatment of indigenous inhabitants could give rise to potential expulsion. In the end the Council did not consider Article 16(4) and opted for withdrawing the plan of assistance to Liberia.[260] Magliveras has suggested that the sanction of expulsion did not meet the 'proportionality test' as the League would not have benefited from Liberia's removal and there was another method of obtaining compliance with the Covenant's obligations.[261] Despite the failure to expel Liberia, it is noteworthy that, in a situation akin to the controversy surrounding Abyssinia's admission, serious breaches of Article 23(b) were considered of such importance by at least one member that it decided to raise the ultimate sanction.

[257] 'Report of the Rapporteur of Committee I/2 on Chapter III (Membership)', Doc. No. 1178 I/2/76(2), 24 June 1945, UNCIO Documents, vol. VII, p. 330.

[258] Charter of the United Nations, Arts. 5, 6. See 'Summary Report of Twenty-First Meeting of Committee I/2, June 12, 1945', Doc. No. 941 I/2/62, 13 June 1945, UNCIO Documents, vol. VII, p. 1, for the fate of a Belgian proposal to omit reference to expulsion in the Charter.

[259] 'Council Meeting, 18 May 1934' (1934) *L.N. Off. J.* 509.

[260] *Ibid.* at 513.

[261] Magliveras, *Exclusion from Participation*, p. 21.

Whether the USSR was truly 'expelled' from the League on 14 December 1939 is debatable as a matter of procedure.[262] The USSR and two other states were not present at the Council meeting where the resolution was adopted and a number of other members abstained from voting. The League's initial reluctance to admit the USSR to membership was largely due to its internal policies, but in the end the Soviets' external relations led the Council to consider expulsion. Following the USSR's invasion of Finland beginning on 30 November 1939, the Finnish government appealed to the League. In the Assembly's meetings it was alleged that the USSR had violated Covenant obligations, including Articles 12 and 15, as well as the Russo-Finnish Treaty of Non-Aggression of 1932 and the Kellogg-Briand Pact of 1928.[263] A number of representatives emphasised that expulsion was not a response to the Soviets' ideology or form of government but was due to aggression against Finland.[264] The Argentinian representative recalled his country's early attempts to ensure that all states would become members of the League,[265] but did not appear to consider such sentiments to be incompatible with the move to exclude the USSR. In fact, in their haste to expel the USSR, delegations failed to consider the possible inconsistency between the League's desire to admit all states and expulsion.

In its resolution recommending expulsion, the Assembly stated that the USSR had 'not merely violated a covenant of the League', it had 'by its own course of action placed itself outside the Covenant'.[266] The Council promptly responded that same afternoon with a resolution expelling the USSR.[267] Gross has commented that the Assembly adopted language not found in the Covenant; nor was it sufficiently precise as to the actual obligations that the USSR had violated.[268]

[262] Leo Gross, 'Was the Soviet Union Expelled from the League of Nations?' (1945) 39 *Am. J. Int'l L.* 35 at 43. Cf. Magliveras, *Exclusion from Participation*, pp. 25–6.

[263] 'Assemblies 1937–9, Plenary Meetings, Twentieth Session of the Assembly, Resolutions Adopted by the Assembly', in *League of Nations Records*, p. 53.

[264] 'Assemblies 1937–9, Twentieth Session of the Assembly, Third Plenary Meeting, 15 December 1939', in *League of Nations Records*, p. 14 (Freyre, Argentina); 'Assemblies 1937–9, Twentieth Session of the Assembly, Fourth Plenary Meeting', in *League of Nations Records*, p. 27 (Zafrula Khan, India).

[265] 'Assemblies 1937–9, Twentieth Session of the Assembly, Third Plenary Meeting, 15 December 1939', in *League of Nations Records*, p. 15 (Freyre, Argentina).

[266] 'Records of the Twentieth Ordinary Session of the Assembly, Plenary Meetings, Resolutions Adopted by the Assembly', in *League of Nations Records*, p. 53.

[267] (1939) *L.N. Off. J.* 506.

[268] Gross, 'Was the Soviet Union Expelled from the League of Nations?' at 43.

The USSR roundly condemned the League's action as 'a stupid decision' and declared that it would 'henceforth have its hands free'.[269] The lack of a League response to the much greater problems closer to home demonstrates that the Soviet retort was not without merit.[270] Both factors indicate a lack of clarity and consistency in the League's approach to expelling the USSR. Using Simpson's language, the League's response to the invasion of Finland was a reaction to the USSR's 'illiberal' external policies[271] rather than its undemocratic nature. Moreover, as the League's *raison d'être* was the peaceful resolution of international disputes, the Council's action in removing the USSR for external aggression would appear to accord with Mitrany and Claude's belief that the participation of states in an international organisation should be related to its fundamental purposes.[272] But while the USSR may have been expelled for its aggressive action against Finland, there is little doubt that anti-communist sentiments motivated the drastic form of that condemnation, despite comments to the contrary during the Assembly debates.[273]

C Exclusion from the UN

1 Expulsion and suspension

The UN has never suspended or expelled a member pursuant to Articles 5 and 6 of the Charter. Indeed, the ambit of Article 6 is uncertain given that it enables the General Assembly to expel a member on a recommendation of the Security Council when it has 'persistently violated' the Charter's principles.[274] Magliveras has suggested that the Principles referred to in this Article should be divined from the 'Declaration on Principles of International Law concerning Friendly Relations and

[269] 'Statement on the Expulsion of the USSR from the League of Nations', 16 December 1939, reproduced in Jane Degras, *Soviet Documents on Foreign Policy* (Oxford University Press, 1953), vol. III, pp. 412–14.

[270] Degras, *Soviet Documents*, p. 414. See also Walters, *A History of the League*, vol. II, pp. 806–7.

[271] Gerry Simpson, *Great Powers and Outlaw States – Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004), p. 281. See above Chapter 1, p. 59.

[272] Claude, *Swords into Plowshares*. See Chapter 1, p. 42.

[273] Walters, *A History of the League*, vol. II, p. 805. Walters wrote that '[a]ll those States whose policy had been affected by fear and hatred of Communism denounced the perfidy of Stalin in language which none of them used about Hitler'.

[274] Kelsen suggests that it is unclear whether the violation of 'one Principle is sufficient': Kelsen, *Law of the United Nations*, p. 711.

Cooperation among States in Accordance with the Charter of the United Nations'.[275] Included within these principles are the prohibition on the threat or use of force, the obligation to settle disputes by peaceful means and the obligation to refrain from intervening in a member's internal affairs.[276] The Declaration also refers to equal rights and self-determination; however, Magliveras suggests that the reference to these ideals cannot be construed as an obligation, as the Charter does not commit members to a particular course of action.[277] Guidance as to the Principles that would fall within Article 6 can also be obtained from the ICJ in the *Expenses Case*, where the Court stated, in passing, that the General Assembly's powers under both Articles 5 and 6 are 'specifically related to preventative or enforcement action'.[278] This interpretation is easily sustainable upon the wording of Article 5, which refers to preventative and enforcement action, but it is not so obvious that the application of Article 6 is limited solely to such measures. The Charter's emphasis on the UN's role in the peaceful resolution of disputes suggests that if a functional approach is taken to participation, then any sanction involving the exclusion of a member must be related to that member's aggressive international policies rather than its internal composition. Arguably, this reading also accords with statements at the San Francisco Conference to the effect that the organisation should refrain from examining a state's constitutional order. The prohibition on intervention in the internal affairs of member states in Article 2(7) may also operate as a counterweight to any attempt to exclude a state on the basis of its democratic or human rights record.

This reasoning constitutes strong grounds for suggesting that the UN should only attempt to exclude a member when its actions negatively impact upon international peace and security. Whatever the relative merits of the two proposals, suggestions that Israel should be expelled as a result of its alleged 'aggression and expansionist activities'[279] and that Serbia and Montenegro should be suspended during the conflict in

[275] Magliveras, *Exclusion from Participation*, p. 36.

[276] 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations', GA Res. 2625 (XXV), 25th session, 1883rd plenary meeting, UN Doc. A/RES/2625 (XXV), 24 October 1970; Magliveras, *Exclusion from Participation*, pp. 36–7.

[277] Magliveras, *Exclusion from Participation*, pp. 37–8.

[278] *Expenses Case* at 164.

[279] 'Extracts relating to Article 6 of the Charter of the United Nations', in *Repertory of Practice of United Nations Organs*, Supp. 6 (1979–84), vol. I, p. 130.

the former Yugoslavia[280] at least accord with that rationale. But the most notable attempt to expel a member highlights that the lack of democratic government and the violation of human rights can justify the application of the ultimate sanction. During the 1960s and 1970s, a number of attempts were made to exclude South Africa from the organisation in accordance with the growing condemnation of apartheid. In October 1961 a resolution was drafted calling upon the Security Council to consider whether South Africa should be expelled pursuant to Article 6. The opposition of three permanent members in the Security Council meant that the resolution could not go forward and in fact the proposal to expel South Africa was defeated in the General Assembly in any case.[281] A General Assembly resolution was passed in 1962 calling for South Africa's expulsion and a similar resolution was put to the Security Council in 1974. The sponsors of this later resolution rejected the argument that the expulsion of South Africa would violate the principle of universality, on the basis that South Africa's membership in the UN eroded the Charter's fundamental principles.[282] South Africa's breaches of Charter principles included most importantly racial discrimination, but also its continued presence in Namibia. In the words of the Kenyan delegate, those who supported South Africa's expulsion believed in universality but not 'at the price of the Charter'.[283] In opposing the resolution, members referred to the principle of universality, with the US and the UK emphasising the need to keep South Africa within the 'pressures of civilized international opinion'.[284] Similar sentiments in favour of universality were also invoked during debates concerning the exclusion of both Israel and Yugoslavia.[285] These statements accord with a conception of universality that equates membership with the representation of all states in the international community. The attempts to expel South Africa failed, but it was not suggested that the gross

[280] 'Provisional Verbatim Record of the 3116th Meeting', UN SCOR, 47th session, 3116th meeting, UN Doc S/PV.3116, 19 September 1992.

[281] See discussion in 'The Question of Race Conflict in South Africa' (1961) *Y.B.U.N* 108 at 108–113.

[282] See debates at UN SCOR, 29th session, 1806th meeting, 29 October 1974.

[283] *Ibid*., p. 7 (Kenya).

[284] UN SCOR, 29th session, 1808th meeting, 30 October 1974, p. 8 (USA), p. 12 (UK).

[285] See 'Repertory of Practice of United Nations Organs', p. 130; and comments by the Zimbabwean representative on the Security Council in 'Provisional Verbatim Record of the 3116th Meeting', UN SCOR, 47th session, 3116th meeting, UN Doc. S/PV.3116, 19 September 1992.

violation of human rights could never constitute a basis for exclusion, only that the sanction should be used as a last resort.[286]

2 Forced exclusion

More successful was the forced exclusion of the FRY (Serbia and Montenegro) from the UN between 1992 and 2000. The complex background to this situation, involving both General Assembly and Security Council resolutions, as well as an opinion from the Under-Secretary General and Legal Counsel of the UN, is described previously.[287] When the ICJ was confronted with the question of whether the FRY was a UN member in the period 1992–2000, it concluded that 'from the vantage point' of 2004 the fact of Serbia and Montenegro's admission to the UN in 2000 meant that it was not a member when it instituted proceedings in 1999.[288] The logical result of this conclusion is that Yugoslavia was no longer in existence or was forcibly excluded from the UN during the relevant period. If it was forcibly excluded, the question is why?

On the one hand, the resolutions of the political organs of the UN emphasised that the SFRY had ceased to exist (the Security Council) and therefore the FRY needed to apply for membership (the Security Council and General Assembly). This position was supported by the conclusions of the Badinter Commission, which opined that 'the FRY (Serbia and Montenegro) is a new state which cannot be considered the sole successor to the SFRY'.[289] The Badinter Commission was of the view that the SFRY's membership of international organisations needed to be 'terminated according to their statutes'.[290] If the SFRY had dissolved and, as a consequence, the FRY was not the continuation of that state, then there would be no entity to exclude – as such, no question of forcible exclusion would arise. But the behaviour of the UN on this matter was not so clear-cut as the resolutions would suggest.[291] The Under-Secretary-General and Legal Counsel's opinion emphasised that, despite the FRY's inability to participate in the General Assembly, Yugoslovia's membership had not been terminated, its seat and nameplate would

[286] See UN SCOR, 29th session, 1808th meeting, 30 October 1974, p. 12 (UK).
[287] See Chapter 1, pp. 21–2 and pp. 26–7.
[288] *Legality of Use of Force Case* at 1042. See discussion in Chapter 1, pp. 26–7.
[289] *Opinion No. 10*, 4 July 1992, para. 5 (1993) 92 ILR 206 at 208.
[290] *Opinion No. 9*, 4 July 1992, para. 4 (1993) 92 ILR 203 at 205.
[291] See Yehuda Z. Blum, 'UN Membership of the "New" Yugoslavia: Continuity or Break?' (1992) 86 *Am. J. Int'l L.* 830 at 834; Crawford, *Creation of States*, p. 711.

remain, and its flag would continue to fly at the UN's headquarters.[292] Furthermore, between 1992 and 2000 the FRY paid UN contributions.[293] And, despite the conclusions of the ICJ in 2004 in the *Legality of Use of Force Case*, the UN's judicial organ was not finished with the issue of the FRY's status in the UN. In 1993 Bosnia and Herzegovina filed a case in the ICJ alleging that Yugoslavia (Serbia and Montenegro) had violated various treaties, most notably the Genocide Convention. Although the case was commenced in 1993, final judgment was not delivered until February 2007 – after the decision in the *Legality of Use of Force Case* and after Serbia and Montenegro had split into its constituent republics. In the 2007 *Genocide Merits Decision*, Serbia (as the respondent) argued that the FRY was not a UN member and therefore not a party to the Statute of the Court when proceedings were instituted by Bosnia and Herzegovina,[294] an argument which accorded with the 2004 decision in the *Legality of Use of Force Case*. If successful, this contention would have led to the conclusion that the Court lacked jurisdiction. In response to Serbia's argument, the ICJ applied the principle of *res judicata* to a 1996 judgment[295] in which the ICJ had determined that its jurisdiction was based on Article IX of the Genocide Convention.[296] (Neither the applicant nor the respondent had raised the FRY's status in the UN at that stage of proceedings.) Thus, in 2007 the Court found that the FRY's 'capacity to appear before the Court in accordance with the Statute was an element in the reasoning of the 1996 Judgment which can – and indeed must – be read into the Judgment . . . That element is not one which can at any time be reopened and re-examined'.[297] Although this meant that the Court could consider the allegations of genocide made against Serbia and Montenegro, as is remarked by Dimitrijević and Milanović, 'the formal consistency of

[292] 'Letter Dated 29 September 1992 from the Under-Secretary-General, the Legal Counsel, Addressed to the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations', UN GAOR, 47th session, Agenda Item 8, Annex, UN Doc. A/47/485, 30 September 1992.

[293] Crawford, *Creation of States*, p. 189.

[294] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro) (Merits)*, 26 February 2007 (2007) 46 ILM 188 at 210 ('*Genocide Merits Decision*').

[295] *Ibid*. at 224.

[296] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia) (Preliminary Objections)* [1996] ICJ Rep. 595 at 617.

[297] *Genocide Merits Decision* at 244.

the Court's 2007 judgment with the NATO cases is no more than superficial'.[298]

With these divergent positions in mind, a sample from the UN debates indicates the reason for the forcible exclusion of the FRY. During the discussions following the 1992 Security Council resolution which declared that the SFRY ceased to exist, the representative from Hungary referred to his 'hope' that the leaders of the FRY would 'draw the appropriate conclusions from the resolution . . . and . . . ensure that a state of law, a democratic system, human rights and the rights of national minorities would prevail'.[299] Eight months later, when the General Assembly debated a resolution calling for the exclusion of the FRY from the Economic and Social Council, the Danish representative pointed to the need to send an 'unequivocal message to Belgrade'.[300] The US was more forthright in referring to the human rights violations and displaced persons resulting from the conflict.[301] As was suggested by Judge Dimitrijević in his dissenting opinion in the *Application for Revision of the Judgment of 11 July 1996*, the measures taken against the FRY were '*punitive*' in nature.[302] It can be concluded from these statements that the FRY was forcibly excluded from UN bodies as a result of its aggressive behaviour and the human rights violations occurring during the conflict in the region.[303] Although representing a successful effort to exclude a member, it was accomplished by bypassing the legal provisions of the Charter.[304]

3 The alternative: representation and the credentials process

Membership and representation are distinct concepts, but where the denial of a representative's credentials results in the exclusion of a

[298] Vojin Dimitrijević and Marko Milanović, 'The Strange Story of the Bosnian Genocide Case' (2008) 21 *Leiden J. Int'l L.* 65 at 84.

[299] 'Provisional Verbatim Record of the 3116th Meeting', UN SCOR, 47th session, 3116th meeting, UN Doc. S/PV.3116, 19 September 1992, p. 17.

[300] 'Provisional Verbatim Record of the 101st Meeting', UN GAOR, 47th session, 101st meeting, UN Doc. A/47/PV.101, 24 May 1993, p. 3.

[301] *Ibid.*, p. 8.

[302] *Application for Revision of the Judgment of 11 July 1996* at 64.

[303] Crawford writes that '[i]t is probably not a coincidence that the rejection of the claim of automatic continuity [by the FRY to the SFRY's UN membership] was associated with the involvement of the FRY in the civil wars in Croatia and Bosnia and Herzegovina'. Crawford, *Creation of States*, pp. 708–9.

[304] See also Yehuda Z. Blum, 'Was Yugoslavia a Member of the United Nations in the Years 1992–2000?' (2007) 101 *Am. J. Int'l L.* 800 at 818.

member, then its effect is equivalent to suspension.[305] This is also the case where the government effectively in control of a territory is rejected as the valid representative, leaving another delegation to fill a member's seat. The distinction between credentials and representation has been described as follows:

> credentials are normally considered as documents that emanate from a legitimate government for the purpose of clarifying the status of a given delegate. On the other hand, representation is concerned with the question of whether the government authority will be considered generally as the international agent of the state.[306]

Traditionally, the role of the Credentials Committee of the General Assembly has been understood as dealing with the first issue. However, there is a close relationship between the two concepts, often resulting in the Committee having to deal with both credentials and representation.

(a) Two rival representatives and the dispute over China's seat The most obvious example of the use of exclusion to indicate disapproval of a state's government where there are two rival governments is the seating of Nationalist China rather than the PRC in the UN. The PRC was excluded from the UN due to US opposition to the communist government, resulting in the government in control of the mainland territory being unable to participate in the work of the UN.[307] Dating from as early as 1949, a number of attempts were made to unseat the representative of the Nationalist Government.[308] But it was not until October 1971 that the General Assembly passed a resolution expelling the Chiang Kai-shek representatives and declaring that the PRC was the 'only lawful representative of China in the United Nations'.[309] At the time of this dispute, both Cuba and the UK submitted proposals dealing with the way in which the right of representation should be determined. The Cubans

[305] See Chapter 1, p. 20.

[306] F. Jhabvala, 'The Credentials Approach to Representation Questions in the UN General Assembly' (1977) 7 *Cal. W. Int'l L.J.* 615 at 620.

[307] Lyman M. Tondel (ed.), *The International Position of Communist China – Background Papers and Proceedings of the Fifth Hammarskjöld Forum* (Dobbs Ferry: Oceana Publications, 1965), pp. 50–1.

[308] See discussion in Edward McWhinney, 'Credentials of State Delegations to the UN General Assembly: A New Approach to Effectuation of Self-Determination for Southern Africa' (1976) 3 *Hast. Con. L.Q.* 19 at 28.

[309] 'Restoration of the Lawful Rights of the People's Republic of China in the United Nations', GA Res. 2758, UN GAOR, 26th session, 1976th plenary meeting, 25 October 1971.

suggested that four criteria should be used: effective control of the territory, the general consent of the population, ability to fulfil the international obligations of the state, and respect for human rights and fundamental freedoms.[310] When analysing the options, Singh preferred the UK's proposal, which deleted reference to respect for human rights but maintained the requirement that the representative have the support of the 'will of the nation substantially declared'.[311] Singh's reasons for preferring the British proposal and for denying the legality of the refusal to seat the PRC centred on his belief that to import democratic considerations into the credentials test would contravene the Charter and would constitute an undue interference in the internal affairs of a state.[312] He also regarded the UN's stance towards the PRC as discriminatory, given that a number of other revolutionary governments in a similar position had not been excluded.[313] It may be tempting to regard the failure to seat the PRC in the UN as an early example of the role of democracy in determining exclusion from the UN. In reality it was due to US opposition to communism rather than any substantive attempt to uphold democratic principles. The Secretary-General condemned the linkage between the recognition policies of individual states and representation in UN organs, and emphasised that where there are two rival claimants, representation should be accorded to the government with effective authority over a state's territory.[314]

(b) The exclusion of South Africa through the rejection of credentials The negative response to the PRC in the organisation's early years resulted in the unusual situation of two potential claimants vying for a place at the UN and, importantly, a permanent seat on the Security Council. In the case of South Africa there was only one potential claimant – the much maligned Nationalist government. The failed attempts to expel South Africa from the organisation did not deter that government's critics. Instead, they turned their attention to the Credentials Committee where they achieved much greater success. The

[310] 'Question of the Representation of China' (1950) *Y.B.U.N* 421 at 430.
[311] *Ibid.* at 430–1; Nagendra Singh, *Termination of Membership of International Organizations* (London: Stevens and Sons, 1958), p. 153.
[312] Singh, *Termination of Membership*, pp. 166–7. [313] *Ibid.*, p. 163.
[314] 'Letter Dated 8 March 1950 from the Secretary-General to the President of the Security Council Transmitting a Memorandum on the Legal Aspects of the Problem of Representation in the United Nations', UN SCOR, 5th session, UN Doc. S/1466, February 1950.

use of the credentials process as a means of demonstrating disapproval of a particular government shifted membership issues from the Security Council to the more representative General Assembly. The credentials of the South African delegation were tested on a number of occasions in both the Credentials Committee of the General Assembly, as well as in the General Assembly itself. While the Credentials Committee consistently confirmed the South African representatives' credentials, the General Assembly took two approaches. First, it neither accepted nor rejected South Africa's credentials. Second, in later years the plenary organ accepted the credentials of all other members apart from the credentials of the South African delegation.[315] It was not until 1974 that South Africa's credentials were rejected by both the Credentials Committee and the General Assembly and its delegation was excluded from the General Assembly following a presidential ruling to the effect that South Africa could not participate in the Assembly's work.[316] Thus, the credentials process became a method of determining the representative character of a particular government.[317] The rejection of the credentials of the South African delegation was criticised as illegal, as 'a dangerous precedent',[318] and was characterised as the equivalent of suspension.[319] In using the credentials process in this way, the General Assembly potentially sidestepped the Article 5 requirement that both major political organs of the UN must be involved in a suspension decision.

(c) Problems with the use of the credentials process to implement democracy Following the rejection of South Africa's credentials by the Committee, there have been a number of other occasions when a state's representatives have been tested through the credentials process.

[315] See Magliveras, *Exclusion from Participation*, pp. 213–18; Raymond Suttner, 'Has South Africa Been Illegally Excluded from the United Nations General Assembly?' (1984) 17 *Comp. & Int'l L.J. Sth Af.* 279 at 282.

[316] UN GAOR, 29th session, 2281st plenary meeting, 12 November 1974, p. 854. The President's ruling was unsuccessfully challenged in a vote at the same meeting (91 in favour, 22 against, 19 abstentions): at p. 856.

[317] Magliveras, *Exclusion from Participation*, p. 213.

[318] UN GAOR, 29th session, 2281st plenary meeting, 12 November 1974, p. 858 (France).

[319] See 'Statement by the Legal Counsel Submitted to the President of the General Assembly at its Request' (1970) *U.N. Jurid. Y.B.* 169 at 170; UN GAOR, 29th session, 2281st plenary meeting, 12 November 1974, p. 854 (USA). This view is supported by Magliveras, *Exclusion from Participation*, p. 221; Dan Ciobanu, 'Credentials of Delegations and Representation of Member States at the United Nations' (1976) 25 *Int'l & Comp. L.Q.* 351; Yehuda Z. Blum, *Eroding the United Nations Charter* (Dordrecht: Martinus Nijhoff Publishers, 1993), pp. 47–8.

In the cases of Cambodia, Sierra Leone, Afghanistan, Liberia and Haiti, the Credentials Committee either deferred a decision on the credentials of the government or accredited a former representative instead of the government effectively in control of the territory.[320] For example, following the 1991 military coup in Haiti, the General Assembly passed a resolution denouncing the 'violent interruption of the democractic process' and affirmed 'as unacceptable any entity resulting from that illegal situation'.[321] In 1992 the 'purported credentials' of the delegation representing the military regime were rejected.[322] Griffin has identified four reasons for this type of credentials decision: embedded UN interests in the form of UN involvement in a country, the foreign policy objectives of powerful states (both internationally and within a region), the end of the Cold War and changing community standards through a growing commitment to democracy.[323] This last factor is significant, but is by no means the only relevant issue, particularly when considering that the credentials process has accredited a number of undemocratic regimes. This is perhaps best demonstrated by the 2008 attempt to challenge the credentials of the military regime in Burma – a regime which refuses to recognise the victory of the National League for Democracy and its leader, Aung San Suu Kyi, in elections held in 1990. In September 2008 the winners of the 1990 elections sent a letter to the UN Secretary-General, Ban Ki-Moon, asking him to recognise a representative of the Members of Parliament Union 'to represent the people of Burma and the legitimate, democratically elected Members of Parliament in all organs of the United Nations'.[324] In a press briefing on 26 September 2008 a UN spokesperson revealed that the Secretary-General had decided not to take action as the letter did not comply with Rule 27 of the

[320] See Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford University Press, 1999), pp. 274–83; Matthew Griffin, 'Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy through its Accreditation Process and Should It?' (1999) 32 *N.Y. J. Int'l L. & Pol.* 725 at 745–7.

[321] 'The Situation of Democracy and Human Rights in Haiti', GA Res. 46/7, 31st plenary meeting, UN Doc. A/RES/46/7, 11 October 1991.

[322] 'UN Scorns Haitian Credentials', *The Globe and Mail* (Canada), 22 September 1992. See also 'First Report of the Credentials Committee', GAOR, 47th session, Agenda Item 3, UN Doc. A/47/517, 9 October 1992; and discussion in Griffin, 'Accrediting Democracies' at 746.

[323] Griffin, 'Accrediting Democracies' at 748–61.

[324] 'Myanmar 1990 Election Winners Want Junta's UN Seat', *The Guardian* (UK), 10 September 2008. On the question of Burma/Myanmar's name, see Chapter 4, n 158.

Rules of Procedure of the General Assembly.[325] Rule 27 provides that '[t]he credentials shall be issued either by the Head of the State or Government or by the Minister for Foreign Affairs'.[326] The spokesperson referred to a letter from the Under-Secretary-General for Legal Affairs to the Members of Parliament Union in which the Secretary-General's role in reviewing credentials was described as 'technical'.[327] Interestingly, one day after the General Assembly adopted the Report of the Credentials Committee without a vote, it passed a resolution condemning Myanmar for a litany of abuses, including enforced disappearances, restrictions on freedom of movement and association, violations of international humanitarian law and the lack of representation for the National League for Democracy.[328]

The invocation of Rule 27 is reminiscent of General Assembly debates in 1982 surrounding the seating of representatives of Democratic Kampuchea. Following the Vietnamese invasion of Cambodia to oust the Khmer Rouge regime, a question arose as to whether the representatives of the newly installed People's Revolutionary Council (backed by Vietnam) or the representatives of the coalition government of Democratic Kampuchea (including the Khmer Rouge) should be seated in the General Assembly.[329] The US distinguished between its condemnation of the 'despotic rule of the Khmer Rouge' and its support for the 'acceptance of the credentials of the Democratic Kampuchea on technical grounds'.[330] It relied upon Rule 27 to add weight to its view that there was no issue regarding the credentials of Democratic Kampuchea and that in 'the absence of any superior claim, the Credentials Committee should . . . recommend seating representatives of the government whose credentials have been accepted by previous sessions of the General

[325] 'Daily Press Briefing by the Offices of the Spokesperson for the Secretary-General and the Spokesperson for the General Assembly President', UN Department of Public Information, New York, 26 September 2008.

[326] Rules of Procedure of the General Assembly, rule 27 ('Submission of Credentials').

[327] 'Daily Press Briefing', 26 September 2008.

[328] 'Situation of Human Rights in Myanmar', GA Res. 63/245, 63rd session, 74th plenary meeting, Agenda Item 64(c), UN Doc. A/RES/63/245, 24 December 2008. The record of the General Assembly discussions on the Report of the Credentials Committee is referenced at: 'Report of the Credentials Committee (A/63/633)', GAOR, 63rd session, 74th plenary meeting, Agenda Item 3(b), UN Doc. A/63/PV.74, 23 December 2008.

[329] Griffin, 'Accrediting Democracies' at 738.

[330] 'First Report of the Credentials Committee', GAOR, 37th session, Agenda Item 3, UN Doc. A/37/543, 14 October 1982, p. 4.

Assembly'.[331] As in 2008, a distinction was drawn between the credentials process and the democratic and human rights credentials of a particular regime. But the description of the process as technical belies the fact that a state's representativeness is being tested, albeit sporadically, through credentials, resulting in situations where the government in control of a territory has been unable to take up a state's seat. The unsuccessful attempt to seat a representative of the Members of Parliament Union of Burma merely serves to highlight the intermittent nature of this process.

Blum has characterised the two approaches to the credentials process as the objective approach (based on effectiveness) and the subjective approach (based on legitimacy).[332] In describing the possibilities in this way, there is little doubt that Blum prefers an approach based on his preference for 'objective legal criteria' rather than one that takes political considerations into account.[333] In his view, issues as to whether a government is the true representative of the people fall within the category of extra-legal factors. Questions remain as to whether the Credentials Committee is the appropriate body to determine the representative character of a state's government, particularly given the lack of representativeness within the Credentials Committee itself.[334] The practice of accrediting democracy through the credentials process may also give the unwanted impression that all governments whose credentials are accepted are considered legitimate.[335] Of greater concern is the potential for the credentials test to introduce a 'fault line' between democratic and non-democratic UN members.[336] Given the possibility that a distinction may be drawn between these two categories, the form of democracy being promoted through the credentials process must also be questioned. It would appear that to the extent that the credentials procedure has indicated a preference for a form of government, the presence of free and fair elections is the decisive factor. However, elections are not the only determinant of democracy and the use of the credentials process in this manner may hide other concerns about the democratic or human rights conditions in a member state.[337] Finally, using Schwarzenberger's

[331] *Ibid.* [332] Blum, *Eroding the United Nations Charter*, p. 38. [333] *Ibid.*

[334] Griffin, 'Accrediting Democracies' at 771–3. See also Magliveras, *Exclusion from Participation*, p. 217.

[335] See comments of the Costa Rican representative to the General Assembly in 1981 in Roth, *Governmental Illegitimacy in International Law*, p. 247.

[336] Griffin, 'Accrediting Democracies' at 778–9.

[337] See *ibid.* at 779–81. See also discussion in Chapter 1, pp. 53–7, on the range of meanings of the term democracy.

language, the use of the credentials test to promote democracy where there is a contest between rival candidates suggests a tentative move away from a policy of heterogeneous universality to one of homogeneous universality within the UN.

V Conclusion

Following the adoption of the Dumbarton Oaks Proposals in 1944, Kelsen wrote that in order for the UN to be able to fulfil its purpose as a universal peace organisation, it must have a universal character. He believed that admission to the organisation should be as easy as possible and that submission to the Charter alone demonstrated a state's 'love for peace'.[338] Over the years this link between universality and peace has been the predominant influence on the development of criteria for determining participation in both the League of Nations and the UN. To some extent Rudinski was correct in stating that the League and the UN 'proceeded on the assumption that a new member has to be an asset to the organisation and not a liability, has to facilitate rather than obstruct the cause of peace and security'.[339] But this assumption has always been tempered by a more fundamental goal in determining membership – a broad vision of an organisation comprising all states. With this goal in mind, the main character requirements in the Covenant and the Charter – that a state be self-governing or peace-loving – have been flexibly applied. As universality has been the ultimate goal of both organisations, it is perhaps surprising that human rights and democracy have appeared as an undercurrent in admission processes at all. Such principles arose in membership discussions in the UN during the Cold War, but were often used as a mask for ideological tensions rather than the development of consistent admission criteria.[340] Decolonisation and the subsequent admission of the former colonies is perhaps the clearest example of the promotion of a right through the membership process, but in reality external self-determination and statehood instead of internal self-determination and democracy were being upheld. These later characteristics were viewed as desirable but not decisive. Whereas the admission of the former colonies upheld the Charter principle of

[338] Hans Kelsen, 'The Old and New League: The Covenant and the Dumbarton Oaks Proposals' (1945) 39 *Am. J. Int'l L.* 45 at 47.
[339] Rudzinski, 'Admission of New Members' at 147.
[340] Claude, *Swords into Plowshares*, p. 90.

self-determination, the admission of Bosnia and Herzegovina can be seen as an aspect of the organisation's role in international peace and security. In this case it was the violation of human rights that pre-empted the Security Council's decision to recommend admission. The relevance of human rights and democracy in these membership processes mimics the importance of these principles to the organisation as a whole.

The meagre practice on exclusion, particularly in the UN, may give a more substantive role to human rights and democratic conditionality, but this has been achieved largely through the credentials process, rather than the application of the Charter's provisions. From the limited examples it is difficult to define the substantive human rights and democratic principles that the UN is seeking to uphold through exclusion policies. Certainly the practice indicates that matters traditionally considered within the limitations of Article 2(7) are not beyond the ambit of the organisation's exclusion powers. Additionally, UN organs have demonstrated that when faced with an unacceptable member they will use extra-legal measures to achieve their objectives. But once again the narrow range of this practice indicates that Kelsen, rather than Kant, had the final say in determining participation in the universal peace organisations.

The application of the membership criteria highlights that UN members ultimately believe that the effectiveness of a peace organisation comes from its global character.[341] But the pull towards universal membership does not tell the complete story of the relevance of human rights and democracy in the debates leading to particular admission or exclusion decisions in both the League and the UN. Such debates reveal that an applicant's democratic and human rights record was raised by existing members. However, in the end the legitimacy of both the League and the UN has been determined by their ability to both obtain and retain members. It is in this goal that the UN has succeeded where the League failed. The failure to achieve universality has been linked to the failure of the League to achieve peace.[342] While neither organisation has been successful in preventing war, when League members engaged in

[341] Singh, *Termination of Membership*, p. 164.

[342] For example, Murray has suggested that the League failed as the absence of the US and the USSR (for most of the time) meant that it was not strong enough to act against Germany. See Gilbert Murray, 'Covenant and Charter' in National Peace Council London, *The United Nations Charter: A Commentary* (National Peace Council London, 1945), p. 11.

activities contrary to the League's peaceful mandate, they usually withdrew. Withdrawal was not written into the UN Charter and, although an interpretative declaration was adopted at the San Francisco Conference suggesting the possibility of a member voluntarily leaving the organisation, only one state has come close to taking such action.[343] The importance of obtaining and retaining members is also evidenced by the high degree of consensus on the admission of new members since the end of the Cold War, at least to the extent that such matters are discussed within the Security Council's formal meetings rather than in the corridors of the UN.

This final comment leads to questions being asked about the participation process itself. The Charter places the 'indisputable control of the bond of membership' in the hands of the permanent members of the Security Council.[344] Although both the General Assembly and the Security Council have a role to play, it is the Security Council that makes the initial recommendation and where the veto power resides. By placing the question of admission and exclusion on the Security Council's agenda, the founders firmly linked issues of participation to the organisation's role in international peace and security. Members have attempted to circumvent the procedure outlined in the Charter – first, in seeking an opinion from the ICJ to determine whether the General Assembly can act in the face of an intransigent Security Council and, second, through the credentials process. The second attempt has been more successful than the first, but doubts still remain as to whether some more substantive form of democracy is a goal to be sought in the decision-making process for determining participation in an international organisation. This issue will be examined in Chapter 6.

[343] The interpretative declaration adopted at the San Francisco Conference reads as follows:

> [I]f a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other Members, it is not the purpose of the Organization to compel that Member to continue its cooperation in the Organization.

'Summary Report of the Twenty-Eighth Meeting of Committee I/2', Doc. No. 1086, I/2/77, 19 June 1945, UNCIO Documents, vol. VII, p. 267. There is disagreement as to whether Indonesia's action in writing a letter to the Secretary-General in 1965 advising him of its decision to withdraw from the UN constituted withdrawal in the formal sense. See Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, 4th edn (Boston: Brill Academic Publishers, 2003) at paras. 132–3.

[344] Ciobanu, 'Credentials of Delegations and Representation' at 375.

3

Rights, regionalism and participation in Europe

I Introduction

The year 2004 heralded both a beginning and an end to the process of European integration. For many Central and Eastern European applicant states, 2004 marked the final stage in the lengthy procedures for entry into two regional organisations – the EU and NATO.[1] In the same year, both Croatia and Turkey moved closer to their goal of joining (or rejoining) Europe with the European Council's decision to commence accession negotiations for admission to the EU. The decision to admit ten new members to the EU on 1 May 2004 was welcomed as part of an historic process of reunification – a 'transformation' that has changed Europe 'in a thousand ways, and for the better'.[2] The celebrations on May Day closely followed the entry of seven countries to NATO in March 2004 and a string of new members to the Council of Europe in the 1990s. In each case the expansion of these organisations was preceded by an extensive admission procedure involving the fulfilment of a number of conditions on the part of successful applicant states.

The examination of the admission and exclusion practice of the League of Nations and the UN demonstrated that human rights and democracy criteria have played a haphazard role in determining membership of the universal peace organisations. Peace was to be achieved through universality rather than democracy. As was the case with the two universal organisations, the establishment of the three major post-Second World War organisations in Europe was also motivated by the desire to preserve peace. But in Europe and the North Atlantic region, peace was to be accomplished through regional

[1] Although NATO includes non-European members (Canada and the US), it is characterised as a regional organisation on the basis that all future members must be European: North Atlantic Treaty, Art. 10.

[2] Prime Minister Tony Blair, 'Speech on the European Bank for Reconstruction and Development and EU Enlargement', speech delivered on 19 April 2004, www.number-10.gov.uk/output/Page5654.asp.

integration rather than universal membership. The organisations set up as vehicles for participation in Europe have forged the way ahead in developing rigorous membership criteria based on human rights and democracy. This is particularly evident in the major European human rights institution, the Council of Europe, where the admission of several Central and Eastern European states excited much interest in the 1990s. NATO has also confirmed that new members must conform to basic principles of 'democracy, individual liberty and the rule of law'.[3] In 2000 the report of the 'three wise men' examining the commitment of the Austrian government to common European values raised the issue of the membership criteria of the EU in the context of the imposition of sanctions against an existing member.[4] Thus, human rights and democracy are being employed as a means of removing impediments to Churchill's post-War vision of a 'United Europe'.[5]

This chapter traces the development of the role of human rights and democracy across the membership criteria of three European organisations established after the Second World War: the Council of Europe, the EU and NATO. It is the first of two chapters examining the role of human rights and democracy in determining participation in closed, mainly regional organisations. Europe has been selected as the starting point given that it is the most advanced region in terms of both the process of integration and the development of institutions. It is also the region where human rights and democracy have played the greatest role in determining participation. The focus here will be on admission to the European organisations as it is in this sphere that the policies of conditionality have produced the greatest impact. The three institutions examined in this chapter have traditionally been classified as closed regional organisations because their membership is exclusively derived from a defined group of states within a given geographical region. Although this classification appears uncontentious, a geographical notion of European states has certainly expanded since the 1950s when it could be defined to exclude members of the Soviet bloc.[6] More recently, the Council of Europe demonstrated that geography is not merely a matter of location

[3] NATO, 'Study on NATO Enlargement', September 1995, ch. 1 at para. 4.

[4] Martti Ahtisaari, Jochen Frowein and Marcelino Oreja, 'Report' (2001) 40 ILM 102, adopted in Paris on 8 September 2000 ('Report on Austria').

[5] Winston Churchill, 'Foreword', in European Movement, *European Movement and the Council of Europe* (London: Hutchinson, 1949), p. 11.

[6] See Political and Economic Planning, *European Organisations* (London: George Allen & Unwin, 1959), p. xv.

when it observed that Armenia, Azerbaijan and Georgia could apply for membership provided that they indicated 'their will to be considered as part of Europe'.[7] Thus, geography is not a rigid notion and does not necessarily restrict each organisation's desire to achieve full regional membership within a community of European states.

The Council of Europe, NATO and the EU are not the only regional institutions operating in Europe – they have been selected for study due to their rapid and ongoing growth over the last and into the next decade.[8] Although each of the three institutions was established to perform a different function, each perceives that one of its purposes is to unify (or reunify) Europe through expansion, and that such expansion should be tethered to human rights and democratic principles. In this way the boundaries of a new Europe in economic, political and security terms are being dictated by the language of human rights. Parts II and III explore the extent to which the language of democracy and rights has been integrated into the documents and practice of the European organisations in admission decisions, focusing on three key periods of expansion. The practice indicates that despite the apparent desire to restrict the organisations to states that have fulfilled certain criteria, in practice heterogeneity has increased with each round of admissions, revealing a tension between the desire for universal membership amongst European states and the desire to ensure that members have appropriate rights records. The inconsistencies in the practice, both within and across the organisations, will be examined in Part IV.

II Human rights, democracy and participation in Europe

A Human rights and democracy in Europe

On one level it is unsurprising that the European institutions have included reference to human rights and democracy in their membership

[7] Parliamentary Assembly, 'Enlargement of the Council of Europe', Doc. No. 7103 (Report of the Political Affairs Committee, 1994), as quoted in Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, 4th edn (Boston: Brill Academic Publishers, 2003) at para. 54. Georgia became a member of the Council of Europe in 1999, and Armenia and Azerbaijan joined in 2001.

[8] The OSCE will be examined in Chapter 4 as the Helsinki Process was originally established as a fundamentally different form of cooperation between European states (both Western and Eastern). See Theodor Meron and Jeremy Sloan, 'Democracy, Rule of Law and Admission to the Council of Europe' (1996) 26 *Israel Y.B. Hum. Rts* 137 at 141–2; Rachel Brett, 'Human Rights and the OSCE' (1996) 18 *Hum. Rts Q.* 668 at 671–6.

criteria given their place at the forefront of international efforts to protect and promote human rights. The European Court of Human Rights is widely regarded as the most effective regional human rights mechanism in the world. In 2000 members of the EU concluded the Charter of Fundamental Rights of the European Union,[9] recognising both civil and political rights, and economic, social and cultural rights. European states have adopted numerous human rights obligations in treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter,[10] the European Convention on the Legal Status of Migrant Workers[11] and the Framework Convention on the Protection of National Minorities.[12] Just as they have been at the vanguard of efforts to protect human rights, the European institutions have been particularly proactive in declaring democracy a fundamental value. The preambles to the Statute of the Council of Europe, the Treaty on European Union (TEU) and the North Atlantic Treaty all proclaim the importance of democratic principles.[13] The interaction between democracy and human rights is well recognised in Europe – for example, the Preamble to the ECHR provides that both democracy and human rights are the best method of maintaining justice and peace.

On another level, the addition of a policy of human rights conditionality for applicant states by at least two of the organisations – NATO and the EU – is significant given that the promotion and protection of human

[9] Charter of Fundamental Rights of the European Union [2000] OJ C 364/1 (signed and entered into force 7 December 2000). By virtue of Article 6 of the Treaty on European Union (as amended by the Treaty of Lisbon), the Union recognises that the Charter has 'the same legal value as the Treaties'.

[10] European Social Charter, opened for signature 18 October 1961, 529 UNTS 89 (entered into force 26 February 1965). The European Social Charter was revised in 1996: European Social Charter (Revised), opened for signature 3 May 1996, ETS 163 (entered into force 1 July 1999).

[11] European Convention on the Legal Status of Migrant Workers, opened for signature 24 November 1997, ETS 93 (entered into force 1 May 1983).

[12] Framework Convention on the Protection of National Minorities, opened for signature 1 February 1995, ETS 157 (entered into force 1 February 1998).

[13] Statute of the Council of Europe; Consolidated Version of the Treaty on European Union [2008] OJ C 115/13; North Atlantic Treaty. Unless specific reference is made to the 1992 Treaty on European Union, TEU is used to refer to the version of the Treaty on European Union that was consolidated with the Treaty Establishing the European Community (renamed as the Treaty on the Functioning of the European Union) following the entry into force of the Treaty of Lisbon, signed 13 December 2007: [2007] OJ C 306/01 (entered into force 1 December 2009).

rights were not core aims at the time of their foundation.[14] Furthermore, writers differ on the question as to whether there is a fundamentally European approach to human rights that is transferable across borders. Leben argues that there is a distinctive European viewpoint evidenced by the important role played by European states within this field, the relatively homogenous nature of European countries, and the relationship between those countries through the EU, the Council of Europe and the OSCE.[15] Differences between countries on matters of detail do not derogate from Leben's conclusion that both 'the stamp of eighteenth-century revolutionary individualism' and the role of state intervention mark the European approach.[16] However, not all writers agree that there is a uniform vision of rights across Europe.[17] Such a vision would appear to be necessary in order to utilise human rights and democracy as a method of determining participation. While the above conventions and decisions represent one measure of the principles upheld by the European organisations, the requirements that a state must fulfil in order to become a member indicate their central values on a more fundamental level. It will be seen that despite the diverse functions performed by each organisation, the admission criteria have developed to a position whereby the constitutions of the three institutions have a very similar vision of a homogeneous community of European states. Attention will then be focused on the way in which the organisations have implemented this vision in practice in three periods: pre-1990, the early 1990s and the late 1990s to 2004.

B The documentary criteria for participation in Europe

The Council of Europe, NATO and the EU were each established to perform very different functions, but underlying the constitutional

[14] Chava Shachor-Landau, 'Democracy: The Case of the European Union' (1996) 26 *Israel Y.B. Hum. Rts* 157 at 160. Although the North Atlantic Treaty includes reference to 'principles of democracy, individual liberty and the rule of law', it was not until the 1990s that these objectives were fully explored by the organisation: see 'Declaration on a Transformed North Atlantic Alliance Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council', Press Release, 6 July 1990 ('London Declaration').

[15] Charles Leben, 'Is There a European Approach to Human Rights?', in Philip Alston, Mara Bustelo and James Heenan (eds.), *The EU and Human Rights* (Oxford University Press, 1999), p. 97.

[16] *Ibid.*

[17] Päivi Leino, 'A European Approach to Human Rights? Universality Explored' (2002) 71 *Nordic J. Int'l L.* 455 at 457.

instruments of all three organisations is the understanding that an integrated Europe is a fundamental goal. NATO was designed as a collective defence organisation to ensure military security in the North Atlantic area,[18] the function of the European Communities was to promote economic integration across the continent,[19] and the Council of Europe was established as a forum to discuss questions of common concern and action on a range of issues, including human rights and fundamental freedoms.[20] The functions set out in the constituent treaties were infused with the belief that universal membership amongst European states was a goal in itself. The Preamble to the Statute of the Council of Europe states that it is necessary 'to create an organisation which will bring European States into closer association' (although this is tempered with the recognition that members should be 'like-minded').[21] One of the aims of the EU is to 'continue the process of creating an ever closer union among the peoples of Europe',[22] highlighting that expansion is an important goal. Finally, the North Atlantic Treaty affirms the right of 'any' European state to seek admission.[23]

However, the mere fact of being geographically situated in Europe is not enough to gain membership in any of the three organisations. Conditionality is an important part of the process of European integration, as is demonstrated by the fact that the Statute of the Council of Europe, the TEU and the North Atlantic Treaty all outline basic membership criteria. In each case these constitutional instruments provide only a brief guide as to the requirements for admission and are augmented by a range of other 'quasi-legal'[24] documents that further define the standards to which prospective members must adhere. This elaboration of the membership requirements occurred mainly in the 1990s when a number of Central and Eastern European countries sought entry to the three organisations.

[18] North Atlantic Treaty, Arts. 3–5.

[19] Treaty Establishing the European Economic Community, opened for signature 25 March 1957, 298 UNTS 11 (entered into force 1 January 1958), preamble ('Treaty of Rome'); Treaty Establishing the European Coal and Steel Community, opened for signature 18 April 1951, 261 UNTS 140 (entered into force 23 July 1952, expired 23 July 2002), preamble ('Treaty of Paris').

[20] Statute of the Council of Europe, Art. 1(b). [21] *Ibid*., preamble. [22] TEU, preamble.

[23] North Atlantic Treaty, Art. 10.

[24] Christophe Hillion, 'Enlargement of the European Union: A Legal Analysis', in Anthony Arnull and Daniel Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford University Press, 2002), p. 402.

1 Treaty provisions

At the same time that the founding treaties espouse the goal of universal European membership, they also place limits on that membership. The most clearly articulated admission requirements are located in the Statute of the Council of Europe, adopted in 1949 by ten European states. A state may be invited to become a member of the Council of Europe provided that it is 'European' and it is 'able and willing to fulfil the provisions of Article 3'.[25] This Article provides that:

> Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.

The Council's aim is to 'achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress'.[26] Thus, according to the Statute, the acceptance of human rights and fundamental freedoms are necessary preconditions for the admission of a European state to the organisation. Given that the Council of Europe has defined its existence in terms of its ability to effectively promote rights,[27] this insistence that members uphold certain human rights and democracy standards is to be expected.

Perhaps more unusually, human rights and fundamental freedoms are at the forefront of the conditions for entry to the EU, an organisation originally founded to achieve economic integration on the continent. The movement from economic to political union in Europe and the growing concern with the social dimension of market integration[28] is evidenced in the development of membership criteria for the EU. With the adoption of new treaties consolidating the process of integration, aspects of the membership conditions were progressively amended. Prior

[25] Statute of the Council of Europe, Art. 4. [26] *Ibid*., Art. 1.

[27] For example, a report by the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe ('Parliamentary Assembly') on the conflict in the Chechen Republic noted that 'membership of the Council of Europe is about the enhancement of human rights or it is about nothing': Parliamentary Assembly, 'Conflict in Chechnya – Implementation by Russia of Recommendation 1444', Doc. 8697, Report of the Political Affairs Committee, 4 April 2000.

[28] See Nanette Neuwahl, 'The Treaty on European Union: A Step Forward in the Protection of Human Rights?', in Nanette Neuwahl and Allan Rosas (eds.), *The European Union and Human Rights* (The Hague: Martinus Nijhoff Publishers, 1995), p. 2.

to the Treaty of Amsterdam (1997), the only treaty criterion that had to be fulfilled for admission to the European Community was that a state be 'European'.[29] While the Maastricht Treaty (1992) stated that the EU is composed of members 'whose systems of government are founded on democracy'[30] and pointed to the Union's 'respect' for fundamental rights,[31] these provisions were not explicitly set down as entry conditions for future applicants. Following the Treaty of Amsterdam, the relevant criteria were located in Article 49 of the TEU, which provided that:

> Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union. It shall address its application to the Council, which will act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.

Article 6(1) indicated that 'the Union is founded on principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law'. Fundamental rights were defined in terms of the ECHR and the principles common to the constitutional traditions of member states as principles of Community law.[32] However, the process of European integration did not end with the Treaty of Amsterdam and, as a result of the entry into force of the Treaty of Lisbon (2007), the membership conditions were amended again (although the criteria remain substantially the same). Since 1 December 2009, Article 49 'enables [a]ny European State which respects the values referred to in Article 2 and is committed to promoting them' to apply for membership.[33] Article 2 contains a similar statement of the EU's values as found previously in Article 6(1), with a few important additions. Article 2 includes reference to 'equality' and 'the rights of persons belonging to minorities' as values upon which the Union is founded. It also adds a further sentence to the effect that '[t]hese values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'. The TEU leaves the details of the admission conditions to be filled in by agreement between existing

[29] Article 237 of the Treaty of Rome provided that 'any European State' could become a member of the European Community. See also TEU, Art. O ('Maastricht Treaty'). The Treaty of Amsterdam amended the Maastricht Treaty in 1997: Treaty of Amsterdam, opened for signature 2 October 1997 [1997] OJ C 340/1 (entered into force 1 May 1999).

[30] TEU, Art. F(1). [31] *Ibid*., Art. F(2).

[32] TEU, Art. 6(2) (ex Art. F of the Maastricht Treaty).

[33] Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Art. 49.

members and the applicant,[34] thereby suggesting some flexibility in the application of these criteria to individual states. Notably, the TEU includes reference to democracy, as well as human rights and fundamental freedoms, as important attributes for a potential member. The characteristics of democracy deemed important for EU members are not elaborated further in this instrument.

The treaties of the Council of Europe and the EU both contain substantive provisions enabling the organisations to exclude member states. Both organisations also contain treaty provisions enabling a state to voluntarily withdraw from membership.[35] Articles 8–9 of the Statute of the Council of Europe provide for the suspension and expulsion of a member. Article 8 states that:

> Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.

Article 9 is concerned with the situation where a member has failed to fulfil its financial obligations.[36] Thus, suspension and expulsion from the Council of Europe are based on the same principles upon which applicants for admission are assessed. This is not the case when imposing membership sanctions in the EU. Since the Treaty of Amsterdam, the TEU has enabled the Council (after fulfilling certain procedural requirements) to 'determine the existence of a serious and persistent breach by a Member State' of the principles/values referred to in Article 6(1)/Article 2.[37] If the Council decides that the relevant principles have been breached, it may suspend certain rights, including voting rights in the Council. The Treaty of Nice (2001) amended Article 7 by establishing a preventative mechanism, whereby the Council may address 'appropriate recommendations' to a member in the event that there is a 'clear risk of a serious

[34] *Ibid.*

[35] Statute of the Council of Europe, Art. 7; TEU, Art. 50. The specific provision on withdrawal from the EU (located in Article 50) and the procedures to be followed in such a case were written into the TEU by the Treaty of Lisbon.

[36] Statute of the Council of Europe, Art. 9: 'The Committee of Ministers may suspend the right of representation in the Committee and the Consultative Assembly of a member which has failed to fulfil its financial obligation during such period as the obligation remains unfulfilled.'

[37] TEU, Art. 7(2).

breach by a Member State' of the principles or values of the EU.[38] Interestingly, the criteria for exclusion in Article 7(2) are not the same criteria upon which admission to the organisation is based. Suspension from certain membership rights is only dependent upon a determination that a state's democratic or human rights record is defective, whereas in order to become a member of the EU, a state must fulfil two additional criteria – a functioning market economy and the ability to take on the *acquis*. Consequently, the exclusion provisions emphasise the fundamental importance of the political criteria to the EU's expectations of current members and its vision of a European state.

The founding treaty of the third organisation, NATO, has the briefest list of requirements for potential members and makes no provision for exclusion or withdrawal. Article 10 of the North Atlantic Treaty provides that:

> The Parties may, by unanimous agreement, invite any other European State in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area to accede to this Treaty.

Consequently, Article 10 defines membership in terms of geography and security interests. In NATO the debate over enlargement has concerned the extent to which the inclusion of Eastern European countries will create new divisions in Europe or bring greater security to the region.[39] Indeed, given the purpose of the North Atlantic Treaty and the dissolution of the Warsaw Pact, it has been questioned whether NATO should be enlarged or disbanded.[40] NATO appears to have overcome this problem by reorienting itself from a military alliance to an organisation designed to ensure the security of democracies in Europe with both defence and peace-keeping functions.[41] Thus, the enlargement of

[38] *Ibid*., Art. 7(1). The Maastricht Treaty was amended by Article 1 of the Treaty of Nice, opened for signature 26 February 2001: [2001] OJ C 80 (entered into force 1 February 2003), Art. 1.

[39] See Ted Carpenter, 'Strategic Evasions and the Drive for NATO Enlargement', in Ted Carpenter and Barbara Conroy (eds.), *NATO Enlargement: Illusions and Reality* (Washington D.C.: Cato Institute, 1998), p. 17; Rein Müllerson, 'NATO Enlargement and the NATO-Russian Founding Act: The Interplay of Law and Politics' (1998) 47 *Int'l & Comp. L.Q.* 192.

[40] John Woodliffe, 'The Evolution of a New NATO for a New Europe' (1998) 47 *Int'l & Comp. L.Q.* 174.

[41] In 1990 the Heads of State and Government stated that '[w]e reaffirm that security and stability do not lie solely in the military dimension, and we intend to enhance the political component of our Alliance as provided for by Article 2 of our Treaty': 'London Declaration' at para. 2. See also North Atlantic Council, 'Washington Declaration', Press Release No. NAC-S(99)63, 23 April 1999 at para. 3.

NATO to include new democracies in Europe has been the cause and also the effect of the change in NATO's direction.

2 Other documentary sources

The list of membership criteria is not determined solely by a survey of the articles of the treaties establishing each of the institutions. The collapse of the Soviet bloc led to an explosion in the number of potential applicants for all three organisations, and subsequently the more precise definition of admission requirements. The development of these more detailed criteria outside the constitutional instruments of the three organisations raises the concern of the majority in the *First Admissions Case* regarding the practice of imposing additional standards upon future members.[42] It may be questioned whether the rationale of the *First Admissions Case* can be transposed onto the admissions process in the European organisations, given that the case dealt with membership of a universal organisation. However, its principles of treaty interpretation, including the emphasis on a textual analysis, would appear to be valid across the constitutions of various international organisations. In the only attempt to obtain judicial review of an admission decision in Europe, the European Court of Justice (ECJ) rejected an application calling for a ruling on the precise conditions for the admission of new members to the European Economic Community (EEC). In dismissing the application, the ECJ briefly noted that Article 237 of the Treaty of Rome expressly enabled the authorities to define the legal conditions for accession.[43] The question is to what extent do the criteria contained in these subsequent instruments merely elaborate upon existing treaty provisions or create new requirements for membership?

While the Council of Europe did not amend its statutory requirements, in 1993 the Heads of Government at Vienna expanded Articles 3 and 4 by making explicit reference to the triad of 'democracy, the rule of law and respect for human rights'.[44] An applicant for the Council of Europe is now assessed according to the criteria of free and fair elections, freedom of expression, the protection of national minorities and the observance of principles of international law. A state must also agree to

[42] *First Admissions Case* at 62. See discussion in Chapter 1, pp. 24–5.
[43] *Lothar Mattheus* v. *Doego Fruchtimport und Tiefkühlkost eG* [1978] ECR 2203 at 2211.
[44] Council of Europe, 'Vienna Declaration of the Council of Europe', Vienna, 9 October 1993 ('Vienna Declaration').

sign the ECHR and accept the jurisdiction of the European Court of Human Rights.[45] Thus, the Council of Europe has encompassed a definition of democracy that goes beyond elections to include minority rights and the establishment of the rule of law. On the other hand, at least in its documentary requirements, it appears to have fallen short of requiring adherence to broader notions of economic and social rights from potential members, including ratification of the European Social Charter.[46]

The EU's entry conditions were redrafted in its constitutional instruments and also clarified at additional meetings. In its 1992 Report 'Europe and the Challenge of Enlargement', the European Commission stated that a new member must satisfy three conditions: European identity, democratic status and respect for human rights.[47] In 1993 the requirements were expanded at the Copenhagen European Council in the context of membership applications from countries in Central and Eastern Europe. As a result, they now comprise the following elements: the political criteria, the economic criteria and an ability to take on the obligations of membership.[48] These criteria have been applied to other candidate countries, such as Turkey, Croatia and the former Yugoslav Republic of Macedonia, and will most likely be applied to future applicants.[49] The first requirement (the political criteria) obliges an applicant to have established stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (this final criterion was not included in the TEU until the Treaty of Lisbon). Second, an applicant must have a functioning market economy and a demonstrated ability to cope with competitive pressures and market forces within the Union. Third, an applicant must have the capacity to

[45] *Ibid.*

[46] *Ibid.* The Vienna Declaration includes reference to the European Social Charter, but does not provide that members must ratify that treaty.

[47] European Commission, 'Europe and the Challenge of Enlargement' (1992) 3 *EC Bulletin Supplement* 92, Lisbon, 27 June 1992 at para. 8.

[48] 'Conclusions of the Presidency at the Copenhagen Council 1993' (1993) 6 *EC Bulletin* 13 ('Conclusions of the Presidency at Copenhagen').

[49] Marise Cremona, 'Variable Geometry and Setting Membership Conditionalities: A Viable Strategy?', in Christopher Clapham *et al.* (eds.), *Regional Integration in Southern Africa: Comparative International Perspectives* (Johannesburg: SAIIA, 2001), pp. 193, 196. The 2009 report on enlargement by the Commission applies the criteria to both candidate and potential candidate countries: Commission of the European Communities, 'Communication from the Commission to the European Parliament and the Council – Enlargement Strategy and Main Challenges 2009–2010', Brussels, COM(2009) 553 Final.

take on 'the obligations of membership including adherence to the aims of political, economic and monetary union'.[50] The Copenhagen European Council was not only concerned with the position of each applicant in relation to the membership criteria, but also with the relationship between enlargement and integration in the Union.[51] While all three criteria are necessary for a country to become a member of the EU, only the political criteria have been explicitly included in the TEU.

The most expansive redefinition of membership criteria outside the constitutional instrument has occurred in NATO. Although Article 10 of the North Atlantic Treaty does not contain any reference to human rights and democracy, detailed membership criteria can be found in the 1995 Study on NATO Enlargement and the 1999 Membership Action Plan (MAP). The Study examines the impact of enlargement on the effectiveness of the alliance, as well as providing guidance on the criteria to be fulfilled before a state can accede to the North Atlantic Treaty.[52] The MAP sets out a list of activities designed to assist aspiring members in their preparations for future membership.[53] The organisation asserts that there is no fixed or rigid list of membership criteria, but states must fulfil political, economic and military standards prior to joining NATO.[54] New members must be in a position to further the principles of the North Atlantic Treaty and must preserve the Alliance's political and military capability.[55] The political criteria to be fulfilled are closely related to those espoused by the Council of Europe and the EU. Future members of NATO must conform to basic principles of democracy and individual liberty, and must demonstrate a commitment to the rule of law and human rights. Specific attention is given to the need for appropriate democratic and civilian control over their armed forces.[56] In addition, applicants are expected to provide information on their economy and pertinent economic policy developments.[57] Despite the fact that NATO is a military alliance, its drive for enlargement is based on

[50] 'Conclusions of the Presidency at Copenhagen'.
[51] 'The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries': *ibid.*, p. 13.
[52] See generally Woodliffe, 'The Evolution of a New NATO' at 180–2.
[53] NATO, 'Membership Action Plan', Press Release No. NAC-S(99)66, 24 April 1999 at para. 2.
[54] NATO, 'Study on NATO Enlargement' at para. 7. [55] *Ibid.* at para. 4.
[56] *Ibid.* at paras. 3–4; NATO, 'Membership Action Plan', ch. I at paras. 1–2.
[57] NATO, 'Study on NATO Enlargement' at para. 5.

remarkably similar criteria to those found in the constituent documents of the Council of Europe and the EU.

Through these specific and detailed conditions, participation in Europe has been firmly tied to human rights and democratic values. While the criteria for determining exclusion are confined by each organisation's founding treaty, the development of the admission criteria has taken place, for the most part, outside the terms of the constituent instrument. In some cases this can be seen as merely a refinement of constitutional provisions that may otherwise appear 'vague'[58] or uncertain. In the words of the ICJ in the *First Admissions Case* the extra requirements permit the organisation to appreciate 'such circumstances of fact as would enable the existence of the requisite conditions to be verified'.[59] In other cases the new criteria can be viewed as 'the imposition of new conditions',[60] raising questions regarding legality. These deviations from the requirements set out in the constitutional instruments do not appear to have been influenced by the fact that each organisation was set up to perform a different function. Thus, when striking a balance between admitting all European states on the one hand and ensuring the effective functioning of the organisation on the other, on paper, the organisations have come down firmly in favour of linking their future functions with their members' rights records.

III Admission and exclusion in the European organisations

The founding treaties and additional documents evidence the twin goals of the organisations: first, to integrate Europe and, second, to ensure that all European states are subject to human rights and democracy standards. Although each organisation has acknowledged that it is open to all European states, other factors have a more important role to play in admission decisions. The internal characteristics promoted by the European institutions appear to be strongly based on liberal democratic principles. Social and economic rights are not irrelevant, but neither are they given the same priority in provisions determining participation. All three organisations proclaim the importance of free elections and the rule of law. NATO's MAP explicitly mentions individual liberty, the Council of Europe's Vienna Declaration refers to freedom of expression,

[58] Khadine Ritter, 'The Russian Death Penalty Dilemma: Square Pegs and Round Holes' (2000) 32 *Case W. Res. J. Int'l L.* 129 at 133.
[59] *First Admissions Case* at 63. [60] *Ibid.*

and both the EU and NATO specify the need for a free market economy. The overwhelming impression is that when each organisation's criteria are taken together, the end goal – the unification of Europe – is best accomplished through human rights and democracy.

It is easy to label these requirements as 'human rights and democracy conditions', but it is more difficult to define their content. It is here that the problem of determinant versus flexible standards identified earlier is at its most acute.[61] The more flexible the criteria, the greater the chance the applicant states will be admitted, consequently leading to greater heterogeneity within each organisation and also amongst the community of European states. On the other side, if the conditions are interpreted strictly, then applicants may be excluded from participation in Europe.[62] This section will examine the practice of the European organisations to determine the extent to which the documentary criteria have been interpreted strictly (thus securing a homogeneous body of European states) or flexibly (ensuring a more heterogeneous community). This in turn will indicate the degree to which regional integration has in practice been predicated on human rights conditionality.

A Pre-1990s: human rights and democracy assumed

Prior to the 1990s, detailed lists of human rights and democracy criteria did not feature significantly in the documentary membership criteria of any of the three organisations. This lack of attention to specific rights and democracy requirements is also evident in NATO's practice in admitting new members. During this period NATO admitted four states – Greece and Turkey (1952), the Federal Republic of Germany (1955) and Spain (1982). With perhaps one exception, in neither the formal statements of the North Atlantic Council nor the protocols on accession were compliance with human rights and democratic principles featured as necessary credentials for membership. The one exception is Spain, when the North Atlantic Council linked that country's 'peaceful change to parliamentary democracy' with the 'vitality of the Alliance as a force for peace and freedom',[63] indicating a connection between a state's governmental system and NATO membership.

[61] Päivi Leino, 'Rights, Rules and Democracy in the EU Enlargement Process: Between Universalism and Identity' (2002) 7 *Austrian R. Int'l & Eur. L.* 53 at 55. See Chapter 1, p. 53.

[62] Leino, 'Rights, Rules and Democracy' at 56.

[63] 'Declaration of the Heads of State and Government', Meeting of the North Atlantic Council, Bonn, 10 June 1982 at para. 2.

Similarly, the founders of the European Communities did not envisage limiting membership to democracies, and indeed Article 237 of the Treaty of Rome opened potential membership to any European state.[64] Despite this lack of human rights and democratic conditionality in the Treaty of Rome, from the outset the European Commission assumed that applicants would be democratic.[65] The first enlargement of the Communities occurred with applications from the UK, Ireland, Denmark and Norway. In considering these four countries, the European Commission emphasised that their 'long-standing' and 'deeply rooted' political traditions of stability and democracy would be of great value to the Communities.[66] Nearly a decade later, in its Opinion on Greece's membership, the Commission pointed to Greece's return to a 'democratic form of government' as a factor indicating that it must be admitted to the organisations.[67] Similarly, when Spain and Portugal applied for membership after the demise of their respective dictatorships, the Commission commented positively on the process of restoring democracy and the guarantees of individual liberties in each country.[68] Furthermore, membership of the European Communities was perceived as a method of assisting with the consolidation and strengthening of democracies in countries such as Greece, Spain and Portugal,[69] emphasising that it was not necessary for the process to be complete at the time of admission.

[64] Treaty of Rome; G. Federico Mancini and David T. Keeling, 'Democracy and the European Court of Justice' (1994) 57 *Mod. L.R.* 175.

[65] See *Lothar Mattheus* v. *Doego Fruchtimport und Tiefkühlkost eG* [1978] ECR 2203 at 2207 ('Observations of the Commission of the European Communities').

[66] European Commission, 'Opinion on the Applications for Membership received from the United Kingdom, Ireland, Denmark and Norway for Submission to the Council under Articles 237 of the EEC Treaty, 205 of the Euratom Treaty, and 98 of the ECSC Treaty', EU Doc. COM (67) 750, 29 September 1967 at 'Title I: General Problems Raised by Extension of the Community', para. 33. The UK, Ireland and Denmark were admitted in 1973. Norway has not joined due to the failure of two referenda on membership (in 1972 and 1994).

[67] European Commission, 'Opinion on Greek Application for Membership', EU Doc. COM (76) 30, 20 January 1976, ('Opinion on Greece') at 'General Considerations', para. 4. In 1974 Greece emerged from a seven-year period of military rule.

[68] See European Commission, 'Opinion on Spain's Application for Membership', EU Doc. COM (78) 630, 30 November 1978 at 'Part One – General Remarks', para. 2; European Commission, 'Opinion on Portuguese Application for Membership', EU Doc. COM 78 (220), 23 May 1978 at 'Part One – General Remarks', paras. 1–2.

[69] For example, 'Opinion on Greece' at 'General Considerations', para. 15. See also Prodromos Dagtoglou, 'The Southern Enlargement of the European Community' (1984) 21 *Common Mkt L.R.* 149 at 161.

With the Statute's more extensive membership criteria, the organs of the Council of Europe gave greater attention to issues of human rights and democracy during this period. Winkler asserts that the thirteen states admitted to the Council of Europe in the first forty years did not pose any particular issues for the membership criteria as their compliance with democracy and human rights standards was not in doubt.[70] They could be described as parliamentary democracies with free and fair elections operating on the basis of the rule of law, the separation of powers, the independence of the judiciary and the protection of the rights contained in the ECHR.[71] In the case of Spain, the Parliamentary Assembly observed that a 'full democracy' is one in which basic human rights are guaranteed.[72] On the admission of Portugal, specific mention was made of the military's acceptance of the supremacy of civilian authority.[73] In both cases it appears that the Parliamentary Assembly viewed democracy as being greater than elections; however, its definition of human rights was limited to the ECHR, despite the adoption of the European Social Charter in 1961. As was the case with the EU and NATO, in this period the Parliamentary Assembly did not examine a state's human rights record in detail, preferring merely to record a country's democratic status. For example, when Finland was admitted in 1989, rather than giving a comprehensive report on that country's situation, the Parliamentary Assembly recognised that 'Finland is an old-established parliamentary democracy and respects the principle of the rule of law, as well as the human rights and fundamental freedoms embodied in the European Convention on Human Rights'.[74]

The practice indicates that in the first forty years of each organisation Europe was considered to be a homogeneous community of states respecting democratic principles as well as individual rights. While NATO did not specifically include these conditions in its membership criteria, its position vis-à-vis the Warsaw Pact countries meant that a democratic government effectively became a necessary feature for admission. The admission

[70] Hans Winkler, 'Democracy and Human Rights in Europe: A Survey of the Admission Practice of the Council of Europe' (1995) 47 *Austrian J. Pub. & Int'l L.* 147 at 148.
[71] *Ibid.* at 155.
[72] Parliamentary Assembly, 'Resolution 656 (1977) on the situation in Spain', 8 July 1977 at para. 4.
[73] Parliamentary Assembly, 'Resolution 627 (1976) on the situation in Portugal', 7 May 1976 at para. 3.
[74] Parliamentary Assembly, 'Opinion No. 144 (1989) on the Application for Membership of the Council of Europe by Finland', 1 February 1989 at para. 3.

decisions demonstrate that since its inception the European integration project has been 'bound up intimately with democracy'.[75] The significance of an elected government to the European definition of democracy in this period is confirmed by the fact that the attempt to exclude Greece from the Council of Europe represented the only occasion when a European organisation came close to suspending a member. In 1969 four members alleged that Greece had violated the ECHR at a time when it was ruled by a military regime.[76] The European Commission of Human Rights investigated the allegations and found that Greece had breached a variety of ECHR provisions, including Article 3 (prohibition of torture), Article 5 (deprivation of liberty), Article 6 (fair hearing) and Articles 9 and 10 (freedoms of thought, conscience and expression).[77] However, Greece withdrew from the organisation before the members voted on the issue.[78] The Commission's findings highlight the Council of Europe's concern with the violation of a wide range of civil and political rights in Greece. Nevertheless, the resolutions adopted by the Council of Europe when considering Greece's readmission in 1974 demonstrated that the organisation's principal concern was the undemocratic change of government resulting from the military coup. Thus, in 1974 the Parliamentary Assembly specifically referred to the 'holding of free parliamentary elections' as a statutory requirement in order for Greece to rejoin the organisation.[79] The importance of democratic government to participation in the European organisations is also demonstrated by the Council of Europe's threat to institute the Article 8 procedure against Turkey due to military intervention and the overthrow of parliamentary democracy in 1980.[80]

The European Commission on Human Rights' examination of Greece was the only occasion on which there was a significant analysis of a state's human rights and democracy credentials in determining participation

[75] Jeffrey Anderson, 'Introduction', in Jeffery Anderson (ed.), *Regional Integration and Democracy – Expanding on the European Experience* (Lanham: Rowman & Littlefield, 1999), p. 1.

[76] 'Report of the European Commission of Human Rights on the "Greek Case"' (1969) 12 *Y.B. Eur. Conv. Hum. Rts* 1. The four applicant governments were Denmark, Norway, the Netherlands and Sweden.

[77] *Ibid.* at 501 (Art. 3), 134 (Art. 5), 149 (Art. 6), 164 (Arts. 9–10).

[78] Committee of Ministers, 'Resolution (69) 51 on Greece, adopted on 12 December 1969' (1970) 9 ILM 414.

[79] Parliamentary Assembly, 'Opinion No. 69 (1974) on the Readmission of Greece to the Council of Europe', 27 November 1974.

[80] Parliamentary Assembly, 'Recommendation 904 (1980) on the situation in Turkey', 1 October 1980.

prior to 1990. Despite each organisation acknowledging the importance of these criteria, the admission decisions did not set out at length the standards to be attained, nor was there detailed examination of a particular state's rights record. Democracy was the key requirement for participation, rather than the fulfilment of particular rights criteria, and when it came to determining the features of democratic government, the approach of 'I know it when I see it' was the preferred one. Even in the lengthy opinions prepared by the European Commission, leaving aside some brief comments about the social aspects of enlargement, that body devoted itself to a state's economic integration into the Communities. This was despite an early acknowledgement that the European Communities were concerned with both economic and political integration.[81] Consequently, there was a lack of clarity in identifying the norms that dictated membership of Europe. The fact that the admission of Spain and Portugal was seen as a method of consolidating democracy in those countries further confirms that a 'perfect' record was not necessary – instead the organisations practised a form of qualified homogeneity. In effect, prior to the collapse of the Soviet bloc, in each organisation it was assumed, rather than proven, that the applicants (Western European democracies) had appropriate democratic and rights records.

B Early 1990s: human rights and democracy acknowledged

The early 1990s saw the beginning of an influx of new members to two of the three organisations – the EU and the Council of Europe. Although NATO expanded its partnership for peace programmes and links with non-members, it did not in fact increase in size.[82] In the EU the new additions did not result in any substantial changes either to the

[81] The preamble to the 1957 Treaty of Rome referred to the members' determination 'to lay the foundations of an ever closer union among the peoples of Europe' and to 'preserve and strengthen peace and liberty'. Similarly, the preamble of the Treaty of Paris refers to the desire 'to establish, by creating an economic community, the foundation of a broad and independent community among peoples long divided by bloody conflicts'. See also Dagtoglou, 'Southern Enlargement' at 161.

[82] During this period NATO developed the Partnership for Peace programme whereby non-member states were invited to develop cooperative military relations with NATO. In subscribing to this programme, partners evidenced their commitment to 'the preservation of democratic societies': NATO, 'Partnership for Peace: Framework Document Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council', Brussels, 10 January 1994 at para. 2, www.nato.int/docu/comm/49–95/c940110b.htm.

membership process or the criteria to be attained by each applicant country. But when faced with a number of applications from Central and Eastern European countries, the Council of Europe began to develop and apply seemingly more rigorous standards and procedures.

As was the case with the early admissions to the Communities, the democratic and human rights credentials of the three countries granted membership in this period appeared to be assumed rather than analysed in detail. In the opinions prepared for Austria, Finland and Sweden both the economic and political conditions necessary for membership were mentioned, but while the economic requirements were dealt with in depth, little attention was given to the political criteria.[83] The major development in this period was the addition in each opinion of a standard paragraph modelled on the 1992 European Commission report stating that applicants must fulfil the basic conditions of European identity, democratic status and human rights.[84] As is indicated by the opinion on Sweden, where the Commission merely acknowledged 'Sweden's democratic and human rights record' as contributing to its European identity,[85] the addition of this paragraph did not alter the extent of the Commission's examination. Apart from statements referring to the importance of human rights and democracy, there was little discussion of the characteristics needed in order for a state to satisfy this element of the membership criteria.

The most significant alterations to membership criteria in the early 1990s occurred in the Council of Europe, where an elaborate procedure involving missions by rapporteurs and a report by a team of eminent jurists developed.[86] The alterations were not only procedural, as is demonstrated by the Parliamentary Assembly's opinions on applications from the Eastern European states. The major shift in the admission

[83] For example, European Commission, 'The Challenge of Enlargement – Commission Opinion on Austria's Application for Membership', EU Doc. SEC (91) 1590 final, 1 August 1991; European Commission, 'The Challenge of Enlargement – Commission Opinion on Finland's Application for Membership', EU Doc. SEC (92) 2048 final, 4 November 1992.

[84] European Commission, 'Europe and the Challenge of Enlargement' at para. 8. For example, European Commission, 'The Challenge of Enlargement – Commission Opinion on Sweden's Application for Membership', EU Doc. SEC (92) 1582 final, 31 July 1992 ('Opinion on Sweden') at Part I, para. 20.

[85] European Commission, 'Opinion on Sweden' at para. 20.

[86] For further discussion of the development of the admission procedure in the Council of Europe, see Winkler, 'Democracy and Human Rights' at 160; Meron and Sloan, 'Democracy, Rule of Law and Admission' at 150–2.

policy at this time involved the identification of specific rights in the membership opinions. For example, when recommending the admission of Estonia, the Parliamentary Assembly expected the 'Estonian authorities to base their policy regarding the protection of minorities on the principles laid down in Recommendation 1201 on an additional protocol on the rights of national minorities to the European Convention on Human Rights'.[87] In the case of Slovakia, the Parliamentary Assembly went one step further and certified that it could be admitted to membership, provided that the government undertook to fulfil specific commitments relating to minority rights.[88] The inclusion of respect for minorities as an important attribute for membership highlighted that prospective members may be subjected to more detailed standards than applicants in the past. In the eyes of the Council of Europe a community of European states could accommodate a degree of flexibility and was not necessarily created by applying the same standards to all members.

These two opinions demonstrate that by the early 1990s the Parliamentary Assembly was prepared to go outside the terms of the Statute and the ECHR to develop its membership criteria. Additionally, in a trend that was to develop later in the same decade, the Council of Europe began to admit members which failed to fulfil the admission criteria at the time the opinions were written. This move is evident in the wording of the opinions concerning Estonia and Slovakia, and is particularly prominent in the observations made regarding Romania. In this latter opinion, the Parliamentary Assembly 'expected' that Romanian authorities would amend certain aspects of their legislation and 'urged' the improvement of detention conditions.[89] It also suggested that Romania ratify the European Charter for Regional or Minority Languages.[90] Despite these noted shortcomings, the Parliamentary Assembly recommended Romania's admission.

The changes in the Council of Europe's membership practice in this period demonstrate that the desire to reunite Western and Eastern

[87] Parliamentary Assembly, 'Opinion No. 170 (1993) on the Application of the Republic of Estonia for Membership of the Council of Europe', 13 May 1993 at para. 5.

[88] Parliamentary Assembly, 'Opinion No. 175 (1993) on the Application of the Slovak Republic for Membership of the Council of Europe', 29 June 1993 at paras. 9–10. See Winkler, 'Democracy and Human Rights' at 162.

[89] Parliamentary Assembly, 'Opinion No. 176 (1993) on the Application by Romania for Membership of the Council of Europe' at paras. 7, 9. See Winkler, 'Democracy and Human Rights in Europe' at 166.

[90] Parliamentary Assembly, 'Opinion on Romania' at para. 11.

Europe and to achieve universal membership amongst European states began to overcome the desire to restrict the organisation to only those states achieving certain human rights and democracy standards. In a move away from its early practice, the phrase 'able and willing' in Article 4 was interpreted to include states that would be able to satisfy the Council's requirements in the future.[91] As the organisation moved towards realising greater heterogeneity in its membership, the level of scrutiny for potential applicants also increased substantially. Whereas in the past the opinions merely observed that states fulfilled the terms of the Council of Europe's Statute, the early 1990s saw the Parliamentary Assembly and its committees undertake significant studies of each country's situation. These more onerous conditions did not result in the Central and Eastern European states being rejected – in fact quite the opposite appeared to be true. Conversely, the EU firmly stated that respect for human rights and democracy were necessary preconditions for membership (although these conditions were not strictly defined or monitored), demonstrating its desire to create an homogeneous community of European states. Paradoxically, prior to the accession of the Central and Eastern European countries, the organisation still aiming to restrict its membership to states with established rights records undertook less scrutiny of an applicant's situation than the organisation that was moving towards a policy of heterogeneous universality. The membership practice in this period demonstrated a division between the two organisations: for the EU, a unified Europe was a community of states that respected human rights and democracy whereas, in the eyes of the Council of Europe, the borders of Europe were determined by a state's ability and willingness to adhere to such standards in the future.

C Late 1990s–2004: human rights and democracy applied

Having joined the Council of Europe in the early 1990s, the Central and Eastern European countries turned their attention to NATO and the EU. Ironically, when calls for Europe to integrate were most vocal, all three organisations increased both the range and number of admission requirements. Apart from amendments to the TEU, these changes occurred outside the formal terms of the founding treaties of each of

[91] Peter Leuprecht, 'Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?' (1998) 8 *Transnat'l L. & Contemp. Probs*. 313 at 329.

the organisations. At this stage the institutions employed two methods in seeking to ensure the homogeneous nature of their communities: first, the procedural mechanisms in the membership process were amplified and, second, the substantive human rights and democracy conditions were augmented. At a time when the requirements for membership appeared to be at their most strenuous, the membership of each organisation increased, indicating that the interests of reunifying Europe demanded that these more extensive conditions be interpreted in a flexible manner.

1 Increased procedural requirements

The increased rigour of the admission procedures in this period was most apparent in developments in NATO and the EU. In the case of NATO, four rounds of accession negotiations were held with the Czech Republic, Hungary and Poland in 1997. During these negotiations the three states' military capabilities, ability to contribute forces to NATO's activities and to accept the political and legal obligations were discussed.[92] Detailed procedures were also adopted in the 2003–4 round of NATO admissions, where each applicant submitted to a process involving two sessions of accession talks, the adoption of letters of intent, a timetable for completion of reforms, the ratification of protocols and finally accession to the North Atlantic Treaty.[93] More stringent criteria were applied in the 1997 membership rounds than in the case of earlier admissions,[94] and chief amongst the new requirements were democratic and human rights principles.

In the EU the European Commission's monitoring procedure involved both initial opinions and regular reports examining the success of each applicant in meeting the Copenhagen criteria.[95] The sources used in the preparation of the section on the political criteria included answers to a questionnaire, information from international organisations (including the Council of Europe) and non-governmental organisations, bilateral meetings, and reports from member states' embassies and the

[92] Marian Nash, 'Contemporary Practice of the United States Relating to International Law' (1998) 92 *Am. J. Int'l L.* 491.

[93] NATO, 'Enlargement – What Does This Mean in Practice?', www.nato.int/issues/enlargement/in_practice.htm. The 2004 enlargement resulted in seven new NATO members: Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia and Slovenia.

[94] Woodliffe, 'The Evolution of a New NATO' at 182.

[95] The ten successful applicants to the EU in the 2004 enlargement were Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

Commission's delegation.[96] While the section analysing the political criteria still constituted the first and smallest part of each opinion, unlike the earlier practice, it now included segments on 'Democracy and the Rule of Law', 'Human Rights and the Protection of Minorities' and a 'General Evaluation'. Issues relating to democracy and human rights were also integrated into the sections of each opinion dealing with the free movement of persons, the administrative and judicial capacity to take on the *acquis*, and economic and social cohesion.[97]

Logically, the most obvious result of these more extensive and detailed admission procedures would be greater homogeneity in the community of European states. By expanding the admission process, arguably each organisation was able to determine in greater detail the capacity of applicants to meet the necessary standards of human rights and democratic government. Whether this was in fact the result of a more demanding process depends on the extent to which the standards were interpreted rigorously. This issue is considered below. The question remains as to whether these more detailed procedures also resulted in a more democratic admission procedure within the institutions. International organisations do not usually operate according to principles of direct democracy[98] and, in the European institutions, the extensive admission procedures belie the fact that final decisions on membership are made by organs that are not directly elected by the European people.[99] In the EU the uniformity of the opinions strongly disproves suggestions in the TEU that individual applicants had a substantial say in the conditions applied by the Commission. Furthermore, the organs charged with granting admission do not have to follow the recommendations of the reports of bodies established to regulate compliance with the admission conditions. Thus, the membership process reveals a tension between the

[96] For example, European Commission, '2000 Agenda – Commission's Opinion on Lithuania's Application for Membership of the European Union', EU Doc. 97/15, 15 July 1997 at Part B(1). This list of sources remains the same in the Commission's opinion on each applicant.

[97] For example, European Commission, 'Agenda 2000 – Commission Opinion on Estonia's Application for Membership of the European Union', EU Doc. 97/12, Brussels, 17 July 1997; European Commission, 'Agenda 2000 – Commission Opinion on Latvia's Application for Membership of the European Union', EU Doc. 97/14, Brussels, 17 July 1997.

[98] Shachor-Landau, 'Democracy' at 160.

[99] Decisions on admission to the Council of Europe are made by the Council of Ministers (on the recommendation of the Parliamentary Assembly). In the EU, decisions are made by the Council after receipt of the reports of the European Commission and with the consent of the European Parliament. The North Atlantic Council invites applicants to join NATO.

goal of ensuring that each member's government is constituted according to democratic principles and the lack of democracy evident in procedural aspects of the process itself. This process will be re-examined in Chapter 6.

2 Substantive rights

Not only were more rigorous procedures put in place during this period, but applicants were also asked to comply with a much broader range of standards. In determining admission, civil and political rights featured high on the list of rights to be observed by European states. Significantly, reference was also made to economic and social rights and the situation of minorities. While the number of human rights and democracy conditions listed in the instruments of admission increased substantially in this period, it was not always clear whether failure to meet all or even most of the standards would constitute a bar to admission. Arguably, it is the list of states faced with the spectre of suspension in the late 1990s that painted a more accurate picture of the fundamental values of Europe.

(a) New members The decisions on admission in all three organisations during this period indicate that compliance with civil and political rights is at the heart of ensuring the ability of each organisation to effectively fulfil its functions. The opinions prepared by the European Commission and the Parliamentary Assembly of the Council of Europe point to the importance of access to justice, the abolition of the death penalty, freedom of expression and association, the right to own property and respect for privacy.[100] In the EU the application of the membership criteria in the Commission's opinions and regular reports confirms that prospective members must have a multiparty system with regular elections and a constitutional separation of powers.[101] In turn, this system is seen to facilitate the ability of prospective members to create a functioning market economy necessary to conform to the economic admission criteria. Democracy has been defined broadly and encompasses not only regular elections, but also civil society and the role of non-governmental organisations.[102] The obligations assumed by individual NATO countries are

[100] For example, European Commission, 'Opinion on Latvia' at '1.2 – Human Rights and the Protection of Minorities'; Parliamentary Assembly, 'Opinion No. 193 (1996) on Russia's Request for Membership of the Council of Europe', 25 January 1996; Parliamentary Assembly, 'Opinion No. 234 (2002), Bosnia and Herzegovina's Application for Membership of the Council of Europe', 22 January 2002.

[101] European Commission, 'Opinion on Latvia' at '1.1 – Democracy and the Rule of Law'.

[102] *Ibid.* at '1.2 – Human Rights and the Protection of Minorities'; European Commission, 'Agenda 2000 – Commission Opinion on Slovenia's Application for Membership of the

less accessible, but summaries of documents prepared for Slovenia and Bulgaria feature reference to internal political reforms, the removal of judicial backlogs, the establishment of a comprehensive legal framework for fighting corruption and the ratification of human rights instruments.[103]

The sense that recent applicants have been judged by more detailed standards than previous members, evidencing a lack of consistency, is strengthened by the fact that the organisations have not limited themselves to assessing a state's compliance with civil and political rights. In recommending admission to the Council of Europe, the Parliamentary Assembly has suggested ratification of the European Social Charter by an applicant.[104] The European Commission has referred to the right to a minimum means of subsistence, the right to social security and the right to education.[105] Although it has been suggested that the EU's opinions make 'short shrift' of a state's compliance with economic and social rights, the same is not the case with minority rights.[106] For example, in the European Commission's opinions on Estonia, Latvia and Slovakia the sections on minority rights are longer and more descriptive than the sections on both civil and political rights, and economic and social rights. Other opinions and regular reports give details about the situation of specific groups, including the Roma in the Czech Republic and Romania,[107] the Kurds in Turkey[108] and the

European Union', EU Doc. 97/19, Brussels, 17 July 1997 at '1.2 – Human Rights and the Protection of Minorities'.

[103] See NATO, 'Annual National Programmes of the Republic of Slovenia for the Implementation of the Membership Action Plan', Executive Summary for 2002–2003, http://nato.gov.si/eng/documents/action-plan-2002–2003; Executive Summary for 2003–2004, http://nato.gov.si/eng/documents/action-plan-2003–2004 ('Annual National Programme for Slovenia'). The schedule for Bulgaria is summarised in 'Letter of Intent and a Timetable for Completion of Reforms in connection with Bulgaria's Accession to NATO Approved', 27 February 2003, www.government.bg/English/Priorities/ForeignPolicy/2003–02–27/1137.html.

[104] Parliamentary Assembly, 'Opinion on Bosnia' at para. 15(iii)(j).

[105] For example, European Commission, 'Opinion on Latvia' at '1.2 – Human Rights and the Protection of Minorities'.

[106] Barbara Brandtner and Allen Rosas, 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice' (1998) 9 *Eur. J. Int'l L.* 468 at 487.

[107] European Commission, '2000 Agenda – Commission's Opinion on the Czech Republic's Application for Membership of the European Union', EU Doc. 97/17, 15 July 1997 at '1.2 – Human Rights and the Protection of Minorities', p. 16; European Commission, '2000 Regular Report on Romania's Progress towards Accession', 8 November 2000 at '1.2 – Human Rights and the Protection of Minorities', p. 24.

[108] European Commission, '2001 Regular Report on Turkey's Progress towards Accession, Brussels, 13 November 2001', UN Doc. SEC (2001) 1756 at '1.2 – Human Rights and the Protection of Minorities', p. 29.

Turkish minority in Bulgaria.[109] NATO also requires that applicants guarantee minority rights, as is evidenced by documents prepared for Latvia's and Slovenia's admission.[110]

It is also evident that applicants are not being judged by a common set of standards. For example, some applicants have been asked to become a party to instruments not yet ratified by existing members of an organisation.[111] In the Council of Europe the requirements have ranged from the predictable (ratification of the ECHR) to the unexpected (implementation of recommendations on the media, telecommunications and competition,[112] and ratification of conventions on cybercrime and the suppression of terrorism).[113] Not only have the respective organisations broadened the range of treaties to be ratified by prospective members, but country-specific issues have been identified in the opinions. For example, the European Commission singled out Lithuania for its lack of legislation dealing with pornography and child prostitution, as well as its attitude towards Lithuanian Nazi war criminals.[114] In the opinions on Bulgaria and Romania, reference was made to the plight of children in orphanages,[115] and the 2001 Regular Report on Turkey noted concerns

[109] European Commission, 'Commission's Opinion on Bulgaria's Application for Membership of the European Union', EU Doc. 97/11, 17 July 1997 at '1.2 – Human Rights and the Protection of Minorities', p. 18.

[110] *Latvia's Annual National Programme* at 2003 – Executive Summary, 'The Political and Economic Chapter'; *Timetable for Completion of Reforms – Latvia* at 'Objective 1', www.am.gov.lv/en/nato/4478/4492; *Annual National Programme for Slovenia*, 2003–2004 at 'Human Rights and Ethnic Communities Protection'.

[111] For example, when the Council of Europe admitted Russia, it was asked to ratify a number of conventions, including Protocols 4 and 6 to the ECHR and the Framework Convention on the Protection of National Minorities. At that stage, the UK had yet to ratify the first two instruments (it still has not ratified Protocol 4). Some original members of the Council of Europe have not ratified the Framework Convention. See Bill Bowring, 'Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes' (1997) 4 *Eur. Hum. Rts L.R.* 638.

[112] Parliamentary Assembly, 'Opinion No. 195 (1996) on Croatia's Request for Membership of the Council of Europe', 24 April 1996 at para. 9.

[113] Parliamentary Assembly, 'Opinion on Bosnia' at para. 15(iii)(k).

[114] European Commission, 'Opinion on Lithuania' at '1.2 – Human Rights and the Protection of Minorities'.

[115] European Commission, 'Opinion on Bulgaria' at '1.2 – Human Rights and the Protection of Minorities', p. 17; European Commission, '2000 Agenda – Commission's Opinion on Romania's Application for Membership of the European Union', EU Doc. 97/18, 15 July 1997 at '1.2 – Human Rights and the Protection of Minorities'.

regarding domestic violence against women.[116] The opinions do not stipulate whether these specific problems would be detrimental to a state's application – indeed, overall, Lithuania received a positive assessment on the political criteria.[117] As a whole, while the coverage of different human rights in the opinions is wide, the amount of detail on each specific right is not, giving the impression of a checklist approach rather than an indepth analysis of an applicant's situation.[118] The tendency to refer to country-specific issues and to add to the list of rights in the membership criteria demonstrates once again that creating a homogeneous community of European states is not necessarily the result of the application of a common set of standards. Flexibility has been preferred over clarity and coherence. This potentially divisive approach is somewhat tempered by the fact that not all rights are given the same weight in the admission process. Thus, countries have been held to fulfil the criteria despite acknowledged shortcomings in some areas.[119]

(b) Attempts to exclude members The initiation of the Council of Europe's Article 8 procedure against Greece in 1969 highlighted the importance of a parliamentary democracy to participation in Europe. Once again, the prospect of excluding members from the Council of Europe and the EU emphasised three fundamental issues for a distinctly European conception of rights: the prohibition on capital punishment, the protection of minorities, and the increased emphasis on respect for human rights and international humanitarian law obligations during armed conflict. The prominence given to capital punishment in the context of possible suspension against a member state reflects the strength of opposition to the death penalty in Europe.[120] Ritter points to over 300 EC documents alone concerning the abolition of capital

[116] European Commission, '2001 Regular Report on Turkey' at '1.2 – Human Rights and the Protection of Minorities', p. 28.

[117] European Commission, 'Opinion on Lithuania' at '1.3 – General Assessment'.

[118] Nowak has stated that (with the exception of the coverage of protection of minorities) the analysis in the chapters on human rights in the EU's opinions seems 'superficial and relates more to the *de jure* rather than the *de facto* situation': Manfred Nowak, 'Human Rights "Conditionality" in relation to Entry to, and Full Participation in, the EU', in Alston with Bustelo and Heenan (eds.), *The EU and Human Rights*, p. 691.

[119] Andrew Williams, 'Enlargement of the Union and Human Rights Conditionality: A Policy of Distinction?' (2000) 25 *Eur. L.R.* 601 at 616.

[120] Ritter, 'The Russian Death Penalty Dilemma' at 130–1.

punishment.[121] The Parliamentary Assembly of the Council of Europe has condemned the retention of the death penalty in a number of members of the former Soviet bloc, including Belarus (where the procedure for admission was temporarily suspended), Russia and the Ukraine. The Ukraine has received particular attention, with the Parliamentary Assembly considering both the rejection of the Ukraine's credentials due to the 'blatant violation' of its undertakings[122] as well as the formal sanction of suspension under Article 8.[123] The threat was repeated in 1999[124] until the Ukraine adopted Protocol 6 to the ECHR on the abolition of the death penalty in 2001.[125] The retention of the death penalty was not the only violation of civil and political rights mentioned in the Council of Europe's deliberations on both Russia and the Ukraine, but it received the most attention in the context of possible exclusion.

The rising importance of minority rights in Europe is also demonstrated by the position taken by the Council of Europe[126] and the EU towards states failing to adhere to European standards. As yet, the EU has not invoked the preventative mechanism in Article 7 of the TEU, although its response to the formation of the coalition government between the People's Party and Haider's Freedom Party (FPÖ) in Austria in 2000 gives some pointers as to the way in which members may be monitored in future. The FPÖ was described as a 'right wing populist party with extremist expressions'.[127] Party officials had made statements which could be interpreted as xenophobic and which praised Austrian Waffen SS veterans.[128] In response to these developments, the President of the EU Council, together with the other thirteen European leaders, announced a number of sanctions.[129] Following this announcement, three prominent European figures were

[121] *Ibid*. Ritter notes that most of these documents concern non-member states.

[122] Parliamentary Assembly, 'Resolution 1145 (1998) on Executions in Ukraine', 27 January 1998 at para. 12.

[123] *Ibid*. at para. 1(ii).

[124] Parliamentary Assembly, 'Resolution 1194 (1999), Honouring of Obligations and Commitments by Ukraine', 24 June 1999 at para. 4.

[125] See Parliamentary Assembly, 'Resolution 1244 (2001) Honouring of Obligations and Commitments by Ukraine', 26 April 2001.

[126] When discussing the Ukraine's potential exclusion from the Council of Europe, its failure to ratify the European Charter for Regional or Minorities Languages was also raised. See *ibid*.; Parliamentary Assembly, 'Resolution 1194' at para. 1.

[127] 'Report on Austria' at para. 92.

[128] Ilias Bantekas, 'Austria, the European Union and Article 2(7) of the UN Charter' (February 2000) *A.S.I.L. Insights*, www.asil.org/insights/insigh40.htm.

[129] President of the EU Council, 'Statement from the Portuguese Presidency of the European Union on behalf of XIV Member States', Lisbon, 31 January 2000.

asked to prepare a report on the evolution of the FPÖ, and the Austrian Government's commitment to common European values, including the rights of minorities, refugees and immigrants. The report is an important human rights document – first, for its examination of 'common European values', second, for its support for implementation mechanisms within the EU context, and finally as an indication of the way in which Article 7 may be utilised in the future. Amongst the documents referred to by the authors of the report were the Framework Convention for the Protection of National Minorities, the Convention relating to the Status of Refugees, the Declaration against Racism and Xenophobia, and the Draft Charter of Fundamental Rights.[130] By focusing the authors' mandate on refugees, immigrants and minorities, the EU has designated the principle of non-discrimination as a core European value which, if breached, could give rise to enforcement mechanisms. This equates with the precedence given in the EU's membership opinions to the protection of minorities, as well as the inclusion of minority rights as a 'common' value in Article 2 of the TEU following the adoption of the Treaty of Lisbon.

The Council of Europe has not confined itself to the standards established in the instruments adopted under its auspices when considering members' rights records, for example, referring to violations of international humanitarian law. In 1995 the Parliamentary Assembly recommended that the Committee of Ministers consider suspending Turkey's rights of representation as a result of Turkey's intervention in northern Iraq.[131] The continuing human rights violations in the conflict in Chechnya not only caused the Parliamentary Assembly to suspend the admission procedure at the time Russia was applying for membership but, since Russia became a member, the same conflict has caused the Parliamentary Assembly to request that the Committee of Ministers initiate suspension pursuant to Article 8.[132] Listed amongst the abuses were 'indiscriminate and disproportionate military action', 'attacks on the civilian population' and arbitrary arrest and ill-treatment of non-combatants.[133] Despite the Parliamentary

[130] 'Report on Austria' at paras. 6–19.

[131] Parliamentary Assembly, 'Recommendation 1266 (1995) on Turkey's Military Intervention in Northern Iraq and on Turkey's Respect of Commitments Concerning Constitutional and Legislative Reforms', 26 April 1995.

[132] See Parliamentary Assembly, 'Resolution 1456 Conflict in the Chechen Republic – Implementation by the Russian Federation of Recommendation 1444 (2000)', 6 April 2000.

[133] *Ibid.*

Assembly's suggestion that Article 8 be invoked against Russia, the Committee of Ministers responded by highlighting a number of Council of Europe initiatives in relation to the situation in Chechnya and disclaimed the need to exclude Russia.[134] In the case of Russia the Parliamentary Assembly was willing to raise the prospect of suspension due to breaches of standards articulated in instruments negotiated outside its auspices – for example, the Geneva Conventions of 1949 – demonstrating the European organisations' distaste for military conflict and associated violations of international humanitarian law within member states.[135]

IV Creating a united Europe?

By infusing their membership processes with a 'standardised, principled approach',[136] NATO, the EU and the Council of Europe have all indicated their desire to achieve a homogenous community of European states. Paradoxically, the practice demonstrates that although the institutions seek to remain closed, the accession of the Central and Eastern European countries has resulted in greater heterogeneity as new members bring their own political, economic and social heritage to the expanded organisations.[137] This tension between the desire to open the organisations to all Europeans on the one hand and to restrict the organisations to those states with acceptable rights records on the other hand leads to a number of questions regarding the practice of using human rights standards as a means to integrate Europe. The practice reveals two forms of inconsistency: inconsistency in the application of the criteria between members of the same organisation and inconsistency

[134] Committee of Ministers' Reply, 'Conflict in the Chechen Republic – Reply to Recommendation 1456 (2000) of the Parliamentary Assembly', 27 June 2000. See also Parliamentary Assembly, 'Resolution 1221 (2000) Conflict in the Chechen Republic – Follow-Up to Recommendations 1444 (2000) and 1456 (2000) of the Parliamentary Assembly', 29 June 2000.

[135] Such distaste is also evidenced by the Conference on Security and Co-operation in Europe's decision to exclude the representative of Yugoslavia in 1992 as a result of the armed conflict in that country. For a discussion of this action, see Chapter 4, pp. 211–13.

[136] Cf. Simpson's comments regarding the UN: Gerry Simpson, 'Imagined Consent: Democratic Liberalism and International Legal Theory' (1994) 15 *Aust. Y.B. Int'l L.* 103 at 121–2.

[137] Frank Schimmelfennig, 'The Double Puzzle of EU Enlargement: Liberal Norms, Rhetorical Action, and the Decision to Expand to the East', ARENA Working Paper No. 99/15, 1999, www.arena.uio.no/publications/wp99_15.htm.

in the application of the criteria to members of different organisations. Given these inconsistencies, it must be asked whether human rights and democracy are appropriate conditions to ensure the integration of Europe.

A Inconsistencies in the application of membership criteria

1 Inconsistency within the organisations

Within each institution the expanding list of rights relevant to admission plus the more rigorous processes have resulted in the democratic and human rights records of recent applicants being examined more closely than the records of existing members.[138] This does not mean that new member states have more acceptable human rights records, only that they have been subjected to greater scrutiny. As is highlighted by Williams, the range of rights applied in the opinions and regular reports in relation to the 2004 admissions to the EU were more detailed and developed than those applied in the EU's internal affairs.[139] They were also more detailed than those employed in relation to previous applicants for membership. Differences between previous and future applicants are also demonstrated by the 2004 decision to open EU accession negotiations with Turkey on the basis that it '*sufficiently* fulfils the Copenhagen political criteria'.[140] In 2005 the Commission recommended that the former Yugoslav Republic of Macedonia be granted candidate country status due to the fact that it was 'well on its way to satisfy the political criteria set by the Copenhagen European Council in 1993 and the Stabilisation and Association Process'.[141] This can be compared to the wording in previous opinions where the Commission stated that a particular applicant '*presents* the characteristics of a democracy, with stable institutions guaranteeing the rule of law and human rights'.[142] Such distinctions between current and future members can be seen as part of a trend of exclusivism when it comes

[138] Winkler, 'Democracy and Human Rights' at 161.
[139] Williams, 'Enlargement of the Union' at 611.
[140] Brussels European Council, 'Turkey – Presidency Conclusions', Brussels, 16–17 December 2004 at para. 22 ('Brussels Conclusions') (emphasis added).
[141] European Commission, 'Opinion on the Application from the Former Yugoslav Republic of Macedonia for Membership of the European Union', EU Doc. COM (2005) 562 final, Brussels, 9 November 2005, p. 7.
[142] For example, European Commission, 'Opinion on Estonia' at '1. Political Criteria' (emphasis added).

to admitting new members from Central and Eastern Europe.[143] In a similar vein to Chayes and Chayes's desire to treat like cases alike,[144] Alston and Weiler have stated that a credible human rights policy should avoid double standards,[145] and this includes double standards between members and non-members.[146]

This distinction between the policies applied to existing members and recent applicants may be remedied if monitoring procedures are put in place to record and deal with potential breaches of the membership criteria. Monitoring has been described as 'an indispensable element in any human rights strategy',[147] with two of the three organisations instituting such measures. In the Council of Europe the monitoring procedure initially only applied to members admitted since 1989, but in 1997 it was extended to all members of the organisation,[148] removing potential criticism of a double standard. Article 7 of the TEU, whereby the Council may address 'recommendations' to a member of the EU in the event of a 'clear risk of a serious breach by a Member State' of Article 2 values, provides another monitoring procedure.[149] The success of such procedures depends on the extent to which members are persuaded to live up to the standards set forth in the admission process, and the willingness, or otherwise, of the organisations to institute sanctions in the event of non-compliance. The treaties of two organisations, the Council of

[143] See Renata Szafarz, 'Contemporary European Law: Exclusivism, Paternalism and Partnership', in Jerzy Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century – Essays in Honour of Krysztof Skubiszewski* (The Hague: Kluwer Law International, 1996), pp. 701, 705.

[144] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty – Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995), p. 127. See Chapter 1, p. 44.

[145] Philip Alston and Joseph Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights', in Alston with Bustelo and Heenan (eds.), *The EU and Human Rights*, p. 8.

[146] In 1997 Jusys and Sadauskas also warned of the need to avoid double standards in the context of Lithuania's bid for membership of NATO at a time when it met the requisite political criteria for membership but was excluded due to other factors: Oskaras Jusys and Kaestutis Sadauskas, 'Why, How, Who, and When: A Lithuanian Perspective on NATO Enlargement' (1997) 20 *Fordham Int'l L.J.* 1636 at 1671.

[147] Alston and Weiler, 'An "Ever Closer Union"', p. 55.

[148] Parliamentary Assembly, 'Order No. 488 (1993) on the Honouring of Commitments entered into by New Member States', 29 June 1993; Parliamentary Assembly, 'Resolution 1115 (1997) on the Setting Up of an Assembly Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)', 29 January 1997.

[149] TEU, Art. 7(1).

Europe and the EU, contain substantive provisions allowing for sanctions if a state does not satisfy human rights and democracy standards.[150] Given that membership of these two organisations is certainly valued by all European countries, the threat of suspension or expulsion is a serious weapon in the fight to protect human rights in Europe.

So far there has been a reluctance to use membership sanctions to curb the behaviour of states failing to fulfil human rights and democracy criteria in Europe. This may be due to concerns as to the difficulty of influencing states once they have been removed from the purview of the organisation, or because of problems with evaluating members' behaviour by an agreed set of standards. For example, in their report on the formation of the coalition government in Austria, the 'three wise men' judged that country by its relative position compared with other European countries and not necessarily by absolute standards. This is highlighted by the authors' recognition that although Austria's situation raised issues pertaining to housing for asylum seekers and the high rates of detention, the legal situation was found to be comparable to other European countries.[151] Such evaluations may be necessary to ensure the application of common standards to all members; however, concerns have been raised in the context of Article 8 of the Statute of the Council of Europe that comparisons may be 'dangerous', as measuring one member's behaviour against another's could lead to arbitrary decisions.[152] The difficulty with applying sanctions for deviation from fundamental European values is that a sanction is predicated on a unified understanding of rights across Europe. Comparisons between members of an organisation may lead to divisions rather than integration – certainly, this was the view of the Austrian government when it stated that the EU's actions violated 'fundamental legal principles and the spirit of the European Treaties'.[153]

2 Inconsistency across the organisations

Not only are there inconsistencies in the application of membership criteria between existing and recent members, but despite the apparent

[150] Statute of the Council of Europe, Art. 8; TEU, Art. 7(2).

[151] 'Report on Austria' at para. 40.

[152] Konstantinos Magliveras, *Exclusion from Participation in International Organisations – The Law and Practice behind Member States' Expulsion and Suspension of Membership* (The Hague: Kluwer Law International, 1999), p. 79.

[153] Austrian Government, 'Action Programme of the Federal Government for the Lifting of Sanctions', 5 May 2000 (on file with author).

homogeneity in the standards on paper, there are also discrepancies amongst the different organisations. Some of these discrepancies in membership can be explained on the basis that applicant states have failed to fulfil other admission conditions – for example, the economic criteria necessary for membership of the EU or the military interoperability conditions required for admission to NATO. Thus, it is not to be expected that all European states will be members of the three organisations. However, there are also inconsistencies when it comes to applying the common membership criteria. For example, Turkey was a founding member of the Council of Europe and was admitted to NATO in 1952, but has only recently (somewhat cautiously) been found to satisfy the political requirements for membership to the EU.[154] The Parliamentary Assembly determined that Slovakia could be admitted to the Council of Europe in 1993.[155] Four years later the European Commission found that the same country had yet to meet all the political requirements for accession to the EU.[156]

These inconsistencies reveal that each organisation has drawn the line in different places, with the Council of Europe appearing to allow a wider latitude to applicants when it comes to the prospect of achieving human rights and democracy goals in the future than the EU and NATO. Due to these differences the EU does not rely upon the Council of Europe's assessments[157] (although it does utilise the standards developed by that organisation) in order to decide whether applicants have fulfilled the political criteria. While it is open to each organisation to interpret its membership standards in accordance with its own aims, the need for more than one organisation to undertake democracy and human rights audits is questionable. In the context of a discussion on complementarity amongst regional organisations in Europe, Clapham has stated that there is no need to build three separate European houses in the human rights field.[158] In terms of the EU and the Council of Europe, the need for

[154] Brussels Conclusions. Cf. European Commission, '2003 Regular Report on Turkey's Progress Towards Accession', 5 November 2003 at 'C. Conclusion', p. 132.

[155] Parliamentary Assembly, 'Opinion No. 175 (1993) on the Application by the Slovak Republic for Membership of the Council of Europe', 29 June 1993.

[156] European Commission, '2000 Agenda – Commission's Opinion on Slovakia's Application for Membership of the European Union', EU Doc. 97/20, 15 July 1997 at 'C. Summary and Conclusion'.

[157] Williams, 'Enlargement of the Union' at 617; Manfred Nowak, 'Is Bosnia and Herzegovina Ready for Membership of the Council of Europe?' (1999) 20 *Hum. Rts. L.J.* 285 at 288.

[158] Andrew Clapham, 'On Complementarity: Human Rights in the European Legal Orders' (2000) 21 *Hum. Rts. L.J.* 321. This comment was made in relation to a discussion of the EU, the Council of Europe and the OSCE.

cooperation is acknowledged in the 2007 Memorandum of Understanding, in which the EU recognised the Council of Europe as the 'Europe-wide reference source for human rights'.[159] But the problem identified by Clapham is compounded when the application of human rights and democracy as entry conditions results in different boundaries across the three organisations. Europe's borders are generally associated with membership of the EU,[160] but significantly the other two organisations also view the integration of Europe as a fundamental goal. If a democratic government and adherence to human rights principles determine the boundaries of Europe, then arguably those boundaries lie in three different places. The answer to the question 'where do Europe's borders lie?' may be more difficult than the question 'which criteria stipulate their extension?'.[161]

B The appropriateness of using rights to integrate Europe

The term 'European' has been defined to include geographical, cultural and historical elements.[162] More specifically, the three organisations include compliance with human rights and democratic norms as necessary requirements for a state to be encompassed within the borders of Europe. All three organisations believe that European integration is best achieved by admitting states that fulfil certain conditions. The focus on rights creates legitimacy for the integration project by providing a moral basis for the legal orders established in the different organisations – in particular the pursuit of economic goals within the EU.[163] Nevertheless, it must be considered whether rights are a unifying factor amongst European states. Weiler has suggested that beyond certain core rights found in the ECHR, the definition of fundamental rights often differs between polities and societies.[164] Leino argues that even if all EU members have the same cultural and historical ties,

[159] 'Memorandum of Understanding between the Council of Europe and the European Union', May 2007 at para. 17.

[160] See, for example, Jolanda van Westering, 'Conditionality and EU Membership: The Cases of Turkey and Cyprus' (2000) 5 *Eur. Foreign Aff. R.* 95 at 95.

[161] *Ibid.*

[162] European Commission, 'Europe and the Challenge of Enlargement' at para. 7.

[163] Gráinne de Búrca, 'The Language of Rights and European Integration', in Jo Shaw and Gillian More (eds.), *The New Legal Dynamics of European Union* (New York: Clarendon Press, 1995), pp. 29, 43.

[164] Joseph Weiler, 'Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights', in Neuwahl and Rosas (eds.), *The European Union and Human Rights*, p. 51.

this alone does not 'guarantee a uniform conception of rights'.[165] After examining the protection of the right to life, economic and social rights, and the tension between freedom of expression and hate speech in a number of European countries, Leino concludes that there are real differences amongst states in the region when it comes to both the definition and implementation of these rights.[166] Moreover, Leino's analysis only refers to rights protection in Western European states and does not extend to the Central and Eastern European countries. In this respect, the concentration on civil and political rights in the membership criteria, at the expense of economic and social rights, could divide rather than unite Eastern and Western Europe.

This ambivalence about the place of rights as a means of assisting in regional integration is reflected in the membership practice of the three institutions. On the one hand, the organisations' documentary criteria uphold the idea that a rights-based approach to membership will assist in creating a common European identity. But in practice the organs have admitted states falling short of the detailed standards articulated, in some cases as a strategy to encourage improvement in their rights record. This is apparent in the Council of Europe where a state may be admitted on the basis that it would benefit from membership of the organisation, even if it does not currently meet the accession criteria.[167] At the end of 2007 all applicant states were found to fulfil the political criteria for entry to the EU, despite a pronouncement by the European Commission that there was room for improvement in some areas.[168]

[165] Leino, 'A European Approach to Human Rights?' at 457. See also de Búrca, 'Language of Rights', p. 52. See Chapter 1, p. 51.

[166] Leino, 'A European Approach to Human Rights?' at 487.

[167] For example, in the case of Bosnia and Herzegovina, the Rapporteur of the Political Affairs Committee stated that '[a]dmission would send a clear signal to those who still harbour intentions of re-defining the region along ethnic lines, that multi-ethnic States do have a future in the Balkans': 'Bosnia and Herzegovina's Application for Membership of the Council of Europe', Doc. 9287, 5 December 2001 at para. 108. See also Nowak, 'Bosnia and Herzegovina'.

[168] Croatia was found to fulfil the political criteria in April 2004: European Commission, 'Opinion on Croatia's Application for Membership of the European Union', EU Doc. COM(2004)-257 final, 20 April 2004, pp. 119–20. Although the European Council had already granted candidate country status to Croatia, the former Yugoslav Republic of Macedonia and Turkey, a 2008 Commission document on the main challenges to enlargement highlighted areas for improvement in the political criteria in all three countries: 'Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2007–2008', EU Doc. COM(2007) 663 final, Brussels, 6 November 2007.

NATO now includes respect for human rights and democracy within its admission criteria, but has not consistently demanded these attributes from existing members. Overall, the membership practice reveals neither a preference for strict adherence to restricted membership or complete openness in the form of full regional membership. Instead, it is indicative of a commitment to remain somewhere between these two goals in the desire to integrate the region. A united Europe has room for countries with an established human rights record as well as those needing to improve their democratic and human rights standards in the eyes of other members.

Acknowledging the difficulties in articulating a common vision of rights across Europe does not mean that the organisations should not attempt to use rights as a benchmark for determining membership. However, it does support the organisations' approach of allowing a certain degree of flexibility in the interpretation of the criteria. It remains to be seen whether the internal processes of the organisations will be able to persuade new (as well as existing) members to further improve their rights record. If it is the case, as Leuprecht maintains,[169] that it is easier to press states to fulfil standards when the prospect of membership is still looming, then the problem of inconsistency will remain. The question as to whether membership conditionality can lead to change in the domestic policies of individual European states will be revisited in Chapter 6, but there are conflicting views on whether admission criteria result in substantive changes to government policies. In the context of the passage of ethnic minority legislation in the 1990s, Kelley argues that membership conditionality in the EU and the Council of Europe was a significant factor in changing policies towards minorities in a number of applicant states.[170] Others suggest that the main impact of regional organisations on domestic policies is effected after countries join.[171] Grabbe maintains that conditionality is too blunt an instrument to 'sculpt institutions and policies during the accession process', although in the EU it has been effective at certain points to enforce a few conditions at a time.[172]

[169] Leuprecht, 'Innovations in the European System' at 328.

[170] Judith Kelley, 'International Actors on the Domestic Scene: Membership Conditionality and Socialization by International Institutions' (2004) 58 *Int'l Org.* 425.

[171] Jon C. Pevehouse, 'Democracy from the Outside-In? International Organizations and Democratization' (2002) 56 *Int'l Org.* 515. See also *ibid.* at 431.

[172] Heather Grabbe, 'How Does Europeanization Affect CEE Governance? Conditionality, Diffusion and Diversity' (2001) 8 *J. Eur. Pub. Pol.* 1013 at 1026.

V Functions and the role of rights

Unlike the League of Nations and the UN, where functions were ultimately tied to universality, the European organisations have linked their roles to human rights and democracy. These requirements are now firmly entrenched as preconditions for entry into Europe, with NATO, the Council of Europe and the EU all walking a fine line between their twin policies of expanding to include all European states and limiting participation to states with appropriate rights records. During the admission process, the organisations have emphasised their shared founding purposes of removing divisions on the continent and reuniting West and East. At the same time the organisations have increased both the number and specificity of the admission conditions, most notably in the area of human rights and democracy. Prior to the 2004 round of admissions, Leino concluded that such 'incoherence' in the application of the EU's membership criteria should not necessarily be viewed as a bad thing. Instead, it may be 'another name for the recognition of diversity and openness in relation to political changes'.[173] Highlighting the political nature of the process is one way of reconciling the tensions inherent in the criteria for determining participation. Another method is to return to the link between participation and an organisation's functions. The common practice of the three European organisations in not demanding absolute compliance with human rights and democracy confirms their shared purpose of integration as a significant goal. The differences amongst the three organisations may be explained on the basis that they are using rights in their membership criteria to ensure that an applicant can effectively contribute to each organisation's functions. The European institutions may have been founded with a common aim of unifying the continent, but each achieves that aim through different roles. The purpose of integrating Europe may be realised through greater heterogeneity in membership, but the fulfilment of their individual functions requires adherence (to varying degrees) to human rights and democracy.

Not only does the emphasis on rights highlight that participation in Europe is dependent on democracy and rights standards, but the development of the membership criteria also reveals a progressive change in the functions of each institution. The inclusion of democracy and human rights in NATO's admission criteria is indicative of its shift

[173] Leino, 'Rights, Rules and Democracy' at 87.

from an alliance concerned with military defence vis-à-vis the Warsaw Pact countries to one committed to a broader concept of security. The EU's movement from economic to political integration is evidenced by the need for more detailed human rights and democracy criteria, and the increased scrutiny of applicants' records. The Council of Europe has fundamentally changed its emphasis, as established in its Statute, from an organisation concerned with the defence of democracy, human rights and the rule of law within its membership to one actively engaged in 'democracy building' in new members.[174] Thus, the flexibility of the shared membership criteria is an indication not only of the goal of integration, but also of a change in the functions and focus of each organisation.

In leaving Europe to turn to the membership practice of other closed organisations, it is important to note that the story of European integration did not conclude on 1 May 2004 – Albania and Croatia became members of NATO in 2009, Bulgaria and Romania joined the EU in 2007 and in the same year Montenegro was admitted to the Council of Europe. The Balkan states, Turkey, Iceland and the Ukraine may still join one or all three of the organisations.[175] The impact of the major accessions of the last ten years on the human rights and democratic policies of the three institutions has yet to be fully realised. And, as is noted by Hillion, the accession strategy is certain to colour the relations between old and new members for a number of years to come.[176] The fact that the most recent members of the EU, NATO and the Council of Europe all received attention in Amnesty International's 2008 annual report[177] for various human rights abuses indicates that each organisation is looking for recognition of certain fundamental rights rather than a 'perfect' record. Given that existing members have not always achieved the detailed standards to which they have subjected recent and future members of the organisations, the failure to require compliance with all human rights articulated in the European context is to be expected. The flexibility of

[174] Leuprecht, 'Innovations in the European System' at 326.

[175] Iceland and Albania applied for membership of the EU in 2009. At the Bucharest Summit, NATO leaders agreed that the Ukraine and Georgia would become members of NATO in the future: 'Bucharest Summit Declaration', issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Bucharest on 3 April 2008 at para. 23.

[176] Hillion, 'Enlargement of the European Union', p. 402.

[177] Amnesty International, *Amnesty International Report 2008 – The State of the World's Human Rights*, 2008, http://archive.amnesty.org/report2008/eng/Homepage.

the admission criteria is therefore not necessarily something to be frowned upon. However, it increases the possibility that members will be found to have violated human rights and democracy principles in the future, leading to the potential need to utilise membership sanctions such as suspension. Organisations outside Europe have grappled more extensively with the prospect of excluding members for failing to meet democracy and human rights standards, and it is this practice that will be the focus of the next chapter.

4

Restricting the ranks – excluding states from closed organisations

I Sovereignty, democracy and exclusion

The post-War European institutions are not the only international organisations engaged in expanding their membership while at the same time restricting the possibility of participation to a limited group of states. This book will now turn to other closed international organisations that have defined their functions in terms of unifying a territorial area or, at the very least, achieving a level of cooperation between like-minded states. The organisations chosen for analysis in this chapter cover a wide range of regions and stages of integration. As was the case with the three European institutions, none of the organisations discussed in this chapter have desired to achieve universal membership. In some cases the organisations have restricted their membership along geographical lines, although at least one has used historical criteria to determine participation. They range from institutions aspiring to replicate the type of regional unification achieved in Europe (the African Union) to associations aiming at a greater degree of consultation and cooperation (the Commonwealth).

Despite this diversity in aims and geography, the organisations examined below have two common features apart from their desire to restrict membership to a defined group of states – first, their strong adherence to sovereignty and, second, their willingness to exclude members from participation. The first factor makes the second commonality all the more surprising. Although sovereignty and its twin legal principle, non-intervention, have been topics of discussion and debate in the post-War European institutions, they are expressed with much greater fervour in the founding documents of other closed organisations. Paradoxically, despite this seeming devotion to sovereignty, in many cases these organisations have been willing to exclude members from participation as a result of 'internal' issues, such as violations of democracy and human rights standards. Whereas the majority of activity concerning membership policy in the three post-War European

institutions has centred on admissions, for the most part conditionality has had a more significant impact at the other end of the process in these organisations – suspension or expulsion. At first glance there would appear to be an inherent tension between a commitment to sovereignty and theories of democratic governance seeking to exclude states from the international community on the basis of their governmental system.[1] This paradox between the concepts of sovereignty and exclusion is explored below.

It is often claimed that there is a tension between a state's participation in an international organisation and its sovereignty. But membership of an international organisation can be viewed as both an exercise of a state's sovereignty as well as a constraint upon its independence of action. Sovereignty has been described as embodying two ideas – a state's 'supremacy at home' (internal sovereignty) and freedom from interference and liberty of action in its external affairs (external sovereignty).[2] Originally the principle of sovereignty signified the indivisible, perpetual and supreme power of the state, whether through the monarch or the people in a popular state.[3] Gradually it expanded to include the notion of independence, best encapsulated in Judge Anzilotti's separate opinion in the *Austro-German Customs Union Case*, when he described independence as external sovereignty – 'by which is meant that the State has over it no other authority than that of international law'.[4] This final clause may be seen as a move away from the concept of absolute sovereignty to a more relative notion – one recognising that states may be subject to international rules, albeit rules to which states have consented. As a voluntary act of its sovereignty, a state can freely choose to become a member of an international organisation. However, once they have been admitted to membership, states '*de jure* and/or *de facto* renounce their absolute right to be masters of their own affairs' by agreeing to respect and adhere to an organisation's decisions.[5] In accordance with this view, Franck asserts that through the functional necessities of the international community, states have transferred 'more and more of their sovereignty

[1] Gerry Simpson, *Great Powers and Outlaw States – Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004), p. 55.
[2] Michael Ross Fowler and Julie Marie Bunck, *Law, Power, and the Sovereign State – The Evolution and Application of the Concept of Sovereignty* (Pennsylvania State University Press, 1995), p. 11.
[3] Jean Bodin, *Six Books of the Commonwealth* (abridged and translated by M. J. Tooley, Oxford: Blackwell, 1955), pp. 25, 51.
[4] *Austro-German Union Customs Case (Advisory Opinion)* [1931] PCIJ (ser. A/B) No. 41 at 57.
[5] Athena D. Efraim, *Sovereign (In)equality in International Organizations* (The Hague: Martinus Nijhoff Publishers, 2001), p. 55.

to regional and global systems of governance'.[6] Thus, Franck has claimed that state sovereignty 'is not what it used to be'.[7]

In exploring this seeming contradiction between sovereignty and the exclusion of states from membership, this chapter deals with two types of international organisations. First, organisations aimed at achieving varying degrees of broad regional integration outside Europe will be examined. Included within this group of organisations are the African Union (and its predecessor, the Organization of African Unity), the Organization of American States, the Association of Southeast Asian Nations and the Pacific Islands Forum. For members of these organisations, strong claims of sovereignty have been a means of asserting their independence and rejecting any external interference in their internal affairs. Second, this chapter will examine restricted institutions based on less formal forms of cooperation, such as the OSCE and the Commonwealth. Declarations affirming sovereignty within the framework of these 'soft'[8] organisations match the members' desire to ensure a degree of flexibility in the institutional arrangements by rejecting the adoption of legally binding commitments and maintaining the practice of consensus decision-making. Not all regional organisations or forms of cooperation are covered in this chapter. For example, a number of closed organisations have not adopted admission criteria based on human rights and democratic principles, nor have they displayed any desire to suspend members for failing to fulfil such standards (although they may have excluded members for breaching other fundamental principles).[9]

[6] Thomas Franck, 'Clan and Superclan: Loyalty, Identity and Community in Law and Practice' (1996) 90 *Am. J. Int'l L.* 359 at 368.

[7] Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *Am. J. Int'l L.* 46 at 78.

[8] Jan Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law' (2001) 70 *Nordic J. Int'l L.* 403.

[9] For example, Article 1 of the Pact of the League of Arab States, opened for signature 22 March 1945, 70 UNTS 237 (entered into force 11 May 1945), provides that it is the 'right' of any 'independent Arab state' to become a member of the organisation. The Charter of the Islamic Conference, opened for signature 4 March 1972, 914 UNTS 110 (entered into force 28 February 1973), provides that '[e]very Muslim State is eligible to join the Islamic Conference on submitting an application expressing its desire and preparedness to adopt this Charter'. The question of exclusion has arisen in both organisations, notably in response to issues regarding the Palestinian territories. See Hussein A. Hassouna, *The League of Arab States and Regional Disputes – A Study of Middle East Conflicts* (Dobbs Ferry: Oceana Publications, 1975), p. 39; Hasan Moinuddin, *The Charter of the Islamic Conference and Legal Framework of Economic Cooperation Amongst its Member States* (Oxford: Clarendon Press, 1987), pp. 100–2.

The focus here is on the way in which organisations strongly affirming the principle of sovereignty have attempted to reconcile these statements with the practice of suspending members from participation for breaches of democratic values or human rights.

II Regional integration: the desire to unite and the pressure to exclude

The establishment of the three post-War European organisations was based on the belief that closer cooperation between European nations would ensure peace. Closer cooperation was also a goal for members of regional organisations established beyond Europe, but the motivation for such cooperation was not only the attainment of peace. More important was the need to secure the sovereignty of newly decolonised countries and to reduce the possibility of external intervention. The goal of regional cooperation is set out in the founding documents of the main institutions for achieving broad political integration in the Americas, Africa, Asia and the Pacific: the OAS, the African Union (AU), the Association of Southeast Asian Nations (ASEAN) and the Pacific Islands Forum. In the Charter of the OAS the ideal of broad regional cooperation is expressed in the members' desire to 'achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, territorial integrity, and their independence'.[10] To this end the members agree to 'seek the solution of political, juridical, and economic problems that may arise among them' and to 'promote, by cooperative action, their economic, social and cultural development'.[11] In Africa the main impetus for the decision to dissolve the Organization of African Unity (OAU) and create the AU was the perceived need to strengthen African unity in a number of fields[12] and to promote and defend 'African common positions on issues of interest to the continent and its peoples'.[13] Similarly, the establishment of ASEAN was designed to ensure closer cooperation between states in

[10] Charter of the Organization of American States, opened for signature 30 April 1948, 119 UNTS 3 (entered into force 13 December 1951), Art. 1 ('Charter of the OAS').
[11] *Ibid.*, Art. 2(e)–(f).
[12] See 'Sirte Declaration', OAU, Fourth Extraordinary Session of the Assembly of Heads of State and Government, Sirte, Libya, 8–9 September 1999.
[13] Constitutive Act of the AU, Art. 3(a), (c), (d).

Southeast Asia.[14] The founding document of ASEAN, the Bangkok Declaration, signed in 1967 by Indonesia, Malaysia, the Philippines, Singapore and Thailand, includes within the aims of the organisation the promotion of economic growth, regional peace and stability.[15] The leaders at the first meetings of the South Pacific Forum (the predecessor to the Pacific Islands Forum) decided against adopting a formal charter for the new association, but the members recognised the advantages of cooperation and the need to plan for future regional development.[16]

While the members of the first three organisations were eager to assert the importance of regional cooperation and collaboration, they were equally committed to maintaining their sovereignty and reducing the prospect of external intervention. Anghie argues that there is a difference between European and non-European sovereignty as a result of the distinctive processes that brought sovereignty outside Europe into being.[17] This has resulted in non-European states being more vocal in their commitment to retain their 'hard won prize'.[18] They have been particularly concerned to assert the two international legal principles derived from the concept of sovereignty – the sovereign equality of states and the norm of non-intervention. Such undertakings are found in the fundamental documents of the OAS, the AU and ASEAN.[19] Although there is no equivalent statement in the first communiqués of the South Pacific Forum, a document endorsed by the leaders in 2007 emphasises that '[r]egionalism under the Pacific Plan does not imply any limitation on national sovereignty'.[20]

[14] 'Declaration Constituting an Agreement Establishing the Association of South East Asian Nations (ASEAN)', 1331 UNTS 235 (signed and entered into force 8 August 1967) ('Bangkok Declaration').

[15] *Ibid.* at paras. 1–2.

[16] South Pacific Forum (SPF), 'Joint Final Communiqué', Wellington, 5–7 August 1971; SPF, 'Communiqué', Canberra, 23–25 February 1972.

[17] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004), pp. 194–5. These processes include the mandate system of the League of Nations. In his view non-European sovereigns – former colonies – continue to suffer as a result of their inequalities in economic power.

[18] Georges Abi-Saab, 'The Newly Independent States and the Rule of International Law: An Outline' (1962) 8 *How. L.J.* 95 at 103.

[19] Charter of the OAS, Art. 1; Constitutive Act of the AU, Arts. 3, 4; Charter of the Organization of African Unity, opened for signature 25 May 1963, 479 UNTS 69 (entered into force 13 September 1963), Art. III; Treaty of Amity and Cooperation in Southeast Asia, opened for signature 24 February 1976, 1025 UNTS 316 (entered into force 15 July 1976), Art. 2.

[20] Pacific Islands Forum Secretariat, 'The Pacific Plan for Strengthening Regional Cooperation and Integration', October 2007 at para. 6.

The principle of non-intervention is of particular relevance to this study as an organisation engaged in judging a member's democratic and human rights record is challenging the idea that a state has the 'right freely to choose and develop its political, social, economic and cultural systems'.[21]

A Admission to regional organisations

The desire to bring together states within a region, indicated by the use of such terms as 'cooperation', 'integration' and 'mutual respect' in the founding documents of the four organisations, is also evident in the admission criteria, which are primarily focused on geographic location and statehood. The Bangkok Declaration provides that ASEAN is 'open for participation to all States in the South-East Asian Region' subscribing to its 'aims, principles and purposes'.[22] Prospective members must also ratify the Treaty of Amity and Cooperation in Southeast Asia, which sets out certain fundamental principles, including '[m]utual respect for the independence, sovereignty, equality, territorial integrity' and '[n]on-interference in the internal affairs of one another'.[23] No substantive internal requirements are contained in either instrument. In 2007 the members adopted a new treaty, the Charter of the Association of Southeast Asian Nations, containing a provision that new members must be willing to 'carry out the obligations of Membership'.[24] The Pacific Islands Forum has grown since its inception in 1971, but without reference to formal criteria. Various agreements merely provide for accession by 'other governments ... with the approval of the Forum' without reference to even a geographical condition.[25] Geography and

[21] 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations', GA Res. 2625 (XXV), 25th session, 1883rd plenary meeting, UN Doc. A/RES/2625 (XXV), 24 October 1970.

[22] Bangkok Declaration, Art. 4.

[23] Treaty of Amity and Cooperation in Southeast Asia, Art. 2(a), (c). Ratification of this Treaty is not a sufficient criterion for membership as states outside the region can accede to its terms.

[24] Charter of the Association of Southeast Asian Nations, opened for signature 20 November 2007 (entered into force 15 December 2008), Art. 6(2)(d) ('ASEAN Charter').

[25] Agreement Establishing a South Pacific Bureau for Economic Cooperation, Apia, April 1973 [1973] ATS 13, Art. XI(4); Agreement Establishing the South Pacific Forum Secretariat, Pohnpei, July 1991 [1993] ATS 16, Art. XII(6); Agreement Establishing the Pacific Islands Forum Secretariat, Tarawa, October 2000 [2006] ATS 5, Art. XII(6); Agreement Establishing the Pacific Islands Forum, Port Moresby, 2005 (not yet in force), Art. XI(6).

independence are the main membership conditions for the OAS and the AU. Article 4 of the Charter of the OAS provides that '[a]ll American States that ratify the present Charter are Members of the Organization'. This provision has been described as having three requirements: an applicant must be a state, it must be American and it must ratify the Charter.[26] Similarly, '[a]ny African State' may become a member of the AU. Its predecessor organisation, the OAU, enabled each 'independent sovereign African State'[27] to become a member – although words such as 'independent' and 'sovereign' appear to be somewhat superfluous given the requirement of statehood.

The members' aspiration to encompass all states within their respective regions is indicated by the failure to list substantive membership criteria, such as democratic government. An attempt by Brazil and Uruguay to condition OAS membership on democracy was rejected at the 1948 Conference when the Charter of the OAS was adopted.[28] This is somewhat mitigated by a statement in the Charter that the solidarity of the American states requires 'the political organization of those States on the basis of the effective exercise of representative democracy'.[29] Following the adoption of the Inter-American Democratic Charter, it would be unlikely that a state whose government attained power otherwise than through an election could ever hope to join the OAS. The Constitutive Act of the African Union also proclaims that governments obtaining power through 'unconstitutional means' shall not participate in the AU's activities,[30] although this provision appears to be directed at existing members rather than states aspiring to join. In any event, as nearly all potential members in the four regions have now joined the relevant organisations, the admission criteria are of little practical significance.[31]

[26] L. Ronald Scheman, 'Admission of States to the Organization of American States' (1964) 58 *Am. J. Int'l L.* 968.

[27] Constitutive Act of the AU, Art. 29; Charter of the OAU, Art. XXVIII(1).

[28] Brazilian Delegation, 'Amendment to the Draft Organic Pact of the Inter-American System', Doc. No. CB-118-E, C1–9, 6 April 1948, in International American Conference (9th Bogotá, 1948), *Chronological Collection of Documents*, vol. II. See also Ninth International Conference of American States, *Report of the Delegation of the United States of America with Related Documents* (1948), p. 15.

[29] Charter of the OAS, Art. 3(d).

[30] Constitutive Act of the AU, Art. 30.

[31] All thirty-five independent states in the Americas have ratified the Charter of the OAS: see OAS, *The OAS and the Inter-American System*, www.oas.org/documents/eng/oasin-brief.asp. Fifty-three countries are members of the AU, and ASEAN encompasses all ten Southeast Asian nations. The possibility of ASEAN gaining new members in the future is suggested by the presence of Article 6 ('Admission of New Members') in the 2007

B Excluding states from regional organisations

The lack of any substantive conditions in the admission criteria of the major regional organisations in Africa, the Americas, Asia and the Pacific demonstrates that the main aim was to integrate countries within a region. In two of these organisations, the OAS and the AU, this espousal of sovereignty is matched by equally robust commitments to democracy and human rights principles. Similar pledges can be found in the documents of the Pacific Islands Forum.[32] While there is little indication in the founding treaties that applicants to these three organisations will be judged by such commitments, the same cannot be said for current members. Even in the fourth organisation, ASEAN, there are indications that sovereignty is not 'what it used to be'. This section will turn to those situations where regional political organisations have scrutinised the internal structures of applicants and existing members in order to determine their compliance with the organisation's values.

1 Judging democracy in the Americas

The evolution of the inter-American system from a form of cooperation and solidarity into an international organisation was accomplished in 1948 at the Ninth International Conference of American States held in Bogotá. On the basis of an 'Organic Pact' submitted by the Board of the Pan American Union, the Conference adopted the Charter of the OAS, containing both a declaration of basic principles and provisions relating to the structure and functions of the new organisation.[33] The drafting of the Charter reflects a certain ambivalence about the place of democracy and human rights in the institution. The Latin American states were keen to see the principle of non-intervention included in the Charter, but viewed democracy and human rights as 'ideals the ultimate consequence of which they were not prepared to accept, lest their protection or implementation would in some way interfere with or jeopardize their sovereignty'.[34] This resulted in a division between 'principles' (Chapter II) and 'fundamental

ASEAN Charter. The documents of the Pacific Islands Forum also indicate that new members may join the organisation.

[32] See below at p. 200.

[33] Inter-American Institute of International Legal Studies (IAIILS), *The Inter-American System – Its Development and Strengthening* (Dobbs Ferry: Oceana Publications, 1966), p. xxxii.

[34] Cecilia Medina Quiroga, *The Battle of Human Rights – Gross, Systematic Violations and the Inter-American System* (Dordrecht: Martinus Nijhoff Publishers, 1988), p. 39.

rights and duties of states' (Chapter III) in the Charter. Human rights and democracy are located in Chapter II, while non-intervention is placed in Chapter III.[35] Representative democracy may have been an important principle, but it could not compete with the duty to refrain from intervening in the affairs of other states. Scholars disagree on whether the obligations contained in the two chapters are legally different, although the location of the ideals in a binding treaty signifies that, at the very least, they should be interpreted in accordance with the principle of effectiveness.[36] Democracy was deemed to be important to the OAS, but attempts to further define the concept within the Charter were also rejected.[37] Although no separate article proclaims fundamental human rights, a number of rights are located in the Charter, including freedom from discrimination, the right to work and the right to education.[38] Thus, the original Charter of the OAS articulated the importance of human rights and democracy, but did not elaborate upon the meaning of these principles or provide mechanisms for their enforcement.

(a) The exclusion of Cuba from the OAS Quiroga has remarked that in the years following the adoption of the Charter of the OAS, issues relating to representative democracy and human rights 'were invoked mainly to justify a sort of crusade against communism'.[39] In this context the assumption of power by Fidel Castro in Cuba in 1959 was viewed as directly contrary to the principles of the OAS. The new regime was perceived as a threat to the stability of the region and by 1965 the 'Cuban Situation' had resulted in four applications pursuant to the Inter-American Treaty of Reciprocal Assistance ('Rio Treaty').[40] The exclusion of Cuba occurred as the outcome of the second application, instigated by Peru and Colombia. The Rio Treaty was adopted in 1947 and provides for the convening of an Organ of Consultation in the event of a situation which 'might endanger the peace of America'.[41] In November 1961 the Colombian government requested a Meeting of Consultation of

[35] *Ibid.* [36] *Ibid.*, p. 43.
[37] See discussion in 'Minuta de La Primera Sesion de La Subcommission A', Doc. No. CB-365/C.I.Sub A.5, in Inter-American Conference (9th Bogotá, 1948), *Actas y Documentos*, pp. 299–300.
[38] Charter of the OAS, Arts. 29–30. [39] Quiroga, *The Battle of Human Rights*, p. 51.
[40] For a discussion of the circumstances surrounding all four applications, see IAIILS, *The Inter-American System*, Chapter 8.
[41] Rio Treaty, opened for signature 2 September 1947, 21 UNTS 92 (entered into force 3 December 1948), Art. 6.

Ministers of Foreign Affairs 'to consider the threats to the peace and to the political independence of the American states that might arise from the intervention of extracontinental powers' and to determine the measures to be taken to maintain peace and security in the Americas.[42] The specific 'threat' was not listed in the Colombian government's note or the resolution of the OAS Council calling for the meeting, but it was a clear reference to the potential influence of the USSR in the Americas.

The Charter of the OAS, as adopted in 1948, did not contemplate the possibility of membership sanctions against state parties. But the absence of appropriate provisions failed to prevent the meeting of Ministers of Foreign Affairs held at Punte del Este from declaring that 'as a consequence of repeated acts, the present Government of Cuba has voluntarily placed itself outside the inter-American system'.[43] The meeting resolved that a Marxist-Leninist government in Cuba was incompatible with the inter-American system and such incompatibility should result in the exclusion of Cuba 'from participation in the system'.[44] The resolution was passed by a vote of fourteen to one with six abstentions, and was one of a series of resolutions adopted at the meeting dealing with Cuba.[45] The action taken against Cuba highlights a number of issues regarding the imposition of membership sanctions. First, the resolution did not specify the precise aspects of the Cuban government and its communist system that were deemed to be contrary to the inter-American system. Instead, the resolution proclaimed the importance of non-intervention and the exercise of representative democracy in the Americas, and relied upon a report prepared by the Inter-American Peace Committee to conclude that:

[42] See text of Note of Colombian Government, 13 November 1961, as cited in 'OAS Council Resolution of 4 December 1961', in IAIILS, *The Inter-American System*, pp. 158–9.

[43] 'Resolution VI – Exclusion of the Present Government of Cuba from Participation in the Inter-American System', Final Act, Eighth Meeting of Consultation of Ministers of Foreign Affairs, Punta del Este, Uruguay, Doc. No. OEA/Ser.C/II.8, 22–31 January 1962.

[44] *Ibid.*

[45] The abstaining members were Argentina, Bolivia, Brazil, Chile, Ecuador and Mexico. The other resolutions dealt with a number of associated issues: reaffirming the meeting's faith in democratic principles and the rejection of communism in the Americas; establishing a Special Consultative Committee on Security to deal with issues arising from intervention of the Sino-Soviet Powers in the region; and suspending trade with Cuba in certain items. See 'Resolution I – Communist Offensive in America'; 'Resolution II – Special Consultative Committee on Security against the Subversive Action of International Communism'; 'Resolution VIII – Economic Relations', Final Act, Eighth Meeting of Consultation of Ministers of Foreign Affairs, 22–31 January 1962.

> The present connections of the Government of Cuba with the Sino-Soviet bloc of countries are evidently incompatible with the principles and standards that govern the regional system, and particularly with the collective security established by the Charter of the Organization of American States and the Inter-American Treaty of Reciprocal Assistance.[46]

In excluding Cuba, the Foreign Ministers were focused on the possible implications of communist involvement in the Americas for the collective security system, rather than specific violations of human rights and democracy. The relevant Inter-American Peace Committee's Report identified the basic antagonism between Cuba's one-party political system and representative democracy as well as the 'serious and systematic violation of human rights' in Cuba as breaches of the Charter of the OAS.[47] The resolution picks up this language of human rights and democracy, but concentrates on issues dealing with Sino-Soviet intervention and collective security, emphasising principles of non-intervention and defence. On this basis it is difficult to categorise the meeting's actions as motivated solely by a failure of democracy in Cuba.[48] This reading is strengthened by the fact that Cuba was certainly not the only country being scrutinised for violations of human rights at the time, but it was the only government excluded from the inter-American system.[49] The decision to exclude Cuba on the basis of its political system evokes the earlier resolution to expel the USSR from the League of Nations.

The second feature of the resolution is that the OAS did not expel or even suspend Cuba from the organisation, but rather excluded the 'present government'. Cuba is still described as a member of the OAS, although its government has been unable to participate in the organisation's activities for over forty years.[50] The resolution emphasises that the action was taken against the government rather than the state or people as a whole. But the niceties of language cannot obscure the fact that by denying representation to the sole claimant for the Cuban seat in the OAS, the effect of the resolution has been *de facto*

[46] 'Resolution VI – Exclusion of the Present Government of Cuba from Participation in the Inter-American System', 22–31 January 1962.

[47] 'Report of the Inter-American Peace Committee to the Eighth Meeting of Consultation of Ministers of Foreign Affairs, 1962', in IAIILS, *The Inter-American System*, pp. 98–9.

[48] See also Enrique Lagos and Timothy D. Rudy, 'In Defense of Democracy' (2004) *U. Miami Inter-Am. L.R.* 283 at 302.

[49] See discussion of the situation in the Dominican Republic in Anna P. Schreiber, *The Inter-American Commission on Human Rights* (Leiden: Sithoff, 1970), pp. 120–1.

[50] For changes in the policy of the OAS on Cuba in 2009, see pp. 183–4.

expulsion or suspension. This leads to questions about the legality of the resolution in the context of the Charter of the OAS and the Rio Treaty. Magliveras has suggested that the decision to exclude Cuba was premature, as the government was penalised for an act occurring prior to any decision that a Marxist-Leninist form of government was incompatible with the inter-American system. In his view there was no evidence that Cuba had infringed the Charter's provisions at the time of its exclusion.[51] While it may be true that when the resolution excluding Cuba was passed there was no evidence of non-compliance with OAS principles relating to collective security and non-intervention, the Peace Committee's Report certainly listed breaches of Charter principles relating to democracy and human rights. However, as discussed above, Cuba's failure to fulfil these principles was not the focus of the organisation's wrath. More significantly, in 1962 the sanction of exclusion was not contemplated in either the Charter of the OAS or the Rio Treaty, leading to some delegations expressing doubts about the ability of the organisation to exclude Cuba without an amendment. For example, Mexico opined that 'the exclusion of a member state is not juridically possible' unless the Charter was first amended.[52] Conversely, Fenwick has suggested that where a member has violated the provisions of an organisation's constituent document, the right to exclude should be implied by the fact that the organisation has stated its rights and duties of membership.[53] There are a number of problems with this argument. First, the Charter of the OAS does not explicitly state that the principles violated by Cuba were in fact membership conditions. Second, as exclusion is one of the most drastic measures to be imposed by international organisations against wayward members, a specific amendment in accordance with the Charter is necessary to effect such a sanction. Finally, there is no sense that the Charter was being implicitly revised in the relevant resolutions,[54] and thus the legal validity of Cuba's exclusion was at best doubtful.

[51] Konstantinos Magliveras, *Exclusion from Participation in International Organisations – The Law and Practice behind Member States' Expulsion and Suspension of Membership* (The Hague: Kluwer Law International, 1999), p. 168.

[52] 'Statement of Mexico', Resolutions adopted at the Eighth Meeting of Consultation of Ministers of Foreign Affairs, Punta del Este, Uruguay, 22–31 January 1962. The delegation from Ecuador expressed similar sentiments: see 'Statement of Ecuador'.

[53] C. G. Fenwick, 'The Issues at Punte Del Este: Non-Intervention v Collective Security' (1962) 56 *Am. J. Int'l L.* 469 at 474.

[54] See discussion in Magliveras, *Exclusion from Participation*, p. 169.

(b) The Protocol of Washington and democracy clauses in the Americas The disagreement between OAS members arising as a result of Cuba's exclusion highlighted the need for a more systematic procedure for dealing with members accused of flouting the organisation's principles. In 1991 this lacuna was rectified when a Special Assembly of the OAS General Assembly was convened to consider the possibility of suspending member states in certain situations. As a result of these discussions, the Protocol of Washington was adopted in 1992 to amend the Charter of the OAS.[55] The new Article 9 provides that:

> A Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established.

Such action is dependent on a two-thirds vote at a special session of the General Assembly and can only be undertaken after 'diplomatic initiatives' to restore democracy have been unsuccessful. Suspension is the ultimate sanction available to the OAS and, notwithstanding suspension, 'the Organization shall endeavour to undertake additional diplomatic initiatives to contribute to the re-establishment of representative democracy in the affected Member State'.[56] Furthermore, suspension does not release a member from its obligations under the Charter.[57]

Although the Charter of the OAS continues to espouse a broad range of principles, only the failure of democratic government raises the spectre of suspension. Other measures taken by the OAS in the 1990s and early this century underline this concentration on the promotion of democracy. In June 1991 the OAS General Assembly passed Resolution 1080, which provides that in the event of 'any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government' of a member state, a meeting of the Permanent Council should be called.[58] The Permanent Council may examine the

[55] Protocol of Amendment to the Charter of the Organization of American States, opened for signature 14 December 1992, OAE Doc. OAE/Ser.A/2.Add.3 (entered into force 25 September 1997) ('Protocol of Washington').

[56] Charter of the OAS, Art. 9(d). [57] *Ibid.*, Art. 9(e).

[58] 'Representative Democracy', OAS General Assembly Res. 1080 (XXI-O/91), 5th plenary session, 5 June 1991 ('Resolution 1080').

situation and call for a meeting of the Ministers of Foreign Affairs with a view to adopting appropriate 'decisions', but with no power to impose sanctions. This was rectified ten years later at the Third Summit of the Americas in Quebec City, and at the 28th Special Session of the OAS General Assembly held in Lima. The Summit of the Americas is not formally part of the OAS, although the OAS is the Secretariat of the Summit process and has been appointed to implement various Summit mandates.[59] At the Third Summit, the Heads of State and Government approved the Declaration of Quebec City in which they affirmed that 'any unconstitutional alteration or interruption of the democratic order in a state of the Hemisphere constitutes an insurmountable obstacle to the participation of that state's government in the Summit of the Americas process'.[60] The Inter-American Democratic Charter, adopted at a special session of the OAS General Assembly later that same year, transposes this language to the OAS.[61] In a section entitled 'Strengthening and Preservation of Democratic Institutions', the Democratic Charter provides that an unconstitutional change of government or an unconstitutional 'interruption in the democratic order' amounts to an 'insurmountable obstacle' to the relevant government's participation in OAS bodies.[62]

The promulgation of these instruments leaves no doubt that democratic failure is viewed as a serious issue in the Americas. However, the adoption of three separate documents outlining mechanisms to deal with this issue (leaving aside the Declaration of Quebec City) raises questions as to the legal relationship between the instruments, as well as the type of democratic failure that could result in sanctions. Lagos and Rudy have highlighted that the Democratic Charter is not a legally binding treaty and does not explicitly amend the Charter of the OAS.[63] Instead, the Democratic Charter should be recognised as an aid to interpreting Article 9 of the Charter of the OAS rather than as a formal amendment.[64] Article 19 of the Democratic Charter prevents undemocratic governments participating in OAS meetings and

[59] Summit of the Americas Information Network, 'The Summit of the Americas Process', www.summit-americas.org/eng-2002/summit-process.htm.

[60] 'Declaration of Quebec City', adopted at the Third Summit of the Americas, Quebec City, 20–22 April 2001 at para. 5.

[61] 'Inter-American Democratic Charter', adopted by the General Assembly, 28th special session, 11 September 2001 ('Democratic Charter').

[62] *Ibid.*, Art. 19. [63] Lagos and Rudy, 'In Defense of Democracy' at 304–5.

[64] *Ibid.* at 305. This is in accordance with Article 31 of the VCLT. See also James Crawford, *The Creation of States in International Law*, 2nd edn (Oxford University Press, 2006), p. 155.

enables the Permanent Council to 'undertake the necessary diplomatic initiatives ... to foster the restoration of democracy'.[65] A similar role for the Permanent Council is outlined in Resolution 1080.[66] Both the Democratic Charter and Resolution 1080 leave it to the General Assembly to formally suspend a member from participation in accordance with the procedures mandated in Article 9 of the Charter of the OAS. But the threshold for action in each document is somewhat different[67] – the Secretary-General can call for a meeting of the Permanent Council pursuant to Resolution 1080 'in the event of any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government'.[68] Article 19 of the Democratic Charter may be invoked where there is 'an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state'. Article 21 of the same document provides that a special session of the General Assembly 'shall take the decision to suspend' a member in the event that there has been an 'unconstitutional interruption of the democratic order' and diplomatic initiatives have failed. However, the suspension procedure in the Charter of the OAS requires a higher threshold and can only be triggered where a member's 'democratically constituted government has been overthrown by force'.[69] The differences between the documents highlight the lack of precision in the definition of the circumstances which could give rise to one of a range of measures envisaged by the organisation.[70] This may not be problematic in itself given that it is likely that the ultimate sanction of suspension will only be invoked in the event of a coup. Problems may then emerge in determining whether the Article 9 procedure is limited to military coups or whether it encompasses the illegal dissolution of the legislature or an *autogolpe* (a self-staged coup by an elected president).[71] The potential circumstances where

[65] Democratic Charter, Art. 20.

[66] Resolution 1080. See also Enrique Lagos and Timothy D. Rudy, 'The Third Summit of the Americas and the Thirty-First Session of the OAS General Assembly' (2002) 96 *Am. J. Int'l L.* 173 at 177.

[67] Lagos and Rudy, 'In Defense of Democracy' at 307. [68] Resolution 1080 at para. 1.

[69] Charter of the OAS, Art. 9.

[70] See also discussion in Barry S. Levitt, 'A Desultory Defense of Democracy: OAS Resolution 1080 and the Inter-American Democratic Charter' (2006) 48 *Latin Am. Pol. & Soc.* 93 at 96.

[71] Stephen Schnably, 'Constitutionalism and Democratic Government in the Inter-American System', in Gregory H. Fox and Brad R. Roth (eds.), *Democratic Governance and International Law* (Cambridge University Press, 2000), p. 167.

Article 9 may be applied are perhaps clearer when examining the situations where the organisation's democracy instruments have been activated.

(c) Enforcing democracy through OAS procedures Although only one state has been formally suspended from the OAS, Resolution 1080 and the Democratic Charter have both been invoked in relation to various events in member countries. The procedure provided in Resolution 1080 was employed in the cases of Haiti, Peru, Guatemala and Paraguay in response to unconstitutional or anti-democratic situations.[72] For example, following the 1991 military coup ousting President Jean-Bertrand Aristide's government in Haiti, the Ministers for Foreign Affairs of the OAS called for member countries to suspend diplomatic relations with the military government, to recognise the representatives of President Aristide, and to suspend their economic, financial and commercial ties with Haiti.[73] The powers of the UN Security Council were also activated, most notably to authorise UN members to form a multinational force with the ability 'to use all necessary means to facilitate the departure from Haiti of the military leadership'.[74] The events in Peru in 1992 were somewhat different, with the elected President Fujimori leading an *autogolpe*, resulting in the closure of the Supreme Court and Congress and the suspension of the Constitution.[75] Once again the OAS Permanent Council convened a meeting of the Ministers of Foreign Affairs, who in turn called for 'the immediate reestablishment of democratic institutional order in Peru' and urged the government to formally invite the Inter-American Commission on Human Rights to investigate the situation.[76] A similar sequence of events followed in Guatemala in 1993 with President Jorge Serrano suspending the Constitution and dissolving the Supreme Court and Congress.[77]

[72] For further background on these situations see Levitt, 'A Desultory Defense of Democracy' at 93.

[73] 'Support to the Democratic Government of Haiti', MRE Res. No. 1/91, OAS Permanent Council, PEA/ser.F/V.1, OAS Doc. MRE/RES 1/91 (1991). See also Stephen J. Schnably, 'The Santiago Commitment as a Call to Democracy in the United States: Evaluating the OAS Role in Haiti, Peru and Guatemala' (1994) 25 *U. Miami Inter-Am. L.R.* 395 at 418–21.

[74] 'SC Resolution 940 (1994)', SC Res. 940, UN SCOR, 3413 meeting, UN Doc. S/RES/940, 31 July 1994, para. 4.

[75] Schnably, 'Santiago Commitment' at 457–61.

[76] 'Support for the Restoration of Democracy in Peru', MRE Res. No. 1/92, OAS Ad Hoc Meeting of Ministers of Foreign Affairs, OEA, ser.F/V.2, OAS Doc. MRE/RES 1/92 (1992) at paras. 2, 5.

[77] Schnably, 'Santiago Commitment' at 470–2.

The Permanent Council deplored these events, announced the establishment of a fact-finding mission and urged the authorities to reinstate democracy and human rights.[78] Outside these situations, the OAS Permanent Council has assembled when other anti-democratic behaviour has occurred, for instance when Paraguay's head of the army, General Lino Oviedo, refused to obey the President's order to step down.[79] In contrast, the Permanent Council did not meet when the Ecuadorian Congress removed the elected President from office in violation of the Constitution as a result of allegations of corruption.[80]

The Democratic Charter has also been cited, notably to 'condemn the alteration of constitutional order in Venezuela', when supporters of a coup attempted to oust President Hugo Chávez from power. The Permanent Council called for a meeting of the General Assembly in accordance with Article 20 of the Democratic Charter, but by the time the General Assembly was convened five days later, President Chávez had been restored to office.[81] Thus, the OAS has shown a willingness to cite its democracy standards, to convene fact-finding missions, and in some cases to recommend more stringent measures. But it was not until 2009 that the organisation took the step of suspending a member state. In that year the OAS decided to exclude Honduras following a military coup in which the elected president was taken by soldiers from the presidential palace and placed on a plane to Costa Rica.[82] In a series of resolutions in late June and early July 2009, the organs of the OAS invoked the Democratic Charter and the Charter of the OAS to 'condemn vehemently the coup d'état ... against the constitutionally-established Government of Honduras, and the arbitrary detention and expulsion from the country of the constitutional president José Manuel Zelaya Rosales'.[83] After diplomatic efforts failed to resolve the crisis, on 5 July

[78] 'The Situation in Guatemala', CP Res. No. 605 (945/93), OAS Permanent Council, OEA/ser.G, OAS Doc. CO/RES 605 (945/93) corr. 1 (1993) at paras. 1–2.

[79] Schnably, 'Constitutionalism and Democratic Government', pp. 175–6; Arturo Vanenzuela, 'Paraguay: The Coup that Didn't Happen' (1997) 8 *J. Dem*. 43 at 49–50.

[80] Schnably, 'Constitutionalism and Democratic Government', p. 178.

[81] 'Situation in Venezuela', CP Res. No. 811 (1315/02), OAS Permanent Council, OEA/Ser.G, OAS Doc. CP/Res 811 (1315/02), 13 April 2002 at para. 1; 'Support for Democracy in Venezuela', AG/RES.1 (XXIX-E/02), General Assembly, OAS Doc. OEA/Ser.P, AG/RES.1 (XXIX-E/02), 18 April 2002.

[82] 'Honduran Leader Forced into Exile', *BBC News* (London, UK), 28 June 2009.

[83] 'Current Situation in Honduras', CP Res. No. 153 (1700/09), OAS Permanent Council, OEA/Ser.G, OAS Doc. CP/Res 953 (1700/09), 28 June 2009 at para. 1; 'Resolution on the Political Crisis in Honduras', OAS General Assembly, 1 July 2009 at para. 1. See also

Honduras was suspended from 'its right to participate' in the organisation pursuant to Article 21 of the Democratic Charter.[84] The OAS rejected an attempt by the coup leaders to withdraw from the organisation and thus pre-empt the decision to suspend, on the basis that '[o]nly legitimate governments can withdraw from an entity such as the OAS'.[85] The decision to suspend Honduras was taken pursuant to the power contained in the Democratic Charter, no doubt in response to the fact that the President invoked this instrument in taking his case to the OAS.[86] However, the action of the military in this situation would certainly have fulfilled the more limited test provided in Article 9 of the Charter of the OAS.

In 1996 Acevedo and Grossman compared the new vigour of the OAS in dealing with member states' anti-democratic behaviour to the former policy of non-intervention.[87] But the response of the OAS to anti-democratic conduct in member states has also been described as 'tepid at times'.[88] The reluctance to suspend a member state in the absence of a military coup highlights the problem with deciding the appropriate response to unconstitutional changes of government, and indeed the difficulty in identifying when an unconstitutional change of government has occurred. The problem with defining undemocratic conduct is illustrated by differences of opinion amongst members of the Permanent Council in March 1999 when debating whether the procedures in Resolution 1080 should be strengthened. The discussion occurred soon after the assassination of the Vice-President of Paraguay on 23 March 1999 and the ensuing crisis in that country. On the one hand, the US viewed a political assassination as a 'threat to democratic stability' and supported the need for proactive rather than reactive measures in the

'Situation in Honduras', CP Res. No. 952 (1699/09), OAS Permanent Council, OEA/Ser. G, OAS Doc. CP/RES 952 (1699/09), 26 June 2009.

[84] 'Resolution on the Suspension of the Rights of Honduras to Participate in the OAS', OAS General Assembly, 5 July 2009 at para. 1.

[85] 'OAS Honduras' Interim Government Can't Withdraw', *Reuters* (Washington, D.C., US), 4 July 2009.

[86] Article 17 of the Democratic Charter enables a member government to request assistance from the Secretary General or the Permanent Council when it considers that 'its democratic political institutional process or its legitimate exercise of power is at risk'. See 'Situation in Honduras', preamble.

[87] Domingo E. Acevedo and Claudio Grossman, 'The Organization of American States and the Protection of Democracy', in Tom Farer (ed.), *Beyond Sovereignty – Collectively Defending Democracy in the Americas* (Baltimore: John Hopkins University Press, 1996), p. 147.

[88] Schnably, 'Constitutionalism and Democratic Government', p. 181.

face of such threats.[89] On the other hand, some members were reluctant to classify such a situation as falling with the Resolution's ambit. For example, Mexico cautioned against the involvement of the OAS in matters of domestic jurisdiction.[90] Similarly, in 2000, when the Permanent Council discussed a report alleging that elections in Peru were flawed, some representatives argued that the issue was not within the purview of Resolution 1080.[91] Although these debates occurred prior to the adoption of the Democratic Charter, it is still the case that the mandate of the OAS is less clear in relation to threats not at the level of a military coup.[92]

The practice of the political organs of the OAS in restricting themselves to dealing with breaches of certain norms can be criticised for failure to respond to other violations of fundamental rights in the Americas with the same determination. Despite movement towards implementing democracy and human rights in the political organs of the OAS, the norm of non-intervention still has a strong influence on the decisions taken by member states.[93] In this respect perhaps the real test will come when deciding whether to readmit Cuba. In June 2009 the General Assembly reversed the forty-seven-year ban by the OAS on Cuba and declared that the exclusion resolution of 1962 'ceases to have effect'.[94] At the same time the conditions were laid for Cuba's return, with the General Assembly stating that Cuba's future participation 'will be the result of a process of dialogue initiated at the request of the Government of Cuba, and in accordance with the practices, purposes, and principles of the OAS'.[95] The Cuban government has asserted that it has no desire to start such a dialogue,[96] and thus the organisation has yet to confront the second problem – what reforms

[89] 'Acta de La Seisón Extraordinaria Celebrada el 31 de Marzo de 1999', OEA/Ser.G CP/ACTA 1186/99, 31 March 1999, p. 27.
[90] *Ibid*., p. 28.
[91] 'Acta de La Seisón Extraordinaria Celebrada el 31 de Mayo de 2000', OEA/Ser.G CP/ACTA 1241/00, 31 May 2000, pp. 21–2 (Mexico), p. 25 (Uruguay). See also Levitt, 'A Desultory Defense of Democracy' at 109–10.
[92] See Dexter S. Boniface, 'Is There a Democratic Norm in the Americas? An Analysis of the Organization of American States' (2002) 8 *Glob. Gov*. 365 at 377.
[93] See also Lagos and Rudy, 'In Defense of Democracy' at 307–8.
[94] 'Resolution on Cuba', adopted at the third plenary session, 3 June 2009, Resolution No. AG/RES.2438 (XXXIX-0/09) at para. 1.
[95] *Ibid*. at para. 2.
[96] 'Cuba Rejects OAS Membership, Official Says', CNN, 4 June 2009, http://edition.cnn.com/2009/WORLD/americas/06/04/cuba.oas/index.html.

will be required of Cuba before it can return to full participation? The potential changes demanded of Cuba by the OAS will provide further evidence of the priority accorded by the organisation to particular democratic and rights standards.

2 Dealing with anti-democratic behaviour in Africa

(a) Development of the legal regime Like the Charter of the OAS, the treaty establishing the OAU was ambivalent about the place of human rights principles in an organisation primarily dedicated to consolidating the 'hard-won independence' of African states and defending their sovereignty and territorial integrity.[97] The OAU Charter's preamble began with a declaration that 'it is the inalienable right of all people to control their own destiny' – this destiny included the desire to fight against all forms of 'neo-colonialism' and to promote African solidarity.[98] Human rights were not irrelevant in this vision – the OAU Charter provided that one of the purposes of the organisation was to promote international cooperation with due regard to the UDHR.[99] But the focal point of the organisation was the principle of non-interference in the affairs of member states. This principle was elevated above the protection of human rights by its inclusion in Article III, a provision which members pledged themselves to 'observe scrupulously'.[100] Consequently, the OAU remained silent in relation to some flagrant human rights abuses by its members, although it was responsive to violations involving racial discrimination and the right of self-determination for territories under colonial domination.[101]

In this context it is not surprising that the OAU had no power to impose sanctions against members and was unable to punish states deviating from its policies and principles.[102] The drive for unity on the one hand and coercive action in the form of membership sanctions on the other were incompatible in the eyes of the organisation's founders. This position gradually altered as the OAU began to pay more attention to human rights with the adoption of instruments such as the African

[97] Charter of the OAU, preamble, Art. II(1)(c). [98] *Ibid*., preamble.
[99] *Ibid*., Art. II(e). [100] *Ibid*., Art. VI.
[101] D. C. Turack, 'The African Charter on Human and Peoples' Rights: Some Preliminary Thoughts' (1983–84) 17 *Akron L.R.* 365 at 371. See also Rachel Murray, *Human Rights in Africa – From the OAU to the African Union* (Cambridge University Press, 2004), p. 8.
[102] Suresh Chandra Saxena, 'The African Union: Africa's Giant Step towards Continental Unity', in John Mukum Mbaku and Suresh Chandra Saxena (eds.), *Africa at the Crossroads – Between Regionalism and Globalisation* (Westport, CT: Praeger, 2004), p. 175.

Charter on Human and Peoples' Rights in 1981, the African Charter on the Rights and Welfare of the Child in 1990[103] and the Protocol Establishing an African Court on Human and Peoples' Rights.[104] The move to formalise membership sanctions in response to violations of democratic government led the Assembly of Heads of State and Government (AHSG) of the OAU to decide that 'member states whose governments came to power through unconstitutional means after the Harare Summit [in 1997], should restore constitutional legality before the next Summit'.[105] This trend towards the institutionalisation of human rights concerns culminated in 2000 with the adoption of the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government. In accordance with the AHSG's desire to provide a 'solid underpinning to the OAU's agenda of promoting democracy and democratic institutions in Africa', as well as their noted concern about the resurgence of coups on the continent, the leaders decided that in the event of an unconstitutional change of government, 'the government concerned should be suspended from participating in the policy organs of the OAU'.[106] Exclusion would last for a period of six months, but would not affect a state's membership of the OAU, including its obligation to contribute to the budget.[107] In particular, the Secretary-General was to seek contact with the perpetrators with a view to restoring the constitutional order. According to the Declaration, four situations fall within the ambit of the term 'unconstitutional change of government':

(i) a military coup d'état against a democratically elected government;
(ii) intervention by mercenaries to replace a democratically elected government;

[103] African Charter on the Rights and Welfare of the Child, opened for signature 11 July 1990, OAU Doc. No. CAB/LEG/24.9/49 (1990) (entered into force 29 November 1999).
[104] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. See discussion in Murray, *Human Rights in Africa*, pp. 22–8.
[105] 'Decision on Unconstitutional Changes of Government', AHG/Dec. 142 (XXXV) 1999, OAU 35th Ordinary Session, 12–14 July 1999. See also 'Decision on Unconstitutional Changes in Member States', CM/Dec.483 (LXX) 1999, OAU 70th Ordinary Session of the Council of Ministers, 8–10 July 1999.
[106] 'Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government', AHG/Decl.5 (XXXVI), 36th Ordinary Session of the Assembly of Heads of State and Government and the Fourth Ordinary Session of the AEC, 10–12 July 2000.
[107] *Ibid.*

(iii) replacement of democratically elected governments by armed dissident groups and rebel movements;
(iv) the refusal of an incumbent government to relinquish power to the winning party after free, fair and regular elections.[108]

In comparison to the OAS Charter, OAU (and later AU) documents provided greater clarity when describing the type of situations where membership sanctions could be invoked.

When the AHSG adopted the Declaration on Unconstitutional Changes of Government, they also agreed to the Constitutive Act of the African Union, founding a new organisation designed to facilitate economic and political integration. The AU was established in response to the perceived deficiencies of the OAU, including its inability to deal with serious conflicts and economic problems in Africa, the absence of sanctions in the OAU Charter, and its structural and financial weaknesses.[109] The fourteen objectives and sixteen principles outlined in the constitutional instrument are far more extensive than those set out in the OAU Charter and include the promotion of democratic principles and human rights.[110] The value placed on non-intervention is also downgraded in the AU with a subtle but important change in the wording of the principle. Whereas the OAU Charter proclaimed the importance of 'non-interference in the internal affairs of State', in the Constitutive Act the principle is confined to 'non-interference *by any Member State* in the internal affairs of another'[111] rather than by the organisation as a whole. In accordance with this change, the Constitutive Act explicitly recognises the right of the Union to intervene 'in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'.[112] The Constitutive Act confirms the previous condemnation of unconstitutional rulers by prohibiting governments obtaining power through unconstitutional means from participating in the Union's activities.[113]

[108] *Ibid.*
[109] Corinne A. A. Packer and Donald Rukare, 'The New African Union and its Constitutive Act' (2002) 96 *Am. J. Int'l L.* 365 at 366–9.
[110] Constitutive Act of the AU, Art. 3(g)–(h). See also Tiyanjana Maluwa, 'The Constitutive Act of the African Union and Institution-Building in Postcolonial Africa' (2003) 16 *Leiden J. Int'l L.* 157 at 163; Konstantino D. Magliveras and Gino J. Naldi, 'The African Union – A New Dawn for Africa?' (2002) 51 *Int'l & Comp. L.Q.* 415.
[111] Constitutive Act of the AU, Art. 4(g) (emphasis added).
[112] *Ibid.*, Art. 4(h). The Constitutive Act also recognises 'the right of Member States to request intervention from the Union in order to restore peace and security' (Art. 4(j)).
[113] *Ibid.*, Art. 30.

Although the Act does not further define 'unconstitutional means', reference should be made to the Declaration adopted at the same meeting with its emphasis on actions leading to the replacement of democratically elected governments. In 2007 the AU expanded the range of activities constituting an unconstitutional change of government in the African Charter on Democracy, Elections and Governance. Article 23 of this new Charter replicates the four criteria contained in the Declaration and adds a fifth criterion: '[a]ny amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government'.[114] A 'putsch',[115] as well as a military coup against an elected government, is included within the ambit of the phrase 'unconstitutional change of government'. However, as yet this Charter has not entered into force.[116] As will be seen from an examination of the AU's actions, the organisation has not shied away from suspending members experiencing a particular type of democratic failure.

(b) Unconstitutional changes of government in Africa The OAU dealt with the problem of illegal seizures of power from its establishment.[117] Togo was barred from attending the first OAU conference due to states' objections to a regime that had gained power as the result of a coup. The overthrow of President Nkrumah in Ghana in 1966 also resulted in attempts to prevent his successor being seated at the OAU summit. In 1971 Idi Amin's coup against Milton Obote in Uganda led to difficulties in determining which delegation should be seated at the Ministerial Council.[118] These early attempts to unseat a member were largely on an ad hoc basis, indicating the difficulty in displacing the principle of non-interference. Since the instigation of the more formal measures detailed above, the AU's condemnation of unconstitutional changes of government in countries such as Madagascar, Togo and Guinea has led to the relevant states being suspended from participation in the AU's organs. For example, in June 2002 the Central Organ of the

[114] African Charter on Democracy, Elections and Governance, adopted by the Eighth Ordinary Session of the Assembly, Addis Ababa, Ethiopia, 30 January 2007, Art. 23(5).
[115] *Ibid.*, Art. 23(1).
[116] See comments by Bennitto Motitsoe, 'Idasa Marks First World Democracy Day', in Douglas Racionzer (ed.), *Democracy in Africa: Promoting the African Charter on Democracy, Elections and Governance* (Pretoria: Idasa, 2009), p. 8.
[117] A. Bolaji Akinyemi, 'The Organization of African Unity and the Concept of Non-Interference in Internal Affairs of Member-States' (1972–73) 46 *Brit. Y. B. Int'l L.* 393 at 399.
[118] *Ibid.*

Mechanism for Conflict Prevention, Management and Resolution of the AU at Heads of State and Government Level decided that elections in Madagascar did not result in a 'constitutional and legally constituted Government' and therefore recommended that neither of the two rival candidates should be seated at the AU.[119] The subsequent decision of the First Assembly of the AU to endorse this recommendation and to exclude Madagascar until new elections were held was not without dissenters, particularly as a number of states outside Africa had recognised one of the candidates.[120] In 2003 the AU recognised Ravalomanana as the legitimate President[121] and Madagascar was admitted to the organisation in July that year.[122] Although Maluwa has suggested that this decision did not equate to suspension as Madagascar had not ratified the Constitutive Act at the time of the Assembly's action,[123] it is indicative of the type of behaviour which may result in exclusion from the organisation.

In a clearer example of exclusion from the AU's organs, Togo was suspended when the military installed Faure Gnassingbé as President following the death of his father.[124] In language which would have been unimaginable a few years ago, the AU's Peace and Security Council (PSC) strongly condemned the military's action in Togo and 'the constitutional modifications intended to legally window dress the coup d'état'. It confirmed the suspension of 'the *de facto* authorities in Togo and their representatives from participation in the activities of all organs of the African Union until such a time when constitutional legality is restored to the country'.[125] The PSC also endorsed sanctions imposed

[119] 'Communiqué', Sixth Ordinary Session of the Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution at the Level of Heads of State and Government, Addis Ababa, Ethiopia, 21 June 2002, Doc. No. Central Organ/MEC/AHG/Comm.(VI) at para. 7.

[120] 'Decision on the Situation in Madagascar', Assembly of the AU, 1st ordinary session, Doc. No. ASS/AU/Dec.7(I), 9–10 July 2002 at para. 4. For a discussion of events in Madagascar leading up to the AU's decision, see Richard Cornwell, 'Madagascar: First Test for the African Union' (2003) 12(1) *Afr. Sec. R.* 41 at 48.

[121] 'Communiqué', Seventh Ordinary Session of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution at the Heads of State and Government Level, Addis Ababa, Ethiopia, 3 February 2003, Doc. No. Central Organ/MEC/AHG/Comm (VII).

[122] 'Decision on Madagascar', Assembly of the African Union, 2nd ordinary session, Doc. No. Assembly/AU/Dec.6(II), 10–12 July 2003.

[123] Maluwa, 'The Constitutive Act of the African Union', p. 165.

[124] 'Togo Seen as Test for the African Union', *The Guardian* (London, UK), 24 February 2005.

[125] 'Communiqué', 25th Meeting of the Peace and Security Council, Addis Ababa, Ethiopia, 25 February 2005, Doc. No. PSC/PR/Comm (XXV) at paras. 1, 3.

by the Economic Community of West African States (ECOWAS) and called for other organisations to 'lend their unflinching support' to these measures.[126] Together with ECOWAS, the AU played a role in urging the relevant parties in Togo towards national reconciliation, with the suggestion that the human rights situation should continue to be monitored.[127] Despite unease at 'the persistent tension' in Togo, the AU decided that it could resume participation in May 2005, three months after it was suspended.[128] In the same communiqué, the PSC also urged Togo to promote 'national reconciliation and democracy',[129] suggesting that the AU was not uninterested in issues beyond the electoral process. Similar concerns were evident in the decision to suspend Guinea from the AU following a military coup in late 2008. After the death of the long-standing leader, President Conté, an army officer, Captain Moussa Dadis Camara, seized power in Guinea.[130] The PSC responded by suspending Guinea from participation in the AU 'until the return to constitutional order in that country'.[131] At a meeting convened by the Chairperson of the Commission of the AU one month later, representatives from a number of organisations endorsed a series of proposals, including 'the establishment of a consultative forum comprising all the components of civil society in Guinea' and the organisation of elections.[132] Since that time the AU has 'strongly' condemned the military government for acts of violence during a peaceful protest against the military in September 2009 and joined with ECOWAS in calling for an International Commission of Inquiry into the events surrounding that protest.[133] Thus, although elections were given a prominent place on

[126] *Ibid*. at paras. 4, 6.

[127] 'Report of the Chairperson of the Commission on the Developments in Togo', 30th Meeting of the Peace and Security Council, Addis Ababa, Ethiopia, 27 May 2005, Doc. No PSC/PR/2(xxx) at para. 18.

[128] 'Communiqué', 30th Meeting of the Peace and Security Council, Addis Ababa, Ethiopia, 27 May 2005, Doc. No. PSC/PR/Comm (XXX) at paras. 1, 3.

[129] *Ibid*. at para. 7.

[130] Mouctar Bah, 'Guinea PM Yields to Coup Leaders', *The Age* (Melbourne, Australia), 26 December 2008, p. 17.

[131] 'Communiqué', 165th Meeting of the Peace and Security Council, Addis Ababa, Ethiopia, 29 December 2008, Doc. No. PSC/PR/Comm (CLXV) at para. 3.

[132] 'Statement of the Consultative Meeting on the Situation in the Republic of Guinea', Addis Ababa, 30 January 2009 at para. 5. These proposals had earlier been adopted by ECOWAS.

[133] 'Communiqué', 207th Meeting of the Peace and Security Council at the Level of Heads of State and Government, Abuja, Nigeria, Doc. No. PSC/AHG/Comm.2 (CCVII), 29 October 2009 at paras. 2–3.

the AU's democracy agenda, as events in Guinea unfolded, the AU's response took into account allegations of a broader range of human rights violations.

The role of the PSC in instigating sanctions whenever an unconstitutional change of government takes place in Africa demonstrates that these issues are regarded by the AU as matters of regional security. The Protocol establishing the Peace and Security Council replicates the subtle but important change in the Constitutive Act, whereby the non-interference principle is confined to actions between member states.[134] However, there are limits to the situations where the AU is willing to act. Murray has suggested that the use of suspension as a sanction is confined to situations involving coups against elected governments and thus action against a military regime is not unlawful.[135] Thus, the Council of Ministers did not condemn the ousting of the military regime in Sierra Leone that had earlier removed the elected president from power.[136] The concentration on coups is illustrated by a series of decisions between late 2008 and early 2010. For example, the PSC suspended Madagascar in March 2009 following the ousting of President Ravalomanana, in an event described by the Chairman of the PSC as a 'civilian and military coup'.[137] After weeks of unrest, the Malagasy President handed power to the army, who in turn passed control to the leader of the opposition, Rajoelina. The PSC had little problem in defining this as an 'unconstitutional change of government' and calling for constitutional order to be restored.[138] Additionally, although the AU was quick to suspend Guinea following the 2008 coup, it had failed to take such robust action against the previous government. The former President, Conté, had come to power after a military coup in 1984, suspended the Constitution and

[134] 'Protocol relating to the Establishment of the Peace and Security Council of the African Union', Assembly of the African Union, 1st ordinary session, 9 July 2002, Art. 4(f).

[135] Murray, *Human Rights in Africa*, p. 80.

[136] The OAU welcomed the reinstatement of President Kabbah in 1998, despite the fact that it had been accomplished with the intervention of ECOWAS and ECOMOG (the Economic Community of West African States Monitoring Group). See 'Report of the Secretary-General on the Situation in Sierra Leone', Council of Ministers, 68th ordinary session, Doc. No. CM/Dec.415 (LXVIII), 2–7 June 1998 at para. 2.

[137] Tafessa Jarra, 'African Union Suspends Madagascar over "Coup"', *Reuters* (London, UK), 20 March 2009. The decision to suspend was made pursuant to 'Communiqué', 181st Meeting of the Peace and Security Council, Addis Ababa, Ethiopia, 20 March 2009, Doc. No. PSC/PR/Comm (CLXXXI) at para. 4.

[138] 'Communiqué', 181st Meeting of the Peace and Security Council, Addis Ababa, Ethiopia, 20 March 2009, Doc. No. PSC/PR/Comm (CLXXXI) at para. 3.

subsequently won elections regarded as flawed.[139] Similarly, in February 2010 Niger was suspended from the AU in response to a military coup in which the President, Mamadou Tandja, was ousted from office.[140] In 2009 President Tandja had undertaken a series of measures designed to extend his term of office beyond the limits prescribed by Niger's Constitution.[141] Niger was placed on the PSC's agenda following President Tandja's earlier actions,[142] but membership sanctions were not imposed until after the military coup.

Like the OAS, the OAU and AU have chosen to confine membership sanctions to coups against elected governments as the clearest indicator of an undemocratic regime. Zuma has referred to suggestions that the 'yellow card principle' should be extended to other situations, including 'seriously undemocratic and unconstitutional behaviour, as well as gross violations of human rights by governments'.[143] These suggestions have not been acted upon as yet. A 2010 decision by the AU Assembly emphasising a 'zero tolerance' approach to 'violations of democratic standards'[144] as well as coups d'état and calling on members to ratify the African Charter on Democracy, Elections and Governance may lead to a wider range of democratic failure falling within the ambit of the suspension power. However, as is revealed by the tensions surrounding Madagascar's membership of the AU, the members are not always united on the question of whether membership sanctions are in fact the correct response to an unconstitutional change of government.

3 ASEAN and democracy – on the rise or in retreat?

Of the regional organisations considered so far in this chapter, ASEAN has the lowest degree of regional integration and the strongest adherence

[139] See 'Guinea – Military Takeover' (2008) 45 *Africa Research Bulletin: Political, Social and Cultural Series* at 17771–3.

[140] 'Communiqué', 216th Meeting of the Peace and Security Council, Addis Ababa, Ethiopia, Doc. No. PSC/PR/Comm. 2(CCXVI), 19 February 2010 at para. 5.

[141] For a discussion of these earlier events in Niger and ECOWAS's response, see Chapter 5, p. 259.

[142] 'Communiqué', Peace and Security Council, 207th Meeting at the Level of the Heads of State and Government, Abuja, Nigeria, Doc. No. PSC/AHG/Comm. 3(CCVII), 29 October 2009.

[143] Jacob Zuma, 'Significance of the Launch of the African Union', 3 July 2002, www.au2002.gov.za/docs/key_sa/ausignif.htm.

[144] 'Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacity of the African Union to Manage Such Situations', Assembly of the African Union, 14th ordinary session, Doc. No. Assembly/AU/4/Dec.269(XIV) Rev. 1, 31 January–2 February 2010 at para. 5.

to the principles of sovereignty and non-interference. Economic development may have been the 'outward objective' for the creation of a Southeast Asian association, but states in the region were more concerned about the possibility of threats to their stability, particularly those from communist insurgents.[145] The founding members of ASEAN were suspicious of models based on supranational institutions, such as those established in Europe, and instead favoured principles of informality (as distinct from formal institution-building), flexibility and consensus decision-making.[146] These attributes have been described by both ASEAN leaders and commentators alike as the 'ASEAN Way'.[147] In the organisation's early years, summits were held intermittently and the Secretariat was deliberately kept small, with most of the work being assumed by ASEAN secretariats within the foreign ministries of member states.[148] During the 1980s and 1990s, as the organisation expanded in membership to include all states in the Southeast Asian region, the level of formality and number and range of meetings increased.[149] This culminated in the adoption of the Charter of the Association of Southeast Asian Nations in Singapore in 2007.

(a) Two steps forward: the rise of democracy in Southeast Asia Acharya has commented that a key factor in the establishment of ASEAN was a 'collective retreat from post-colonial experiments in liberal democracy'[150] amongst states in the region, and to varying degrees amongst the five founding members. 'Unlike in Europe, regional institution building in South-East Asia was not founded upon a shared commitment to liberal democracy.'[151] The principle of non-interference in the context of ASEAN has been described as having a number of different aspects, including the members' refusal to criticise the human rights

[145] Amitav Acharya, 'Democratization and the Prospects for Participatory Regionalism in Southeast Asia', in Kanishka Jayasuriya (ed.), *Asian Regional Governance – Crisis and Change* (New York: Routledge, 2004), p. 131.

[146] Amitav Acharya, *Constructing a Security Community in Southeast Asia – ASEAN and the Problem of Regional Order* (London: Routledge, 2001), p. 64.

[147] See discussion in *ibid.* See also Koh Keng-Liam and Nicholas A. Robinson, 'Strengthening Sustainable Development in Regional Inter-Governmental Governance: Lessons from the "ASEAN Way"' (2002) 6 *Sing. Y. B. Int'l L.* 640 at 642–3; Paul J. Davidson, 'The ASEAN Way and the Role of Law in ASEAN Economic Cooperation' (2004) 8 *Sing. Y. B. Int'l L.* 165.

[148] Acharya, *Constructing a Security Community*, p. 65. [149] *Ibid.*

[150] Acharya, 'Democratization and the Prospects for Participatory Regionalism', p. 130.

[151] *Ibid.*, p. 127.

policies of other member states and their consequent rejection of any attempt to make a prospective member's system of government determinative of ASEAN membership.[152] It is therefore of little surprise that the organisation has never suspended or excluded a state located in the Southeast Asian region from participation, nor are there any provisions in the Bangkok Declaration or the Treaty of Amity and Cooperation that envisage such a sanction.

Given this failure to include reference to democratic or human rights principles in ASEAN instruments, the inclusion of ASEAN is this chapter is something of an anomaly. But the failure to explicitly recognise such standards does not tell the whole story of the impact of democracy on the organisation or on its expansion since 1967. The process of democratisation in Southeast Asia has been described as 'incremental' as, one by one, countries have moved to democratic government, leading to ASEAN adopting a 'more relaxed view of state sovereignty and the attendant norm of non-interference in the internal affairs of states'.[153] In 1998 Thailand's Foreign Minister called for a change from non-intervention to 'constructive intervention' or, in a slightly watered down version, 'flexible engagement'.[154] Such a change in policy has also been supported by the Philippines and Indonesia.[155] A New Zealand parliamentary committee found that ratification of the Treaty of Amity and Cooperation would not prevent New Zealand from criticising the human rights policies of Southeast Asian nations. Although New Zealand is not a member of ASEAN, the parliamentary committee's report emphasised that as a result of the evolution of international law since 1976, human rights issues are no longer the exclusive preserve of a particular state.[156] At the 2007 summit the leaders of ASEAN adopted the new ASEAN Charter outlining the organisation's fundamental principles and objectives. For the first time there is explicit reference to the promotion and strengthening of democracy, human rights and good governance in an ASEAN constitutional instrument.[157] In the context

[152] Acharya, *Constructing a Security Community*, p. 58.
[153] Acharya, 'Democratization and the Prospects for Participatory Regionalism', p. 134.
[154] Robert Tasker and Murray Hiebert, 'Dysfunctional Family' (July 1998) 161 *Far East Eco. R.* 20.
[155] See *ibid.* at 20; Acharya, 'Democratization and the Prospects for Participatory Regionalism', pp. 134–5.
[156] Foreign Affairs, Defence and Trade Committee, 'International Treaty Examination of the Accession to the Treaty of Amity and Cooperation in Southeast Asia (1976)', Report, 2005 at para. 33.
[157] ASEAN Charter, Arts. 1(7), 2(2)(h)–(i).

of this developing consciousness of democracy and human rights, the decision to approve Myanmar's membership application (but deny it the opportunity to chair the organisation) and to delay the admission of Cambodia will be discussed.

(b) Two steps back: the admission of Burma Of all the states joining ASEAN since it was established, the admission of Burma/Myanmar[158] has been the most controversial. Its military government, the State Peace and Development Council (SPDC), formerly the State Law and Order Restoration Council (SLORC), is internationally condemned for its failure to recognise the victory of the National League for Democracy in the 1990 elections and for the house arrest of its leader, Aung San Suu Kyi. ASEAN viewed the problems in Myanmar through the prism of non-interference and thus SLORC's human rights and democratic failures did not answer the question whether ASEAN should engage with the regime and ultimately admit it to membership.[159] Rather than openly criticise Myanmar and impose sanctions, ASEAN members pursued a policy of 'constructive engagement' involving diplomacy. Thailand's Deputy Minister of Foreign Affairs stated that 'emphasis was placed on quiet diplomacy and confidence-building measures, aimed towards encouraging the Myanmar government to see the benefit of integrating the country into the region and the mainstream of the international community'.[160] Despite the failure of this policy to produce substantive results, on 31 May 1997 ASEAN admitted Myanmar to membership. In arguing for Myanmar's admission, the principle of non-interference was given centre stage. The Indonesian Foreign Minister Ali Alatas argued that 'it is impossible for ASEAN to apply criteria and conditions for Burma's entry which have never been applicable for other members in the past'.[161] This position was not universally accepted, with Thailand

[158] The name of the country Burma was changed to Myanmar by the military regime in 1989 following the introduction of the *Adaptation of Expression Law (1989)*. The change is not recognised by a number of countries, including the USA, UK and Australia. In this book, 'Myanmar' is used when referring to Burma's membership of ASEAN as it is the name used by the organisation.

[159] Acharya, *Constructing a Security Community*, p. 109.

[160] Address by M. R. Sukhumbhand Paribatra, Deputy Minister of Foreign Affairs of the Kingdom of Thailand, 'Engaging Myanmar in East Asia', Speech delivered at Conference on 'Engaging Myanmar in East Asia', Philippines, 29 November 1998, www.thaiembdc.org/pressctr/statemnt/others/dfm_1198.htm.

[161] As quoted in Michael R. J. Vatikiotis, 'Friends and Fears' (May 1997) 160 *Far East Eco. R.* 15.

suggesting that internal considerations were not irrelevant to the question of membership.[162] Despite muted opposition from the Philippines and Thailand, as well as more vocal criticism outside the Southeast Asian region,[163] Myanmar's admission was approved.

The admission of Myanmar confirmed that a poor human rights and democratic record has little impact on determining whether to admit a country to ASEAN. Regional integration and in particular the vision of an organisation encompassing all ten Southeast Asian nations was a more important goal. Nevertheless, the debate concerning Myanmar's membership reveals a change in policy from the previous practice of strict non-interference in internal affairs to one in which members are more ready to claim a right to criticise the human rights policies of other member states.[164] Democracy within the founding members has led to changes in ASEAN's policy on non-interference, with an official from the Indonesian Foreign Ministry claiming that the ASEAN doctrine of non-intervention 'is no longer a principle which cannot be openly discussed'.[165] Thailand's Foreign Minister also argued for a more robust policy, acknowledging that:

> the dividing line between domestic affairs on the one hand and external or transnational issues on the other is less clear. Many 'domestic' affairs have obvious external or trans-national dimensions, adversely affecting neighbours, the region and the region's relations with others. In such cases, the affected countries should be able to express their opinions and concerns in an open, frank and constructive manner.[166]

Recently, a more robust attitude is evident with the call from Malaysia for Myanmar to be denied its turn as Chair of ASEAN in 2006 (a position which rotates alphabetically amongst member states) until democratic reforms had been implemented.[167] In July 2005 the ASEAN Foreign

[162] See Acharya, *Constructing a Security Community*, p. 113.

[163] Following Myanmar's admission to ASEAN, ministerial meetings between the EU and ASEAN were suspended until 2000: Ang Cheng Guan, 'Myanmar: Time for a Unified Approach' (2001) 32 *Sec. Dialogue* 467 at 468. For a discussion of the United States' position, see Kavi Chongkittavorn, 'ASEAN to Push Back New Admission to December', *The Nation* (Bangkok, Thailand), 30 May 1997.

[164] Acharya, 'Democratization and the Prospects for Participatory Regionalism', p. 134.

[165] *Ibid.*, 135.

[166] Foreign Minister Surin, quoted in Carlyle A. Thayer, 'ASEAN: From Constructive Engagement to Flexible Intervention' (1999) 3(2) *Harv. Asian-Pac. R.* 67 at 70.

[167] Nazri Abdul Aziz (a minister in the Malaysian Prime Minister's department), quoted in Connie Levett, 'Threat to Tip Burma from ASEAN Role', *Sydney Morning Herald* (Sydney, Australia), 28 March 2005.

Ministers stated that Myanmar had 'decided to relinquish its turn to be the Chair of ASEAN in 2006 because it would want to focus its attention on the ongoing national reconciliation and democratisation process'.[168] In an aside that hinted at the possible tensions between members on this issue, the Foreign Ministers also expressed their 'sincere appreciation to the Government of Myanmar for not allowing its national preoccupation to affect ASEAN's solidarity and cohesiveness'.[169] In a first for the organisation, in December 2005 the international outcry over Myanmar's lack of progress on constitutional reform led ASEAN to ask Myanmar to expedite its *Roadmap to Democracy* and to release detainees.[170] Other groups have produced more strongly worded statements – the ASEAN Inter-Parliamentary Caucus on Democracy in Myanmar called for the suspension of Myanmar's membership to ASEAN in the event that there was no progress by December 2006.[171] While ASEAN members did not take up this suggestion, the explicit reference to the situation in Myanmar together with the request for the release of political prisoners is a positive step towards a greater role for human rights issues in the organisation. ASEAN leaders may have rejected the idea of a community built on human rights and democratic values in favour of cohesive regionalism, but non-interference is no longer an absolute principle.

(c) Two steps to the side: the (delayed) admission of Cambodia A stronger indication of ASEAN's willingness to examine an applicant's internal affairs is demonstrated by the decision to delay Cambodia's application at the same time Myanmar was admitted. After the 1993 elections Cambodia was governed by a coalition between First Prime Minister Prince Ranarridh and Second Prime Minister Hun Sen. Frequent disagreements between the two leaders, particularly over the status of former Khmer Rouge soldiers, led to Hun Sen ousting the First Prime Minister in July 1997.[172] Prior to Hun Sen's actions, Indonesia's Foreign Minister Ali Alatas stated that Cambodia's internal turmoil did

[168] 'Statement by the ASEAN Foreign Ministers', Vientiane, Laos, 25 July 2005, www.aseansec.org/17589.htm.
[169] *Ibid.*
[170] 'Chairman's Statement, 11th ASEAN Summit, One Vision, One Identity, One Community', Kuala Lumpur, 12 December 2005 at para. 34.
[171] 'Statement of the ASEAN Inter-Parliamentary Myanmar Caucus (AIPMC) on Good Governance, Democracy and ASEAN', Kuala Lumpur, 2–3 December 2005.
[172] See Acharya, *Constructing a Security Community*, p. 115.

not preclude its entry into ASEAN.[173] Other foreign ministers were not quite so magnanimous, with the Thai Foreign Minister suggesting in the context of the prospective admission that a country's internal politics were 'an important factor to consider'.[174] Malaysia's Foreign Minister described the situation in Cambodia as 'an unfortunate turn of events'.[175] ASEAN reacted to the news of Hun Sen's use of force against Prince Ranarridh by delaying the admission of Cambodia until order was restored and elections were held. Although ASEAN Foreign Ministers reaffirmed the principle of non-interference at the time that they decided to delay Cambodia's membership, Hun Sen was not convinced. He accused ASEAN of interfering in Cambodia's internal affairs, suggesting that such interference could constitute a reason for not joining the organisation.[176]

Identifying any one reason for ASEAN's approach to Cambodia is difficult. In a statement reminiscent of the views of the OAS and the AU, Singapore's Foreign Minister commented that '[a]ny unconstitutional change of government is cause for concern. Where force is used for an unconstitutional purpose, it is behaviour that ASEAN cannot ignore or condone'.[177] He also observed that '[t]he surest and quickest way to ruin is for ASEAN countries to begin commenting on how each of us deals with these sensitive issues'.[178] Despite these remarks, Cambodia was required to fulfil a number of conditions before entry into ASEAN, including respect for the Paris Peace Agreement.[179] The importance of elections to Cambodia's prospective membership was emphasised by Malaysia's Foreign Minister:

> If an election can be carried out – a peaceful and free election conducted in adherence to the UN-brokered Paris Peace Accord – a government chosen by its people will see the admission of Cambodia into ASEAN.[180]

[173] See Ian Stewart, 'Conflicting Signals Remain over Burma's Admission', *South China Morning Post* (Hong Kong), 31 May 1997.
[174] Foreign Minister Prachuab Chaiyasan, quoted in *ibid.*
[175] Quoted in Lee Kim Chew, 'Laos and Myanmar Admitted into ASEAN', *Straits Times* (Singapore), 24 July 1997, p. 1.
[176] Quoted in Acharya, *Constructing a Security Community*, p. 117.
[177] Foreign Minister of Singapore, Professor S. Jayakumar, quoted in Brendan Pereira, 'ASEAN Can't Condone Use of Force: Jaya', *Straits Times* (Singapore), 25 July 1997, p. 29.
[178] Quoted in *ibid.*
[179] 'ASEAN and the Question of Cambodia', *Straits Times* (Singapore), 10 September 1997, Comment and Analysis, p. 3.
[180] Quoted in Fauziah Ismail, 'Cambodia May Join ASEAN after Polls: Abdullah', *Business Times* (Malaysia), 26 September 1997, p. 1.

Similarly, the Singaporean Prime Minister Goh Chok Tong linked the timing of Cambodia's membership to the outcome of elections.[181] The emphasis on elections as a key factor in determining Cambodia's application was a fundamental change from ASEAN's previous policy whereby internal issues were not raised when considering membership. But while Cambodia's move towards democracy played a role in ASEAN's decision to admit it as a member, the importance placed on elections reveals a minimalist concept of what is encompassed in the idea of democratic government.

The decision to delay Cambodia's membership until elections were held is consistent with the practice of other regional organisations. It also reveals a tension between the desire of some members to open ASEAN to discussion of issues concerning democratic government and those still adhering to more rigid notions of sovereignty and non-interference. This tension is revealed by differences between members on issues concerning the admission of Cambodia and Myanmar.[182] It remains to be seen whether an unconstitutional change of government in a current member will give rise to any form of membership sanction, particularly as the final version of the new ASEAN Charter omits any reference to suspension or expulsion.[183] The 2007 Charter gives the ASEAN Summit (comprising the heads of state or government of members) the power to make a determination in the event that there is a 'serious breach of the Charter or non-compliance'.[184] Following Aung San Suu Kyi's arrest and detention in prison in May 2009 for allegedly violating the conditions of her house arrest, US Secretary of State Hillary Clinton suggested that ASEAN should consider excluding Myanmar.[185] In response, the Malaysian

[181] 'Cambodia's Entry into ASEAN Unlikely before Election: Goh', *Agence France Presse* (Paris, France), 29 August 1997.

[182] The tension between more progressive human rights policies and the principle of non-interference is also highlighted by the 2009 Terms of Reference for the ASEAN Intergovernmental Commission on Human Rights. The Commission must 'promote and protect human rights and fundamental freedoms of the people of ASEAN', while at the same time upholding respect for the principle of 'non-interference in the internal affairs of ASEAN Member States': 'ASEAN Intergovernmental Commission on Human Rights (Terms of Reference)', 2009, www.aseansec.org/publications/TOR-of-AICHR.pdf.

[183] Prior to the adoption of the Charter, a report was prepared by a group of eminent persons. The report suggested that suspension or expulsion may be appropriate in 'exceptional circumstances': 'Report of the Eminent Persons Group on the ASEAN Charter', December 2006, www.aseansec.org/19247.pdf at para. 61 ('Report of the EPG'). This recommendation was not explicitly adopted in the Charter.

[184] ASEAN Charter, Art. 20(4).

[185] 'ASEAN should consider Burma expulsion: Clinton', *ABC News* (Australia), 22 July 2009.

Prime Minister stated his preference for discussion rather than expulsion,[186] underlining the view that at least some members are not ready to use the more coercive powers when dealing with violations of human rights and democracy. The decision to deny Myanmar the Chair of ASEAN in 2006 reveals that while suspension or exclusion may be incompatible with the 'ASEAN way', measures may be taken that fall short of suspension, but nevertheless constitute a form of participation sanction that signifies disapproval of a member's policies.

4 Reinventing the Pacific Way in the Pacific Islands Forum

The final regional organisation to be discussed in this section shares ASEAN's distrust of formal institutional arrangements and contains many of the characteristics of the more flexible forms of cooperation detailed in Part III. The Pacific Islands Forum began life as the South Pacific Forum, an informal group of seven Pacific nations: Nauru, Western Samoa, Tonga, Fiji, the Cook Islands, Australia and New Zealand. The first communiqué of the group stated that representatives met for a 'private and informal discussion of a wide range of issues of common concern'.[187] At the time it was 'considered premature to institute a formalised arrangement' and instead the representatives emphasised the importance of 'the frank and informal inter-change of views'.[188] The value of 'easy and informal exchanges' was repeated in the communiqué issued at the next meeting of the Forum in 1972.[189] In that year the 'issues of common concern' included trade and economic cooperation, telecommunications, regional shipping and, significantly, nuclear testing (in light of France's recently concluded tests).[190] The informal approach emphasised in these communiqués accords with descriptions of the 'Pacific Way' as a distinct approach to problem solving in the region, involving elements such as Pacific solutions to Pacific problems, unanimous compromise and the primacy of political goals over administrative feasibility.[191]

[186] *Ibid.*

[187] SPF, 'Joint Final Communiqué', Wellington, 5–7 August 1971. The name of the South Pacific Forum was changed to the Pacific Islands Forum in 2000.

[188] *Ibid.*, 'Future Meetings'. [189] SPF, 'Communiqué', Canberra, 23–25 February 1972.

[190] SPF, 'Final Press Communiqué', 12–14 September 1972.

[191] See Michael Haas, *The Pacific Way – Regional Cooperation in the South Pacific* (New York: Praeger, 1989), pp. 8–13; Jim Rolfe, 'The Pacific Way: Where "Non-Traditional" Is the Norm' (2000) 5 *Int'l Neg.* 427 at 434.

Since these first meetings, the Forum has increased in size and formality. The leaders have adopted a number of treaties and established a secretariat. In particular, at the 2000 meeting the leaders adopted the Biketawa Declaration, a document pledging Forum leaders to certain principles and courses of action.[192] These principles include a commitment to good governance, equal rights, democratic processes and equitable economic, social and cultural development.[193] Although recognising that the Pacific Islands are a 'family', the Declaration enables members to take a number of measures in a time of crisis, including the creation of a Ministerial Action Group, third party mediation and 'necessary targeted measures'.[194] The Biketawa Declaration was heralded by various leaders as a significant step for the Forum – in the words of the Australian Prime Minister, 'a quantum leap forward'.[195] In 2003 it was recognised by Forum leaders as the basis for providing assistance to the Solomon Islands.[196] As Rolfe has commented, the Biketawa Declaration indicates that '[t]he Pacific Way is potentially heading away from its roots towards the Western way'.[197]

In 2009 the leaders moved further from the Pacific Way when they decided to suspend Fiji from meetings of the Forum following the failure of the Fijian military regime to return to democratic rule in an acceptable timeframe. Fiji had been on the agenda of the Forum for a number of years as a result of a military coup in December 2006. An Eminent Persons' Group, a Ministerial Contact Group and a Joint Working Group were established by the Forum to discuss Fiji's return to democracy 'in the shortest practicable time'.[198] Statements from the Pacific Forum-Fiji Joint Working Group evidence the organisation's concern with electoral and constitutional issues as well as the human rights

[192] Thirty-First Pacific Islands Forum, 'Forum Communiqué 2000', Tarawa, Kiribati, 27–30 October 2000, attachment 1, 'Biketawa Declaration'.

[193] *Ibid.* at para 1. [194] *Ibid.* at para. 2.

[195] Quoted in Stewart Firth, 'A Reflection on South Pacific Regional Security, Mid-2000 to Mid-2001' (2001) 36 *Journal of Pacific History* 277 at 279.

[196] Thirty-Fourth Pacific Islands Forum, 'Forum Communiqué', Auckland, New Zealand, 14–16 August 2003 at para. 13. The Communiqué lists the assistance to the Solomon Islands as including a police operation, peace-keepers and assistance to strengthen the justice system. The support was provided at the request of the Solomon Islands government.

[197] Rolfe, 'The Pacific Way' at 435.

[198] Forum Secretariat, 'Pacific Islands Forum – Fiji Joint Working Group on the Situation in Fiji, Terms of Reference', 13 April 2007. These terms of reference were revised on 19 February 2009.

situation on the ground.[199] However, until the May 2009 decision, no sanctions had been instituted by the Forum's leaders. In January 2009 the leaders agreed to 'targeted measures', including 'suspension of participation by the Leader, Ministers and officials of the Fiji Interim Government in all Forum meetings and events'[200] in the event that Fiji had not nominated an election date by 1 May. The leaders distinguished this sanction from 'full suspension of Fiji's membership in the Forum',[201] a sanction which could be implemented at a later date depending on Fiji's progress. On 2 May the Forum Chair recorded the unanimous decision of Forum leaders to suspend 'the current military regime ... from full participation in the Pacific Islands Forum', as well as the Forum's willingness to assist Fiji in returning to democracy.[202] Thus, the leaders have shown their distaste for military regimes while at the same time reaffirming their ability to continue to engage with the Fijian government. Despite the ambiguity in the wording of the Chair's statement, it would appear that the leaders have refrained from implementing the more severe sanction (suspension) and instead have excluded the Interim Government from participation in Forum meetings. The difference between these two measures may not be significant given that the May decision effectively excludes Fiji from gatherings such as the annual leaders' meeting. As is revealed by the actions of other regional organisations in this Part, there is a tension between the need to both condemn the installation of a military government and to keep the defaulting state within the organisation's processes.

III Balancing cooperation and confrontation in informal organisations

Regional integration in Europe, Africa, the Americas and Asia has been achieved through the development of formal institutions based on binding treaty obligations. But cooperation between states does not have to be limited to a particular region, nor does it have to be achieved through formal institutions. In some of these regions less formal means of

[199] 'Pacific Islands Forum – Fiji Joint Working Group on the Situation in Fiji', Press Statement, 19 June 2008.

[200] Pacific Islands Forum Special Leaders' Retreat, 'Leaders' Decisions', Port Moreseby, Papua New Guinea, 27 January 2009 at para. [i].

[201] *Ibid*. at para. [k].

[202] 'Statement by Forum Chair on Suspension of the Fijian Military Regime from the Pacific Islands Forum', Press Statement No. 21/09, 2 May 2009.

cooperation have also developed whereby states have sought to collaborate on specific issues in a flexible framework, for example, the Summit of the Americas, Asia Pacific Economic Cooperation and the South Pacific Forum (as originally established). Klabbers has defined such institutions as 'soft' international organisations due to their flexible institutional make-up and the absence of legally binding commitments.[203] Just as states are not limited in their forms of association, they are not restricted to any one region and thus may create networks across a number of different parts of the world. This section will examine two closed organisations that have developed outside the framework of a formal treaty and yet have utilised rigorous enforcement techniques in the form of membership sanctions when dealing with wayward member states: the OSCE and the Commonwealth.

Both the OSCE and the Commonwealth are informal organisations with a diverse membership of states. The OSCE, formerly the Conference on Security and Co-operation in Europe (CSCE), encompasses fifty-six states in Europe, Central Asia and North America. Originally designed as a forum for political consultation between Eastern and Western European states, the informal nature of the organisation is emphasised by the description of its members as 'Participating States' and the fact that its founding document, the Helsinki Final Act of 1975, is not a legally binding treaty.[204] The Commonwealth, an organisation of fifty-four member states from Europe, Africa, the Asia Pacific and the Americas,[205] was also built around non-binding statements of principles, notably the Agreed Memorandum on the Commonwealth Secretariat (1965) and the Declaration of Commonwealth Principles (1971). As with the other organisations discussed in this chapter, the founding documents of both the OSCE and the Commonwealth recognise state sovereignty and non-intervention as fundamental principles. In the case of the OSCE, the Declaration on Principles Guiding Relations Between Participating States ('Decalogue of Principles') provides that the Participating States 'will respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty'. It also provides that a Participating State will refrain

[203] Klabbers, 'Institutional Ambivalence by Design' at 405.

[204] Th. J. W. Sneek, 'The CSCE in the New Europe: From Process to Regional Arrangement' (1994) 5 *Ind. Int'l & Comp. L.R.* 1 at 9.

[205] In November 2009 the Heads of Government 'warmly welcomed' Rwanda as the fifty-fourth member of the organisation: CHOGM, 'Communiqué', Republic of Trinidad and Tobago, 27–29 November 2009 at para. 5.

from intervention in the domestic jurisdiction of another Participating State.[206] Similarly, the Agreed Memorandum on the Commonwealth Secretariat defines and highlights the advantages of informality in the context of state sovereignty:

> the Commonwealth is not a formal organisation. It does not encroach on the sovereignty of its individual members. Nor does it require its members to seek to reach collective decisions or to take united action.[207]

The Commonwealth Secretariat as a whole, and the Commonwealth Secretary-General as the Chief Officer of the Secretariat, is precluded from discussing the internal affairs of member states without that state's consent, or from interfering in the internal affairs of members.[208] Both the OSCE and the Commonwealth have combined their insistence on sovereignty and non-intervention with the adoption of the practice of consensus decision-making rather than formal voting.[209] The fact that no state can potentially be outvoted on an issue constitutes a further limitation on the organisations' ability to take action in the face of human rights violations within a member state.

Despite the potential limitations inherent in such principles from a human rights perspective, both organisations have developed progressively more detailed statements on the importance of human rights and democratic government. Such statements have included broad reference to equal rights and self-determination, as well as more specific principles.[210] In the Commonwealth particular attention has been given to the issue of racial discrimination, whereas the OSCE's Decalogue of

[206] CSCE, 'Final Act of the Helsinki Conference', 1 August 1975 at 'Decalogue of Principles', Principles I, VI ('Decalogue of Principles'). The meaning of non-intervention in the context of the CSCE is discussed in P. van Dijk and A. Bloed, 'The Conference on Security and Co-operation in Europe: Human Rights and Non-Intervention' (1983) 5 *Liv. L.R.* 117.

[207] 'The Agreed Memorandum on the Commonwealth Secretariat' (1965) at para 4, in A. N. Papadopolous, *Multilateral Diplomacy Within the Commonwealth – A Decade of Expansion* (The Hague: Martinus Nijhoff Publishers, 1982), p. 141.

[208] *Ibid.* at paras. 6, 12–13.

[209] CSCE, 'Final Recommendations of the Helsinki Consultations', 8 June 1973 at para. 69; 'The Agreed Memorandum of Commonwealth Principles', 1965.

[210] CHOGM, 'Declaration of Commonwealth Principles', Singapore, 22 January 1971 at para 5; OSCE, 'Decalogue of Principles'. See also CHOGM, 'Harare Commonwealth Declaration', Harare, Zimbabwe, 20 October 1991; 'Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, Held on the Basis of the Provisions of the Final Act relating to the Follow-up to the Conference', Vienna, 15 January 1989 at 'Principles' ('Vienna Follow-Up Meeting').

Principles highlights the importance of freedom of thought, conscience and religion, and respect for national minorities.[211] More recently, both organisations have been eager to embrace democratic rule as a fundamental principle. For example, the Commonwealth Heads of Government Meeting held in Harare in 1991 promoted the 'fundamental political values of the Commonwealth', defining such values as democratic processes which reflect national circumstances, the rule of law, the independence of the judiciary and just and honest government.[212] In the 1990 Charter of Paris for a New Europe, the Participating States of the OSCE similarly undertook 'to build, consolidate and strengthen democracy as the only system of government of our nations'.[213] The Human Dimension of the OSCE's work encompasses 'all human rights and fundamental freedoms, human contacts and other issues of a humanitarian character'[214] as well as issues relating to democracy and the rule of law.[215] In both the Commonwealth and the OSCE the introduction of these standards has been matched with coercive measures against wayward member states in the form of membership sanctions. Three broad types of behaviour have caused these organisations to override traditional principles of non-intervention and consensus decision-making to suspend members: unconstitutional changes of government in the form of military coups, persistent breaches of democratic and human rights principles, and external aggression. The organisations' flexibility has enabled them to devise membership sanctions for such violations without the need to formally amend their constitutional instruments.

A Condemning coups in the Commonwealth

The practice of regional organisations in Africa, the Americas, the Pacific and even Asia reveals that anti-democratic behaviour is most easily

[211] Commonwealth Heads of Government Meeting, 'Lusaka Declaration of the Commonwealth on Racism and Racial Prejudice', Lusaka, Zambia, August 1979; OSCE, 'Final Act of the Helsinki Conference', 1 August 1975 at Part VII.

[212] CHOGM, 'Harare Commonwealth Declaration' at para. 9.

[213] CSCE, 'Charter of Paris for a New Europe', adopted by the Heads of State or Government of the Participating States in the Conference on Security and Co-operation in Europe, Paris, France, 19–21 November 1990 at 'Human Rights, Democracy and the Rule of Law'.

[214] 'Vienna Follow-Up Meeting' at 'Human Dimension of the CSCE'.

[215] See Merja Pentikäinen, 'The Role of the Human Dimension of the OCSE in Conflict Prevention and Crisis Management', in Michael Bothe *et al.* (eds.), *The OSCE in the Maintenance of Peace and Security – Conflict Prevention, Crisis Management and Peaceful Settlement of Disputes* (The Hague: Kluwer, 1997), pp. 83, 85.

identified, and consequently punished, when an elected government is overthrown in a military coup. The Commonwealth has forged the way ahead in this respect, having suspended three members experiencing unconstitutional changes of government in the form of coups in the 1990s. This represented a radical change from the Commonwealth's past reluctance to expose its members' human rights abuses to the glare of public scrutiny, notable exceptions being South Africa's policy of apartheid and the 'massive violation of human rights' in Uganda.[216] More recently the Commonwealth has abandoned some of its earlier constraints and adopted more forceful policies and processes to encourage its members (and prospective members) to comply with fundamental human rights standards. This change has largely been the result of the Harare Commonwealth Declaration of 1991, heralding a renewed commitment by the Commonwealth to democracy and human rights. The Declaration not only defines the fundamental political values of the Commonwealth, but also recognises the need for an integrated approach to rights, with the Heads of Government pledging their support for equality for women, universal access to education, programmes for strengthening family and community support, and extending the benefits of development within a framework of rights.[217] The members gave weight to their commitment by undertaking 'to focus and improve Commonwealth co-operation in these areas'.[218]

Despite this statement of intent, at the time of the Commonwealth Heads of Government Meeting (CHOGM) in Harare, the Harare Declaration was not seen as a method of judging the behaviour of current members to determine whether they should remain in the organisation. The Australian Prime Minister commented at the Harare meeting that 'no one's talking about throwing anyone out if they don't currently meet [the Harare Declaration's] standards',[219] dismissing any possibility that members would be compelled to implement the Harare principles or that they would be excluded for breaching particular standards. However, Prime Minister Hawke suggested that the Declaration may be relevant for nations applying to join in the future. This idea was later pursued when an Inter-Governmental Group on the Criteria for Commonwealth Membership recommended the adoption of the Harare principles as a

[216] CHOGM, 'London Communiqué', London, 1977 at para. 35.
[217] CHOGM, 'Harare Commonwealth Declaration' at para. 9. [218] *Ibid.* at para. 10.
[219] 'Transcript of News Conference with Prime Minister Hawke at Harare', 15 October 1991, p. 5 (on file with author).

criterion for determining future membership of the organisation.[220] While it was enticing to link future membership to certain fundamental principles, the problem remained that, at the time, it was unlikely that existing members would have passed the more onerous tests being required of future members.[221] This potential disparity between the treatment of future and existing members was removed in 1995 when the Heads of Government adopted the Millbrook Action Programme at the Auckland CHOGM, outlining a tripartite plan to fulfil the commitments stated in the Harare Declaration. The plan includes a number of measures in response to violations of the Harare principles, including suspension from participation in Commonwealth meetings and the removal of technical assistance.[222] The Millbrook Action Programme as written in 1995 emphasised that enforcement may be limited to the violation of political rights by specifically citing the unconstitutional overthrow of a democratically elected government as an event potentially leading to sanctions.[223] In order to put this plan into practice, the Commonwealth established the Commonwealth Ministerial Action Group (CMAG), comprising eight foreign ministers tasked with the responsibility of assessing the nature of a member state's infringement and recommending measures for collective Commonwealth action in order to restore democratic rule.[224]

When Commonwealth leaders met to adopt the Millbrook Action Programme they also decided to suspend Nigeria from membership 'due to the serious violation of the principles set out in the Harare Commonwealth Declaration'.[225] As the Commonwealth lacked

[220] The Group's recommendations were adopted at the 1997 CHOGM in Edinburgh: CHOGM, 'Edinburgh Communiqué', Edinburgh, UK, 24–27 October 1997 at para 20. Following the 2005 CHOGM, another committee was convened to discuss Commonwealth membership. It produced a report for the 2007 CHOGM in which the terms 'democracy' and 'human rights' were further defined in the context of determining admission to the organisation: Committee on Membership, 'Membership of the Commonwealth: Report of the Committee on Commonwealth Membership', Doc. No. HGM(07)(FM) 3, 24 October 2007. This report was endorsed in CHOGM, 'Kampala Communiqué', Kampala, Uganda, 23–25 November 2007 at para. 87.

[221] Editorial, 'Britain and the Future Roles of the Commonwealth' (1995) *The Round Table*, iii at v.

[222] CHOGM, 'Millbrook Commonwealth Action Programme on the Harare Commonwealth Declaration', Millbrook, New Zealand, 12 November 1995 at 'Part B: Measures in Response to Violations of the Harare Principles'.

[223] *Ibid.* [224] *Ibid.* at 'Part C: Mechanisms for Implementation'.

[225] CHOGM, 'Auckland Communiqué', Auckland, New Zealand, 1–10 November 1995 at para. 10.

mechanisms to investigate or report on human rights breaches in member states, there was no formal and publicised investigation by the official Commonwealth into the situation in Nigeria (although other reports[226] supported the action). The precise infringements of Commonwealth principles that engaged the wrath of the other members were not specified in the Auckland communiqué. The meeting commenced with much media attention being devoted to the imminent death sentence on Ken Saro-Wiwa, a human rights and environmental campaigner in Nigeria. The Canadian Prime Minister stated in the Opening Ceremony that 'the death sentence on Ken Saro-Wiwa is an example of the type of behaviour we all want to see abolished'.[227] Despite the attention given to this issue, it can be inferred from statements made at the meeting and the further reference to the Gambia and Sierra Leone in the communiqué that the decision to suspend was motivated by the military coup. While these three states were not the only members violating human rights standards at the time of the meeting, they were the only three governed by military regimes.

Since the action against Nigeria (subsequently returned to full membership after the restoration of civilian rule), both Pakistan and Fiji have been suspended from the Commonwealth following coups. Pakistan was suspended from the councils of the Commonwealth in 1999 after the overthrow of the elected Government, the Heads of Government stating that 'no legitimacy should be accorded to the military regime'.[228] It was again suspended in 2007 following the imposition of a state of emergency.[229] Fiji has also been suspended from the councils of the Commonwealth twice and in 2009 was fully suspended from the organisation. The first occasion was the result of a decision taken at a special CMAG meeting in June 2000 when the Group condemned the use of armed force against the democratically elected Prime Minister and expressed concern over the subsequent imposition of martial law and the abrogation of the Fiji Constitution Amendment Act.[230] At the same

[226] For example, Commonwealth Human Rights Initiative, 'Nigeria – Stolen by Generals, Abuja after the Harare Commonwealth Declaration', 1997.

[227] 'Nigeria Accuses Us of Rights Abuse', *Weekend Australian* (Sydney, Australia), 11–12 November 1995.

[228] CHOGM, 'Durban Communiqué', Durban, South Africa, 12–15 November 1999 at para. 18.

[229] CMAG, 'Concluding Statement', Eve-of-CHOGM Meeting on the Harare Declaration, Kampala, 22 November 2007 at para. 9.

[230] CMAG, 'Concluding Statement', Special Meeting on the Harare Declaration, London, 6 June 2000 at para. 2.

meeting CMAG also made reference to actions against the Prime Minister in the Solomon Islands and warned that in the event of an unconstitutional replacement of government, the provisions of the Millbrook Action Programme would be invoked.[231] Fiji's 2000 suspension was lifted after a Commonwealth Observer Group appointed to observe the 2001 elections concluded that 'conditions did exist for a free expression of will by the electors' and that the elections commanded 'the confidence of the people'.[232] In the case of Pakistan, some commentators have questioned whether the 2004 decision to allow it to rejoin the Commonwealth was premature as fundamental issues, including the separation of the offices of President and Chief of Army Staff, had not been resolved at the time that the suspension was lifted.[233] This criticism appears to be justified given the imposition of the state of emergency in Pakistan in November 2007 and the Commonwealth's decision to again suspend it from the councils of the Commonwealth in the same month.[234]

The importance of the distinction between military and civilian rule and elections in the Commonwealth's principles is reinforced by the fact that Pakistan's membership was reinstated on 12 May 2008 following parliamentary elections and President Musharraf's decision to stand down as Chief of Army Staff.[235] It is further highlighted by CMAG's decision in September 2009 to fully suspend Fiji from the Commonwealth as a result of restrictions on freedom of speech and assembly, the practice of arbitrary arrest and detention of political opponents, breaches of the principle of judicial independence and the Interim Government's delay in holding elections.[236] The difference

[231] *Ibid*. at paras. 7–8.

[232] CMAG, 'Concluding Statement', 17th Meeting on the Harare Declaration, Marlborough House, UK, 20 December 2001. Fiji was again suspended from the councils of the Commonwealth in 2006 following the military takeover of its government: see CMAG, 'Concluding Statement', Extraordinary Meeting on the Harare Declaration, London, 8 December 2006 at para. 4.

[233] CMAG, 'Concluding Statement', 23rd Meeting on the Harare Declaration, London, 21–2 May 2004 at para. 9. For concerns about this decision, see 'Pakistan Re-enters Commonwealth to Mixed Reaction', *Sydney Morning Herald* (Sydney, Australia), 23 May 2004; 'Commonwealth Raps Pakistani Leader', *BBC News* (London, UK), 11 February 2005, http://news.bbc.co.uk/2/hi/south_asia/4258199.stm.

[234] CMAG, 'Concluding Statement', Eve-of-CHOGM Meeting, 22 November 2007 at para. 9.

[235] CMAG, 'Concluding Statement', 29th Meeting on the Harare Declaration, London, 12 May 2008 at paras. 5, 8.

[236] CMAG, 'Concluding Statement', London, 31 July 2009 at para. 7.

between suspension from the councils of the Commonwealth (as was the case with earlier decisions on Fiji and Pakistan) and 'full suspension' from the organisation appears to be one of degree. The 2009 decision had the effect of banning Fijian governmental representatives from the Commonwealth, preventing Fiji from participating in sporting events, including the Commonwealth Games, removing all Commonwealth technical assistance (apart from assistance directed at restoring democracy) and ceasing emblematic representation of Fiji at official events.[237] On the other hand, Fiji remains a member of the organisation and the heads of government 'reaffirmed their willingness to remain engaged with Fiji in support of any good faith efforts' towards the restoration of civilian rule.[238]

B Dealing with persistent breaches of democracy and human rights

The imposition of suspension in the cases of Nigeria, Pakistan and Fiji highlights the ability of the Commonwealth to adapt its policies and processes to move away from state sovereignty in its absolute form to promote Commonwealth values. In making the decision to suspend Nigeria the Commonwealth not only retreated from its previous position on state sovereignty, it also abandoned its former convention of decision-making by consensus as the Gambia did not participate in the final decision.[239] Thus, consensus decision-making is not appropriate in a Commonwealth that enforces certain human rights through methods such as those espoused in the Millbrook Action Programme. Although the Commonwealth has certainly moved beyond the traditional restrictions in the Agreed Memorandum in dealing with anti-democratic behaviour, CMAG has been criticised for failing to enforce the full range of principles encompassed within the Harare Declaration. For example, commentators have suggested that CMAG could have

[237] Commonwealth Secretariat, 'Fiji Suspended from the Commonwealth', Press Release, 1 September 2009; and CHOGM, 'Communiqué', 2009 at para. 10.

[238] CHOGM, 'Communiqué', 2009 at para. 9.

[239] CHOGM, 'Auckland Communiqué' at para. 10: 'The Commonwealth Heads of Government, with the exception of The Gambia, agreed to suspend Nigeria from membership.' The Solomon Islands initially refused to support the suspension of Nigeria, but later withdrew its opposition: see D. McIntyre, 'Dramatic, Tragic, Business-Like and Progressive: The Auckland CHOGM Sets New Standards' (1996) 21 *N. Z. Int'l R.* 2 at 7.

considered issues such as the confrontation between India and Pakistan or the human rights abuses in the Sri Lankan civil war.[240]

In response to calls to widen the ambit of CMAG's powers to specifically incorporate other violations of the Harare Declaration, in 2001 a Commonwealth High Level Review Group clarified CMAG's mandate. In situations where a member is perceived to be in serious or persistent violation of the Harare Commonwealth Principles, the High-Level Review Group decided that CMAG could consider applying the same sanctions as are imposed when an unconstitutional overthrow of government has occurred.[241] CMAG's expanded power to consider a country when it is in serious breach of Harare standards is certainly a progressive move and provides the Group with some flexibility on the issues it can address. The requirement that such measures can only be instigated after the relevant member has been given an opportunity to respond to the allegations and the Secretary-General has utilised a good offices role[242] suggests the need to carefully balance the traditional limitations of the organisation with the desire to deal with serious violations of rights.

Even before the High Level Review Group recommended a change in CMAG's mandate, the Group had demonstrated a willingness to discuss issues beyond the limited context of military coups. This was evident from the Chair's Statement at the Group's May 2000 meeting, when concerns were expressed over 'ongoing violence, loss of life, illegal occupations of property, failure to uphold the rule of law, and political intimidation in the run up to Zimbabwe's parliamentary elections'.[243] Subsequent CMAG statements referred to additional curbs placed on freedom of speech and association in Zimbabwe, with the conclusion that the situation constituted a serious and persistent violation of the Harare Declaration.[244] Despite the pointed reference to these human

[240] Richard Bourne, 'The Commonwealth Ministerial Action Group', in CPSU-SAIIA Briefing, *Australia's Commonwealth Summit – A Briefing on Issues before the Leaders at Coolum in March 2002* (2002), p. 8; Derek Ingram, 'A Much-Too-Timid Commonwealth' (1999) *The Round Table* 497 at 506–7.

[241] Commonwealth High Level Review Group, 'Report by the Commonwealth High Level Review Group to the Commonwealth Heads of Government', Report, 2002 at paras. 21–22.

[242] *Ibid.* at para. 21(iv).

[243] 'Chairman's Statement', 13th Meeting of the Commonwealth Ministerial Action Group on the Harare Declaration, London, 2 May 2000.

[244] See, for example, CMAG, 'Concluding Statement', 17th Meeting on the Harare Declaration, London, 20 December 2001 at para. 13; CMAG, 'Concluding Statement', 18th Meeting, London, 30 January 2002.

rights abuses (although CMAG did not name them as such), the Group did not recommend the imposition of membership sanctions at that time. But the problems in Zimbabwe continued to vex the Commonwealth. In 2002 a Commonwealth Observer Group sent to cover the presidential elections concluded that the elections did not 'adequately allow for a free expression of the will by the electors'.[245] The Commonwealth convened a Chairpersons' Committee, consisting of the Prime Minister of Australia and the Presidents of South Africa and Nigeria (the 'troika'), in order to consider Zimbabwe's position. In deciding to suspend Zimbabwe from the councils of the Commonwealth for twelve months, the Committee listed the essential issues as 'food shortages, economic recovery, the restoration of political stability' as well as the conduct of future elections,[246] signifying that the electoral process was not the only factor taken into account. When it reaffirmed its decision to suspend Zimbabwe in March 2003, the Committee cited problems with respect for human rights, the rule of law, democracy and the economy.[247] Once again this statement declared a willingness to look beyond political rights to take into consideration 'respect for human rights' more generally. While this can be lauded as a step towards taking human rights concerns seriously in the organisation, Zimbabwe's withdrawal from the Commonwealth in December 2003 in the face of further condemnation[248] suggests that organisations have to tread carefully when deciding to invoke membership sanctions. This challenge to the suitability and also the efficacy of suspension as a sanction will be discussed further below.

C *The exclusion of Yugoslavia from the CSCE*

Up until this point, with perhaps the exception of the expulsion of the USSR from the League of Nations, the focus of the decisions of organisations to exclude members has concerned the relevant member's

[245] Election Observer Group, *Zimbabwe Presidential Election 9–11 March 2002* (2002), p. 44.

[246] 'Meeting of Commonwealth Chairpersons' Committee on Zimbabwe', News Release, 19 March 2002.

[247] Commonwealth Secretariat, 'Commonwealth Statement on Zimbabwe', 16 March 2003.

[248] In a letter to the Commonwealth Secretary-General dated 11 December 2003, the Foreign Minister of Zimbabwe, Dr I. S. G. Mudenge, confirmed that Zimbabwe's withdrawal took effect from 7 December 2003. See Commonwealth Secretariat, 'Zimbabwe's Withdrawal from the Commonwealth', Press Release, 12 December 2003.

internal affairs. In the case of the USSR it was a combination of its domestic policies and its invasion of Finland that led the members of the League to call for expulsion. As was recognised by Mitrany, organisations may be democratically governed yet be undemocratic in their external conduct. The clearest example of exclusion as a result of this form of 'pathology'[249] is the decision to suspend Yugoslavia (Serbia and Montenegro) from participation in the CSCE.

As with the Commonwealth, the use of suspension by the CSCE would appear to violate the organisation's original emphasis on sovereign equality and consensus decision-making. However, by the 1990s these principles no longer enjoyed sacrosanct status.[250] At meetings in Berlin and Moscow in 1991 the CSCE adopted exceptions to the consensus principle in emergency situations.[251] In particular, issues relating to human rights, democracy and the rule of law were recognised as of 'direct and legitimate concern to all participating States'.[252] More significantly, the Prague Document on Further Development of CSCE Institutions and Structures, adopted at a meeting of the Council of Ministers in January 1992, stated that in 'cases of clear, gross and uncorrected violations of relevant CSCE principles', action could be taken by either the Council or Committee of Senior Officials (CSO) to protect the CSCE's capability to 'safeguard human rights, democracy and the rule of law'.[253] This paragraph of the Prague Document was used as a basis for the decision to exclude Yugoslavia from participation in the CSCE in July 1992 when the organisation was confronted with Yugoslavia's responsibility for the 'escalating bloodshed and destruction' in Bosnia and Herzegovina.[254] In listing Yugoslavia's violations of CSCE commitments, the CSO referred to the role of the Yugoslav People's Army, the continued fighting and human suffering, obstructions to the delivery of humanitarian aid and the denial of fundamental rights to

[249] See Chapter 1, n 264. [250] Sneek, 'The CSCE in the New Europe' at 27–8.

[251] See 'Summary of Conclusions of the Berlin Meeting of the Council', First Meeting of the Council, Doc. No. 1BERL91.e (19–20 June 1991) at Annex 2, 'Mechanism for Consultation and Co-operation with regard to Emergency Situations'.

[252] CSCE, 'Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE', Moscow, 3 October 1991.

[253] 'Prague Document on Further Development of CSCE Institutions and Structures', Second Meeting of the Council, Doc. No. 2PRAG92.e, 1992 at para. 16.

[254] 'Second Emergency Meeting of the CSO, Helsinki, 6–12 May 1992', in Arie Bloed (ed.), *The Conference on Security and Co-operation in Europe: Analysis and Basic Documents (1972–1993)* (Dordrecht: Kluwer Academic Publishers, 1993), p. 938.

ethnic minorities, including ethnic Albanians in Kosovo.[255] Thus, the CSO appears to have been motivated by both Yugoslavia's aggressive external behaviour in Bosnia and Herzegovina (admitted as a CSCE Participating State in April 1992) as well as its failure to protect human rights within its own territory. Less than two months later the CSO declared that 'no representative of Yugoslavia will be presented at the CSCE Summit in Helsinki or at any subsequent meetings of the CSCE until 14 October 1992'.[256] In a statement reminiscent of comments made at the time of Cuba's suspension from the OAS, the CSO was keen to emphasise that its decision to exclude Yugoslavia was not directed at the people of Serbia and Montenegro, but rather at their government.[257]

The wide range of considerations taken into account by the CSO in excluding Yugoslavia from the CSCE process is further reinforced by statements made after the decision was taken. Such statements included reference to the 'disgraceful policies of so-called "ethnic cleansing"', breaches of human rights and international humanitarian law, attacks on humanitarian convoys and conditions in detention camps.[258] In accordance with its recognition of the link between human rights issues and security concerns, the CSCE was willing to go beyond unconstitutional changes of government in determining whether to impose membership sanctions. The decision to exclude Yugoslavia was affirmed by the CSO at its sixteenth meeting in September 1992[259] and was supported by the US, announcing that 'suspension of participation in CSCE would constitute the clearest evidence of our determination' that member states would not sit by 'in the face of aggression'.[260] The suspension remained in force until November 2000 when the FRY was admitted to the OSCE as a new member distinct from the SFRY.[261] Interestingly, the decision to

[255] CSO, 'Statement on the Former Yugoslavia', 18–20 May 2002; Bloed, *Conference on Security and Co-operation in Europe*, p. 942.

[256] 'Thirteenth CSO Meeting, Decisions of the Committee of Senior Officials, Helsinki 29 June – 7 July 1992', in Bloed, *Conference on Security and Co-operation in Europe*, p. 951 at para. 1.

[257] *Ibid.* at para. 4.

[258] 'Fifteenth Meeting of the CSO, Decisions of the Committee of Senior Officials, Prague, 13–14 August 1992', in Bloed, *Conference on Security and Co-operation in Europe*, p. 954.

[259] 'Sixteenth CSO Meeting, Decisions of the Committee of Senior Officials, Prague, 16–18 September 1992', in Bloed, *Conference on Security and Co-operation in Europe*, p. 962.

[260] John C. Kornblum, 'Continued Aggression in Bosnia-Herzegovina', Statement to the Plenary Session of the Helsinki Follow-Up Meeting of the CSCE, Helsinki, 6 May 1992; 'US Department of State Dispatch', 11 May 1992, pp. 372–5.

[261] 'FRY Becomes 55th OSCE Member State', OSCE, 10 November 2000, www.osce.org/item/4.html.

readmit the FRY was made only after the 2000 presidential elections, although the initial conflict had ended many years previously.[262] Thus, the CSCE/OSCE was concerned with more than the conflict and its repercussions. Consequently, a distinction can be drawn between the basis for suspension (the existence of an armed conflict and accompanying human rights violations) and the reasons for readmission (the result of a more positive demonstration of democracy within the country).

IV Problems with suspension as a sanction for breaches of democracy and human rights

This chapter has covered a wide range of practice on exclusion from organisations with a restricted membership – from the OAS in the Americas to the OSCE in Europe. To return to the main theme, the purpose of this discussion was to examine the way in which closed organisations have reconciled their strong support for sovereignty and non-interference with their willingness to apply the sanction of suspension. The evidence confirms that these organisations have been prepared to suspend members for matters previously viewed as exclusively within a state's domestic jurisdiction. The readiness of the organisations to take this action implies that they have embraced, albeit cautiously, a concept of sovereignty incorporating some democratic and rights standards. Such a concept is more in keeping with the idea that sovereignty resides in the citizens rather than in the state or ruling elite.[263] Despite this readiness to use membership sanctions, decisions to suspend members from institutions with a restricted membership have not been without their difficulties. First, despite the wide-ranging articulation of human rights standards in treaties and other documents, in practice organisations have tended to restrict the use of suspension to a limited range of behaviour, suggesting a selective approach to rights enforcement. Second, the appropriateness of using exclusion as a method of enforcing democratic and human rights concerns may be questioned, particularly when considered against the organisations' primary functions of integration (in the case of regional organisations) and cooperation (in the

[262] Although certainly the FRY could not be described as peaceful after the signing of the Dayton Peace Agreement, given the 1999 conflict in Kosovo.

[263] Richard Falk, 'Sovereignty and Human Dignity: The Search for Reconciliation', in Frances M. Deng and Terrence Lyons (eds.), *African Reckoning: A Quest for Good Governance* (Washington, D.C.: Brookings Institution, 1998), pp. 12–13.

case of the more flexible organisations). Finally, and perhaps most fundamentally, the use of exclusion as a sanction has been criticised on the basis that it removes the ability of the organisation to influence the behaviour of a wayward member state.

A Defining democracy through exclusion criteria

The threat or use of suspension as a sanction for violations of democratic and human rights indicates the gravity of such behaviour in the eyes of these institutions. Each of the organisations has progressively articulated and developed broad statements of rights and, to a lesser extent, has formulated methods of implementing and enforcing these standards. Even ASEAN has concerned itself with undemocratic behaviour and violations of human rights in member states with the new ASEAN Charter and the adoption of Terms of Reference for the Intergovernmental Commission on Human Rights in 2009.[264] However, these wide-ranging statements on democracy and human rights have not translated into membership sanctions in all cases. For the most part, suspension has only been instigated against states engaging in one type of behaviour – unconstitutional changes of government. Certainly, suggestions that there are regional variations in human rights values (for example, in Africa)[265] have not been represented in the range of violations subject to enforcement action in the form of membership sanctions. By limiting the type of behaviour leading to suspension, the organisations are punishing only the most egregious (and also the most obvious) violations of democratic principles. As is commented by Schnably in the context of the OAS, '[t]he more undemocratic a domestic act appears to be, as in the case of a coup, the easier it may be to condemn it, because we may assume that the international community is protecting the popular will'.[266] In accordance with this view, the OAS, the AU and the Commonwealth have focused their attention on military coups. Although the Commonwealth has expanded the remit of CMAG to include violations of human rights outside military coups, so far this has only resulted in the suspension of Zimbabwe following the suspect results of the 2002 presidential election.

Limiting suspension to unconstitutional changes of government may be appropriate as not all members are convinced that membership sanctions are the most effective course of action when dealing with

[264] See n 182. [265] See discussion in Chapter 1, pp. 50–1.
[266] Schnably, 'Constitutionalism and Democratic Government', p. 197.

violations of democracy.[267] It highlights that members of international organisations are only willing to lift the veil of sovereignty in circumstances where democratic rights have clearly been infringed or, as in the case of the suspension of the former Yugoslavia from the CSCE, where a member has violated the sovereignty of another state. The narrow range of circumstances in which organisations will consider suspending a state confirms that although members are willing to articulate a broad definition of democracy, they are not altogether comfortable with enforcing such a definition. This ambivalence towards implementing a broader definition of democracy demonstrates the difficulty in monitoring democratic performance beyond the conduct of elections. Even delineating the more restricted concept of an 'unconstitutional change of government' is problematic. When defining the type of behaviour constituting an unconstitutional change of government, an organisation could draw on a number of approaches. Schnably has suggested two possibilities: the first is based on specifying principles of 'transnational constitutional law' and the second is concerned with preserving a state's constitutional design subject to overriding international principles.[268] The first approach involves an organisation establishing 'substantive principles of constitutional law that are necessary for constitutional government anywhere'.[269] A violation of these principles would represent an unconstitutional change of government leading to membership sanctions. Organisations providing greater definition to the type of democratic government they believe members should possess and to the conduct that would result in sanctions would appear to be developing such principles of transnational constitutional law. The second approach dictates that international law should respect the right of states to design their own form of constitutional order and should only intervene if a state fails to respect that domestic order.[270] By imposing membership sanctions in a limited range of circumstances involving unconstitutional changes of government, the organisations have emphasised that they will

[267] See, for example, the Commonwealth's pronouncement that the Gambia did not participate in the decision to suspend Nigeria from the Commonwealth (CHOGM, 'Auckland Communiqué'); comments by Mexico at the time of Cuba's exclusion from the OAS ('Statement of Mexico'); and comments by Romania at the time of Yugoslavia's suspension from the CSCE ('Statement on the Situation in Bosnia-Herzegovina to the Plenary Session of the Helsinki Follow-Up Meeting by the Delegation of Romania, 6 May 1992', as quoted in Marc Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 *Am. J. Int'l L.* 569 at 599).

[268] Schnably, 'Constitutionalism and Democratic Government', p. 183.

[269] *Ibid.*

[270] *Ibid.*

also respect a member's constitutional order and will only impose membership sanctions where a member has violated its own internal principles (as would be the case in the event of a coup). By adopting a minimalist definition of democracy when assessing whether to suspend a member from participation, the organisations have taken an amalgam of the two approaches and underlined the fact that they will recognise their members' sovereignty and the principle of non-intervention bar the clearest examples of democratic failure. However, this approach concentrates on a limited definition of democracy, demonstrating an inconsistency between the articulated standards and the circumstances in which membership sanctions will be imposed.

B The suitability of suspension as a sanction

The suitability of suspension as a remedy in international institutional law for breaches of democracy and human rights must be assessed against the functions fulfilled by an organisation. Just as exclusion may be inappropriate in an organisation desiring to attain universal membership, it may also be inappropriate for an organisation seeking to unite all states in a region or aiming to provide a flexible forum for cooperation between states. Taking a functionalist approach to membership questions, regional organisations may be considered to be stronger if all states in a region are members and informal organisations may be more flexible if they eschew rigid procedures such as sanctions. But the readiness to suspend members reveals that while the integration of states within a geographical area is still a goal of regional organisations outside Europe, the organisations do not view integration as incompatible with exclusion. Similarly, organisations such as the Commonwealth and the OSCE, which provide fora for discussion on areas of common concern, are ready to suspend members even though this may diminish their capacity to influence the behaviour of those members to conform to the organisation's principles.

The tension between the aims of the organisations and their willingness to exclude members for breaches of democracy and human rights has led to criticism of decisions to suspend. For example, Romania claimed that Yugoslavia and the other republics of the former Yugoslavia 'should be inside the CSCE process, rather than outside it' during the conflict in the early 1990s.[271] As the CSCE was the primary

[271] 'Statement on the Situation in Bosnia-Herzegovina'.

European security organisation dealing with the crisis at the time, such comments cannot be ignored. Reports also indicate that not all leaders of the Pacific Islands Forum were in agreement with the decision to suspend Fiji, despite the organisation reaffirming the sanction at the leaders' meeting in August 2009.[272] When the Commonwealth suspended Nigeria, its Foreign Minister was very critical of the Commonwealth's actions, suggesting that it had been singled out when other countries had also committed 'offences' against the Harare Declaration. He also condemned the use of coercive procedures within the traditional concept of the Commonwealth[273] – a concept which includes the Commonwealth's practice of non-intervention in the internal affairs of member states. Certainly, not all members are convinced that exclusion is compatible with the traditional functions of the organisations. But the decision to suspend states despite opposition in some quarters (not least from the suspended state) demonstrates that concerns regarding human rights and democracy are now central to the way in which these organisations perceive their roles. It is no longer possible for members to use state sovereignty and non-intervention as justifications for a failure to act in the face of (at least some) breaches of democracy and human rights. As was established by the development of the admission criteria in the European organisations, goals such as integration and cooperation between states must be placed in the context of other objectives, such as the promotion of democracy and human rights.

C The efficacy of exclusion as a remedy

The use of suspension as a sanction in international institutional law must also be examined to determine whether it is an effective remedy. Some commentators regard expulsion as a 'necessary evil', only to be employed as a last resort.[274] Jenks described expulsion as a 'clumsy'

[272] Campbell Cooney, 'Fiji's Forum Suspension "Proving Unpopular"', *ABC News* (Australia), 5 May 2009; 'FSM President Warns Against Being Too Harsh on Fiji', *Radio Australia News* (Australia), 24 July 2009. For the Communiqué reaffirming the Pacific Islands Forum sanction against Fiji, see 'Forum Communiqué', Fortieth Pacific Islands Forum, Cairns, Australia, 5–6 August 2009 at para. 40.

[273] See remarks by T. Ikimi, Foreign Minister of Nigeria, during a press conference at the Auckland CHOGM, in (1996) *The Round Table* 131.

[274] Nagendra Singh, *Termination of Membership of International Organizations* (London: Stevens and Sons, 1958), p. 58. See Chapter 1, p. 23.

weapon,[275] although he acknowledged that in regional or closed organisations expulsion might be appropriate on the basis that such organisations are under no obligation to admit states not sharing their common purposes.[276] Expulsion can be distinguished from suspension on the basis that when a state is suspended from an organisation, it is not released from the obligations of membership and therefore the action does not produce the long-term political effects of expulsion.[277] This view is reflected in the preference of organisations studied in this chapter for suspension rather than expulsion as their weapon of choice. By confining their actions to the less drastic sanction of suspension, the states under scrutiny are not outside the organisations' processes altogether. To illustrate this fact, a number of organisations have emphasised when excluding states that the action is taken against the government rather than the people of a particular country. This is evident in a number of decisions: for example, the OAS's resolution to exclude 'the present government of Cuba', the Pacific Islands Forum's decision to suspend 'the current military regime in the Republic of the Fiji Islands' and the CSCE's affirmation that the exclusion of the Yugoslav government was not directed at the Serbian people.

Whether suspension can be regarded as an effective solution to a member's lack of progress on human rights and democracy depends on the aims of the organisation. The objectives of organisations in suspending members must be seen as twofold: to emphasise the organisation's disapproval of the actions of the suspended government and to put pressure on that government to change its policies. In relation to the first objective, the actions of organisations such as the OAS, the AU, the Commonwealth and the CSCE indicate to the international community, as well as current members, that serious violations of democratic and human rights principles will not be tolerated. None of the organisations examined in this chapter are open organisations – instead they have defined their membership in terms of a number of factors. In accordance with Jenks's views above, exclusionary policies are

[275] C. Wilfred Jenks, 'Expulsion from the League of Nations' (1935) 16 *Brit. Y. B. Int'l L.* 155.

[276] C. Wilfred Jenks, 'Due Process of Law in International Organizations' (1965) 19 *Int'l Org.* 163 at 166. See also Louis B. Sohn, 'Expulsion or Forced Withdrawal from an International Organization' (1964) 77 *Harv. L.R.* 1381 at 1416.

[277] C. Wilfred Jenks, 'Some Constitutional Problems of International Organizations' (1945) 22 *Brit. Y. B. Int'l L.* 11 at 25–6.

not on their face incompatible with the concept of a closed organisation. Although suspension has only been used in a fairly limited range of circumstances, by threatening such a sanction, organisations have defined themselves in terms of their commitment to democracy and human rights.

However, an organisation's indication of disapproval should not obscure the fact that the end goal is to ensure that a member alters its behaviour. The more important purpose of membership sanctions is to persuade the member to rectify its ways. The difficulty is that once a state is no longer a member, the organisation does not have the same capacity to put pressure on the state. It has been stated that the instigation of suspension or expulsion by the organisation 'simply removes the recalcitrant member from the very pressures of general opinion which . . . are perhaps the best means of securing a return to fulfilment of obligations'.[278] Contrary to this position, many of the organisations maintain that they have a role to play in restoring democracy and human rights in a state. For example, the CSCE continued to deal with the situation in Yugoslavia despite that country's suspension. Article 9 of the Charter of the OAS asserts that the organisation still has a role in re-establishing democracy in a suspended member. This is confirmed by the 2009 resolution on Honduras which urges the Inter-American Commission on Human Rights 'to take all necessary measures to protect and defend human rights and fundamental freedoms in Honduras' and instructs the Secretary-General and other representatives to promote the return of Honduras to democracy.[279] Organs of the AU are willing to discuss a suspended member's record in order to enable it to fulfil its obligations and thus return it to full membership. The same is true of the Commonwealth, as is demonstrated by its interventions with respect to Fiji, Pakistan and Zimbabwe.[280] The Commonwealth Statement on Zimbabwe, issued prior to Zimbabwe's withdrawal at the Abuja CHOGM, makes clear the intention of the Heads of Government to 'encourage and assist the process of national reconciliation' despite its

[278] C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd edn (Cambridge University Press, 2005), pp. 123–4.

[279] 'Resolution on the Suspension of the Rights of Honduras to Participate in the OAS', OAS General Assembly, 5 July 2009 at paras. 2–3.

[280] See, for example, comments by CMAG on Fiji in 'Concluding Statement', 14th Meeting on the Harare Declaration, New York, 15 September 2000; and the statement on Pakistan in 'Concluding Statement', 17th Meeting on the Harare Declaration, London, 20 December 2001 at para. 6.

suspension.[281] It appears that even after Zimbabwe's withdrawal, the Commonwealth Secretariat continued to seek to assist in promoting progress in that state, including its return to the Commonwealth in due course.[282]

Zimbabwe's failure to deal with the criticisms made by the Commonwealth's organs and its subsequent withdrawal demonstrates that suspension has not assisted the Commonwealth in obtaining its objectives, at least in the short term. As is highlighted by Kirgis, the ability of exclusionary policies to change the behaviour of a state depends on the benefits to be obtained from membership of an organisation.[283] Exclusionary practices are 'only effective against States which are anxious to avoid isolation and dread public blame'.[284] While states in regional organisations in Europe, Africa and the Americas appear to perceive that the advantages of being within a geographical grouping are greater than being outside the group, this may not be the case where the benefits provided by an organisation are less easy to define in terms of a member's economic or political objectives. Even in the European organisations, a state has withdrawn in the past when in its view the threat of suspension outweighed the advantages of membership.[285] Zimbabwe's action reveals that not all states have replaced the mantra of sovereignty and non-intervention with the principles of democracy and human rights, perhaps justifying the organisations' cautious approach in limiting membership sanctions to particularly egregious breaches of democratic principles. Despite this cautious approach, these organisations have moved away from a strict adherence to sovereignty and non-intervention, and have aligned at least some aspects of their future roles with their ability to meet challenges to human rights and democracy in member states.

[281] Commonwealth Secretariat, 'CHOGM Statement on Zimbabwe, Abuja, 7 December 2003', 7 December 2003.

[282] Comments by Matthew Neuhaus, Director of Political Affairs, Commonwealth Secretariat, 'Zimbabwe and the Commonwealth: What Now for the Promotion of Human Rights?', Conference organised by the Commonwealth Human Rights Initiative, London, 31 March 2004.

[283] Frederic L. Kirgis, *International Organizations in their Legal Setting*, 2nd edn (St Paul, MI: West Group, 1993), p. 585.

[284] K. Zemanek, 'The Legal Foundations of the International System – General Course on Public International Law' (1997) 266 *Recueil des Cours* 163.

[285] See discussion of Greece's withdrawal from the Council of Europe in Chapter 3. The military government in Honduras also attempted to withdraw from the OAS when faced with suspension: see 'OAS Honduras' Interim Government Can't Withdraw'.

5

The relationship between powers, purposes and participation in specialised organisations

I Introduction

In May 1947, following the adoption of a resolution by the International Civil Aviation Organization (ICAO) effectively barring Spain from membership, the Peruvian delegate made the following statement:

> Both in the United Nations and here, Peru has defined its ideological position, which is that the specialized agencies should have the widest possible membership, that their actions should be governed by technical criteria, and that the intervention of political considerations may jeopardize the attainment of the objectives which these agencies have been created to serve.[1]

Despite these reservations, Peru voted for the resolution on the basis that it had previously been approved by the UN General Assembly. The delegate's statement, although not Peru's ultimate vote, reflects Claude's comments as set out in Chapter 1 – that decisions on membership should be made with reference to the aims of the organisation.[2] For the most part, the organisations examined to date were established for, or have subsequently developed, wide-ranging aims and purposes of a general political nature.[3] This chapter moves away from organisations founded to fulfil general purposes in order to examine organisations dealing with specialised, sometimes quite technical matters. While the division between general and specialised institutions is not always clear-cut, as all international organisations are established for specific purposes, the functions of the organisations discussed in this chapter are more

[1] 'Proceedings First Session', ICAO First Assembly, Doc No. 7325-C/852, 1947, p. 84.

[2] Inis L. Claude, *Swords into Plowshares – The Problems and Progress of International Organization*, 4th edn (New York: Random House, 1971), p. 86; Chapter 1, n 173 and accompanying text.

[3] Only NATO breaks this mould with its specific focus on military defence, but even it has extended its role to encompass broader cooperation in the military security field.

confined than those examined previously. Cooperation between states is still a fundamental goal, but it is cooperation on a specific topic.

The Peruvian delegate's comments at the First Assembly of ICAO reflect a widely held view that participation in specialised institutions, including the specialised agencies of the UN, should be governed solely by the specific purposes for which the organisation was established. Thus, admission to ICAO should be dependent upon an applicant being able to contribute to 'safe, regular, efficient and economical air transport'[4] amongst other goals. Membership of the Universal Postal Union (UPU) and the International Telecommunication Union (ITU) would be determined by a state's ability to facilitate international cooperation for the improvement and promotion of postal services and telecommunications respectively.[5] Regional and subregional trade organisations, such as ECOWAS, the Andean Community (CAN) and the Caribbean Community (CARICOM) should admit or exclude a state depending on whether that state can further the achievement of goals such as economic union, the development of a single market and efforts to improve the living standards of people within the region.[6] Yet, this acknowledged link between functions and membership has not prevented a number of specialised institutions from conditioning admission and exclusion decisions on human rights and democracy. Controversially, specialised organisations have excluded members for human rights violations despite the absence of a suspension or expulsion clause in their constitutional instruments. Such actions have been criticised as illegal and beyond the powers of the organisations.[7]

This chapter examines the relationship between the purposes of an organisation, the powers contained in its founding charter and associated

[4] Convention on International Civil Aviation, opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947), Art. 44(d) ('Chicago Convention').

[5] Constitution of the Universal Postal Union, opened for signature 10 July 1964, 611 UNTS 62 (entered into effect 1 January 1966), Art. 1(2) ('Constitution of the UPU'); Constitution and Convention of the International Telecommunication Union, opened for signature 22 December 1992, 1825 UNTS 330 (entered into force 1 July 1994), Art. 1(a) ('Constitution and Convention of the ITU').

[6] Treaty of the Economic Community of West African States, opened for signature 28 May 1975, 1010 UNTS 17 (entered into force 20 June 1975) (revised 24 July 1993), Art. 3; Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy, opened for signature 5 July 2001, 2259 UNTS 295 (entered into force 4 February 2002), Art. 6; Andean Subregional Integration Agreement, opened for signature 26 May 1969 (1969) 8 ILM 910 ('Cartagena Agreement').

[7] Konstantinos Magliveras, *Exclusion from Participation in International Organisations – The Law and Practice behind Member States' Expulsion and Suspension of Membership* (The Hague: Kluwer Law International, 1999), p. 231.

documents, and its membership decisions. The aim is to determine the extent to which the specialised purposes of the organisation have influenced the exercise of express and implied powers in relation to membership conditions. It draws on the ICJ's jurisprudence, discussed in Chapter 1, on the interpretation of constituent instruments. The organisations are examined on the basis of the purposes contained in their constituent instruments: Part II considers the practice of the specialised agencies of the UN, while Part III examines the international and regional trade organisations. These organisations represent an amorphous group given their wide variety of functions and range of membership provisions. Some organisations, such as the UPU, the ITU and ICAO, aim to have universal (or near-universal) membership; others, such as CAN, CARICOM and ECOWAS, comprise of states in a particular region. The first group of organisations, the specialised agencies, has been selected in order to examine the tension between their limited technical mandates, the legal powers contained in their constitutional instruments and the members' desire to exclude certain states for violations of human rights and democracy. The second group, the international and regional trade organisations, is part of the growing debate in international law on the interaction between human rights and trade. Despite an acceptance of the relationship between these two concepts, the question whether the membership of trade organisations should be conditioned on human rights and democracy is rarely considered. This has not prevented these organisations adopting, or attempting to adopt, such criteria in their membership decisions. As the purposes of both the specialised agencies and trade organisations are more limited than organisations examined previously in this work, there would appear to be less room to interpret the legal provisions of their charters to take into account human rights and democracy issues. As mentioned above, in the words of the Peruvian delegate, such 'political considerations may jeopardize the attainment of the objectives which these agencies have been created to serve'. The extent to which these words have been borne out in the membership practice is examined below.

II The specialised agencies of the UN

A The establishment of the specialised agencies and the politicisation of their work

The concept of specialised international organisations, devoted to ensuring cooperation and coordination between states on specific

topics, is the most concrete manifestation of Mitrany's vision of a web of functional arrangements as a means of promoting international peace. Specialised institutions dealing with the postal service, telecommunications and meteorology were first established in the 1860s and 1870s and thus pre-date the establishment of the UN by eighty years.[8] Article 24 of the Covenant of the League of Nations envisaged the prospect of 'all international bureaux ... and all committees for the regulation of matters of international interest' being brought within the auspices of the League; however, this aim was not accomplished until the creation of the UN. Chapter X of the UN Charter gives the Economic and Social Council (ECOSOC) the power to enter into agreements with specialised agencies and to coordinate their activities.[9] The UN organisational chart currently lists fifteen such agencies, including a number of institutions founded prior to 1945, such as the International Labour Organization (ILO) and the ITU. Their activities cover such diverse fields as raising levels of nutrition and agricultural productivity (Food and Agricultural Organization), improving maritime security and preventing ocean pollution (International Maritime Organization) and advancing people's health and eradicating diseases (World Health Organization).

The early specialised organisations, such as the UPU and the ITU, tended to have limited objectives, confined to standardising activities and providing information within their respective fields. Subsequently, the aims of a number of the specialised agencies were extended to include the provision of technical assistance, particularly to developing countries.[10] For example, the WHO's aims include assisting 'governments, upon request, in strengthening health services'.[11] Furthermore, the constituent instruments of some specialised agencies articulate a vision that appears to transcend their narrow technical field. This is evident in the founding documents of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the ILO, which emphasise the members'

[8] Douglas Williams, *The Specialized Agencies and the United Nations – The System in Crisis* (London: C. Hurst, 1987), p. 1. The International Meteorological Organization was established in 1873 (later renamed as the World Meteorological Organization). The International Telecommunication Union and the General Postal Union (now the Universal Postal Union) were established in 1865 and 1874 respectively.

[9] Charter of the United Nations, Arts. 57, 63.

[10] Williams, *Specialized Agencies*, p. 14.

[11] Constitution of the World Health Organization, opened for signature 22 July 1946, 14 UNTS 185 (entered into force 7 April 1948), Art. 2(c).

desire to 'contribute to peace and security'[12] (UNESCO) and 'secure the permanent peace of the world' (ILO) in fulfilling their functions.[13] Although the Western powers may have originally wished to draw a distinction between the political powers of the General Assembly and the technical role of the specialised agencies,[14] these agencies have been caught up in a number of major international controversies. This has led commentators to argue that the specialised agencies have been politicised – a term which inevitably has negative connotations as it suggests an agency's involvement in issues or questions that are beyond the mandate set out in its constituent instrument.[15] Although it is almost impossible for the specialised agencies to separate themselves from the politics of their members, or indeed to fail to discuss highly sensitive questions, politicisation is damaging when it hinders the capacity of organisations to fulfil their functions.

One aspect of the politicisation of the work of the specialised agencies has involved debates about participation. Like the UN, the specialised agencies are open to all states – universal membership is seen as a method of enhancing their ability to perform their mandates. The eradication of major diseases, the coordination of international postal, telecommunications and air services, and the worldwide protection of intellectual property all require universal (or as close as possible to universal) membership. That universal participation is in itself an objective is highlighted by the membership roster of the agencies: there are 191 members in the UPU, 193 in the WHO, 190 in ICAO, and 184 in the World Intellectual Property Organization (WIPO). The UPU emphasises that 'one of its essential features . . . is its universality' and the ITU Constitution provides that in determining its membership the 'desirability of universal participation in the Union' should be recognised.[16] However, the objective of universal membership has not prevented states from using membership issues as a vehicle for expressing their distaste for the policies of an agency or a particular state, or to promote their own

[12] Constitution of the United Nations Educational, Scientific and Cultural Organization, opened for signature 16 November 1945, 4 UNTS 275 (entered into force 4 November 1946), Art. I(1) ('UNESCO Constitution').

[13] Constitution of the International Labour Organization, opened for signature 28 June 1919, Part XIII of the Treaty of Versailles (1919), preamble.

[14] Williams, *Specialized Agencies*, p. 14.

[15] *Ibid.*, pp. 155–6; Sagarika Dutt, *The Politicization of the Specialized Agencies – A Case Study of UNESCO* (Lewiston: Mellen University Press, 1995), p. 24.

[16] International Bureau of the UPU, Constitution and General Regulations of the UPU, Parts I, XII; Constitution of the ITU, Art. 2.

place in the international community. For example, the US withdrew from both UNESCO and the ILO, in the latter case citing the ILO's increasing involvement in political issues outside its mandate.[17] Entities such as the Palestine Liberation Organization, Namibia and Taiwan have sought admission to the specialised agencies as a method of boosting their status in the international community.[18] Most importantly for the purposes of this book, the threat of suspension or expulsion from the specialised agencies has been used to indicate disapproval of a state's human rights violations or undemocratic policies. The fact that a founding treaty does not contain an exclusion clause, or that the stated objectives of the organisation do not encompass human rights concerns, has not prevented attempts being made to suspend or expel members.

These actions have been characterised as illegal by writers who reject the view that the doctrine of implied powers, as outlined in Chapter 1, applies to suspension or expulsion. Magliveras argues that the implied powers of international organisations do not extend to matters governing the organisation's relationship with member states.[19] In his view 'suspension and expulsion are not related to the objectives of an organisation; they are membership issues falling into an area where . . . it has no residual powers'.[20] Schermers and Blokker suggest that exclusion from membership in the absence of an express provision is *ultra vires* an organisation's constitution and a breach of international law.[21] These comments add a new aspect to the role of human rights and democracy as membership criteria. Up until this point, the addition of human rights and democracy criteria to membership decisions has been regarded by organisations and their members as a method of promoting the role of an international organisation on human rights and democracy issues. But

[17] See Secretary of State Kissinger's letter to the Director-General, quoted in Victor-Yves Ghebali, *The International Labour Organization – A Case Study on the Evolution of UN Specialized Agencies* (Dordrecht: Martinus Nijhoff Publishers, 1989), p. 114.

[18] See Frederic Kirgis, 'Admission of Palestine as a Member of a Specialized Agency and Withholding the Payment of Assessment in Response' (1990) 84 *Am. J. Int'l L.* 218; Mark S. Zaid, 'Taiwan: It Looks Like It, It Acts Like It, Is It a State? The Ability to Achieve a Dream through Membership in International Organizations' (1998) 32 *New Eng. L. Rev.* 805; Ebere Osieke, 'Admission to Membership in International Organizations: The Case of Namibia' (1980) 51 *Brit. Y.B. Int'l L.* 189.

[19] Magliveras, *Exclusion from Participation*, p. 255. [20] *Ibid.*

[21] Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, 4th edn (Boston: Brill Academic Publishers, 2003) at para. 148. See also Nagendra Singh, *Termination of Membership of International Organizations* (London: Stevens and Sons, 1958), p. 75.

a challenge to the actions of specialised organisations on the basis that they are *ultra vires* their own constitutions may detract from that perception. This section will examine three situations where the specialised agencies have endeavoured to exclude members and the way in which concerns about human rights and democracy determined the outcome of such actions.[22]

B Excluding the enemy: Spain in the UPU and ICAO

During the Second World War, Spain, led by its military ruler General Franco, was a non-belligerent, although it supported the Axis powers at various points in the conflict. Subsequently, Spain was excluded from the San Francisco Conference, and the USSR, the US and the UK agreed at the Potsdam Conference that they 'would not favour any application for membership put forward by the present Spanish Government' due to its association with the enemy states.[23] This decision was extended to participation in the UN specialised agencies by a 1946 General Assembly resolution with a recommendation that the Franco Government be excluded from 'international agencies established by or brought into relationship with the United Nations'.[24] In making this decision the General Assembly referred to the fascist nature of Franco's regime, its support for the enemy powers and its role in the 'conspiracy to wage war' against the Allies.[25] The resolution also recommended that the Security Council should consider appropriate measures if a 'government which

[22] Spain, South Africa and Israel are not the only members that have been excluded from the specialised agencies. Portugal was also barred from some of the agencies for its colonial policies in Africa. See, for example, 'Resolution A19–2', ICAO, Doc. 9061, 1 March 1973, which provided that 'as long as the Government of Portugal refuses to implement the United Nations General Assembly Resolutions on the Granting of Independence to Colonial Countries and Peoples', it will not be invited to ICAO meetings: 'Nineteenth Session (Extraordinary)', ICAO Assembly, 17 February – 2 March 1973, pp. 11–12. In 1999 the International Labour Conference passed a resolution excluding the government of Myanmar from certain ILO 'meetings, symposia and seminars' following a Commission of Inquiry into the use of forced labour: 'Resolution on the Widespread Use of Forced Labour in Myanmar', 87th Session, International Labour Conference, Geneva, June 1999 at para. 3(c).

[23] 'Conclusion on Peace Treaties and Admission to the United Nations Organization, Protocol of Proceedings, 1 August 1945, Part IX' ('Potsdam Conference'), available from *The Avalon Project*, www.yale.edu./lawweb/avalon.

[24] 'Relations of Members of the United Nations with Spain', GA Res. 39(I), UN GAOR, 1st session, 59th plenary meeting, UN Doc. A/RES/39(I), 12 December 1946.

[25] *Ibid.*

derives its authority from the consent of the governed, committed to respect for freedom of speech, religion and assembly and to the prompt holding of an election' was not established.[26] The wording of this resolution highlights that the decision to recommend the exclusion of Spain from membership was primarily a result of Spain's position vis-à-vis the enemy states during the Second World War. The undemocratic nature of Spain's government was a factor in the decision, but it was of secondary relevance.

Once the UN General Assembly had recommended the exclusion of Spain, it was up to the specialised agencies to implement the resolution. In December 1946 the General Assembly tied its approval of ICAO's status as a UN specialised agency to ICAO's compliance with any decision of the Assembly with respect to Franco's Spain.[27] As Spain was already a member of ICAO due to its ratification of the Chicago Convention and there was no provision for expulsion in the original Convention,[28] the General Assembly's demand caused ICAO some difficulty. The debates in the ICAO's Assembly reveal tensions between states on the question of whether Spain's internal structure and wartime activities were relevant to its status in an organisation devoted to regulating civil aviation. Countries such as Peru and Portugal contended that issues of a 'political character' should not 'disrupt activities of a purely technical nature', particularly those that would be enhanced by universal cooperation.[29] The US did not reject such claims, but suggested that a recommendation of the General Assembly was 'more important than the technical advantage of having one country continue as a member of [ICAO]'.[30] The final vote resulted in the adoption of an amendment to Article 93 of the Chicago Convention, providing (in part) that:

> A State whose government the General Assembly of the United Nations has recommended be debarred from membership in international agencies established by or brought into relationship with the United Nations shall automatically cease to be a member of the International Civil Aviation Organization.[31]

[26] *Ibid.*

[27] 'Agreements with Specialized Agencies', GA Res. 50(I), UN GAOR, 1st session, 65th plenary meeting, UN Doc. A/RES/50(I), 14 December 1946.

[28] Article 94(b) enabled ICAO's Assembly to declare that a state which fails to ratify an amendment of the Chicago Convention within a specified period of time shall cease to be a member of the organization if the amendment 'is of such a nature as to justify this course'.

[29] 'Proceedings First Session', ICAO First Assembly, Doc. 7325-C/852, 1947, p. 84 (Peru), p. 85 (Portugal).

[30] *Ibid.*, p. 83 (US). [31] Chicago Convention, Art. 93 *bis* (1).

The passage of Article 93 *bis* did not automatically result in the exclusion of Spain since an amendment to the Chicago Convention does not come into operation until it has been ratified by two-thirds of the state parties, and only then in respect of the states that have ratified.[32] Following an ICAO Assembly resolution indicating that Spain should not participate in ICAO activities until the amendment came into force, Spain withdrew from the organisation, giving a written declaration that 'we could hardly accept the role of an unwelcome guest'.[33] As is suggested by Sohn, Spain could have insisted that ICAO's action was invalid given that the amendment to the Chicago Convention did not come into force until after the controversy had ended.[34] But the potential illegality of ICAO's action did not affect the legitimacy of the forced exclusion of Spain in the view of the majority of its members.

The effort to isolate Spain from the international community also resulted in its *de facto* exclusion from one of the oldest international organisations, the UPU. Following the 1878 Paris Conference, the UPU possessed one of the most open membership policies of all international organisations, allowing any country to accede to its Convention by a unilateral declaration. This policy changed in 1948 after it was designated a specialised agency of the UN and the revisions of the UPU Convention relating to accession came into force. The new procedures required a state to submit an application, that existing members be consulted and, finally, that the applicant be approved by a two-thirds majority of the membership.[35] In 1947 the UN Secretary-General requested that France consider not inviting the Franco government to attend the Paris Congress of the UPU, in accordance with General Assembly Resolution 49(I).[36] France acceded to this request, despite the potential illegality of the action (the Buenos Aires Convention provided that delegates of the Union's members had the right to participate in the UPU's congresses).[37] In debating this action, members of the UPU opposing France's decision emphasised the universal and technical

[32] Chicago Convention, Art. 94.
[33] 'Proceedings First Session', ICAO First Assembly, Doc. 7325-C/852, 1947, p. 86.
[34] Louis B. Sohn, 'Expulsion or Forced Withdrawal from an International Organization' (1964) 77 *Harv. L.R.* 1381 at 1404. Article 93 *bis* came into force on 20 March 1961.
[35] See 'Commentary to Article 11' in the Constitution and General Regulations of the UPU, p. A.13.
[36] Union Postale Universelle, *Documents du Congrés de Paris* (1947), vol. II, p. 251.
[37] Universal Postal Convention (with Final Protocol), opened for signature 23 May 1939, 202 LNTS 159, Art. 13(1). See also Magliveras, *Exclusion from Participation*, p. 68.

character of the UPU and suggested that if the absence of Spain was declared illegal, then the decisions of the Congress could be void.[38] In support of Spain's exclusion, members relied upon the General Assembly resolution, with representatives also pointing to Spain's War record and fascist regime.[39] Additionally, Spain's lack of democratic government was highlighted by some delegations. For example, the USSR emphasised that Franco's government had been imposed on the Spanish people, while Byelorussia suggested that a democratic delegation from Spain would be welcomed back to the organisation.[40] France's decision to exclude Spain was approved by Bulgaria as it was indicative of its belief that the UPU should not be a refuge for fascists, but a 'nursery for democracy'.[41] The Congress decided to pass a resolution decreeing that Spain was momentarily blocked from acceding to the Convention until the General Assembly resolution was repealed or its objective was achieved.[42]

Over time, animosity towards Spain decreased and in 1950 the US altered its previous position due to international events, including the situation in Korea.[43] The matter was debated in the Ad Hoc Political Committee of the UN General Assembly, where supporters of a resolution reversing the previous policy raised the aim of universality, the principle of non-intervention, the lapse of time since the War and the need to allow the agencies to determine their membership on the basis of their purposes.[44] The representative from Liberia suggested that the principle of democracy was an uncertain basis on which to determine a state's participation, while the Canadian representative hoped that 'through contact with the democratic States of the world, the Spanish people might know the fundamental freedoms which every human being

[38] For example, Union Postale Universelle, *Documents du Congrés de Paris*, vol. II, p. 238 (Argentina), p. 246 (Colombia).

[39] *Ibid*., p. 251 (France), pp. 243–4 (USSR), pp. 254–5 (Byelorussia), p. 259 (Bolivia).

[40] *Ibid*., p. 244 (USSR), p. 255 (Byelorussia).

[41] '[L]a France a dû prendre une décision à ce subject, elle s'est dit précisément que l'Union postale universelle qui a toujours été une pépinière de démocratie, ne pouvait pas se transformer en refuge des fascistes': *ibid*., pp. 256–7.

[42] 'L'Espagne . . . momentanément empêchés d'adhérer à la Convention et aux Arrangements, comme suite à une decision du XII Congrès postal prise conformément à la resolution de l'Assemblée générale des Nations Unies du 12 décembre 1946, pourront adherer à ces Actes dès que cette resolution sera rapportée ou sera devenue sans object': *ibid*., p. 295.

[43] Sohn, 'Expulsion or Forced Withdrawal' at 1403.

[44] UN GAOR, 5th session, Ad Hoc Political Committee, UN Doc. A/AC.38/SR.25, 27–8 October 1950, pp. 163–71. See comments by representatives of the Dominican Republic, Costa Rica, Pakistan and Canada.

was entitled to enjoy'.[45] In voting against the resolution, representatives from the Soviet bloc raised essentially the same concerns as had been put forward at the UPU Congress, including the religious and political persecution practised by the Franco government (Poland) and the terror and intimidation suffered by the Spanish people (Byelorussia).[46] The USSR dismissed the draft resolution as pandering to the interests of the US.[47] This stance was rejected by the General Assembly as a whole with the successful passage of General Assembly resolution 386(V) in November 1950, declaring that:

> The specialized agencies of the United Nations are technical and largely non-political in character and have been established in order to benefit the peoples of all nations, and . . . therefore, they should be free to decide for themselves whether the participation of Spain in their activities is desirable in the interest of their work.[48]

In 1950 Spain was still ruled by a military dictator and consequently it would appear that arguments based on the technical and universal character of the specialised agencies, bolstered by the interests of Western powers in the Cold War, prevailed over any lingering distaste for the undemocratic nature of the Franco government and the human rights abuses perpetuated in Spain.

C *Excluding apartheid South Africa from the specialised agencies*

The campaign against apartheid South Africa's participation in the specialised agencies was more protracted and also more successful than the attempts to expel that country from the UN. Although South Africa was never suspended or expelled pursuant to the UN Charter, the General Assembly refused the credentials of the South African delegation in 1974, effectively excluding it from participation in that organ.[49] South Africa remained a member of a number of the specialised agencies, including the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD); however, it was suspended from

[45] *Ibid.*, p. 171 (Liberia), p. 170 (Canada). [46] *Ibid.*, p. 175 (Poland), p. 180 (Byelorussia).
[47] *Ibid.*, p. 177 (USSR).
[48] 'Relations of States Members and Specialized Agencies with Spain', GA Res. 386 (V), UN GAOR, 5th session, 304th plenary meeting, UN Doc. A/RES/386(V), 4 November 1950, revoking Resolution 39(I) of 12 December 1946.
[49] See Chapter 2, pp. 116–17.

the World Meteorological Organization (WMO) and was expelled from the UPU. Action was also taken against South Africa in the form of the removal of voting privileges, the rejection of credentials, or exclusion from meetings in the ILO, the IMO, the WHO, the International Atomic Energy Agency (IAEA) and the Food and Agricultural Organization (FAO).[50] South Africa withdrew from the ILO, the FAO and UNESCO (this later withdrawal being described as South Africa's only 'voluntary' withdrawal).[51] This section will focus on discussions in the ILO, the WMO and the UPU, which to a large extent mimic deliberations in other specialised agencies. The debates on the exclusion of South Africa raise issues concerning the legality of action taken in the absence of a constitutional provision, the relationship between the purposes of the agency and the condemnation of racial discrimination, and the appropriateness of removing a member from a universal organisation.

Of all the specialised agencies, the exclusion of apartheid South Africa for its racially discriminatory policies was most closely aligned to the purposes of the ILO with its broad mandate to promote peace through social justice. This fact was not lost on delegates to the 1961 International Labour Conference when debating a resolution calling on South Africa to withdraw.[52] In supporting the resolution, the Nigerian government delegate emphasised that 'there is no other international organisation in the world today which stands for and dedicates itself more resolutely to the cause of social justice than the International Labour Organisation'.[53] The potential illegality of a resolution calling for expulsion in the absence of an express provision in the ILO Constitution was sidestepped by settling for withdrawal.[54] When discussing the link between the purposes of the ILO and South Africa's policies, for the most part the debate focused on discrimination *per se*, although some delegates specifically linked South Africa's apartheid policy to the treatment of workers (and therefore to the ILO's mandate on labour standards).[55] In contrast, the South African employers' delegate claimed that South Africa's policies covered areas outside the ILO's reach, including the exercise of franchise rights.[56] Although many delegates condemned apartheid, not all were convinced that withdrawal was the

[50] Williams, *Specialized Agencies*, p. 73. [51] *Ibid.*

[52] 'Resolution Calling for the Withdrawal of the Republic of South Africa from Membership of the International Labour Organization, on the Grounds of the "Apartheid" (Racial Discrimination) Policy Practised by the Government of the Republic, Submitted by the Resolutions Committee (adopted on 29 June 1961)', in International Labour Conference, *Record of Proceedings*, 45th session (1961), p. 891.

[53] International Labour Conference, *Record of Proceedings*, 45th session (1961), p. 576.

[54] *Ibid.* [55] *Ibid.*, p. 610 (Chad). [56] *Ibid.*, p. 584 (South Africa).

appropriate solution. In highlighting the shortcomings of forcing South Africa to withdraw, the Peruvian delegate raised a number of issues, including the possibility that it would 'constitute a very dangerous precedent', the ineffectiveness of the resolution (it was known that South Africa would not accede to the request), its doubtful constitutional basis and the principle of universality.[57] South Africa refused to comply with the request in 1961, but withdrew in 1964 when faced with potential amendments to the ILO Constitution permitting suspension and expulsion, specifically where the UN found a country to have 'flagrantly and persistently' pursued a policy of racial discrimination.[58] The withdrawal of South Africa from the ILO meant that members never needed to fully consider whether South Africa's policies violated the ILO's objectives. It can be argued that the ILO's broad purposes encompassed the sanctioning of discriminatory policies that affected labour, even where the reach of those policies extended beyond employment matters.

A more tenuous link between apartheid and the purposes of a specialised agency was drawn at the 1975 Meteorological Congress, where a resolution to suspend South Africa from the WMO was considered. By 1975 the WMO was one of the few specialised agencies where South Africa still enjoyed full membership rights and at least one delegate regarded this anomaly as an 'embarrassment' to the WMO's members.[59] In contrast to the ILO Constitution, the WMO Convention explicitly provides for suspension where a member 'fails to meet its financial obligations to the Organization or otherwise fails in its obligations under the present Convention'.[60] Consequently, provided that a member has failed to meet its obligations, then *prima facie* suspension would appear to be a legitimate sanction. The first difficulty with this provision is that it refers to action by a member in violation of the 'obligations' of the Convention rather than the 'purposes' of the WMO, a point which was highlighted by the Australian delegate at the 1975 Congress.[61] At no point does the WMO Convention list a member's obligations, although

[57] *Ibid.*, p. 582 (Peru).
[58] International Labour Conference, *Record of Proceedings*, 48th session (1964), pp. 834, 838. In accordance with Article 36 of the ILO Constitution, these amendments were required to be ratified by two-thirds of the membership to come into force. As yet, they have not come into force.
[59] Seventh World Meteorological Congress, *Proceedings* (28 April–23 May 1975), pp. 75, 77 (Tanzania and Uganda).
[60] WMO Convention, Art. 31.
[61] Seventh World Meteorological Congress, *Proceedings* (28 April–23 May 1975), p. 80.

Article 8 provides that '[a]ll members shall do their utmost to implement the decisions of the Congress'.[62] The Congress is a body comprising members' delegates and has a number of functions, including the promulgation of technical regulations.[63] But the distinction between the purposes of the organisation and the obligations of members was sidestepped by delegates in favour of a resolution excluding South Africa on the basis that it had violated the WMO's aims. For example, Tanzania stated that the South African policy breached one of the primary aims of WMO, which is to assist '[m]embers in the development of their natural resources for the economic and social development of *all* their peoples'.[64] These comments lead to the second problem: even if it was possible to equate 'obligations' with 'purposes' (aims), Tanzania's argument rested on a very wide reading of the WMO's purposes. Article 2 of the WMO Convention limits the organisation's purposes to technical issues, such as the facilitation of 'worldwide cooperation in the establishment of networks of stations for the making of meteorological observations' and the 'uniform publication of observations and statistics'.[65] None of these purposes suggest a broader concern with a commitment to human rights or democracy in a member state. Whereas it was arguable that South Africa's policies violated the ILO's purposes, it is almost impossible to argue that they breached the WMO Convention. This factor did not prevent the majority of members endorsing a resolution suspending South Africa's rights in the organisation. The successful resolution invoked the UDHR and referred to General Assembly resolutions where the specialised agencies had been asked to deny South Africa participation while it practised apartheid and failed to abide by resolutions concerning Namibia.[66] While it is true that South Africa had not complied with relevant General Assembly resolutions, such a failure does not activate a decision to suspend pursuant to the WMO Constitution or the WMO–UN Agreement.[67] Relying on the purposes of the organisation did not enhance the legal status of the WMO resolution.

[62] WMO Convention, Art. 8(a). [63] *Ibid.*, Arts. 6–7.
[64] Seventh World Meteorological Congress, *Proceedings* (28 April–23 May 1975), p. 75.
[65] WMO Convention, Art. 2.
[66] 'WMO Resolution Suspending South Africa Rights and Privileges', in Seventh World Meteorological Congress, *Abridged Report with Resolutions* (28 April–23 May 1975), p. 136.
[67] 'Draft Agreement with the World Meteorological Organization', Annex A to ECOSOC Res. 403(XIII), 'Relations with the World Meteorological Organization', approved by 'Relations with the World Meteorological Organization', GA Res. 531 (VI), UN GAOR, 6th session, 356th plenary meeting, UN Doc. A/RES/531(VI), 20 December 1951.

The final action to be considered is the expulsion of South Africa from the UPU, an institution with the twin aims of securing 'the organization and improvement of the postal services' and promoting 'the development of international collaboration' in postal services.[68] Delegates to the UPU Congress in Rio de Janeiro voting for South Africa's expulsion were faced with a double hurdle. First, the UPU Constitution (like the WMO Convention) does not make reference to human rights or democracy and on that basis it was difficult to bring the matter within the purposes of the organisation. Second, there is no provision for expulsion. Despite these lacunae, a number of attempts were made to expel South Africa, although it was not until 1979 that a resolution calling for South Africa's expulsion was passed by a simple majority in a secret vote.[69] Both elements of the vote were controversial, particularly as Article 11(1) of the UPU Constitution provided that '[a]ny member of the United Nations may accede to the Union'. In Switzerland's view, Article 11 elevated the matter to a constitutional question and therefore a decision on South Africa's expulsion could only be made by a qualified two-thirds majority.[70] Senegal argued that as there was no expulsion provision, no question of amending the Constitution arose.[71] Such a view would only be acceptable if a power to expel can be implied into the constituent instrument of an international organisation. Many delegations rejected such an implication and questioned the legality of the proposed action. For example, Japan argued that the action would be 'unconstitutional and inadmissible' unless the Constitution was first altered.[72] A similar view was put forward by the representatives of Ireland and Botswana.[73] Switzerland's position was rejected in a very close vote.[74]

If the doctrine of implied powers as articulated in the *Reparations Case*[75] could be extended to support the legality of South Africa's expulsion, then it would be necessary to align the action with the UPU's purposes. Malaysia attempted to bring the resolution within the ambit of the UPU's aims by arguing that '[i]t was no use discussing freedom of

[68] Constitution of the UPU, Art. I(2).

[69] UPU, *Documents of the 1979 Rio de Janeiro Congress* (1979), vol. II, pp. 1181–2. The resolution was adopted with seventy-seven in favour and forty-four against, with thirteen abstentions.

[70] *Ibid.*, p. 1181. [71] *Ibid.*, p. 1180. [72] *Ibid.*, p. 1172.

[73] *Ibid.*, p. 1163 (Ireland), p. 1165 (Botswana).

[74] *Ibid.*, p. 1181. Sixty-eight countries considered the matter was not of a constitutional nature, fifty-seven countries considered it was of a constitutional nature and six countries abstained.

[75] See discussion in Chapter 1, p. 38.

transit of international mail when the principle of freedom was not reflected in the right to self-determination of people of all nations and when such rights were denied to people because of the colour of their skin'.[76] Other delegations were content to condemn South Africa's policies from a human rights perspective without indicating the way in which South Africa's expulsion could be aligned to the purposes of the organisation.[77] Utilising arguments based on the UPU's purposes, opponents of the resolution, as well as delegations in favour of deferring its consideration to a committee, promoted the universality of the organisation's mission and queried the impact that exclusion would have on the postal services of neighbouring countries.[78] Universality was also invoked by supporters of the resolution on the basis that 'racial discrimination ... was a phenomenon contrary to universal principles'.[79] While it is doubtful that the principle of universality can be invoked in support of the expulsion of a country from a universal organisation, it could be relevant if it is accepted that South Africa's continuing participation in the specialised agencies left them open to the threat of a walk-out by the African countries. Thus, the expulsion of South Africa would enhance universality if, as was the case at the 1963 ILO Conference, African countries refused to participate unless action was taken against South Africa.[80] However, if this view of universality is accepted, it is still difficult to equate the fulfilment of the UPU's purposes with South Africa's expulsion. Consequently, the UPU's action lacks a legal basis even if it is acknowledged that a state may be expelled from an international organisation on the basis of an implied power. This view was emphasised in a declaration by members of the EC at the close of the Rio de Janeiro Congress where they indicated that the decision lacked legal validity.[81] The EC declaration underlines the questionable legality

[76] UPU, *Documents of the 1979 Rio de Janeiro Congress* (1979), vol. II, p. 1163.

[77] *Ibid*., p. 1162 (Burundi), p. 1163 (Nigeria), p. 1167 (German Democratic Republic and Senegal), p. 1169 (Jordan).

[78] On the principle of universality, see UPU, *Documents of the 1979 Rio de Janeiro Congress*, p. 1163 (Ireland), p. 1164 (US), p. 1173 (Canada). On the impact of South Africa's expulsion on postal services in the region, see UPU, *Documents of the 1979 Rio de Janeiro Congress*, p. 1164 (Lesotho), p. 1165 (Botswana), p. 1170 (Kenya).

[79] UPU, *Documents of the 1979 Rio de Janeiro Congress*, p. 1169 (Benin).

[80] For details of the pressure exerted by the African group, see Richard E. Bissell, *Apartheid and International Organizations* (Boulder, CO: Westview Press, 1977), pp. 80–1.

[81] 'Declaration by Nine European Community Members at the signing of the Final Act of the 1979 Congress of the Universal Postal Union', reproduced in (1979) 50 *Brit. Y.B. Int'l L.* 310 at 311.

of expulsion as a sanction against a state which refuses to abide by human rights principles in an organisation with limited functions.

D The campaign to condemn Israel

From the perspective of many Western commentators, the campaign to exclude Israel has been viewed as the defining example of the politicisation of the specialised agencies.[82] The attempt to exclude Israel from the UN involved both the UN General Assembly and the specialised agencies. In a series of General Assembly resolutions, Israel was condemned for a variety of actions, including its occupation of Palestinian and other Arab territories, its alleged acquisition of territory in violation of the UN Charter, the establishment of settlements on Arab land, breaches of Geneva Convention IV and the laws of occupation, and aggression against Lebanon.[83] In 1982 a resolution on the Middle East called on the specialised agencies 'to conform their relations with Israel to the terms of the present resolution'.[84] In the specialised agencies, Israel was also censured for a range of issues that were brought ('[w]ith a little ingenuity')[85] within their mandate. For example, the World Health Assembly (the supreme decision-making body of the WHO) adopted a number of resolutions expressing its concern for the health of the inhabitants of the occupied territories.[86] In 1983 the Assembly condemned Israel for its attacks on Lebanon and the subsequent destruction

[82] Clare Wells, *The UN, UNESCO and the Politics of Knowledge* (London: Macmillan, 1987), p. 3.

[83] For example, 'Resolution 34/70', GA Res. 34/70, UN GAOR, 34th session, 92nd plenary meeting, UN Doc. A/RES/34/70, 6 December 1979; 'The Situation in the Middle East', GA Res. 35/207, UN GAOR, 35th session, 98th plenary meeting, UN Doc. A/RES/35/207, 16 December 1980; 'The Situation in the Middle East', GA Res. 36/226, UN GAOR, 36th session, 103rd plenary meeting, UN Doc. A/RES/36/226, 17 December 1981.

[84] 'The Situation in the Middle East', GA Res. 37/123, UN GAOR, 37th session, 108th plenary meeting, UN Doc. A/RES/37/123, 16 December 1982 at para. 16. This call was repeated in a number of subsequent resolutions, including 'The Situation in the Middle East', GA Res. 38/180, UN GAOR, 38th session, 102nd plenary meeting, UN Doc. A/RES/38/180, 19 December 1983 at para. 16; 'The Situation in the Middle East', GA Res. 39/146B, UN GAOR, 39th session, 101st plenary meeting, UN Doc. A/RES/39/146, 14 December 1984 at para. 16; 'The Situation in the Middle East', GA Res. 40/168B, UN GAOR, 40th session, 118th plenary meeting, UN Doc. A/RES/40/168[B], 16 December 1985 at para. 16.

[85] Williams, *Specialized Agencies*, p. 57.

[86] For example, 'Health Conditions of the Arab Population in the Occupied Arab Territories, Including Palestine', Thirty-Third World Health Assembly, Doc. No. WHA33.18; 'Health Conditions of the Arab Population in the Occupied Arab

of cities and camps and injuries to civilians without any reference to a particular health policy.[87] Israel was also cited by the General Conference of UNESCO for, *inter alia*, altering the historical character of Jerusalem. In 1974 a resolution was adopted inviting the Director-General to withhold assistance from Israel until it complied with UNESCO resolutions on the issue.[88] Thus, the condemnation of Israel covered violations of the UN Charter (Mitrany's description of undemocratic behaviour abroad), international humanitarian law and the rights of the Palestinian people.

In two agencies associated with the UN, attempts were made to exclude Israel from the organisation as a whole – the IAEA and the ITU. In the first instance, action in the IAEA was taken against Israel as a result of the destruction of the Iraqi nuclear facilities at Osiraq in June 1981. Following the attack, the Security Council adopted Resolution 487 (1981) in which it 'strongly' condemned the act as a violation of the UN Charter and considered that it constituted 'a serious threat to the entire IAEA safeguards regime'.[89] Article XIX(B) of the Statute of the International Atomic Energy Agency enables the General Conference to suspend a member (on a recommendation by the Board of Governors) where it has persistently violated the provisions of the Statute or of any agreement entered into pursuant to the Statute.[90] In 1982 the General Conference considered whether Israel should be suspended pursuant to this Article, with Tunisia's representative alleging that Israel had been in 'persistent violation of the Statute and the purposes and principles of the Charter of the United Nations'.[91] In opposing the move to exclude

Territories, Including Palestine', Thirty-Fourth World Health Assembly, Doc. No. WHA34.19; 'Health Conditions of the Arab Population in the Occupied Arab Territories, Including Palestine', Thirty-Fifth World Health Assembly, Doc. No. WHA35.15; 'Health Conditions of the Arab Population in the Occupied Arab Territories, Including Palestine', Thirty-Sixth World Health Assembly, Doc. No. WHA36.27.

87 'Health Conditions of the Arab Population in the Occupied Arab Territories, Including Palestine', Thirty-Sixth World Health Assembly, Doc. No. WHA36.27 at para. 2.

88 'Resolution 3.427', in *Records of the General Conference of the United Nations Educational, Scientific and Cultural Organization*, 18th session (1974), vol. I, pp. 59–60. For a discussion of UNESCO's resolutions concerning Israel, see Dutt, *Politicization of the Specialized Agencies*, pp. 93–101, 122–32.

89 'Resolution 487 (1981)', SC Res. 487, UN SCOR, 2288th meeting, 19 June 1981.

90 Statute of the International Atomic Energy Agency, opened for signature 26 October 1956, 276 UNTS 3 (entered into force 29 July 1957), Art. XIX(B).

91 International Atomic Energy Agency General Conference, 'Record of the Two Hundred and Forty-Fifth Plenary Meeting', Doc. No. GC(XXVI)/OR.245, 24 September 1982 at para. 5.

Israel, various representatives drew attention to the principle of universality, the potential precedent set by such a sanction and the failure to specify the precise provision of the Statute violated by Israel.[92] Additionally, the US argued that the incident could not be regarded as a 'persistent violation'.[93] The draft resolution was rejected when it failed to obtain the two-thirds majority of the General Conference as required by the Statute. Following the defeat of this resolution, the battle moved to the credentials process with the Iraqi representative recommending at the next meeting of the General Conference that the Israeli delegation's credentials be rejected on the basis that Israel could not be considered the 'legal representative' of the Golan Heights, Jerusalem, the West Bank and the Gaza Strip.[94] In making this proposal, the Iraqi delegate equated Israel's situation to that of South Africa.[95] This resolution was passed (after an incident which Gross has described as the 'theatre of the absurd')[96] and consequently the *de facto* suspension of Israel was achieved. As a result of the vote, the UK, the US and Italy announced their intention to withdraw from the proceedings.[97] Like the expulsion of the USSR from the League of Nations, the attempt to suspend Israel from the IAEA was made as a result of aggressive action abroad rather than the violation of human rights standards at home.

[92] *Ibid.* at para. 22 (Belgium), para. 23 (Denmark), para. 9 (US).

[93] *Ibid.* at para. 9. Imber has argued that this statement detracted from the force of the other arguments put before the General Conference and 'begged the question as to how many times need a reactor be bombed to destruction before such behaviour could be deemed "persistent"': Mark F. Imber, *The USA, ILO, UNESCO and IAEA – Politicization and Withdrawal in the Specialized Agencies* (London: Macmillan, 1989), p. 79.

[94] International Atomic Energy Agency General Conference, 'Record of the Two Hundred and Forty-Sixth Plenary Meeting', Doc. No. GC(XXVI)/OR.246, 24 September 1984 at para. 19.

[95] *Ibid.*

[96] Leo Gross, 'Comment: On the Degradation of the Constitutional Environment of the United Nations' (1983) 77 *Am. J. Int'l L.* 569 at 577–8. The resolution was put to the vote with the result as follows: forty in favour and forty against, with six abstentions. The representative of Madagascar subsequently stated that he had been absent at the time of the vote and would have voted in favour of the resolution. After a debate about the correct procedure to be followed, the US requested a roll-call vote with a result of forty-one in favour and thirty-nine against, with five abstentions: see International Atomic Energy Agency General Conference, 'Record of the Two Hundred and Forty-Sixth Plenary Meeting', Do. No. GC(XXVI)/OR.246, 24 September 1984 at paras. 28–47.

[97] International Atomic Energy Agency General Conference, 'Record of the Two Hundred and Forty-Sixth Plenary Meeting', Doc. No. GC(XXVI)/OR.246, 24 September 1984 at para. 48 (UK), para. 49 (US), para. 52 (Italy).

However, as was the case when the USSR was expelled from the League, it is clear that other concerns and animosities motivated the action against Israel.[98]

In the action against Israel in the ITU there was a more explicit focus on human rights with reference to the UDHR in the draft resolution. In 1982 the Plenipotentiary Conference of the ITU considered a draft resolution entitled 'Exclusion of Israel from the Plenipotentiary Conference and from all other Conferences and Meetings of the Union'. The resolution recalled the UN Charter and the UDHR, noted Israel's refusal to implement General Assembly and Security Council resolutions, and condemned its 'continuing violation . . . of the international law' and 'the massacres of the Palestinian and Lebanese civilians'.[99] The resolution also stated that the 'fundamental principles' of the ITU were 'designed to strengthen peace and security in the world by developing international cooperation and better understanding among peoples'. The only substantive measure contained in the draft resolution was Israel's exclusion from the ITU Plenipotentiary Conference 'as long as it does not comply with its international obligations'.[100] On a request for advice on the legality of such a measure, the ITU Legal Adviser opined that the sanction would be illegal as there was no suspension provision in the ITU Convention and, furthermore, it would violate the principle of universality stipulated in Article 1(2).[101] The Legal Adviser also commented upon the fact that the 'fundamental principles' cited in the draft resolution were not found in the Convention,[102] thus suggesting that the resolution was outside the purposes of the organisation. Consequently, the draft suffered from the defects evident in the resolutions attempting to suspend or expel South Africa from the specialised agencies. Unlike the case of South Africa, in the face of

[98] This concern was expressed by the US as follows: 'after 30 years marked by military action in virtually every region of the globe, no Member State had ever been suspended'. See International Atomic Energy Agency General Conference, 'Record of the Two Hundred and Forty-Fifth Plenary Meeting', Doc. No. GC(XXVI)/OR.245, 24 September 1982 at para. 13.

[99] 'Draft Resolution: Exclusion of Israel from the Plenipotentiary Conference and from All Other Conferences and Meetings of the Union', ITU Plenipotentiary Conference, Nairobi, plenary meeting, Doc. No. 120(Rev.2)-E, 4 October 1982.

[100] *Ibid.*

[101] 'Opinion Given by the Legal Adviser to the Plenipotentiary Conference of the International Telecommunication Union on 18 October 1982' (1982) *U.N. Jurid. Y.B.* 214 at 217. The principle of universality is now located in Article 2 of the Constitution of the ITU.

[102] *Ibid.*

a threatened US withdrawal, the relevant paragraph suspending Israel was not adopted by the Conference.[103] The final version of the resolution attempted to bring the matter specifically within the purposes of the ITU by expressing the need to assist Lebanon with reconnecting the telecommunications facilities destroyed by Israel,[104] although no sanctions were imposed. The reference to the UDHR was retained, indicating that human rights considerations were used to bolster the validity of the resolution or, at least, the alleged illegality of Israel's actions.

Arguably a more effective form of membership sanction against Israel in the UN and the specialised agencies has been its exclusion from a regional grouping. There are five regional groups at the UN: Africa, Asia, Eastern Europe, Latin America and the Caribbean, and Western European and Other States (WEOG). This last group encompasses the states of Western Europe plus Australia, Canada, New Zealand and informally the US, demonstrating that the term 'region' has been used to encompass both regional and political affiliations. Although there is no specific mention of the regional groups in the UN Charter, they form a crucial part of the UN's organs and the specialised agencies. Participation in a regional group enables a member to be selected as a candidate for elected positions in the UN, including as a judge of the ICJ and the President of the General Assembly.[105] In the specialised agencies, membership of a regional group has a similar function. Taking into account geography, Israel is naturally a member of the Asian Group; however, it is excluded due to the need to obtain the consent of current members, including the Arab states. Israel's exclusion from a regional grouping in UNESCO is indicative of the way in which this tactic has been employed. At the 1964 General Conference of UNESCO a resolution established five regions for 'the execution of regional activities': Africa, Latin America and the Caribbean, Arab States,

[103] The final resolution was 'Resolution Adopted by the Plenipotentiary Conference Regarding Israel and Assistance to Lebanon', Res. 74, in International Telecommunication Convention – Final Protocol, Additional Protocols, Optional Additional Protocol, Resolutions, Recommendations and Opinions (1982), pp. 338–9.

[104] *Ibid.*

[105] See Article 4 of the Statute of the International Court of Justice; and Rule 30 of the 'Rules of Procedure of the General Assembly', UN Doc. A/520/Rev.16, 17 November 2006. 'Question of the Composition of the Relevant Organs of the United Nations: Amendments to Rules 31 and 38 of the Rules of Procedure of the General Assembly', GA Res. 33/138, UN GAOR, 33rd session, 89th plenary meeting, UN Doc. A/RES/33/138, 19 December 1978. This Resolution sets out the regional groupings and provides that they are the basis for selecting various positions in the General Assembly.

Asia and Europe.[106] Five members, including Israel, were not assigned to any region.[107] At the 18th Session of the General Conference in 1974, Israel unsuccessfully asked to join the European region in order to enable it to 'discharge its duty to the Organization'.[108] At the same meeting a resolution was passed condemning Israel for allegedly violating cultural artifacts in East Jerusalem and asking the Director-General of UNESCO to withhold assistance from Israel until it complied with UNESCO resolutions and decisions.[109] At the Plenary Meeting of the General Conference, where a vote was taken on the allocation of places to the regional groups, the Jamaican delegate submitted that 'every Member State, so long as it remains a Member State, has the right to participate in UNESCO's activities whether they are international or regional'.[110] In opposing Israel's allocation to the European group, Lebanon's delegate described Israel as an historical and geographical paradox, and compared it with South Africa and Rhodesia – states also isolated by the international community.[111] The Israeli delegate blamed UNESCO's reliance on politics rather than principles as the reason for its exclusion from the European group.[112] While exclusion from a regional grouping did not affect Israel's *de jure* membership of the UN specialised agencies, it hindered its ability to participate fully in their activities. Israel was finally assigned to the European group of UNESCO in 1976, and in May 2000 it was invited to become a

[106] 'Definition of Regions with a View to the Execution of Regional Activities', Res. 5.9, in *Records of the General Conference of the United Nations Educational, Scientific and Cultural Organization*, 13th session (1964), p. 85.

[107] The other four members were Australia, Canada, New Zealand and the US: Dutt, *Politicization of the Specialized Agencies*, p. 129.

[108] Reports, *Records of the General Conference of the United Nations Educational, Scientific and Cultural Organization*, 18th session (1974), vol. II, p. 162. The proposal was defeated by thirty-five votes against twenty-three votes in favour, with twenty-six abstentions in Programme Commission V.

[109] 'The United Nations Educational, Scientific and Cultural Organization (UNESCO)' (1974) 28 *Y.B.U.N* 963 at 964.

[110] Proceedings, *Records of the General Conference of the United Nations Educational, Scientific and Cultural Organization*, 18th session (1974), vol. III, p. 425.

[111] *Ibid.*, p. 422.

[112] *Ibid.*, p. 428. The Israeli delegate stated that:

> Perhaps we should now introduce a new principle in UNESCO. Should we call it the Orwellian principle? 'In UNESCO every member is equal – only some are more equal than others.' That is, some members can and do belong to two regions, and just those very members prevent another member from belonging even to one. And that not because their own region is likely to be affected but just because of blind hatred.

member of WEOG in the UN on a temporary (and subsequently indefinite) basis.[113]

E Purposes, powers and politicisation in the specialised agencies

The exclusion of Spain, South Africa and Israel from various specialised agencies highlights the way in which those agencies have employed membership sanctions to condemn a state's human rights and democratic record. The fact that the agencies aim to achieve universal membership has not been an impediment to exclusion where the majority of the members believe that a member's participation is no longer desirable or is an embarrassment to the agency. Furthermore, factors such as the organisations' restricted purposes and even the lack of explicit powers in the constitutional instrument have not prevented a state from being suspended or even expelled. While the violation of human rights and democratic principles was the core reason for excluding South Africa from the specialised agencies, in the case of Spain and Israel these principles constituted only one aspect of the decisions. In these latter two cases it would appear that human rights and democratic concerns were raised in order to add weight to other issues, including continuing opposition to Spain's wartime record and condemnation of Israel's Middle East policies. In all three cases an additional factor was the presence of a strong and organised opposition from particular quarters – the Allied powers (Spain), African states (South Africa) and Arab states (Israel).

States opposing the exclusion of the three countries have cited a number of reasons, including the illegality of the action and the need to preserve the technical character of the agency. Although the ICJ has recognised the doctrine of implied powers in decisions such as the *Reparations Case* and the *WHO Advisory Opinion*, it is difficult to extend these decisions to cover all the actions of the specialised agencies. For example, although the ICJ held that an international organisation may have certain implied powers based on what is essential to perform its duties in the *Reparations Case*, it is doubtful whether this would include the power to exclude a member in the absence of a constitutional

[113] Permanent Mission of Israel to the United Nations, 'Backgrounder – Israel and the Western European and Others Group (WEOG)', July 2007. This Backgrounder notes that Israel's membership of WEOG is limited to UN bodies that have seats allocated through WEOG in New York.

provision. Thus, the actions of the UPU in relation to Spain and South Africa and the attempt to exclude Israel from the ITU cannot be sustained by the respective constitutions. Some commentators support the implication of a power to expel in the exceptional situation where 'an incorrigible member indulges in grave and persistent violation of the basic principles of the instrument, and refuses to withdraw voluntarily with a view to bringing the normal machinery of the Organization to a standstill'.[114] A similar argument could be based on Article 60(2) of the VCLT, which enables the parties to a multilateral treaty to suspend or terminate the treaty's operation in relation to a state in material breach of the treaty's provisions.[115] A material breach consists of 'the violation of a provision essential to the accomplishment of the object or purpose of the treaty'.[116] Although arguments based on the need to ensure the continued operation of an organisation are enticing, they provide little support for the decisions of the UPU and the ITU in the situations detailed in this chapter. This is due to the fact that it is almost impossible to align the UPU and the ITU's essential functions or operations with a decision to exclude a state on the basis of the violation of human rights.

In cases where there is an express power to exclude a member in a constitutional instrument, the reasoning in the *WHO Advisory Opinion* requires that, in the process of treaty interpretation, it is necessary to examine the organisation's objectives as well as its practice.[117] Taking into account the scope of the activities of the specialised agencies, an express power to suspend or expel cannot be conditioned on criteria outside the purposes contained in the constitutional instrument. Consequently, the suspension of South Africa from the WMO cannot be defended on the basis of the doctrine of implied powers. The resolution calling on South Africa to withdraw from the ILO may be justified on the basis of the organisation's social justice mandate, but in 1961 the organisation still lacked an exclusion clause in its constitution. Applying Claude's rule of essentiality (that states should only be excluded if their presence detracts from the organisation's functions),[118] the presence of all three states in the specialised agencies did not detract from the ability of the agencies to

[114] Rahmatullah Khan, *Implied Powers of the United Nations* (Delhi: Vikas Publications, 1970), p. 124. See also Schermers and Blokker, *International Institutional Law* at para. 148.

[115] Schemers and Blokker, *International Institutional Law* at para. 148; Magliveras, *Exclusion from Participation*, pp. 232–40.

[116] VCLT, Art. 60(3). [117] Chapter 1, p. 37. [118] *Ibid.*, p. 42.

fulfil their functions and, on the contrary, breached the much-cited principle of universality.

The result of the failure of the specialised agencies to bring these exclusion decisions within the parameters of their constitutional instruments and functions is that critics have claimed that the agencies have been inappropriately politicised. It is argued that the human rights and democratic record of a member state should have no bearing on whether it can participate in the activities of a specialised universal organisation. Of course, politicisation does not always have to be viewed negatively. At the plenary session of the General Assembly where the resolution was passed enabling Spain to participate in the specialised agencies, the USSR argued that the agencies should not be viewed as non-political organisations as they must be guided by UN policies and principles in carrying out their work.[119] From this perspective, human rights and democracy issues can be seen as having a legitimate role in determining the membership of specialised agencies, and a positive part to play in bolstering the legitimacy of decisions to exclude. However, if this analysis were to be adopted, it would be expected that the specialised agencies would apply the criteria consistently to all members. It is perhaps in this respect that the agencies' decisions have been politicised as it is clear that some members have been targeted while other states in breach of democracy and human rights principles have not been subject to membership sanctions. Bulgaria may have suggested that the UPU be a 'nursery for democracy' in 1947, but certainly was not looking for these principles to be applied comprehensively to all members. In this sense the actions of the specialised agencies have failed the criteria of coherence as an element of the legitimacy of membership decisions.

III International trade organisations

A The relationship between economic growth and the promotion of human rights in the constitutions of trade organisations

The constitutions of organisations devoted to facilitating international trade are much more explicit than the specialised agencies in linking their technical (economic) purposes to a broader concern with human welfare. International economic and trade regimes and international human rights law are perceived as having similar aims – to promote

[119] UN GAOR, 5th session, 304th plenary meeting, 1950, pp. 375–6.

human well-being and development.[120] According to the Marrakesh Agreement Establishing the World Trade Organization, trade liberalisation must be pursued 'with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income', at the same time 'allowing for the optimal use of the world's resources in accordance with the objective of sustainable development'.[121] Consequently, there appear to be clear linkages between the promotion of economic and social rights, the right to development and the stated objectives of the WTO, despite the fact that human rights are not mentioned in the Agreement.[122] The constitutions and treaties of regional economic communities in the Americas, Africa and the Caribbean transcend broad commitments to increase development and standards of living to explicitly support democratic government and human rights as fundamental principles. In the Americas, both CAN and the Southern Cone Common Market (MERCOSUR) are subregional organisations with the shared aim of establishing a common external tariff.[123] Both organisations have articulated their support for democracy in two documents: the Andean Community Commitment to Democracy and the Protocol of Ushuaia on Democratic Commitment in MERCOSUR.[124] In 1997 members of CARICOM, an organisation

[120] Caroline Dommen, 'Human Rights and Trade: Two Practical Suggestions for Promoting Coordination and Coherence', in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi (eds.), *Human Rights and International Trade* (Oxford University Press, 2005), p. 199.

[121] Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), preamble ('Marrakesh Agreement').

[122] See Sarah Joseph, 'Trade to Live or Live to Trade: The World Trade Organization, Development and Poverty', in Mashood Barderin and Robert McCorquodale (eds.), *Economic, Social, and Cultural Rights in Action* (Oxford University Press, 2007), p. 390.

[123] Cartagena Agreement, Art. 3(e); Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, opened for signature 26 March 1991, 2140 UNTS 319 (entered into force 29 November 1991), Art. 1 ('Treaty of Asunción'). The four members of CAN are Bolivia, Colombia, Ecuador and Peru. In 2006 President Chávez announced Venezuela's withdrawal from CAN and a memorandum of understanding was subsequently signed between the members and Venezuela: see 'Decision 641 – Approval of the Memorandum of Understanding signed by the Member Countries of the Andean Community and the Bolívarian Republic of Venezuela', 9 August 2006. The four members of MERCOSUR are Argentina, Brazil, Paraguay and Uruguay. Each organisation also includes associate members from the other organisation.

[124] Andean Community Commitment to Democracy, opened for signature 27 October 1998 (entered into force 10 June 2000), 'Protocol to the Cartagena Agreement'; Ushuaia Protocol on Democratic Commitment in MERCOSUR, the Republic of Bolivia and the

established primarily for the purpose of economic integration, adopted the Charter of Civil Society for the Caribbean Community, containing pledges to uphold a number of human rights and fundamental freedoms.[125] The largest economic grouping in Africa, the African Economic Community (AEC), includes human and peoples' rights as part of its vision for a continent-wide economic community in Africa.[126] This link between economic integration and human rights is replicated in the treaties establishing the subregional African economic communities, such as ECOWAS and the Southern African Development Community (SADC). The founding treaties of both these institutions were revised in the 1990s with additional weight being given to democracy and human rights issues.[127]

As a result of these provisions there appears to be no question that economic development and human rights are inextricably linked. However, despite these statements linking international trade and human rights, and an abundance of literature discussing the human rights implications of international trading rules,[128] rarely do commentators question whether human rights and democracy should dictate the membership policies of trade organisations. In contrast to the specialised agencies, the practice in the international trade organisations has revolved around the interpretation of explicit powers of admission and exclusion rather than the implication of powers to suspend or expel. The

Republic of Chile, opened for signature 24 July 1998, 2177 UNTS 383 (entered into force 17 January 2002) ('Ushuaia Protocol').

[125] 'Charter of Civil Society for the Caribbean Community', adopted by the Conference of Heads of Government of the Caribbean Community at their Eighth Inter-Sessional Meeting, 19 February 1997; 'Charter of Civil Society Resolution, 1997', adopted by the Conference of Heads of Government of the Caribbean Community at their Eighth Inter-Sessional Meeting, 1997.

[126] Treaty Establishing the African Economic Community, opened for signature 3 June 1991, (1991) 30 ILM 1241 (entered into force 12 May 1994), Art. 3(g)–(h) ('Abuja Treaty').

[127] Treaty of the Southern African Development Community, Art. 5(1)(b); Treaty of the Economic Community of West African States, Art. 4(g), (j).

[128] For example, see Dommen, 'Human Rights and Trade'; Frederick M. Abbott, Christine Breining-Kaufmann and Thomas Cottier (eds.), *International Trade and Human Rights – Foundations and Conceptual Issues* (Ann Arbor: University of Michigan Press, 2006). See also the following debate in the *European Journal of International Law*: Ernst-Ulrich Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 *Eur. J. Int'l L.* 621; Robert Howse, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann' (2002) 13 *Eur. J. Int'l L.* 651; Philip Alston,'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 *Eur. J. Int'l L.* 815.

following discussion will focus on examples where trade organisations have used (or attempted to use) human rights or democracy considerations in their admission and exclusion decisions, thereby promoting the linkage between trade and human rights in their membership practice. It will begin with a discussion of the admission criteria for the WTO and will then move on to consider the constitutional provisions and practice of various regional economic communities (RECs) on suspension.

B The WTO: the potential link between trade policy, labour rights, good governance and membership

The Marrakesh Agreement does not contain an express provision linking membership to the democratic or human rights credentials of a member's government. The WTO, a global organisation devoted to trade liberalisation through the reduction of tariffs and other trade barriers and the elimination of 'discriminatory treatment in international relations',[129] does not purport to deal with humanitarian concerns. But there has been considerable debate as to the extent to which the WTO processes should take into account broader issues, such as the environment and human rights.[130] Additionally, the WTO has been criticised for the 'democratic deficit' within the organisation's processes and the lack of democratic control at the national level of WTO decision-making.[131] Commentators have suggested that one way of reducing the democratic deficit in the WTO is to focus on democracy within WTO members. For example, Atik has proposed the introduction of a democracy criterion for applicant states, although he also concedes that such a criterion could exclude major players (such as China and Russia) from the world trading system.[132] Bacchus believes that attention should be focused on deficiencies in the representative nature of existing member governments[133] rather than the potential democratic deficit within WTO procedures. While a democracy qualification is unlikely to be extended to the existing 153 members, it could be significant for the long queue of countries

[129] Marrakesh Agreement, preamble.

[130] See, for example, 'Symposium: The Boundaries of the WTO' (2002) *Am. J. Int'l L.*; Global Trade Watch, *The WTO: An Australian Guide* (2006), www.tradewatchoz.org/guide/New_WTO_Guide.pdf; Joseph, 'Trade to Live' at 390.

[131] See Chapter 1, n 111.

[132] Jeffery Atik, 'Democratizing the WTO' (2001) 33 *G.W. Int'l L.R.* 451 at 465.

[133] James Bacchus, 'A Few Thoughts on Legitimacy, Democracy, and the WTO' (2004) 3 *J. Int'l Eco. L.* 667 at 670.

waiting to complete the accession negotiations.[134] These suggestions give rise to the following question: to what extent do existing procedures within the WTO require discussion of the human rights and democratic record of an applicant?

1 The role of human rights in the accession process

The Marrakesh Agreement divides the WTO's membership into original members and countries applying to join in the future.[135] The admission provision is brief and states that:

> Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on the terms to be agreed between it and the WTO.[136]

Admission decisions are made by the Ministerial Conference on the basis of a two-thirds majority of the membership.[137] The 'terms' that comprise the accession process are 'left to negotiations between the WTO Members and the Applicant'.[138] The Agreement describes 'least-developed countries' as a special category, providing that they 'will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities'.[139] Existing members play a particularly important role in the negotiations as they constitute the participants in the working party established by the General Council and are also involved in bilateral negotiations. The accession process entails gathering information on the applicant's trading regime, multilateral negotiations relating to WTO rules on goods, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and trade in services, and bilateral negotiations on market access.[140] The accession terms are contained in three documents: the report of the working party established by the General

[134] As at 14 September 2009, there were twenty-nine countries in accession negotiations with the WTO. See *Summary Table of Ongoing Accession*, WTO (April 2009), www.wto.org/english/thewto_e/acc_e/status_e.htm.

[135] Marrakesh Agreement, Arts. XI, XII. [136] *Ibid.*, Art. XII(1). [137] *Ibid.*, Art. XII(2).

[138] WTO Secretariat, 'Technical Note on the Accession Process', WTO Doc. WT/ACC/10/Rev.3, 30 November 2005, p. 3.

[139] Marrakesh Agreement, Art. XI(2). The need to simplify and streamline accession procedures for least-developed countries is acknowledged in a set of guidelines adopted by the General Council in 2002: 'Accession of Least-Developed Countries', WTO Doc. WT/L/508, 20 January 2003.

[140] WTO Secretariat, 'Technical Note on the Accession Process', p. 1.

Council, the protocol of accession and the attached schedules listing the member's specific commitments.[141]

Due to the private nature of any bilateral negotiations, it is difficult to gauge the degree to which human rights considerations may play a role in negotiations between individual members and applicants (if at all). The most concrete record of the commitments made by applicants is contained in the protocol of accession signed at the completion of all negotiations. To date, none of these protocols commit individual countries to improving their human rights or democratic record. While there were many discussions outside the organisation concerning China's record on human rights and democracy,[142] no explicit human rights and democracy conditions were listed in its protocol of accession. Despite the lack of such criteria, human rights were relevant to the decision of the US Congress to grant Permanent Normal Trade Relations (PNTR) status to China in 2000. This decision in turn paved the way for China to join the WTO. For PNTR status to be granted, Congress needed to revoke the application of the Jackson-Vanik law with respect to China. The US Congress links human rights concerns with trade relations through the Jackson-Vanik law amending the Trade Act 1974 (US). This amendment prohibits the US President from granting most-favoured nation (MFN) status to a country with a non-market economy that denies its citizens the freedom to emigrate until the President has reported to Congress about that country's emigration policies.[143] The stated purpose of the amendment is to 'assure the continued dedication of the United States to fundamental human rights'.[144] As a result of the Jackson-Vanik amendment, China's MFN status was reviewed annually in the context of a debate on its human rights record. The removal of this requirement in 2000 enabled the US to grant MFN status to China as required by Article I of the General Agreement on Tariffs and

[141] Karen Halverson, 'China's WTO Accession: Economic, Legal and Political Implications' (2004) 27 *Boston Coll. Int'l & Comp. L.R.* 319 at 323–4.

[142] See Alice E. S. Tay and Hamish Redd, 'China: Trade, Law and Human Rights', in Deborah Z. Cass, Brett G. Williams and George Barker (eds.), *China and the World Trading System – Entering the New Millennium* (New York: Cambridge University Press, 2003), p. 156; Robert E. Scott, 'China Can Wait', Economic Policy Institute Briefing Paper, May 1999, www.epi.org/briefingpapers/china99.pdf.

[143] Trade Act, 19 USC § 2432(a) (1974). The amendment is named after its two sponsors: Senator Henry Jackson and Congressman Charles A. Vanik: Di Jiang-Schuerger, 'The Most Favoured Nation Trade Status and China: The Debate Should Stop Here' (1997–98) *John Marsh. L.R.* 1321 at 1323.

[144] Trade Act, 19 USC § 2432(a) (1974).

Trade.[145] A similar process has resulted in other countries subject to the Jackson-Vanik requirements being granted PNTR status by the US.[146] Although selected human rights principles may have been relevant to the US process, ultimately China's admission to the WTO reinforces the conclusion that democracy does not play a role in accession negotiations.

The most persistent human rights issue to arise in the context of the WTO is the status of core labour standards. Prior to the creation of the WTO, a number of industrialised countries and workers' groups supported the insertion of a 'social clause' protecting worker's rights into the WTO agreement.[147] The status of core labour standards as an issue relevant to accession became apparent during the negotiations for the admission of Cambodia and Vietnam. The draft report of the Working Party on Cambodia's accession contained two paragraphs on core labour standards, noting that the 'implementation of core labour standards in Cambodia remained problematic in certain areas such as freedom of association ... and required overtime'.[148] Thus, specific reference was made to aspects of labour standards aimed at the protection of the individual. However, reference to these standards was removed from the final version of the report.[149] Core labour standards also featured in the negotiations for the admission of Vietnam. The first draft of the working party report included reference to a member's request that Vietnam provide information on three labour issues, including 'the provision of core labour standards to workers in Viet Nam through national law and practice'.[150] Once again, at Vietnam's request, this section was deleted from the final report.[151] Vietnam's request is in

[145] General Agreement on Tariffs and Trade, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 29 July 1948), Art. 1 ('GATT 1947'); Halverson, 'China's WTO Accession' at 324–5.

[146] For example, Romania, Mongolia and the Czech Republic: William H. Cooper, 'Congressional Research Service Report for Congress – The Jackson-Vanik Amendment and Candidate Countries for WTO Accession: Issues for Congress', 14 March 2006.

[147] Francis Maupain, 'Is the ILO Effective in Upholding Workers' Rights?: Reflections on the Myanmar Experience', in Philip Alston (ed.), *Labour Rights as Human Rights* (Oxford University Press, 2005), p. 125.

[148] 'Draft Report of the Working Party on the Accession of Cambodia', WTO Doc. WT/ACC/SPEC/KHM/4, 24 March 2003 at para. 131.

[149] See 'Report of the Working Party on the Accession of Cambodia', WTO Doc. WT/ACC/KHM/21, 15 August 2003.

[150] 'Draft Report of the Working Party on the Accession of Viet Nam', WTO Doc. WT/ACC/SPEC/VNM/5, 22 November 2004.

[151] 'Viet Nam's Talks Now "Well into Final Stages"', WTO News Item, 27 March 2006, www.wto.org/english/news_e/news06_e/acc_vietnam_27march06_e.htm. See

accordance with the stance adopted by developing countries at the 1996 Singapore Ministerial Meeting, where they strongly rejected extending the WTO's reach to core labour standards. In their view, 'the comparative advantage' of developing countries in this area 'must in no way be put into question'.[152] To date, human rights principles have not featured in the published working party reports or the protocols of accession, but the introduction of core labour standards into the admission process demonstrates that WTO members have attempted to incorporate reference to human rights principles where they could impact on trade policy.

2 The requirements of good governance in trade policy

Human rights and democracy are sometimes linked to wider concerns such as good governance and transparent and accountable government processes. Following the Uruguay round of negotiations, these principles gained greater recognition within WTO processes.[153] Various WTO agreements include provisions requiring transparency and accountability at the national level, through the publication of laws relating to the scope of the agreements, the uniform and impartial application of such laws, and provisions enabling effective enforcement. For example, Article X of GATT provides that '[l]aws, regulations, judicial decisions and administrative rulings' pertaining to matters within the ambit of GATT 'shall be published promptly in such a manner as to enable governments and traders to become acquainted with them'.[154] Transparency in relation to existing and new laws is also mandated by Article III of the General Agreement on Trade in Services.[155] Procedures for review are included in GATT and TRIPS. GATT states that contracting parties must have independent procedures in place for the 'prompt review and correction of administrative action relating to customs matters'.[156] Article 41(a) of TRIPS requires the availability of enforcement procedures to 'permit effective action against any act of infringement of intellectual property rights' covered by TRIPS. Such procedures must be 'fair and equitable', decisions must be 'reasoned' and

also 'Report of the Working Party on the Accession of Viet Nam', WTO Doc. WT/ACC/VNM/48, 27 October 2006.

[152] 'Singapore Ministerial Declaration', WTO Doc. WT/MIN(96)/Dec, adopted on 13 December 1996 at para. 4.

[153] Sylvia Ostry, 'WTO Membership for China: To Be and Not To Be – Is that the Answer?', in Cass, Williams and Barker (eds.), *China and the World Trading System*, p. 34.

[154] GATT 1947, Art. X(1).

[155] Marrakesh Agreement, annex 1B (General Agreement on Trade in Services) 1869 UNTS 183, Art. III(1)–(3) (GATS).

[156] GATT 1947, Art. X(3)(b).

judicial review should be available.[157] These provisions only apply to matters within the ambit of the WTO and therefore fall far short of the requirement for effective remedies (and also a claimed right to access government information) as defined by international human rights law. However, they can be seen as being encompassed within the values of transparency, accountability and the rule of law as demanded by good governance principles.

Commitments requiring applicants to publish WTO-related measures, particularly before such measures are implemented or enforced, have become more detailed in the reports of recent working parties.[158] For example, the report of the Working Party on Tonga referred to Tonga's commitment to publish 'all regulations and other measures pertaining to or affecting trade in goods, services and TRIPS, except for laws, regulations and other measures involving national emergency or security, or for which publication would impede law enforcement'.[159] Furthermore, such laws would not operate until publication.[160] Most notably, good governance obligations in trade policy assumed a prominent place during accession negotiations for China.[161] In its Protocol of Accession, China undertook to publish 'all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange'.[162] It also agreed to apply and administer relevant laws 'in a uniform, impartial and reasonable manner'[163] and to establish or maintain procedures for review of decisions relating to the implementation of WTO agreements, including an appeal right.[164] As is noted by Halverson, China was not the only applicant facing difficulties meeting the transparency requirements, but what was unusual was the extent to which rule of law discussions became part of the accession process.[165] While doubts may exist as to China's ability to fulfil these

[157] Marrakesh Agreement, annex IC (Agreement on Trade-Related Aspects of Intellectual Property Rights) 1867 UNTS 299, Art. 41(2)–(4).
[158] Peter Williams, *A Handbook on Accession to the WTO* (Cambridge University Press, 2008), pp. 100–11.
[159] See 'Report of the Working Party on the Accession of Tonga', WTO Doc. WT/ACC/TON/17/WT/MIN(05)/4, 2 December 2005 at para. 180.
[160] *Ibid*. For further examples of such commitments, see Williams, *Handbook on Accession*, p. 111.
[161] Halverson, 'China's WTO Accession' at 345.
[162] 'Protocol on the Accession of the People's Republic of China', WTO Doc. WT/L/432, 23 November 2001, Part I at para. 2(C).
[163] *Ibid*., Part I at para. 2(A)(2). [164] *Ibid*., Part I at para. 2(D).
[165] Halverson, 'China's WTO Accession' at 359.

requirements,[166] the accession negotiations demonstrate that issues relating to good governance (at least as far as trade policy is concerned) are relevant to admission to the WTO. However, clauses encouraging good governance in this limited sphere, while a worthy objective, should not be confused with human rights.[167] Turning from the substance to the procedure of the accession negotiations, China's admission also raises concerns in relation to the democratic nature of the accession process. The lengthy negotiations leading to China's accession and the conditions placed on countries such as Cambodia, despite the recognition in the Marrakesh Agreement of their special position, highlight the disparities in the treatment of applicants to the WTO. These issues will be explored in Chapter 6.

C Regional Economic Communities – connecting free trade and democracy through exclusion

1 Constitutional provisions of RECs

Of all the specialised institutions studied in this chapter, the constitutions of organisations established to facilitate economic integration and non-discriminatory trade within a region contain the most explicit link between democratic governance and membership. This connection is found in the treaty provisions and practice of RECs in the Americas, Africa and the Caribbean. The connection between democracy and membership found in the constitutive instruments of the RECs is demonstrative of the fact that countries join regional trade blocs for economic as well as non-economic reasons, including 'assistance in developing political and social institutions'.[168] It also indicates that RECs are extending their purposes beyond economic integration to encompass broader concerns about the way in which the governments of their member states function.

In South America both CAN and MERCOSUR expressly condition continuing membership on democratic governance. The Andean Community Commitment to Democracy stresses that 'the Andean Community is a community of democratic nations that have shown a sustained will to

[166] Ostry, 'WTO Membership for China' at 35.
[167] Thomas Cottier, 'Governance, Trade and Human Rights', in Abbott, Breining-Kaufmann and Cottier (eds.), *International Trade and Human Rights*, p. 104.
[168] Maurice Schiff and L. Alan Winters, *Regional Integration and Development* (Washington, D.C.: World Bank, 2003), p. 187.

promote democratic living and the constitutional state'.[169] It provides for a number of measures to be undertaken by the Council of Foreign Ministers of CAN in the event that 'the democratic order is disrupted in any of the Member Countries'.[170] Such measures include the '[s]uspension of the Member Country's participation in any of the bodies of the Andean Integration System'.[171] Consistent with the practice of organisations discussed in Chapter 4, suspension does not preclude other states in the Andean Community from assisting with the re-establishment of the democratic order in the wayward member.[172] The four members of MERCOSUR have also made democratic government a condition of membership, stating that 'the full effectiveness of democratic institutions is an essential condition for cooperation in the framework of the Treaty of Asunción'.[173] The members' commitment to democracy was reinforced in the Protocol of Ushuaia on Democratic Commitment in MERCOSUR, in which the members of MERCOSUR, together with Bolivia and Chile, agreed that the 'full implementation of democratic institutions is an essential condition for the pursuit of integration processes' between the parties.[174] In very similar terms to the Andean Community Commitment to Democracy, the Ushuaia Protocol provides that consultations shall be held among themselves '[i]n the event of a breach of the democratic order in a State Party to this Protocol'.[175] If the consultations are unsuccessful, then the state parties can recommend that a member be suspended from participation in the bodies of the regional integration processes.[176]

Although the founding treaties of the African economic communities all contain reference to human rights principles, only two envisage the possibility of sanctioning a member for violations of human rights or democracy: ECOWAS and SADC. In 2001 the Heads of State and Government of ECOWAS adopted the Protocol on Democracy and Good Governance, which explicitly provides for a number of sanctions, including suspension from all decision-making bodies, in the event that 'democracy is abruptly brought to an end by any means or where there is a massive violation of Human Rights in a Member State'.[177] A definition

[169] Andean Community Commitment to Democracy, preamble. [170] *Ibid*., Art. 2.
[171] *Ibid*., Art. 4(a). [172] *Ibid*., Art. 6.
[173] 'Presidential Declaration on the Democratic Commitment in MERCOSUR', 25 June 1996.
[174] Ushuaia Protocol, Art. 1. [175] *Ibid*., Art. 4. [176] *Ibid*., Art. 5.
[177] 'Protocol A/SP1/12/01 on Democracy and Good Governance, Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security', ECOWAS, 21 December 2001, Art. 45(1).

of democracy is not given in the Protocol, but the substantive articles cover a wide range of principles, including the separation of powers, independence of the judiciary, popular participation, freedom of political parties, civilian command of the armed forces and free and fair elections.[178] Suspension does not preclude ECOWAS from monitoring the situation and encouraging and supporting 'efforts being made by the suspended Member State to return to normalcy and constitutional order'.[179] The addition of this Protocol enlarges on ECOWAS's developing work in conflict resolution and peace-keeping within the region.[180] Another regional economic community, SADC, enables sanctions to be imposed against a member that 'persistently fails, without good reason, to fulfill obligations' or that 'implements policies which undermine the principles and objectives of SADC'.[181] SADC's principles include 'human rights, democracy and the rule of law'.[182] The measures that may be imposed in these two situations are to be determined 'on a case-by-case basis' by the Summit of the Heads of State or Government, leaving the choice of sanctions to be implemented to the discretion of this organ.[183] Although SADC Treaty does not specify the type of sanctions to be imposed in these cases, it states that a member may be suspended if it fails to pay its contributions for various periods specified in the Treaty.[184] Consequently, the SADC clearly envisages that suspension is a possible sanction, although there is no explicit acknowledgement in the Treaty that it is an appropriate response to violations of human rights and democracy.

2 The membership practice of RECs

The treaty provisions detailed above are, for the most part, focused on the behaviour of existing members rather than potential applicants. Given that only a few of the organisations listed have accepted new members since foundation, the concentration on current rather than future members is reflected in the membership practice.[185] Three examples highlight

[178] *Ibid.*, Art. 1. [179] *Ibid.*, Art. 45(3).

[180] See, for example, 'Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security', ECOWAS, 10 December 1999.

[181] Treaty of the Southern African Development Community, Art. 33(1)(a)–(b).

[182] *Ibid.*, Art. 4(c). [183] *Ibid.*, Art. 33(2). [184] *Ibid.*, Art. 33(1)(c), (3).

[185] On the admissions side, when debating Venezuela's application to join MERCOSUR, some Brazilian senators criticised Venezuela's commitment to democracy and its attitude towards freedom of the press. The comments highlight that democracy and human rights may be relevant, and also contentious, issues when a state applies to join an REC. After a number of delays, the Senate voted thirty-five to twenty-seven in favour

the similarity in the situations where regional economic communities have exercised their power to suspend a member state. One further example, ECOWAS's suspension of Niger, suggests that a broader range of anti-democratic behaviour may lead to membership sanctions.

In 2009 two RECs in Africa excluded member states following action by the main regional body, the African Union.[186] In March the Extraordinary Summit of SADC suspended Madagascar 'until the return of the Country to constitutional normalcy' after a civilian-military coup in which the army handed control to the leader of the opposition when the President resigned.[187] However, SADC's failure to take comparable measures against Zimbabwe despite human rights organisations highlighting numerous problems (for example, state-sponsored violence against supporters of the opposition, restrictions on freedom of expression and assembly, and flaws in the electoral process)[188] suggests that the organisation will only activate sanctions in limited circumstances. The situation in Zimbabwe is mentioned in SADC communiqués between 2007 and 2009, with the President of South Africa being appointed to facilitate dialogue between the opposition and the government of Zimbabwe.[189] But the communiqués do not specifically list the issues confronting Zimbabweans and nor did SADC impose membership sanctions.[190] In contrast, in 2009 the leaders of ECOWAS barred the newly

of ratifying Venezuela's Protocol of Adhesion. See 'Brazilian Senate Condemns Venezuela Further Delaying its Mercosur Bid', *MercoPress*, 4 September 2009; 'Brazilian Senate Gives Green Light to Venezuela in Mercosur', *Agência Senado*, 17 December 2009.

186 See Chapter 4 for a description of the events leading to the suspension of Madagascar and Guinea.

187 SADC, 'Communiqué of the Extraordinary Summit of SADC Heads of State and Government', Lozitha Royal Palace, Kingdom of Swaziland, 30 March 2009 at para. 16. See Chapter 4, p. 190.

188 Human Rights Watch, 'Bashing Dissent: Escalating Violence and State Repression in Zimbabwe', Report, 2007; Human Rights Watch, '"Bullets for Each of You": State Sponsored Violence since Zimbabwe's March 29 Elections', Report, 2008; Amnesty International, 'Zimbabwe: Moving from Words to Action', Report, 2009.

189 SADC, 'Communiqué of the 2007 Extraordinary SADC Summit of Heads of State and Government, Dar es Salaam, Tanzania', 28–29 March 2007; SADC, 'Communiqué of the SADC Heads of State Summit, Lusaka, Zambia', 17 August 2007; SADC, 'Communiqué of the 2008 First Extraordinary SADC Summit of Heads of State and Government, Lusaka, Zambia', 13 April 2008; SADC, 'Communiqué, Extraordinary Summit of SADC Heads of State and Government: Presidential Guest House, Pretoria, Republic of South Africa', 26–27 January 2009.

190 The Communiqué of the 2008 Extraordinary Summit references the 'challenges facing the people of Zimbabwe': SADC, 'Communiqué of the 2008 First Extraordinary SADC Summit of Heads of State and Government, Lusaka, Zambia', 13 April 2008, para. 10.

installed military leaders of Guinea from participating in meetings of the organisation, citing the Protocol on Democracy and Good Governance as the basis for the decision.[191] Although it is clear that ECOWAS members suspended Guinea because of the military transition, later statements emanating from the International Contact Group on Guinea, comprising a number of different organisations, demonstrated that violations of human rights such as freedom of expression and association were also of interest.[192] The Contact Group joined the AU in condemning the violent suppression of a protest in September 2009 and in calling for an International Commission of Inquiry into the event, reinforcing its concern with the 'gross' violation of human rights.[193]

The Protocol on Democracy and Good Governance was again cited when ECOWAS suspended Niger in October 2009 as a result of breaches of the Constitution and a failure to delay controversial elections. In an attempt to extend his term of office beyond the constitutionally prescribed limits, Niger's President, Mamadou Tandja, announced a referendum for a new Constitution, dissolved parliament and suspended the Constitutional Court after it annulled a presidential decree calling for the referendum. The referendum was subsequently passed in August 2009 and legislative elections were held in October (both polls were boycotted by the opposition), notwithstanding calls by ECOWAS to delay the elections in favour of commencing a political dialogue to resolve the crisis.[194] When the elections went ahead, ECOWAS suspended Niger. Referring to a statement by the Chairman of the Authority of Heads of State and Government, an ECOWAS press release issued at the time of Niger's suspension stated that 'the violation of the 1999 Constitution by the authorities in Niger, the intolerance of divergent opinions, and the muzzling of the opposition political parties . . . constitute sufficient grounds for the imposition of sanctions on Niger in accordance with

[191] ECOWAS, 'ECOWAS Leaders Reject Military Transition in Guinea', Press Release No. 003/2009, 10 January 2009.

[192] ECOWAS, 'Contact Group Expresses Concern at Slow Pace of Process [sic] of Restoration Constitutional Order in Guinea', Press Release No. 066/2009, 27 June 2009.

[193] ECOWAS, 'International Contact Group Calls for New Transitional Authority in Guinea', Press Release No. 108/2009, 13 October 2009. For the relevant AU statement, see Chapter 4, p. 189.

[194] For a summary of the events leading to ECOWAS's decision see: 'Niger – Results Validated' (2009) 46 *Africa Research Bulletin: Political, Social and Cultural Series* at 18180–1; 'Niger – Election Goes Ahead' (2009) 46 *Africa Research Bulletin: Political, Social and Cultural Series* at 18146–7.

Article 45 of the Protocol'.[195] Thus, ECOWAS has emphasised that violations of democracy outside a military coup may lead to sanctions, including suspension, being imposed.[196]

In the cases of Guinea and Niger, ECOWAS could point to a relevant legal instrument. However, the absence of an express provision mandating suspension for violations of human rights or democracy did not prevent another regional economic organisation, CARICOM, from imposing a form of membership sanction in the face of threats to democracy. In March 2004 the CARICOM Heads of Government convened an emergency session at which they issued a statement pointing to their 'alarm over the events leading to the departure from office by President Aristide and the ongoing political upheaval and violence in Haiti'.[197] Following this statement, the Heads of Government met later the same month to reaffirm that 'Haiti remains a member of the Caribbean Community', but that 'no action should be taken to legitimise the rebel forces'.[198] As the head of the interim administration of Haiti had issued a statement 'putting to sleep' Haiti's relations with CARICOM, the Heads of Government decided that it was not possible to 'receive the interim administration in the Council of the Community'.[199] Following this meeting, the Heads of Government reiterated their opposition to 'any interruption of the democratic process' and stated that the 'removal of democratically elected governments by extra-constitutional means is unacceptable to membership of the Community'.[200] In this way CARICOM announced that democracy and membership were inextricably linked. During discussions of Haiti's position, St Lucia's Prime Minister recommended the introduction of expulsion as a sanction in the event that a

[195] ECOWAS, 'ECOWAS Suspends Niger from Membership of Organisation', Press Release No. 113/2009, 21 October 2009.

[196] The AU did not exclude Niger at this point in time, but did suspend it in February 2010 after a military coup against President Tandja on 18 February. See Chapter 4, p. 191 and 'Niger – Military Coup' (2010) 47 *Africa Research Bulletin: Political, Social and Cultural Series* at 18279–81.

[197] CARICOM, 'Statement Issued by CARICOM Heads of Government at the Conclusion of an Emergency Session on the Situation in Haiti, 2–3 March 2004, Kingston, Jamaica', Press Release No. 22/2004, 3 March 2004.

[198] CARICOM, 'Statement on Haiti Issued by the Fifteenth Inter-Sessional Meeting of the Conference of Heads of Government of the Caribbean Community, 25–26 March 2004, Basseterre, St. Kitts and Nevis', Statement of Meeting, March 2004.

[199] *Ibid.*

[200] CARICOM, 'The Calivigny Statement on Haiti Issued by the Twenty-Fifth Meeting of the Conference on Heads of Government of the Caribbean Community, 4–7 July 2004, St. George's, Grenada', Statement of Meeting, 7 July 2004.

member repudiates the democratic process.[201] To date, this suggestion has not been adopted. In June 2006 the Heads of Government of CARICOM 'welcomed the return to constitutional rule in Haiti' following the presidential and parliamentary elections, and in July the leaders greeted Haiti's 'formal return . . . with great satisfaction'.[202] Although CARICOM did not formally suspend Haiti's membership, its refusal to accept the coup's leaders as Haiti's representatives is another example of *de facto* exclusion from an international organisation. The exclusion of Haiti from CARICOM and the suspension of Madagascar and Guinea from SADC and ECOWAS, respectively, reinforce the conclusion reached in Chapter 4 that regional organisations are willing to use membership sanctions against an unconstitutional change of government as the most concrete manifestation of democratic failure. ECOWAS's reaction to the situation in Niger demonstrates that the violations of democracy falling within that expression may be expanding. The response of CARICOM to the situation in Haiti highlights that RECs may choose to take action even where the violations fall outside the main functions of the organisation and despite the lack of a legal provision in the constitution mandating such a measure.

D *Extending the functions of international economic organisations through membership*

The link between human rights and economic development found in the constitutional documents of the international trade organisations has not necessarily been replicated in the membership provisions of all these organisations. For example, the WTO's status as the preeminent global trade organisation has meant that its admission criteria remain firmly related to an applicant's trading policies. Yet the introduction of core labour standards and good governance issues into the accession process proves that it is not always possible to separate human rights and democratic principles from trade considerations. The attempts to include core labour standards in the final working party reports have failed, but the efforts made suggest that some members are ready to draw

[201] CARICOM, 'Saint Lucia Prime Minister Urges Colleagues to Amend Charter', News Release No. 33/2006, 10 February 2006.

[202] CARICOM, 'Statement on Haiti's Re-admittance to the Councils of the Community', News Release No. 104/2006, 6 June 2006; CARICOM, 'Communiqué Issued at the Conclusion of the Twenty-Seventh Meeting of the Conference of Heads of Government of the Caribbean Community (CARICOM), 3–6 July 2006, Bird Rock, St. Kitts and Nevis', News Release No. 147/2006, 6 July 2006.

the link between human rights and trade in admission decisions. These developments have occurred without the introduction of additional criteria into the admission provision. By utilising arguments based on the VCLT[203] it is possible to argue that such actions fall within the Marrakesh Agreement. Article XII(1) enables a wide range of considerations to be taken into account during accession negotiations. In delineating the factors relevant to interpreting the accession provision, reference must be made to the object and purpose of the Agreement.[204] The broad statement in the Preamble to the Marrakesh Agreement linking trade liberalisation with the need to 'raise standards of living' would appear to justify the relationship between (at least some) human rights principles, trade and accession to the global trade organisation. Applying the ICJ's reasoning,[205] it may be said that these factors are connected to the (broad) admission criteria, despite the reluctance of the members to adopt these standards in final accession documents.

A number of RECs have decided that continuing membership should be based on the democratic record of a member government. While there is no doubt that in most cases suspension may be legally supported by a provision in an organisation's charter, it is nonetheless surprising to find such provisions in the founding documents and associated agreements of RECs. Furthermore, the four examples of exclusion identified have resulted from violations of democratic principles, even though the promotion of democracy and human rights were not the primary objectives of these organisations at foundation (when compared with the desire to promote a free trade area). Taking a strictly functionalist approach to the application of membership sanctions, the actions taken by SADC, ECOWAS and CARICOM do not assist in the fulfilment of their most important roles. Instead, the exclusion policies adopted by RECs in Africa and the Americas are further evidence of a change in their constitutional functions. As was the case with the EU, the development of the link between participation and democracy in the constitutional provisions of these organisations is part of a move to broaden their agenda beyond economic integration and free trade to encompass other aspects of regional cooperation. The adoption of these criteria by RECs throughout the international community highlights that human rights and democracy are an important element in the decision-making

[203] See Chapter 1, p. 34. [204] VCLT, Art. 31(1).
[205] *First Admissions Case* at 62. See Chapter 1, p. 24.

processes of international organisations with a variety of purposes and roles.

IV Conclusion

The aim of this chapter was to examine the extent to which the functions of specialised organisations and the legal provisions contained in their charters have influenced the application of human rights and democracy conditions in their membership criteria. On one level the answer to that question would appear to be 'not at all'. The practice of the UN specialised agencies indicates that human rights and democracy have shaped decisions on participation, despite the fact that the technical purposes of the agencies do not encompass these issues. The specialised agencies, like the RECs in the Caribbean and Africa, have used exclusionary tactics as a means of criticising the human rights and democratic record of members. In the case of RECs in both Africa and the Americas, suspension provisions were introduced in the 1990s to reinforce articles in the constituent documents emphasising the importance of democracy to regional integration. The introduction of such provisions leaves no doubt as to the legality of such actions; however, the practice of excluding members for violations of democracy falls outside the major purposes for which these organisations were founded. Members of the WTO have raised the possibility that issues such as core labour rights and good governance may be relevant to admission, at least to the extent that such issues impact on an applicant's ability to fulfil the organisation's trading functions. In the process, the acknowledged link between human rights and trade has been highlighted.

Members of specialised organisations have recommended either the suspension or expulsion of members perceived as egregious offenders of human rights and democratic principles. Given the narrower purposes of the organisations studied in this chapter, their willingness to use human rights and democracy as criteria conditioning membership decisions throws into sharper relief the importance of these principles to international organisations as a whole. In this respect, Archer's comment that an organisation's membership criteria inform us about its aspirations is pertinent.[206] The constitutional provisions (and the attempts to amend such provisions), as well as the actions of specialised organisations in interpreting the relevant articles, suggest that a wide range of

[206] Clive Archer, *International Organizations*, 3rd edn (New York: Routledge, 2001), p. 45.

international organisations view the implementation of human rights and democracy by their members as significant matters. These principles must therefore be regarded as increasingly important to specialised organisations, not only as substantive legal rules regulating the conduct of members, but also as principles governing the framework of such organisations. Although in the case of the UN specialised agencies the use of human rights and democracy conditions may be characterised as the result of 'politics', this does not diminish the fact that the members phrased their concerns about particular states in the language of human rights and democracy. The range of organisations utilising these criteria is evidence that the practice of international institutions is developing to integrate these principles into the processes governing some of their most basic decisions.

6

Legitimacy, democracy and membership

I Introduction

The practice examined in the four previous chapters demonstrates that human rights and democracy have played an important role in determining both admission to and exclusion from a wide variety of international organisations. This movement is not limited to international or regional organisations of the West, but includes organisations of a global and universal character, as well as those established outside Europe. Human rights and democracy criteria have not been consistently applied within an organisation or across organisations with similar mandates or membership policies, but nevertheless have influenced decisions on participation. The role of these criteria has ranged from a form of collective legitimation of a state to a means of integrating countries within a region; a criterion for determining the application of membership sanctions and a method of promoting an organisation's ability to fulfil its functions. Individual member states and groups of states have also used the language of human rights and democracy in membership decisions to fulfil their own political objectives or to advance their ideological views. Admission and exclusion decisions have been conditioned on these criteria, although such a policy may clash with other objectives or purposes of the organisation, such as universality, regional integration and non-intervention in the domestic affairs of member states. Furthermore, the lack of a power within a constituent instrument expressly permitting an international organisation to expel or suspend a state has failed to prevent organisations excluding a member on the basis of human rights violations or breaches of democracy.

This chapter will begin by tracing the different roles played by human rights and democracy in the membership criteria of international organisations. Part III will then analyse the problems revealed with the practice from the perspective of the concept of legitimacy outlined in Chapter 1, distilling some key conclusions from the discussion in the previous four chapters. In Part IV the focus moves to another aspect of

democracy – the democratisation of international organisations. Up until this point, the analysis undertaken in this book has been concerned with the role played by democracy as a criterion for the participation of states in international organisations. At various points questions have been raised as to whether the process for determining membership (for example, in the Security Council, the EU and the WTO) accords with the vision of democracy being required of members. If democracy is being promoted as a desirable value for members of an international organisation, then it would seem appropriate that it should also be applied within the organisation. Part IV examines the place of democracy in international organisations and, in particular, the extent to which the process for admitting and excluding states adheres to the democratic principles being demanded of applicants and members. The chapter concludes by examining the consequences of conditioning membership on human rights and democracy from the perspective of the process of democratisation and the enforcement of human rights law. Although the consequences of the practice of membership conditionality are equivocal, international organisations should not shy away from using membership criteria as one of a number of strategies to protect human rights and democracy.

II The roles of human rights and democracy in determining participation

The practice reveals that international organisations have conditioned membership criteria on human rights and democracy for a number of different reasons. First, these criteria have been used in admission policies in order to legitimise a state's place in the international community (the League of Nations and the UN) or within a regional grouping. The League of Nations and the UN have used their admission conditions as a method of validating a state's place in the international community while at the same time moving towards the goal of universal membership. The democratic and human rights record of applicants was raised when discussing the criteria of 'self-governing' at the League of Nations. It has also been employed when debating the meaning of 'peace-loving' or 'statehood' at the UN in order to either cast doubt on an applicant's worthiness or to highlight its acceptability for membership of the preeminent international institution of the time. Regional organisations have used human rights and democracy as criteria indicating acceptance (or otherwise) of a state's ability to participate in a regional community – the ultimate aim being the enhancement of the

process of regional integration. This is most pronounced in the European institutions where the introduction and progressive development of human rights and democracy conditions in the admission process is concerned with the desire to set values for participation in Europe. The language of rights has also been utilised in the membership practice of regional organisations outside Europe, albeit at the other end of the membership spectrum. By suspending member states for breaching democracy, organisations in Africa, the Americas and the Pacific have demonstrated that participation is about more than economics and security and, as is the case with Europe, encompasses the establishment of values. The exclusion of states from organisations such as the AU, the OAS, the Pacific Islands Forum and ECOWAS is a method of denying a member's credibility within a regional grouping with a view to placing pressure on that member to conform to certain standards.

Organisations as diverse as the OSCE, the Commonwealth, the UN specialised agencies and regional institutions in Africa have suspended states for breaching human rights and democracy, despite the incompatibility of such action with other fundamental principles. The use of human rights and democracy as criteria to determine exclusion in many of these organisations is not only about sanctioning aberrant behaviour, but also performs a second role – legitimising the organisation in the eyes of other international actors. For example, when the WMO debated the suspension of apartheid South Africa in 1975, a delegate referred to the embarrassment caused to the organisation by South Africa's continued presence in its ranks. Members were concerned about the way in which the WMO would be viewed given that it was the only specialised agency not taking action against South Africa at the time.[1] The Commonwealth's decision to adopt the Millbrook Action Programme, enabling that organisation to suspend a member in the event of an unconstitutional change of government, was part of the Commonwealth's desire to forge a more prominent role for itself in the international community on issues of democracy, good governance and human rights. In the words of the British Prime Minister at the Harare CHOGM, the Commonwealth could 'catch the tidal wave of human rights or democracy ... [o]r be carried along by it'.[2] Regional

[1] See Chapter 5, p. 234.

[2] Prime Minister John Major, 'Address at the Opening Ceremony of the Commonwealth Heads of Government Meeting', Opening Ceremony of the Commonwealth Heads of Government Meeting, Harare, 16 October 1991.

organisations in Asia and Africa have also exhibited the same concern. For example, the decision by Myanmar not to take up its turn as chair of ASEAN was partly due to pressure exerted by the US and the EU on ASEAN, including a threat to boycott ASEAN meetings if Myanmar occupied the role without improving its human rights record.[3] A similar rationale can be attributed to the AU, where the decision to suspend an undemocratic member is part of a push to assert the members' credentials with respect to issues of democracy and good political governance concerning states and entities within, and also outside, Africa.[4]

Third, the practice of introducing human rights and democracy into the membership criteria of international organisations has been viewed as a method of enhancing an organisation's ability to fulfil its functions. In Europe the connection between admission and human rights and democracy is viewed as essential to the goal of regional integration. In particular, the EU has linked its ability to achieve economic integration with fulfilment of the 'political objectives'; that is, a commitment to democracy, human rights, the protection of minorities and the rule of law. Regional trade organisations in the Americas, Africa and the Caribbean have also aligned their desire to achieve a free trade area or customs union with the promotion of democratic government within member states. Some members of the WTO have attempted to connect the WTO's primary function to promote free trade with core labour standards through the admission process. To date, these attempts have failed; nevertheless, good governance in trade policy has been factored into the accession criteria (although it is recognised that this is not the same as human rights conditionality). The language of functions has been employed in the specialised agencies of the UN when excluding

[3] See 'European Parliament Resolution on Burma', Res. No. P6_TA(2005)0186, 12 May 2005.

[4] This is also apparent in the establishment of the African Peer Review Mechanism (APRM) as part of the New Partnership for Africa's Development (NEPAD). The APRM is a voluntary peer review mechanism designed to ensure that states conform to agreed standards in certain areas, including democracy and good political governance: 'African Peer Review Mechanism (APRM): Base Document', Doc. No. AHG/235 (XXXVIII), Annex II, 38th Ordinary Session of the Assembly of Heads of State and Government, Durban, South Africa, 8 July 2002. Although not an explicit aim of the APRM, the possibility of increased foreign investment and partnerships with countries outside Africa are seen as potential outcomes of a positive assessment: see Kempe Ronald Hope, 'Toward Good Governance and Sustainable Development: The African Peer Review Mechanism' (2005) 18 *Governance* 283 at 301–2; and comments by Wiseman Nkuhlu (former Executive Head, NEPAD Secretariat) in 'Well, A Little' (2004) 8363 *The Economist* 45.

states for breaches of democracy and human rights. In the WMO, the UPU and the ITU a number of representatives linked their attempts to suspend or expel South Africa and Israel to the various agencies' ability to fulfil their respective roles. In most cases these attempts were not compelling due to the difficulty in connecting the decision to exclude the member with the objects and purposes of the organisation. Despite this asymmetry, the challenges were still made on the basis of human rights and democracy.

In some international organisations the introduction of human rights and democracy into the membership criteria has also signalled a change in the organisation's functions. This is apparent in NATO, the AU, ECOWAS, CARICOM and the Pacific Islands Forum, where the introduction of democracy and human rights considerations has indicated that the organisation is enlarging the scope of its activities and moving into new fields of cooperation. In the case of NATO this has been achieved without constitutional change, while in ECOWAS and the AU the constituent instruments have been revised to explicitly include human rights, democracy and good governance principles. The move to expand the roles of CARICOM and the Pacific Islands Forum has been achieved through the adoption of additional instruments. In the first three organisations named, the most obvious manifestation of the growth in activities has been the provision of military forces in peace enforcement and humanitarian assistance roles. In CARICOM and the Pacific Islands Forum the rise in importance of rights issues is demonstrated by the adoption of the Charter of Civil Society for the Caribbean Community and the Biketewa Declaration, both listing a number of human rights principles.[5] The use of membership sanctions to punish the most egregious breaches of democratic government is a means of supporting the addition of these new activities and functions.

Finally, human rights and democracy have been introduced into the membership criteria as a form of collateral attack on unpopular states or international pariahs. For example, in various UN specialised agencies, human rights and democracy issues were raised by members during

[5] 'Charter of Civil Society for the Caribbean Community', adopted by the Conference of Heads of Government of the Caribbean Community at their Eighth Inter-Sessional Meeting, 19 February 1997; 'Charter of Civil Society Resolution, 1997', adopted by the Conference of Heads of Government of the Caribbean Community at their Eighth Inter-Sessional Meeting, 19 February 1997; Thirty-First Pacific Islands Forum, 'Forum Communiqué 2000', Tarawa, Kiribati, 27–30 October 2000, attachment 1, 'Biketawa Declaration'. See Chapter 5, p. 248; Chapter 4, p. 200.

debates to exclude Spain as a method of strengthening resolutions calling for removal. While the principal reason for the opposition to Spain's membership was based on its War record, human rights and democracy concerns enhanced the legitimacy of the action. In the League of Nations, the human rights and democracy credentials of states were raised during membership debates throughout the life of the organisation in order to boost a potential member's status or, alternatively, to quash its claims for admission. Most prominently, members cited misgivings about the lack of democratic government and religious freedom in the USSR when it was invited to become a member of the League in 1934, although the real fear was communism. During the admission crisis in the early years of the UN, human rights and democracy were raised, particularly by the West, as a method of dismissing the claims for admission by countries from the Soviet bloc. The motivating factor behind the use of the veto power was antipathy towards the USSR, but human rights issues were used to strengthen the case for non-admission. Although concerns about an applicant's human rights record did not ultimately prevent a state becoming a member of either organisation, existing members voiced either their approval or their anxieties in the language of human rights and democracy. The end result was admission, but it was significant that members utilised the membership process to express their concerns about a state's human rights record. The application of human rights and democracy in this context highlights the fact that international organisations and their members are applying these principles in the decision-making processes for determining institutional questions, as well as adopting declarations and treaties on human rights that guide the conduct of members.[6] But the use of these criteria to achieve the political goals of certain members, despite the absence of any specific provision in the organisations' constitutions, raises issues regarding the legitimacy of the practice.

III The legitimacy of the practice

This study of the role of human rights and democracy in determining the participation of states in international organisations reveals that there are problems with the use of these criteria which may undermine the legitimacy of the practice. These include potential non-compliance with the constituent instrument, the incompatibility of the practice with the

[6] See Chapter 1, pp. 5–16.

functions and purposes of an organisation, and the lack of clarity and coherence in the application of the criteria. Each of these issues will be considered in turn.

A The question of legality and the constituent instrument

As is stated in Chapter 1, the question of legality must be assessed by reference to the constitutional instrument of the relevant organisation. Amongst the organisations studied, the issue of compliance with the constituent document can be divided into four issues. First, there are organisations such as the Council of Europe, the OAS and the AU, where the founding treaty expressly includes human rights and/or democracy as conditions governing admission or exclusion. In other organisations, including MERCOSUR, the Andean Community and ECOWAS, additional protocols or treaties have been adopted conditioning membership decisions (usually exclusion) on a state's democratic or human rights record. Few issues of legality have arisen in relation to the membership practice of these organisations. When determining admission, the Council of Europe has certainly enlarged the range of rights relevant to assessing whether an applicant fulfils the Article 3 conditions of 'human rights and fundamental freedoms' since the organisation was founded. However, given the development of human rights law and the proliferation of human rights treaties in Europe, it would be difficult to argue that this practice is contrary to the Statute of the Council of Europe or would violate the principles of treaty interpretation outlined by the ICJ. At the other end of the membership process, MERCOSUR and the Andean Community have yet to employ their powers to suspend a member in breach of democratic principles. To date, the OAS, ECOWAS and the AU have only exercised their powers of suspension in circumstances clearly falling within the powers contained in the Charter of the OAS and the Democratic Charter, the ECOWAS Protocol on Democracy and Good Governance and the Constitutive Act of the African Union (and subsequent AU protocols) respectively.

Second, there are a number of organisations where the power to admit or exclude is not expressly subject to human rights or democracy conditionality, but even in these cases such considerations have been brought into the membership process either formally or informally. In the former group are organisations such as the EU, NATO, the Commonwealth, the Pacific Islands Forum and the OSCE, where additional requirements of human rights and democracy have been added to

the original membership criteria. The latter group includes the UN, the WTO and the WMO – organisations that have taken (or have attempted to take) into account human rights and democracy concerns when deciding whether to admit or exclude individual states, despite the lack of documentary provisions. In accordance with Article 31 of the VCLT and the reasoning of the ICJ, the legality of this practice must be assessed by reference to the purposes and functions of the organisation. In the EU and NATO the practice of attaching human rights and democracy conditions to membership applications, for example, through the EU's Copenhagen Council decision or NATO's Membership Action Plan is not explicitly in contravention of the wide purposes expressed in their respective treaties. The extra requirements may have been termed 'quasi-legal'[7] due to the fact that they are not located in the founding documents, but they appear to constitute a permissible interpretation of those documents. In the case of the Commonwealth, the OSCE and the Pacific Islands Forum, the introduction of criteria conditioning the power to suspend has been aligned to the organisations' mandates to promote respect for human rights and democratic government. But it is also in contravention of their founding principles, including sovereignty, non-intervention and informality. Nevertheless, given the flexible constitutional arrangements of these three organisations, as well as the absence of binding treaty provisions, the practice cannot be viewed as illegal.

A similar conclusion can be reached in relation to the UN, although for different reasons. Despite the fact that the power of admission in Article 4 is not explicitly conditioned on human rights or democracy, such issues have been raised in admission debates. The motivation behind the discussions may have been political (for example, antipathy towards a particular candidate or its supporters), but the consideration of human rights issues in admission decisions may not be *ultra vires* the UN Charter. In the *First Admissions Case* the ICJ recognised the problem of separating political and legal considerations, and, as is highlighted by Crawford, 'it is difficult to tell whether the real political factors at issue in any specific case have been permissible ones'.[8] According to the ICJ, the Security Council should act in accordance with the purposes and principles of the UN Charter,[9] and these principles include the promotion of

[7] See Chapter 3, n 24.
[8] James Crawford, *The Creation of States in International Law*, 2nd edn (Oxford University Press, 2006), p. 180.
[9] See Chapter 2, p. 90.

human rights. This reasoning leads to the conclusion that human rights are within the range of considerations relevant to the exercise of the power in Article 4. This is particularly the case where human rights issues may impinge on matters of peace and security – fundamental principles of the organisation.

It is more difficult to argue that human rights and democracy are pertinent matters in determining admission to specialised organisations possessing broad powers to admit or suspend states. In the case of the WMO it is impossible to align the decision to suspend South Africa from membership with the non-fulfilment of a member's obligations (as required by the WMO Convention), thus indicating that the decision is tainted with illegality. The Marrakesh Agreement[10] gives the WTO a wide power to admit states subject to the terms to be agreed between the organisation and the applicant. For the most part, human rights and democracy issues have been outside the purview of the accession process, despite calls for democratic government (by commentators) and core labour standards (by members) to be included in accession negotiations. Good governance in relation to trade policy played a role in China's negotiations, although the lack of democratic government more generally did not. The attempts to raise core labour standards in the working party reports for Cambodia and Vietnam ultimately failed in accordance with the agreement reached at the Singapore Ministerial Meeting that labour rights should be dealt with by the ILO. Even if other members had been successful in obtaining agreement to refer to core labour rights in the reports, it is doubtful that such references would have been outside the accession power in the Marrakesh Agreement. The WTO's purposes include raising standards of living,[11] and labour issues have both human rights and trade implications.

The third group of legal issues arises when organisations exercise powers to suspend or expel a member in the absence of relevant constitutional provisions. Does the doctrine of implied powers accommodate such actions? As detailed in Chapter 5, many writers deny that implied powers can be used as a basis for suspending or expelling a member of an international organisation. According to the narrow approach espoused by Justice Hackworth, powers may be implied from the express powers located in the constitutional instrument.[12] The majority of the ICJ in the

[10] Marrakesh Agreement, Art. XII(1). [11] *Ibid*., preamble.
[12] *Reparations Case* at 198. See Chapter 1, n 148.

Reparations Case[13] took a broad approach and relied upon the principle of effectiveness in deciding that powers may be implied to enable the organisation to fulfil its purposes. Even relying upon this broader approach, it is difficult to justify the implication of a power to suspend or expel a member from an organisation with narrow technical functions on the basis of violations of human rights and democracy. Furthermore, the act of suspension or expulsion detracts from the principle of universality – a principle expressly located in the constitutions of the ITU and the UPU. Thus, the decisions to exclude Spain and South Africa are *ultra vires* the constituent instrument of the relevant specialised agencies.

Finally, there are circumstances where an organisation has instituted some other form of participation sanction against a wayward member state. The inability to use formal powers of suspension or expulsion has led organisations to devise alternative means of removing alleged violators of human rights and democracy. In the UN the failure to obtain Security Council agreement for the removal of member states has resulted in the use of the credentials procedure in the General Assembly to indicate disapproval of a member's democratic record. The same problem led to the forced exclusion of the FRY from participation in UN organs. Other organisations have also indicated their disapproval of a member's human rights policies through novel membership sanctions. The list includes Israel's exclusion from the regional grouping system in the UN and its specialised agencies, France's failure to invite Franco's Spain to the 1947 Paris Congress of the UPU, CARICOM's refusal to accept the leaders of Haiti's coup as valid representatives, and Myanmar's decision (under pressure) to decline its turn to take on the role of Chair of ASEAN. These sanctions are extra-legal measures – they have been taken outside the provisions of the constituent instruments, but do not result in a state being suspended or expelled from an organisation (although in practice they may have a similar impact).[14] The readiness of international organisations to rely upon such measures highlights that states wish to demonstrate their disapproval but are unwilling to institute formal sanctions, particularly where exclusion may remove the organisation's ability to deal with violations of

[13] *Reparations Case* at 183.

[14] Cf. Sir Robert Jennings, 'Opinion regarding the Exclusion of Israel from the United Nations Regional Group System', Prepared for the Government of Israel, 4 November 1999, http://www.ajcarchives.org/AJC_DATA/Files/222.pdf. In this Opinion Jennings argued that Israel's exclusion from the UN regional groups violated the UN Charter, including Article 2(1).

human rights or democracy within a member state. The institution of these types of sanctions suggests an uneasy compromise between legality and politics in the membership process.

B The relationship between membership and functions

The second criterion used to assess the legitimacy of the practice of using human rights and democracy as membership conditions in this work involves an analysis of the extent to which these conditions complement the functions of an organisation. Adopting a functionalist analysis, Efraim has stated that:

> the increasingly important role played by [international governmental organisations] in global governance requires that the form of cooperation conform to each organization's respective functions. Thus, the principles, norms, rules or other concepts that form a given [international governmental organisation's] decision-making structures must also reflect the purpose of that organization.[15]

These sentiments can be extended to membership questions. The rules governing the participation of states in an international organisation should enhance the organisation's ability to fulfil its functions and also reflect its purposes. Here a distinction must be drawn between two potential issues: the question of whether the membership criteria of human rights and democracy are merely compatible with an organisation's functions, and the question of whether human rights and democracy are actually necessary to enable an organisation to fulfil its functions. It is relatively easy to establish that human rights and democracy are compatible with an organisation's functions, particularly in organisations with broad functions and purposes such as the UN, the OAS, the AU, the Council of Europe and the EU. This is most obviously the case where the promotion of human rights or democracy is a core principle or function. It is more difficult to demonstrate, in accordance with Claude's rule of essentiality, that membership criteria based on human rights and democracy are necessary or essential to enable an organisation to fulfil its functions.

In determining whether the practice of introducing human rights and democracy into the admission and exclusion process is necessary to enable an organisation to discharge its functions, the starting point is,

[15] Athena D. Efraim, *Sovereign (In)equality in International Organizations* (The Hague: Martinus Nijhoff Publishers, 2001), p. 363.

once again, the constitutional instrument and its statement of functions. Beginning with the Council of Europe, the use of detailed human rights and democracy criteria in the admission process is viewed as an essential method of ensuring the performance by the organisation of its core functions – the promotion and protection of human rights. Claude's principle of essentiality would appear to be satisfied given the importance of human rights to the role of the Council of Europe. In international organisations with generalist functions, such as the UN, it is more difficult to argue that the organisation's ability to perform its functions requires all states to have acceptable human rights and democratic records. Although such membership criteria are compatible with many of the UN's purposes and would promote the fulfilment of its aims, they are not requirements for enabling the UN to perform its functions. Put simply, all members of the UN do not need to be human rights and democracy compliant to enable the UN to discharge all of its functions.

The same problem is evident in various regional organisations such as the EU, the OAS, the AU, the Pacific Islands Forum and also the Commonwealth. The use of human rights and democracy in the membership criteria is compatible with the diverse functions of these bodies, but could conflict with fundamental aims – such as regional integration, consensus decision-making or non-intervention. However, in these organisations the application of human rights and democracy criteria in admission or exclusion decisions does not appear to have attracted any significant degree of criticism. In particular, unlike the UN and its specialised agencies, there have been few serious charges of politicisation (leaving aside the OAS's decision to exclude Cuba). This is due to two factors: first, these organisations have amended either their constitutional instruments or other foundation documents (thus ensuring the legality of their membership decisions as examined above) and, second, the change in the membership criteria has reflected a growth in the functions of each organisation to include human rights and democracy issues. For example, in the EU the fulfilment of the 'political criteria' as set out by the Copenhagen European Council is firmly linked to full market integration. A similar process has taken place in regional trade organisations outside Europe – an expansion in the organisations' purposes to include human rights and democracy has been met by a desire to ensure that existing members fulfil certain conditions, notably a government chosen in compliance with a member's constitution. The original purposes and functions, the facilitation of regional trade or the creation of a customs union have been supplemented by additional roles that

suggest, if not demand, compliance with basic democratic principles. In another specialised regional organisation, NATO, the addition of more onerous membership requirements is also evidence of a change in its functions away from a defence pact to an organisation concerned with wider aspects of security in Europe. Thus, human rights and democracy are not merely desirable features for membership, but have become membership requirements.

In other specialised organisations the disjuncture between the constitutionally expressed functions and the practice of removing states in breach of human rights or democracy standards has resulted in exclusion decisions failing to meet this indicia of legitimacy. Although some members attempted to relate decisions to exclude Spain, South Africa and Israel to the functions of the specialised agencies, including the coordination of telecommunications, postal services and meteorology, in most cases such attempts were unconvincing. Only in the case of the ILO and possibly UNESCO is it feasible to link the functions of the organisation to the decision to exclude a member on the basis of human rights and democracy violations. In another specialised organisation, the WTO, a distinction can be drawn between the broad principles expressed in the founding instrument and the primary functions pursued by the organisation. The Marrakesh Agreement indicates that the WTO's major function is trade liberalisation, but the Preamble provides that this function must be pursued in accordance with the need to raise standards of living and ensure full employment. Thus, the principles espoused in the Marrakesh Agreement are quite broad, whereas the function of the WTO is relatively narrow (trade liberalisation). In recognition of this limited function, the WTO has refrained from requiring applicants to fulfil human rights and democracy standards, at least so far as is evidenced by the protocols of accession and final working party reports. The WTO accession process follows Efraim's preference for a functionalist approach to decision-making over one emphasising the organisation's wider principles as stated in the constitutional instrument. In terms of a functionalist analysis, the WTO's membership process can be said to have a wide degree of legitimacy.

C The clarity and coherence of the criteria

1 Clarity

The final criterion of legitimacy requires an examination of the actual standards used in determining membership questions and the way in which they are applied across a range of membership decisions within an

organisation. A number of organisations have adopted relatively clear standards when deciding whether to admit a new member or exclude an existing member. For example, exclusion (and potential exclusion) of members from regional organisations such as the AU, the OAS, CAN and MERCOSUR has been limited to unconstitutional changes of government or interruptions to the democratic order, usually (but not always) as the result of military coups. Consequently, the criteria for determining exclusion from membership fall short of the definitions of democracy and human rights espoused by members. While this creates a disparity between the standards articulated by an organisation and its willingness to hold members to account for violating those standards, the criterion of an unconstitutional change of government fulfils Franck's requirement of clarity or determinacy. Although the exclusion criteria can be criticised for their lack of comprehensiveness, there is little doubt as to the type of violations that could lead to suspension or expulsion.

The human rights and democracy standards adopted by organisations such as the Council of Europe and the EU when determining admission are also relatively clear in the sense that clarity refers to textual clarity. The various organs of these two organisations have set out a wide range of standards listed in European human rights treaties as indicia by which applicants for membership are judged. The list of these instruments has grown in recent years (reflecting the growth in human rights conventions adopted under the auspices of the Council of Europe). In the context of the EU, Schimmelfennig, Engert and Knobel have argued that any lack of clarity in the standards was offset by the fact that applicants were given feedback on their performance against the various admission conditions, thus ensuring a degree of determinacy in the process.[16] However, clarity does not necessarily result in consistency in application (see below).

Amongst other organisations, there is less clarity in the type of abuses that will result in failure to admit or a decision to exclude. In the Commonwealth the range of behaviour that could lead to suspension has been expanded from an unconstitutional change of government to include 'serious or persistent violations'[17] of the Harare Declaration. So

[16] Frank Schimmelfennig, Stefan Engert and Heiko Knobel, 'The Impact of EU Conditionality', in Frank Schimmelfennig and Ulrich Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe* (Ithaca, NY: Cornell University Press, 2005), p. 32.

[17] Commonwealth High Level Review Group, 'Report by the Commonwealth High Level Review Group to the Commonwealth Heads of Government', 2002 at paras. 21–2.

far only Zimbabwe has been found to meet this threshold, although other Commonwealth countries have suffered serious human rights abuses in recent years, potentially falling within the wider Harare remit. The failure to exclude other members in such circumstances reveals a lack of precision in identifying the type of situations deemed to be serious or persistent in the future. A similar observation can be made about the OSCE: although the Prague Document adopted in 1992 suggests that action would be taken in 'cases of clear, gross and uncorrected violations of relevant CSCE principles',[18] it is only through the decision to suspend Yugoslavia that further definition can be given to the situations potentially giving rise to membership sanctions.

Even less clear are the circumstances likely to lead to a failure to grant membership or a decision to exclude an existing member from the universal organisations. The phrase 'self-governing' in the Covenant of the League of Nations was given a variety of interpretations in admission decisions in the first years of the League, although eventually it was clear that it merely referred to a state's independence. References to an applicant's human rights situation were made in some decisions, but there was no consistency in the human rights issues considered in membership discussions. The same holds true in the early years of the UN – human rights issues were raised when debating applications by members of the Soviet bloc and the former colonies, but without any clear sense of the type of violations (if any) that could result in admission being denied. Without guidelines in the UN Charter or other instruments, it was impossible to identify the issues to be given precedence. In both cases the political implications of admission or non-admission decided the question of membership. In the other universal organisations studied in this book, the specialised agencies, the campaign against Spain (the Franco regime), South Africa (racial discrimination) and Israel (the treatment of Palestinians in the occupied territories) was dictated by the strength of the opposition to their respective governments rather than the identification of particular rights within the ambit of the agencies' protection. The use of the credentials process to exclude various regimes from the UN is more principled in the sense that it has recently been directed at unrepresentative governments installed through procedures not deemed to be free and fair. Nonetheless, as is the case with regional organisations in

[18] 'Prague Document on Further Development of CSCE Institutions and Structures, Second Meeting of the Council, Doc No 2PRAG92.e, 1992 at para. 16.

Africa and the Americas, the definition of democracy being promoted is somewhat limited.[19]

2 Coherence

The clarity of the human rights and democracy criteria does not necessarily result in consistency of application. A lack of coherence in the use of membership conditions is the area where the most prominent legitimacy problems emerge. Even in organisations where both the legality of the membership criteria is beyond doubt and the relationship between the organisation's functions and the conditions can be established, there is often a lack of coherence or consistency in the application of these criteria. The practice suggests two potential issues when determining coherence: first, consistency in the operation of admission criteria between existing members and members applying to join; and, second, consistency in treatment between applicants joining at the same time or between existing members (when deciding suspension or expulsion). In relation to the first issue, organisations have subjected new members to detailed standards not demanded of existing members at the time of application. For example, new members of ASEAN must fulfil Article 6(1)(d) of the ASEAN Charter, requiring applicants to agree to be 'bound and to abide by the Charter' (including the promotion and protection of human rights and fundamental freedoms).[20] Current members were not subject to such principles when they joined the organisation. This issue is particularly pertinent in the European organisations, where states admitted in the 2004 round of accessions were assessed against much more detailed criteria (for example, the treatment of minorities) than previous applicants. Additionally, applicants in the same round of negotiations have not necessarily been treated consistently when human rights and democracy standards have been applied.[21] However, as is recognised in Chapter 3, such incoherence is justifiable where flexibility is needed to accommodate differences between applicants as well as meet other goals, notably European integration.

In international organisations with relatively narrow (clear) criteria for exclusion, consistent application is more likely. Members have only

[19] Matthew Griffin, 'Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy through its Accreditation Process and Should It?' (1999) 32 *N.Y. J. Int'l L. & Pol.* 725 at 779–81.

[20] ASEAN Charter, Art. 1(7).

[21] See discussion at Chapter 3, pp. 150–1; Schimmelfennig, Engert and Knobel, 'The Impact of EU Conditionality', p. 32.

been suspended from the AU following an unconstitutional change of government, for the most part in the form of a coup – for example, in the cases of Togo, Guinea, Madagascar and Niger. The same was true in the Commonwealth when the criteria for suspension were limited in the same way. Although the more recent expansion of the Commonwealth's criteria to include serious or persistent breaches of the Harare Declaration could result in a number of members falling foul of the Commonwealth's principles, to date, only Zimbabwe has been suspended. Even when applying the original criteria, consistency has not always been achieved. For example, Pakistan was readmitted to the councils of the Commonwealth in 2004 due to some progress identified by the Commonwealth Ministerial Action Group, despite the continued presence of a military regime. It may be argued that such a decision represents a degree of flexibility on exclusion issues by encouraging a suspended member to make further progress towards the restoration of democracy. However, it also leaves the Commonwealth open to allegations of a lack of political will when dealing with defaulting members.

The organisations displaying the greatest incoherence in the application of human rights and democracy standards in the membership process are the universal organisations. Numerous members of the UN specialised agencies have engaged in violations of human rights and democratic principles, but have not been marked out for exclusion in the same way as Spain, South Africa or Israel. The accession process in the WTO also displays a wide degree of incoherence, in the sense that each new applicant is assessed according to different criteria, depending on the concessions extracted during bilateral negotiations and the changes needed to ensure their trading policies are WTO compatible. As is the case with the EU, such incoherence (or flexibility) is justifiable when it is a necessary part of ensuring that a new member is able to fulfil its obligations to the WTO or where it is recognised that certain applicants should be subject to special concessions.[22] The importance of ensuring good governance in trade policy appears to fall within the former category. However, the failed attempts to introduce core labour standards into recent accessions by developing countries, although a worthy attempt to guarantee workers' rights in new members, do not fulfil this criterion of legitimacy. Least developed countries have been less successful in countering the addition of trade-related concessions

[22] For example, the recognition of the special status of least-developed countries in the Marrakesh Agreement, Art. XI(2).

(termed WTO-plus concessions) in negotiations with existing (more powerful) members.[23] Although an examination of these trade-related criteria is beyond the scope of this work, they point to potential problems in the WTO accession process from the perspective of democracy. These problems will be discussed further in Part IV.

Incoherence, as discussed so far, is viewed as an aspect of the application of human rights and democracy criteria to individual states. But the admission and exclusion practice suggests another type of inconsistency – that is, inconsistency between the standards articulated by an organisation and the criteria used in membership decisions. The UN, the EU, the Council of Europe, the OAS and the AU have all articulated wide-ranging definitions of human rights, encompassing both civil and political rights and economic and social rights. In Africa the definition of rights articulated in the most significant human rights treaty, the African Charter on Human and Peoples' Rights, extends to the inclusion of peoples' rights. However, when it comes to using human rights and democracy as membership conditions, the organisations have taken a more limited view of the standards to be considered. By confining themselves to the suspension of members where there is an unconstitutional change of government, regional organisations outside Europe have preferred clarity over comprehensiveness. In the 2004 round of admissions the EU and Council of Europe referred to a broad range of human rights and democratic values, highlighting that a number of European instruments are relevant in deciding an applicant's place in Europe. However, despite reference to economic and social rights and the European Social Charter in admission negotiations, for the most part the two organisations have concentrated on civil and political rights and minority rights. This is reinforced by the few situations in which the Council of Europe has suggested suspending a member (or, in the case of the EU, a member has been subject to review).

The disparity between the standards espoused by the organisations and the standards included in their admission and exclusion decisions suggests a lack of will, and perhaps capacity, in enforcing all aspects of international human rights law and democracy. It also highlights priorities in the implementation and enforcement of human rights and

[23] Daniel Gay, 'Vanuatu's Suspended Accession Bid: Second Thoughts?', in Peter Gallagher, Patrick Low and Andrew Stoler (eds.), *Managing the Challenges of WTO Participation* (Cambridge University Press, 2005), pp. 593, 602; Roman Grynberg and Roy Mickey Joy, 'The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System', in Roman Grynberg (ed.), *WTO at the Margins: Small States and the Multilateral Trading System* (Cambridge University Press, 2006), p. 702.

democracy, thereby contradicting statements supporting the interdependence of all human rights. This is problematic from the perspective of ensuring respect for all international human rights standards. The more pressing question for this discussion is whether the selective nature of the rights employed in membership decisions affects the legitimacy of those decisions. Although the membership criteria may not be comprehensive, this does not necessarily undermine the legitimacy of the membership process, provided that the criteria are clear and also consistently applied. It cannot be expected that international organisations will be able to enforce all aspects of human rights and democracy through their membership decisions. Therefore, a certain amount of selectivity must be part of the process if organisations are to attract and, importantly, retain members. From the perspective of the membership process, clarity and consistency in the enforcement of rights is to be preferred over comprehensives, in the sense that comprehensive means covering all international instruments. It is also important that this is achieved by a process which demonstrates a degree of democracy or accountability. Franck writes that legitimate rules should be derived from legitimate institutions, and 'legitimate institutions . . . are those which are established and function in accordance with ascertainable principles of right process'.[24] The degree to which the membership process accords with the democratic principles being demanded of member states is discussed in the next Part of this chapter.

IV Democracy and the membership process of international organisations

International organisations with a wide variety of members and functions have embraced the idea that human rights and democracy are relevant factors in making decisions concerning membership. The question remains as to whether this is being achieved through a process that accords with the standards of democracy being demanded of applicants and existing members. White has linked the international community's support for fostering democracy within states with the desire for increased democracy in international organisations.[25] He has recently written that it seems 'perverse that organisations should be advocating

[24] Thomas Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990), p. 64.

[25] Nigel White, *The Law of International Organisations*, 2nd edn (Manchester University Press, 2005), p. 201.

democracy within their membership but not practising it themselves. This erodes their legitimacy'.[26] A number of organisations have imposed democratic government as an admission criterion or have suspended states where an undemocratic change of government has occurred. Yet the process by which this is accomplished does not necessarily meet with the (often wide) definition of democracy endorsed by the organisation. This discussion will move away from the substantive aspects of the human rights and democracy conditions to the 'process' aspects of the decisions to admit or exclude states. It will first examine the promotion of democracy as a value within international organisations generally, before highlighting the problems with the decision-making process for determining admission and exclusion from the perspective of democracy.

A Democracy within international organisations

Commentators frequently decry the lack of democracy within international organisations. Internationalisation by its very nature can lead to a 'loss of democracy' as decision-making is taken out of the control of legislatures and placed in the hands of international officials.[27] As is acknowledged by Ku and Jacobson, 'ensuring that their decision-making accords with democratic tenets becomes increasingly important as international institutions gain authority'.[28] The greater the potential for an organisation to interfere either directly or indirectly in the legislative process of a member state, for example the WTO or the EU, the more likely it is to be challenged for its democratic deficiencies. Allegations of a 'democratic deficit' have been particularly vehement in relation to the activities of the EU, with writers pointing to the fact that only one organ is elected (the European Parliament), the lack of an integrated European party system, as well as the concentration of power in the European Commission and the European Court of Justice.[29] The focus of many of

[26] *Ibid.*

[27] Ralf Dahrendorf, 'The Third Way and Liberty – An Authoritarian Streak in Europe's New Center' (1999) 78(5) *Foreign Aff.* 13 at 16.

[28] Charlotte Ku and Harold K. Jacobson, 'Broaching the Issues', in Charlotte Ku and Harold K. Jacobson (eds.), *Democratic Accountability and the Use of Force in International Law* (Cambridge University Press, 2003), p. 8. See also Richard Falk and Andrew Strauss, 'On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty' (2000) 36 *Stan. J. Int'l L.* 191 at 212.

[29] See, for example, Wolfgang Merkel, 'Legitimacy and Democracy: Endogenous Limits of European Integration', in Jeffrey Anderson (ed.), *Regional Integration and*

these criticisms is the lack of direct public participation in the activities and the decision-making organs of the EU.

Not all share the view that the EU and other international organisations suffer from a lack of democracy. For example, Merkel links the legitimacy of an intergovernmental organisation to the process of approval by parliaments and citizens of member states through referenda on acceptance of the organisation's founding treaty.[30] However, he acknowledges that this response does not cover the supranational aspects of one of the organisations, the EU.[31] It also does not encompass situations where citizen participation is not an element of a state's treaty ratification process. Moravcsik disagrees with the view that the EU's structure and processes lack democratic legitimacy.[32] He believes that the EU's processes involve both direct and indirect accountability through the European Parliament and elected national officials.[33] This argument is reinforced by provisions of the TEU introduced by the Treaty of Lisbon articulating the principle of representative democracy and the right of citizens 'to participate in the democratic life of the Union'.[34] These debates not only reveal differences regarding whether an organisation is sufficiently democratic or not, but also about the type of democracy to be applied at the international level.

In choosing between models of democracy at the international level, one option is to turn to national models of democracy.[35] But a number of problems emerge when attempting to transpose representative democracy within states to international institutions. First, democracy requires a *demos* and there is no equivalent political community of people at the international level.[36] The second key problem relates to process – as Efraim has highlighted, organisations aiming for universal membership

Democracy – Expanding on the European Experience (Lanham, MD: Rowland & Littlefield, 1999), p. 52; and summary of arguments in Andrew Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' (2002) 40 *J. Common Mkt Stud.* 603 at 604–5. See also Chapter 1, n 111.

[30] Merkel, 'Legitimacy and Democracy', p. 48. [31] *Ibid.*

[32] Moravcsik, 'In Defence of the "Democratic Deficit"' at 603. [33] *Ibid.* at 611.

[34] TEU, Art. 10(3), (1).

[35] Eric Stein, 'International Integration and Democracy: No Love at First Sight' (2001) 95 *Am. J. Int'l L.* 489 at 531.

[36] Joseph H. H. Weiler, *The Constitution of Europe – 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press, 1999), pp. 268–9. See Chapter 1, n 112.

'are too fragile to withstand the rigour of democratic rule'.[37] Democracy would appear to require (at the very least) elections together with an international electoral system. The EU has attempted to rectify these problems by declaring that '[e]very national of a Member State shall be a citizen of the Union' and by maintaining that European citizens are 'directly represented' through the European Parliament.[38] However, outside the EU, it is difficult to conceptualise the way in which such a system could be established, how it would operate and the organisations that would be subject to a ballot.[39] In internatonal organisations more generally, national models of democracy could impair the goals and efficiency of international organisations and decrease their ability to fulfil their functions.[40] The problem with applying the concept of popular control to the international level has led Dahl to argue that international organisations will never achieve democracy.[41]

The difficulties in implementing national models of democracy at the international level suggest that it is necessary to look for inspiration elsewhere to cure the democratic deficit within international organisations. Held has formulated a concept of cosmopolitan democracy as an alternative to current governance arrangements at the international level.[42] In Held's vision, cosmopolitan democracy arises from 'diverse networks' within the global order, such as welfare, culture, civil associations and the economy.[43] The cosmopolitan vision of democracy involves transnational legislative and executive bodies, including an assembly of democratic peoples and an international court system.[44] The assembly would focus on the most pressing international problems, such as food, health, global warming and the reduction of weapons of mass destruction.[45] Cosmopolitan democracy is a grand plan at the

[37] Efraim, *Sovereign (In)equality*, p. 368. [38] TEU, Arts. 9, 10(2).

[39] Efraim, *Sovereign (In)equality*, p. 368. See also Karl Zemanek, 'Legal Foundations of the International System: General Course on Public International Law' (1997) 266 *Recueil des Cours* 9 at 101.

[40] Efraim, *Sovereign (In)equality*, p. 371; Stein, 'International Integration and Democracy' at 492.

[41] Robert A. Dahl, 'Can International Organizations Be Democratic? A Sceptic's View', in Ian Shapiro and Casiano Hacker-Cordón (eds.), *Democracy's Edges* (Cambridge University Press, 1999), p. 33.

[42] David Held, *Democracy and the Global Order – From the Modern State to Cosmopolitan Governance* (Cambridge: Polity Press, 1995); David Held, *Models of Democracy*, 3rd edn (Cambridge: Polity Press, 2006), Chapter 11.

[43] Held, *Democracy and the Global Order*, p. 271. [44] *Ibid.*, pp. 272–3.

[45] Held, *Models of Democracy*, p. 306. On the prospects for a Global Peoples Assembly, see Falk and Strauss, 'On the Creation of a Global Peoples Assembly'.

global level rather than a simple model for injecting greater democracy into international organisations (although it does include the democratic accountability of international organisations as one of its tenets).

In finding alternative methods for increasing the legitimacy of international organisations, there has been an increasing focus on accountability as a concept of greater relevance to the structure and functioning of international organisations. Without accountability, the content of the rules and decisions made by international organisations are regarded as suspect.[46] Keohane and Nye have asserted that democratic legitimacy is derived from a number of sources and that 'insofar as legitimacy depends on processes, accountability is central'.[47] Accountability is also fundamental to the measures for curing the democratic deficit proposed by Stein and White.[48] Stein lists the importance of open and transparent processes, the creation of an ombudsman's office to receive complaints of maladministration and the need for decision-making to provide an opportunity for genuine participation by all members as potential reforms.[49] The Final Report of the International Law Association's Committee on the Accountability of International Organisations also includes transparent and participatory decision-making processes and access to information as important indicators of good governance (an aspect of the accountability of international organisations).[50] Transparency involves public voting for normative decisions, public meetings of non-plenary bodies and the ability of entities particularly affected by a decision to be granted an 'appropriate status'.[51]

[46] Paul B. Stephan, 'The New International Law – Legitimacy, Accountability, Authority, and Freedom in the New Global Order' (1999) 70 *U. Colo. L.R.* 1555 at 1578.

[47] Robert O. Keohane and Joseph S. Nye Jr, 'Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democracy Legitimacy', Working Papers Series, John F. Kennedy School of Government, Harvard University, 2001, p. 26.

[48] Stein, 'International Integration and Democracy'; White, *Law of International Organisations*, Chapter 7.

[49] Stein, 'International Integration and Democracy' at 532.

[50] International Law Association (ILA), Committee on the Accountability of International Organisations, 'Final Report on the Accountability of International Organisations', 2004, www.ila-hq.org/en/committees/index.cfm/cid/9, pp. 8–9 ('Final Report'). The Committee divided the concept of accountability into three interrelated levels: internal and external scrutiny and monitoring, tortious liability for injuries arising out of the activities of international organisations and responsibility for acts or omissions which constitute a breach of international law. For a discussion of the ILA's approach, see White, *Law of International Organisations*, p. 190.

[51] ILA, 'Final Report', p. 8.

Participatory processes require international organisations to implement procedures that enable members to fully participate in decision-making, and for the membership of non-plenary organs to be periodically reviewed. They also require specially affected member states to be provided with an opportunity to express their views in the relevant organ.[52] The publication of documents and information (subject to obligations of confidentiality) is also a key aspect of the accountability of international organisations.[53]

It is difficult to argue against these elements as a minimum for rectifying the democratic deficit in international organisations – transparency, participation and access to information are important elements of accountability. As is acknowledged by the ILA Committee, power entails accountability[54] and to the extent that international organisations exercise power, they must be accountable for its exercise. The next section will examine the extent to which the procedures of international organisations in respect of the decisions under study – those relating to admission and exclusion – are subject to democratic or accountability mechanisms.

B Democracy in the decision-making process for determining membership

Throughout this book, questions have been raised about the way in which decisions concerning membership are made by international organisations. Is it appropriate that unrepresentative bodies, such as the UN Security Council or the European Commission, play a role in membership decisions? Is there a power imbalance in the accession procedure for the WTO that undermines its democratic legitimacy? Should membership issues be debated in public fora rather than behind closed doors? In exploring the decision-making process for determining membership this section will examine three elements of accountability listed above: the composition of the organ deciding admission and exclusion, the extent of participation by the affected state and the transparency of the membership process (including the public nature of the debates).

1 Representation

(a) Admission decisions If international organisations are promoting democracy and public participation within member states, then it would

[52] *Ibid.* [53] *Ibid.*, p. 9. [54] *Ibid.*, p. 5.

appear to be axiomatic that decisions on membership should be made by organs where all member states are able to debate and vote. For the most part, the final decision on admission to an international organisation is made by a representative organ, although the same is not always true of decisions to suspend or expel. In the UN (and its predecessor, the League of Nations), the EU, the Council of Europe, NATO and the WTO decisions to admit an applicant are reached by organs composed of delegates from all members. For example, in the League of Nations admission decisions were made by the Assembly on a two-thirds majority of the existing members.[55] The Statute of the Council of Europe locates the power to admit applicant states in the Committee of Ministers, a body composed of foreign ministers of member states.[56] The North Atlantic Council (a body comprising representatives of NATO member states) has the central role in determining admission to NATO. The power to admit new members to the WTO is placed in the Ministerial Conference (or the General Council when a state is admitted between Ministerial Conference meetings).[57] Both organs include representatives of all WTO members. Admission to the UN specialised agencies in relation to non-UN members is also decided by the main deliberative organ of the relevant agency composed of all member states.[58]

In the EU three organs are involved in the lengthy admission process – the Commission (the executive organ of the EU), the European Parliament (a body of directly elected representatives from member states) and the Council (a body of ministers of member states). The Council makes the ultimate decision by a unanimous vote after having consulted the Commission and received the assent of the European Parliament.[59] The involvement of the European Parliament in admission adds an extra dimension to the democratic nature of the process. Only one other organisation under consideration, the ILO, gives non-government delegates a say in admission decisions.[60] In the Council of

[55] Covenant of the League of Nations, Art. 1(3).
[56] Statute of the Council of Europe, Art. 4.
[57] Marrakesh Agreement, Art. XII(2).
[58] UNESCO Constitution, Art. II(2); Constitution of the ILO, Art. I(4); Constitution of the UPU, Art. 11(4); Constitution and Convention of the ITU, Art. 2(c).
[59] TEU, Art. 49.
[60] Non-UN members may be admitted to the ILO by a two-thirds majority vote of the delegates of the General Conference (including two-thirds of the government delegates). Delegates of the General Conference comprise delegates from employer and workers' groups in member states: Constitution of the ILO, Art. 7.

Europe the Parliamentary Assembly also has a role to play in admission decisions, its composition being dependent on the method of appointment adopted by national parliaments. Given the influence that the EU, and in particular the admission of new countries to the EU, may have on the lives of citizens within member states, the involvement of the European Parliament would appear to operate as an extra democratic control over the decision-making process. It also acts as a counterweight (in democratic terms) to the role of the non-elected European Commission – an organ with considerable influence in the admission process through the preparation of opinions and regular reports on an applicant's ability to meet the criteria.

This summary of the organs making the final determination on membership applications indicates that all members are able to participate (at least at the final stage) in admission decisions. This does not necessarily mean that all members are involved in the process – the greater the level of detail in the admission criteria in organisations such as the EU, the WTO and the Council of Europe, the more likely it is that other organs, such as the European Commission, the WTO Secretariat or committees of the Council of Europe's Parliamentary Assembly, will need to be involved. In one sense this is not problematic – it is to be expected that where an applicant must meet detailed criteria, the function of investigation will be delegated to experts or smaller groups of state representatives to provide the necessary information. However, from the perspective of democracy, these bodies are not elected and have only indirect links to the people.[61] In the UN a non-representative body in the form of the Security Council can effectively override the decisions of the representative body. The deadlock concerning the admission of a number of countries during the Cold War was caused by the involvement of the Security Council and the exercise of the veto power. Attempts by the General Assembly to circumvent the requirements of Article 4(2) of the UN Charter in order to admit the states caught in the deadlock were unsuccessful. The involvement of an organ in which one member can veto an admission decision is contrary to the ideal of representative and participatory processes as an aspect of accountability.

(b) Exclusion decisions As is the case with the decision to admit a new member, in the Council of Europe the power to suspend a state resides in

[61] Robert O. Keohane, 'International Institutions: Can Interdependence Work?' (Spring 1998) *Foreign Pol.* 82 at 92.

a representative body of the organisation – the Council of Ministers.[62] The same is true of the OAS and the regional economic communities in the Americas and Africa.[63] In the UN suspension or exclusion is determined by the General Assembly on a recommendation of the Security Council.[64] Just as the veto power has proved an effective method of preventing states from becoming members of the UN, it has also been used as a tool to combat the threat of suspension or expulsion. The efforts of the African group of states and their supporters against South Africa constituted the most serious attempt to expel a member from the UN. But these attempts failed due to the inability to muster the necessary support amongst the permanent five.

In other organisations a decision to exclude an existing member is made by a non-representative organ. For example, in the League of Nations the power to expel a state pursuant to Article 16(4) of the Covenant of the League of Nations was located in the Council. In the AU the fifteen-member Peace and Security Council can institute sanctions against a state when an unconstitutional change of government occurs.[65] A decision to suspend a state from the Commonwealth is made by the Commonwealth Ministerial Action Group, a body comprising eight foreign ministers of member states. The choice of these organisations to limit the number of states involved in what is often a very controversial decision displays a preference for ensuring that the power of suspension can in fact be exercised when violations of democracy or human rights have occurred. The greater the number of states involved in the decision to suspend, the more likely that political considerations and alliances between members of the organisation will influence the

[62] Statute of the Council of Europe, Art. 8.

[63] Article 9 of the Charter of the OAS (as amended) provides that the General Assembly of the OAS can decide to suspend a state. Article 5 of the Andean Community Commitment to Democracy indicates that the Council of Foreign Ministers shall determine suspension in the Andean Community. In MERCOSUR a decision to suspend a member is made by the 'other states parties' acting together: see Ushuaia Protocol, Art. 5. In ECOWAS a decision to suspend is made by the Authority of the Heads of State and Government of the Community: 'Protocol A/SP1/12/01 on Democracy and Good Governance, Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security', ECOWAS, 21 December 2001, Art. 45(2).

[64] Charter of the United Nations, Arts. 5, 6.

[65] 'Protocol relating to the Establishment of the Peace and Security Council of the African Union', Assembly of the African Union, 1st ordinary session, 9 July 2002, Art. 7(g). The Peace and Security Council operates together with the Chairman of the Commission of the African Union in exercising this power.

process and prevent a decision being made. For example, a number of southern African states lobbied unsuccessfully for the restoration of Zimbabwe's membership in the Commonwealth, despite the fact that no demonstrable progress had been made in Zimbabwe's internal situation.[66] By confining the number of states involved in the decision to continue the suspension of Zimbabwe (in this case the members of the Commonwealth Chairpersons' Committee), the Commonwealth chose an effective decision-making process over a representative one. In effect it demonstrates a preference for a functional rather than a democratic procedure.[67]

2 Transparency in the membership procedures

According to the ILA, transparency is a key feature in deciding the accountability of international organisations.[68] Franck has also written that 'a rule is more likely to be perceived as legitimate when its contents are relatively transparent, when the content can be determined with comparative ease and certainty'.[69] The same is true of the process by which a rule is applied. The transparency of the membership procedure of an international organisation can be assessed by reference to the public nature of the decision-making process and the ability to access information on admission and exclusion decisions. All organisations examined in this work make their decisions on admission, suspension and expulsion in public, in the sense that their resolutions and statements are (more or less) available to actors outside the organisation. However, it is not always the case that their deliberations on membership are open to external scrutiny. Although this is an issue in a number of organisations,[70] the UN provides one of the more telling examples of this problem.

In the early years of the UN, admission decisions were discussed and debated in both the General Assembly and the Security Council in detail. Debates on the various attempts (successful and otherwise) to exclude Spain, South Africa and Israel from the specialised agencies were also heated.

[66] 'CHOGM Leaders Tackle Zimbabwe on Second Day of Summit', *ABC News* (Australia), 6 December 2003, www.abc.net.au/news/stories/2003/12/06/1004884.htm.
[67] See Efraim, *Sovereign (In)equality*, p. 380.
[68] ILA, 'Final Report', p. 8. See also Keohane, 'International Institutions' at 94. The transparency of international organisations is an element of Held's vision of cosmopolitan democracy: Held, *Models of Democracy*, p. 306.
[69] Franck, *Power of Legitimacy*, p. 64.
[70] See discussion of the European Council in Keohane, 'International Institutions' at 92.

But in recent years it has been increasingly the case that 'deals' on UN applicants are made outside the General Assembly and the Security Council, and that the records of these two organs merely reflect the consensus reached.[71] When the General Assembly admitted the FRY (Serbia and Montenegro) in 2000 (a decision which may well have been controversial), the decision was adopted by 'acclamation' rather than by vote and no state spoke out against the FRY's membership.[72] When the General Assembly discussed the admission of Slovenia, Bosnia and Herzegovina, and Croatia in 1992, the President's opening speech revealed that delegations had only been given the draft resolutions that morning.[73] All three entities were admitted to membership without a vote, despite doubts about the status of Bosnia and Herzegovina at the time it was admitted. The same process was followed when Montenegro applied for UN membership as a separate state in 2006.[74] Consequently, official discussions on admission in the main political organs of the UN are rather anodyne and give away little as to the issues existing members have considered important.[75] The goals of both participation and transparency are at odds with the use of informal closed-door meetings which reduce opportunities for external scrutiny.[76]

The availability of information on admission and exclusion decisions is also indicative of the transparency of the process. An information strategy ensures that external audiences have a clear idea of the reasons

[71] An early example of private negotiations on membership is evidenced by the admission of Mongolia and Mauritania to the UN in 1961: see Chapter 2, p. 99.

[72] UN GAOR, 55th session, 48th plenary meeting, UN Doc. A/55/PV.48, 1 November 2000, p. 27; 'Admission of the Federal Republic of Yugoslavia to Membership of the United Nations: Draft Resolution', UN GAOR, 55th session, Agenda Item 19, UN Doc. A/55/L.23, 1 November 2000.

[73] 'Provisional Verbatim Record of the 86th Meeting', UN GAOR, 46th session, 86th meeting, UN Doc. A/46/PV/86, 29 May 1992, p. 6.

[74] UN GAOR, 60th session, 91st plenary meeting, UN Doc. A/60/PV.91, 28 June 2006, p. 6. 'Admission of the Republic of Montenegro to Membership of the United Nations', GA Res. 60/264, UN GAOR, 60th session, 91st plenary meeting, Agenda Item 114, UN Doc. A/RES/60/264, 28 June 2006.

[75] Secretary-General Kofi Annan made similar comments in relation to the General Assembly's work as a whole, stating that the passage of General Assembly resolutions by consensus has 'become an end in itself' and 'prompts the Assembly to retreat into generalities, abandoning any serious attempt to take action'. In his view 'many so-called decisions simply reflect the lowest common denominator of widely different opinions': 'In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General', UN Doc. A/59/2005, 21 March 2005 at para. 159.

[76] ILA, 'Final Report', p. 9.

behind the decisions taken by international organisations.[77] It is equally important to ensure proper access to information within an organisation.[78] Both the EU and the Council of Europe publish voluminous documentation concerning the admission procedure for each applicant over the life of the process. The Council of Europe's deliberations on the possible suspension of Russia and the Ukraine are also publicly available. The WTO releases the working party reports, protocol of accession and other information about a state's application for membership, although only after the accession process has been successfully completed. In other organisations, such as the Commonwealth, the AU, CARICOM and the Pacific Islands Forum, the relevant resolutions and statements concerning decisions on exclusion are available, although verbatim debates and discussions of the relevant organs are not. Thus, organisations publish varying degrees of information on admission and exclusion decisions. In the event that an organisation fails to debate membership decisions in public or otherwise does not provide information on the admission and exclusion process, accountability is undermined.

3 Participation of the affected state

Another measure of accountability is the capacity of the affected state to participate in the relevant organ when a decision about its future is being made. Due to the transparency issues considered above, it is not always easy to identify the extent to which an applicant has the ability to participate in admission decisions. Where the admission of a new state to an organisation requires concrete changes to domestic laws and arrangements, the importance of its participation is most obvious. The extensive and sometimes lengthy negotiations leading to admission to NATO, the Council of Europe, the EU and the WTO all require applicant input. Schimmelfennig, Engert and Knobel believe that the 'continuous stream of EU evaluations of the political situation in the candidate countries' is a method of upholding the legitimacy of the EU admission process.[79] In their view the applicants were fully aware of the steps that needed to be taken to meet the conditions and were kept informed during the process.[80]

The WTO is another organisation requiring a high level of applicant participation in the admission process, but this does not mean that participation is on an equal footing. In the context of negotiations for

[77] *Ibid.* [78] *Ibid* (citations omitted).
[79] Schimmelfennig, Engert and Knobel, 'Impact of EU Conditionality', p. 32. [80] *Ibid.*

the entry of Vanuatu to the WTO, Gay has highlighted the inequality of bargaining power between existing members and a least-developed country. This lack of power results from a shortage of resources, including trained personnel, the complexity and cost of negotiations, and attempts by members to extract the maximum concessions possible from developing and least-developed states.[81] Although there have been efforts to counter some of these deficiencies through WTO training seminars for officials and the provision of expertise by other international organisations, the basic inequality between existing members and under-resourced applicants remains. The lack of information during negotiations for WTO membership can also inhibit the ability of groups within applicant countries to comment on or contribute to negotiations.[82]

At the suspension or expulsion stage, a number of organisations offer a member state the ability to be heard before a decision is made (if not vote on such a decision). In the UN specialised agencies the minutes of the relevant organs record Spain, South Africa and Israel's attempts to counter the threats to exclude them. In other organisations, such as the Commonwealth, the AU, ECOWAS and CARICOM, it is more difficult to determine the extent to which an existing member had the right to be heard before the adoption of an exclusion decision. Certainly, there are no publicly recorded objections in official documentation, although in some cases the views of the relevant states were voiced after the meetings.[83] Any organisation desiring to abide by the minimum standards of accountability would need to provide an existing member with a right to be heard prior to an exclusion decision being finalised.

4 Increasing accountability in the membership procedure: judicial review?

Despite the fact that the decisions to exclude members from the specialised agencies recorded the lowest degree of legitimacy on the substantive factors (that is, legality, relationship with functions, and clarity and

[81] Gay, 'Vanuatu's Suspended Accession Bid', p. 602; Grynberg and Joy, 'Accession of Vanuatu to the WTO'.

[82] See comments of Raoul Jennar, Oxfam (Belgium), in relation to Cambodia's accession, reproduced in Samnang Chea and Hach Sok, 'Cambodia's Accession to the WTO: "Fast Track" Accession by a Least-Developed Country', in Gallagher, Low and Stoler (eds.), *Managing the Challenges of WTO Participation*, p. 124.

[83] See, for example, comments by the Nigerian Foreign Minister following the suspension of Nigeria from the Commonwealth: Chapter 4, p. 218.

coherence of the criteria), the same decisions indicate a high level of accountability in terms of process. The organ making the decision was representative of the membership, allowed the relevant state to participate and followed a transparent process (at least at the stage when the actual decision was made). Although these factors do not save the decisions from their substantive legitimacy problems, they highlight that there is not necessarily a correlation between the legitimacy of the admission or exclusion criteria and the level of accountability in the membership process.

When admitting and excluding states, some international organisations fail to live up to the (admittedly quite low) standards of democracy demanded of member states. What can be done to improve the legitimacy of the process? Apart from increasing the level of representation and the transparency of the procedures, another possibility would be to include review by an independent organ. In some respects the European Commission acts as such an organ in the EU, as it must give a positive opinion on the admission conditions prior to any further steps being taken in the admission process. The problem from a process perspective is that the Commission's examination is completed prior to any further steps being undertaken by member states. Therefore, in reality it does not operate as a method for review of the actual decision. In the context of the WTO, Grynberg and Joy have suggested the addition of a panel of experts to the accession process, to assess whether an applicant's trade regime conforms to WTO rules, as a means of reducing the potential for members to demand the addition of 'WTO-plus' conditions.[84] However, they also recognise that such reforms are unlikely to be implemented as existing members benefit from a 'power based' process.[85] Applicants lack the ability to demand review of an admission decision until they become part of an international organisation. Once a state has joined an organisation, it appears to be reluctant to engage in reform of the process.

The provision of review by an international (or regional) court could offer another potential method of oversight. Judicial review would enable a court to assess whether an organisation is acting in accordance with its constitutional instrument, thus providing a degree of impartiality to the process. In the context of suspension and expulsion Magliveras has suggested that a judicial authority should have the ability to determine whether a member has breached the organisation's aims prior to any

[84] Grynberg and Joy, 'Accession of Vanuatu to the WTO', p. 712. [85] *Ibid.*, p. 713.

suspension decision by a plenary organ.[86] In his view only after an independent and impartial judicial or arbitral opinion has been given should a plenary organ suspend a member.[87] A court could ensure that exclusion decisions are based on the organisation's constitutional instrument rather than being driven solely by political considerations. A similar process could also be used in relation to admission decisions. Any clause enabling judicial oversight would need to include specific standing provisions to enable applicants – as distinct from members – to access the court or tribunal.

There are two potential difficulties with judicial review as a means of assessing the legality of membership decisions. First, the prospect of inserting a judicial or arbitral body into the admission or exclusion process raises the question whether a court or another organ should provide an authoritative interpretation of an organisation's constituent instrument. Some charters are silent on this issue; some designate an entity or organ responsible for making such determinations, while other constituent instruments provide for a judicial determination.[88] In all cases the organ allocated the primary responsibility for reaching a decision will normally be the body most frequently tasked with interpreting a particular provision in a constitutional instrument.[89] Thus, both members and organs are involved in the process of constitutional interpretation. The question remains as to whether a judicial body should also be involved. While Magliveras clearly supports the addition of a court or tribunal on the basis that it would add to the impartiality of a suspension decision, not all writers favour judicial control over the decisions of an international organisation. In 1960 Fawcett suggested that review by a court may be inappropriate in organisations designated the interpreter of

[86] Konstantinos Magliveras, *Exclusion from Participation in International Organisations – The Law and Practice behind Member States' Expulsion and Suspension of Membership* (The Hague: Kluwer Law International, 1999), p. 269.

[87] *Ibid.*, p. 270.

[88] Examples of constituent instruments without a provision for authoritative interpretation include the Charter of the United Nations and the Charter of the OAS. The second category includes provisions such as Article IX(2) of the Marrakesh Agreement, which gives the Ministerial Conference and the General Council the 'exclusive authority to adopt interpretations of [the] Agreement'. An example of a provision allowing for the judicial resolution of disputes concerning interpretation is Article 37 of the ILO Constitution (referring disputes to the International Court of Justice). For further examples, see C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd edn (Cambridge University Press, 2005), pp. 27–32.

[89] José E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005), p. 80.

their own constitutions.[90] He contended that 'the absence of judicial control over an international organization ... can sharpen the sense of international responsibility in those who must make decisions within it, and foster co-operation between countries'.[91] Interpretation by a judicial body may increase the perceived independence and legality of a membership decision; however, interpretation by a plenary organ could be deemed more democratic.[92] Second, unless the constitutional instrument gives relatively clear guidance on the standards by which members are to be assessed, a judicial body may face the same problems in assessing compliance as a political organ. The decision in the *First Admissions Case* highlights that even where courts give opinions on membership questions, the process of separating the legal considerations from the political considerations is complex. Furthermore, the addition of a court in the process will not prevent inconsistencies in the targeting of particular members or applicants, although it would ensure that any membership decision is supported by the organisation's constitution. Therefore, the provision of judicial review would increase legal accountability (in those cases where the legality of the decision is questioned) and perhaps also the transparency of a decision, but would not necessarily assist in relation to the other aspects of accountability detailed above.

V Membership and the protection of democracy and human rights

This book has been concerned with the legitimacy of the practice of utilising human rights and democracy conditions in the membership criteria of a broad range of international organisations. The above discussion reveals three points: first, the conditions may be outside an organisation's constituent documents; second, they may not be aligned to an organisation's functions; and third, the standards may suffer from defects in clarity and coherence. However, despite these problems, in most organisations the criteria can be regarded as legitimate. Only in the UN specialised agencies can it be said that the practice fails to meet any of the three indicia set out in Chapter 1. Paradoxically, the process by which

[90] J. E. S. Fawcett, 'The Place of Law in an International Organization' (1960) 36 *Brit. Y.B. Int'l L.* 321 at 328.

[91] *Ibid.*

[92] See discussion in Alvarez, *International Organizations as Law-Makers*, pp. 77–9 regarding a Belgian proposal to introduce a provision into the UN Charter providing for authoritative interpretations.

exclusion was achieved in these organisations followed the principles of accountability. Certainly, in some instances the human rights and democracy criteria need to be expressed in an organisation's constitutional instrument (to remove allegations of illegality). The criteria would benefit from further alignment to the functions of an organisation (especially where organisations are established to fulfil limited purposes). Greater clarity in definition as well as coherence in application would assist with the perceived legitimacy of the standards. Additionally, the membership process should follow democratic or accountability principles. However, once these factors are appropriately addressed in individual organisations, it cannot be said that the inclusion of human rights and democracy conditions results in an improper 'moralization'[93] of the membership issue.

This analysis has focused on the question of membership criteria from the perspective of international institutional law and the principles and functions articulated in the constituent instruments of international organisations. But it is also important to consider the implications of the practice from the viewpoint of the promotion and protection of democracy and human rights in the international legal system. If it is important that international organisations be viewed as democratic or accountable, the question arises whether the inclusion of democratic states results in greater democracy within an organisation. If the ultimate aim of including human rights principles in the membership criteria is to ensure greater compliance with these principles by member states, then it is also important to consider whether this objective is achieved. The following analysis throws some doubts on the suggestion that human rights and democratic conditionality assist with these two goals, but concludes by arguing that international organisations should not shy away from pursuing this practice where it meets the indicia of legitimacy discussed above.

A International organisations as democratic actors

International organsations are widely viewed as suffering from a democratic deficit. However, rather than concentrate on democracy within organisations, it has been suggested that the legitimacy of international organisations as a whole would be increased if their members were more democratic. This gives rise to two questions. First, if we accept the existence of a democratic

[93] Inis L. Claude, *Swords into Plowshares – The Problems and Progress of International Organization*, 4th edn (New York: Random House, 1971), p. 95. See Introduction, p. 4.

deficit in international organisations, does the practice of admitting and excluding states on the basis of their democratic records remedy that deficit? Second, can the practice of imposing democracy and human rights conditions in the membership criteria be regarded as problematic from the process of democratisation as a whole? In exploring this issue, the distinction between 'democratisation from above' and 'democratisation from below' outlined in Chapter 1 will be employed.

1 Curing the democratic deficit within international organisations

For many commentators the most effective means of countering the criticism that international organisations suffer from a democratic deficit is to promote democratic institutions within member states. Thus, Bacchus argues that '[t]o the extent that the individual states that are the Members of the WTO become more truly democratic . . . the combined efforts of those individual states in their combined capacity *as the WTO* will be more truly democratic as well'.[94] Moravcsik also believes that the democratic legitimacy of the EU is sustained by democracy within member states: '[a]s long as the domestic governments of these countries remain liberal democracies, there is no reason to doubt that their interactions with the EU will remain as firmly subject to democratic accountability as national policies'.[95] Efraim sums up such sentiments by stating that:

> A proper functioning democratic state is a better insurance and a more functional proposition for the existence of democratic representation in [international governmental organisations] than the establishment of democratic governance in international institutions. Accordingly, instead of searching for new places to democratize, it is more important to reinforce existing democratic states and to promote and ensure the move toward democratic societies.[96]

These comments identify two strands of thought on the relationship between the promotion of democracy within states and within international organisations. First, a democratic government will be more likely to act in accordance with the views of its citizens at the international level than an undemocratic government. Second, democratic states will act in

[94] James Bacchus, 'A Few Thoughts on Legitimacy, Democracy and the WTO' (2004) 7 *J. Int'l Eco. L.* 669 at 670.
[95] Moravcsik, 'In Defence of the "Democratic Deficit"' at 619.
[96] Efraim, *Sovereign (In)equality*, pp. 371–2.

accordance with principles of democratic accountability when making decisions as members of international organisations. Consequently, the inclusion of democracy in the membership policies of international organisations should enhance democracy at the international level.

Although this argument is attractive, there appears to be little evidence to suggest that democratic government at the domestic level has a direct impact on the functioning of an international organisation. The first proposition was argued at the Commission on the League of Nations in response to Smut's suggestion that the League should include a body of delegates with representatives from national parliaments. The Commission rejected this proposal, with Wilson asserting that government delegates to the League would represent public opinion since only responsible governments would be admitted.[97] Bourgeois agreed, stating that if a responsible government 'takes the wrong attitude it will be overthrown in its own country'.[98] But even in democratic societies, issues concerning foreign affairs and diplomatic relations are often the least democratic part of decision-making, with such matters being removed from direct citizen participation.[99] For example, the UK, Australia and Canada all achieve the top rating by Freedom House in their annual survey of political rights and civil liberties, and are thus regarded as 'free'.[100] Yet in all three countries entry into a treaty (including the constitution of an international organisation) is the result of an executive rather than a parliamentary decision.[101] When elected parliamentary representatives are involved in the process of treaty ratification, citizens are not necessarily aware of the decisions being made in the realm of foreign affairs or may not directly participate in those decisions. Such comments have been made in relation to the US and also when reviewing the process for Cambodia's accession to the WTO.[102] Therefore, the

[97] 'Ninth Meeting', in David Hunter Miller, *The Drafting of the Covenant* (New York: G. P. Putnam's Sons, 1928), vol. I, p. 233.

[98] *Ibid.*, p. 234.

[99] Dahl, 'Can International Organizations Be Democratic?', p. 30.

[100] Freedom House, 'Freedom in the World', 2007, www.freedomhouse.org/template.cfm?page=363&year=2007.

[101] For a discussion of the treaty-making processes in these three states, see Joanna Harrington, 'The Role for Parliament in Treaty-Making', in Hilary Charlesworth *et al.* (eds.), *The Fluid State – International Law and National Legal Systems* (Sydney: Federation Press, 2005), p. 34.

[102] Dahl, 'Can International Organizations Be Democratic?', p. 24; Chea and Sok, 'Cambodia's Accession to the WTO', pp. 124–5. Chea and Sok have indicated that Cambodia's accession to the WTO demonstrated a low level of citizen participation despite the involvement of parliament.

promotion of democracy in states does not necessarily mean that those states will be directly responsive to the views of their populations on issues arising under the auspices of international organisations.

Additionally, it does not appear that democratic states can be expected to operate in a more democratic way when acting as participants within international organisations. Although it has been suggested that states externalise the norms displayed in their domestic processes,[103] there are doubts as to whether democratic government at the national level results in greater democracy or accountability at the international level.[104] In support of a link between democracy at home and democracy abroad, Slaughter has asserted that a state's external behaviour depends on its internal constitution.[105] But in critiquing Slaughter's liberal theory, and in particular her description of the quality of the relations between liberal states, Alvarez argues that the evidence that liberal states behave better than non-liberal states at the international level is equivocal.[106] For example, Alvarez points to states' participation in treaty regimes to emphasise that the evidence 'does not support a liberal/non-liberal distinction with respect to the decision to be bound, the level of compliance after ratification, or the likelihood of resort to peaceful dispute resolution when treaty disputes arise'.[107] Consequently, admitting states on the basis of their democratic records to international organisations may not improve the level of democracy or accountability within an organisation.

2 Democracy as a membership condition: democratisation from above?

The more fundamental question is whether the use of democracy as a membership criterion is contrary to the very idea of democratisation. In Chapter 1 Sakamoto's distinction between democracy from below (when a democratic movement begins at a grassroots level) and democracy from above (when initiatives are taken by those who hold power) was posited. When democracy is initiated or imposed by an international

[103] See discussion in Sara McLaughlin Mitchell, 'A Kantian System? Democracy and Third-Party Conflict Resolution' (2002) 46 *Am. J. Pol. Sci.* 749.
[104] White, *Law of International Organisations*, p. 201.
[105] Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *Eur. J. Int'l L.* 503 at 537.
[106] José E. Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (2001) 12 *Eur. J. Int'l L.* 183.
[107] *Ibid.* at 209.

organisation, it can be viewed as an example of democracy from above rather than below.[108] The impact of imposing detailed criteria is particularly acute when a state, perhaps having undergone a regime change, is seeking admission to an international organisation. At this stage in the process an applicant is subject to externally-controlled membership conditions. Once a state is a member of an organisation, it may be taken that it has agreed to existing criteria, including the possibility of sanctions being instigated in the event that those criteria are breached. Of course, this comment does not hold true where a state is suspended or expelled pursuant to a process beyond the parameters of the constitutional instrument, or where new criteria are introduced after the state has joined.

Of all the organisations examined in this book, the admission conditions of the European institutions constitute the most obvious examples of detailed democracy criteria being imposed as part of the application process. The implementation of the admission criteria in the EU, the Council of Europe and NATO revealed that with each round of admissions, the list of rights and democracy criteria increased far beyond those provided in the relevant articles of the founding treaties. While the treaties do not necessarily exclude reference to detailed lists of standards, the conditions are now more extensive than those outlined in the most fundamental human rights document in Europe, the ECHR. While the change to a democratic form of government in many of the new members was initially the result of grassroots pressures in the former Soviet bloc,[109] to some extent the details of the transition process have been furthered by the prospect of admission to one or all of the European institutions. In terms of Sakamoto's model of 'deepening democracy' outlined in Chapter 1,[110] it is certainly true that in their assessments of a state's situation the institutions have not limited themselves to an account of formal government structures. For example, they have been concerned with the presence of civil society movements in some applicant states. They have also held bilateral meetings with individual applicants to discuss the admission requirements, suggesting that

[108] See also Jon C. Pevehouse, *Democracy from Above – Regional Organizations and Democratization* (Cambridge University Press, 2005), p. 217.

[109] Dianne Otto, 'Challenging the "New World Order": International Law, Global Democracy and the Possibilities for Women' (1993) 3 *Transnat'l L. & Contemp. Probs.* 371 at 399.

[110] See Chapter 1, p. 56.

the admission process is a joint discussion or 'cooperative'[111] process. But as a whole the addition of detailed human rights and democracy standards into the membership criteria by the governing organs of the three European institutions can be viewed as a type of democratisation from above. Failure to implement the required reforms will effectively exclude a state from the organisation and the considerable benefits of membership. The overwhelming impression is that applicants are being asked to implement reforms by the European institutions in order to conform to a particular version of democratic government envisaged by these institutions.

In terms of the process of democratisation, the UN and writers have highlighted that democracy cannot be imposed from outside, but must come from within a state.[112] Many of these comments are directed at military action by one state which is designed to enforce democracy within another. Jackson distinguishes such military action from democracy conditions and argues that conditionality, in the form of attaching human rights and democracy requirements to loans granted by financial organisations, is a justifiable method of promoting democracy in weak authoritarian countries.[113] He believes that although poor countries have little choice but to accept financial assistance with the conditions attached, the practice of conditionality does not infringe the norms of state sovereignty and non-intervention, and thus does not constitute 'democratic crusading'.[114] Similar arguments can be made in relation to the practice of attaching democracy and human rights conditions to the admission criteria of international organisations: states are free to choose whether to join an organisation and are therefore free to accept or reject the conditions. The problem with this argument is that in many cases the freedom to choose whether to join an organisation is an illusion – if states want to participate in a particular international or regional activity, then they must accept the admission conditions.[115]

Leaving aside a state's freedom to choose, a more powerful indication that membership conditions cannot necessarily be viewed as an imposition by the organisation on an applicant state is the fact that many states

[111] Hans Winkler, 'Democracy and Human Rights in Europe: A Survey of the Admission Practice of the Council of Europe' (1995) 47 *Austrian J. Pub. & Int'l L.* 147 at 167.

[112] Robert Jackson, *The Global Covenant – Human Conduct in a World of States* (Oxford University Press, 2000), p. 363. See also comments by Koskenniemi and Simpson and the Secretary-General's Guidance Note: Chapter 1, p. 58.

[113] Jackson, *Global Covenant*, p. 365. [114] *Ibid.*

[115] See Chapter 1, n 32 and accompanying text.

actively seek membership in order to consolidate democracy within their borders. In the context of regional organisations, Pevehouse argues that 'domestic elites can use membership or accession ... to further democratic consolidation'.[116] Thus, it cannot be assumed that governments reluctantly submit to the detailed admission processes – instead, leaders may 'attempt to tie their own hands by joining regional organizations'.[117] To illustrate his argument, Pevehouse points to Greece's accession to the EC and Paraguay's decision to join MERCOSUR as attempts by the respective leaders to strengthen democracy within their own countries.[118] Schimmelfennig also argues that membership of the EU and NATO enhanced both the international and domestic legitimacy of the supporters of liberal democratic reform in the Central and European countries.[119] He writes that it is easier to justify changes in domestic and foreign policy if they are being 'demanded by Western organizations as a condition of closer cooperation and accession (or can be legitimized this way)'.[120] The prospect of admission can assist democratic parties within states.[121] This does not necessarily translate into the desire of citizens within a state to join an organisation (although the data indicates that citizens within Central and Eastern European states supported membership of the European institutions).[122] Such evidence at least serves to neutralise suggestions that human rights and democracy conditions in the admission criteria of international organisations are, by their very nature, an (unwanted) imposition 'from above' on applicant states.

[116] Pevehouse, *Democracy from Above*, p. 3. [117] *Ibid.*, p. 185. [118] *Ibid.*, pp. 174, 181.

[119] Frank Schimmelfennig, *The EU, NATO and the Integration of Europe – Rules and Rhetoric* (Cambridge University Press, 2003), p. 91.

[120] *Ibid.*

[121] Milada Vachudova, 'The Leverage of International Institutions on Democratizing States: Eastern Europe and the European Union', Working Paper No. 2001/33, Robert Schuman Centre for Advanced Studies, 2001, pp. 5, 10. See also Wojciech Sadurski, 'EU Enlargement and Democracy in New Member States', in Wojciech Sadurski, Adam Czarnota and Martin Krygier (eds.), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Vienna: Springer, 2006), p. 27.

[122] See Cas Mudde, 'EU Accession and a New Populist Center–Periphery Cleavage in Central and Eastern Europe', Working Paper No. 62, Centre for European Studies, Harvard University, 2005, p. 2. Mudde has highlighted that although support in terms of 'Yes' votes for accession to the EU was strong in candidate countries from Central and Eastern Europe, in some cases, for example, Hungary, there was a low voter turnout.

B The protection of human rights

The discussion in section A highlights that the promotion of democracy at the national level does not necessarily translate into greater democracy at the international level. But it cannot be said that the practice of employing democracy as a condition for membership necessarily results in the inappropriate imposition of democracy on states. What about the implications of the practice for the protection of human rights? Is the use of human rights and democracy conditions in membership decisions a useful mechanism in the fight to promote and protect human rights? Two features of the international legal system are relevant here. First, the practice on admission and exclusion demonstrates that membership policies are a potent force in international institutions. States want to participate in universal, regional and specialised organisations for both symbolic reasons (the desire to join a club) and concrete advantages.[123] With very few exceptions, states actively seek admission to international and regional organisations, and fight attempts at exclusion. The second feature of the international legal system relevant to this discussion is the lack of strong enforcement mechanisms in international human rights law. Although there has been a proliferation of human rights standards since the Second World War as detailed in Chapter 1, this has not been accompanied by the same commitment to enforcement through international processes. Taking into account these two features of the international legal system, it would appear to follow that the practice of inserting human rights conditions into membership polices should aid in the enforcement of human rights law.

There are, however, a number of problems in demonstrating a direct link between membership policies and human rights implementation by states. First, it is difficult to discern the extent to which the admission and exclusion policies of international organisations dictate a state's adoption of human rights and democracy standards. At the admission stage, conditionality acts as a carrot leading to the prize of membership.[124] However, during the accession process, states may improve their democratic and human rights records due to a variety of internal and external factors, thus making it difficult to attribute 'good behaviour' to any one reason. In the EU – the organisation with the greatest pull towards compliance and demanding the most change at the admission

[123] Alvarez, *International Organizations as Law-Makers*, p. 154; Franck, *Power of Legitimacy*, p. 38. See Chapter 1, p. 29.
[124] Sadurski, 'EU Enlargement and Democracy', p. 32.

stage – there are a range of views on whether admission conditions caused positive changes in applicant states.[125] Commentators have attributed progress to a number of factors, including membership conditionality. Sadurski states that 'some of the most important institutional innovations, especially in the first period of democratic change, were taken predominately under *domestic* public pressure'.[126] In his view conditionality was most influential when it 'resonated with domestic preferences and political aims'.[127] As a result, if an EU rule did not accord with domestic public opinion (for example, the application of the principle of non-discrimination in relation to the Roma minority), then it was less likely to be effectively implemented in the candidate countries.[128] Additionally, states are subject to external influences, apart from admission conditions set by an organisation. For example, in the case of the EU, external influences on applicants from Central and Eastern Europe included NATO (and its admission conditions), non-governmental organisations such as the Open Society Initiative and other international organisations such as the OSCE.[129] More positively, Vachudova has suggested that the EU's leverage over states (including conditionality) helped create 'a coherent and modern opposition, and an open and pluralistic political arena'.[130] Consequently, it would appear that changes in applicant states can be attributed to a variety of forces, including the admission conditions.

Once a state has attained membership of an international organisation, exclusion acts as a stick – a method of threatening states in the event that they do not live up to the organisation's human rights and democracy principles.[131] As is the case at the admission stage, it is not easy to determine the extent to which the prospect of exclusion prevents a state from violating the rights of its citizens. It is even more difficult to evaluate whether a decision to exclude a member has an impact on a state's willingness to change its human rights record. For example, South Africa was excluded from the specialised agencies and deprived of its credentials in the UN General Assembly in the 1960s and 1970s. It was also subject to a number of other domestic and international pressures, making it difficult to attribute the end of apartheid to any one factor.

[125] See Chapter 3, p. 161. [126] Sadurski, 'EU Enlargement and Democracy', p. 29.
[127] *Ibid.*, p. 30. [128] *Ibid.* [129] *Ibid.*
[130] Milada Vachudova, *Europe Undivided – Democracy, Leverage and Integration Post Communism* (Oxford University Press, 2005), p. 258.
[131] Sadurski, 'EU Enlargement and Democracy', p. 32.

On the other hand, in the case of Togo it has been suggested that the combined effect of the sanctions imposed by ECOWAS and the AU reversed the 2005 coup in that country.[132] The perceived desirability of membership of a particular organisation, as well as the susceptibility of a state to international pressure, will have a bearing on the threat or use of membership sanctions. The Mugabe government in Zimbabwe resisted any form of international pressure and preferred to withdraw from the Commonwealth rather than face the possibility of renewed suspension. From the perspective of the Zimbabwean government the costs of continued international pressure by the Commonwealth outweighed the benefits of membership. Furthermore, when exclusion has been imposed in apparent violation of a constituent instrument or without reference to the organisation's functions, the relevant states have often dismissed the appropriateness of the action, thereby reducing its value. Such was the case when South Africa, Spain and Israel were excluded from various specialised agencies and the USSR was expelled from the League of Nations. The ad hoc application of membership sanctions in these organisations diminished the possibility of them acting as a method of enforcing human rights standards. The perceived legitimacy of the sanction will impact on its ability to act as a mechanism for enforcing human rights standards in members of an organisation.

The capacity of membership sanctions to aid in the promotion and protection of human rights within member states also depends on the willingness of an international organisation to utilise these measures. Once a state has become a member of an organisation, it is more difficult to exclude it from participation. For example, over the years the Council of Europe has highlighted problems in a number of new members, but has failed to suspend a state despite the presence of an article in its Statute enabling it to take this action. The failure to impose membership sanctions decreases their ability to act as an effective deterrent against potential violations.[133] Amongst the organisations that have suspended members, the threshold for exclusion is usually based on a narrow range of criteria, for example, an unconstitutional change of government. In organisations with a broader range of criteria (for example, serious and

[132] Muthoni Kamuyu, 'Togo', in Ted Piccone and Richard Youngs (eds.), *Strategies for Democratic Change – Assessing the Global Response* (Washington, D.C.: Democracy Coalition Project, 2006), p. 67.

[133] Emilie M. Hafner-Burton, 'Trading Human Rights: How Preferential Trade Agreements Influence Government Repression' (2005) 59 *Int'l Org.* 593 at 614.

persistent breaches of human rights) suspension is rarely invoked. In the Commonwealth and the OSCE only Zimbabwe and Yugoslavia (Serbia and Montenegro) have been suspended for engaging in serious and persistent breaches of human rights. However, the Commonwealth has shown little hesitation in suspending members subjected to a military coup, suggesting that the more precisely defined the criteria, the more likely that membership sanctions will be imposed. Precision in the definition of the criteria adds to the value of membership sanctions as enforcement mechanisms for some human rights and democratic principles. Such value is substantially reduced in relation to human rights standards that are outside the exclusion provisions. As a result, conditionality at the suspension or expulsion stage does not assist in protecting the full range of human rights principles espoused by the organisations, most particularly economic and social rights.[134]

These comments emphasise the link between the legitimacy of the membership criteria and their ability to act as a method of securing compliance with international human rights law. They also point to a number of weaknesses in relying solely upon membership criteria as a method of achieving this objective. But this fact alone should not discourage international organisations and their members from pursuing the practice of inserting human rights conditions into their membership policies, provided that those criteria fulfil the indicia of legitimacy. In relation to the addition of human rights clauses in preferential trade agreements (PTAs), Hafner-Burton has commented that:

> PTAs . . . are certainly not ideal forms of human rights governance and they are not a replacement for human rights laws. They are among the only international institutions with some capacity to enforce compliance, and they may prove to be one of the most effective available means of implementing very basic human rights values into practice, although partial and imperfect.[135]

The same conclusion can be reached when considering human rights and democracy conditionality and the membership of international organisations. On the basis that states actively pursue membership of international organisations and see tangible benefits in joining an association of states, the inclusion of human rights and democracy requirements as part of the admission and exclusion criteria may assist in improving the

[134] Hafner-Burton has made a similar observation in relation to the use of human rights to condition participation in preferential trade agreements: *ibid.*

[135] *Ibid.* at 624.

human rights record of existing members and applicants. Results will vary according to the 'popularity' of an organisation (its power of attraction), the preparedness of a state to be subjected to external pressure (for example, whether the state is concerned with its international image), the capacity of an organisation to instigate the sanction of exclusion (in the case of existing members) and, importantly, the perceived legitimacy of the membership criteria by members and non-members alike. Membership conditionality is one of a number of measures which may be adopted by international organisations to improve awareness of, and compliance with, human rights standards by states. Consequently, provided that the practice accords with principles of legitimacy, international organisations should continue to use membership criteria as a method of increasing the prospect of achieving these aims.

Conclusion

The first five months of 2009 were a challenging time for the organs of international organisations charged with excluding member states for violations of democracy and human rights. In January the leaders of ECOWAS decided to bar the military leaders of Guinea from attending meetings of the organisation; in May the military regime of Fiji was suspended from the Pacific Islands Forum; and in the space of ten days in March, both the AU and SADC suspended Madagascar following an unconstitutional change of government.[1] As the year progressed, other organisations were faced with difficult decisions – ASEAN again came under pressure to exclude Burma's military regime, particularly now that the ASEAN Charter obligates members to act in accordance with 'democracy and constitutional government' and 'the promotion and protection of human rights'.[2] In September the Commonwealth fully suspended Fiji from membership due to human rights violations and the failure of the military regime to achieve satisfactory progress in returning to democracy.[3] Towards the end of the year the European Commission published its annual strategy document on the enlargement of the EU. The document discussed the applicants' progress during 2009 in terms of compliance with democracy and the rule of law, and human rights and the protection of minorities.[4] Even in the most recent

[1] ECOWAS, 'ECOWAS Leaders Reject Military Transition in Guinea', Press Release No. 003/2009, 10 January 2009; 'Statement by Forum Chair on Suspension of the Fijian Military Regime from the Pacific Islands Forum', Press Statement No. 21/09, 2 May 2009; Peace and Security Council of the African Union, 'Communiqué of the 181st Meeting', Addis Ababa, Ethiopia, 20 March 2009, Doc. No. PSC/PR/Comm (CLXXXI) at para. 3; SADC, 'Communiqué of the Extraordinary Summit of SADC Heads of State and Government', 30 March 2009 at para. 16.

[2] ASEAN Charter, Art. 2(h) and (i).

[3] Commonwealth Secretariat, 'Fiji Suspended from the Commonwealth', Press Release, 1 September 2009.

[4] Commission of the European Communities, 'Communication from the Commission to the European Parliament and the Council – Enlargement Strategy and Main Challenges 2009–2010', Brussels, COM(2009) 553 Final.

membership decision of the UN, the admission of Montenegro in June 2006, General Assembly members commented favourably on Montenegro's democratic credentials and its commitment to a multiethnic society, suggesting that such attributes bolstered its claim to membership.[5] Thus, a diverse range of international organisations consider it necessary, if not essential, to incorporate human rights and democracy criteria into their membership decisions.

This book has examined the way in which international organisations have adopted and applied human rights and democracy in their admission and exclusion policies, and has argued that there are problems undermining the legitimacy of the practice in some institutions. These problems include the clash between the criteria and the functions of the organisation, the incompatibility of the practice with the provisions of the constitutional instrument and the lack of clarity and coherence in the criteria. Furthermore, Chapter 6 listed a number of accountability mechanisms which could increase the legitimacy of the membership procedure in the organisations. The process of exploring the legitimacy of the practice has revealed that principles such as universality, regionalism and non-interference in the internal affairs of member states, as well as an organisation's purposes, have been debated and transformed in the discussions surrounding particular membership decisions. Finally, although a number of problems with the use of human rights and democracy as membership criteria have been identified, these problems do not necessarily lead to the conclusion that the practice is illegitimate or should be abandoned in all of the organisations examined.

These findings return us to Mitrany's 1943 warning against the formation of 'ideological unions' or 'holy alliances'.[6] Mitrany believed that the only determinant of a state's membership of a grouping should be that state's performance relating to the group's purpose and its mutual relationships.[7] In one sense the practice of international organisations reveals that they have failed to heed this warning, instead choosing to factor a state's internal situation into the membership process. But in other respects it may be questioned whether international organisations have significantly departed from Mitrany's conception of the

[5] UN GAOR, 60th session, 91st plenary meeting, Agenda Item 114, UN Doc. A/60/PV.91, 28 June 2006, p. 5 (Austria), p. 8 (Ireland).

[6] See Chapter 1, pp. 58, 41.

[7] David Mitrany, *A Working Peace System – An Argument for Functional Development of International Organization* (London: Royal Institute of International Affairs, 1943), p. 15.

appropriate method of determining membership. In deciding on the states to include in a functional organisation, Mitrany concentrated on the group's purpose and relationships. Some organisations have moved away from their original principles and purposes, and this shift has been replicated by the introduction of human rights and democracy conditions in the membership criteria. Thus, purposes and principles are still the focus of membership decisions, although the purposes and principles falling within the area of the mutual relations between states have changed.

Chapter 6 detailed some of the implications of the practice of using human rights and democracy as membership criteria for both democratic accountability within international organisations and also the promotion and protection of human rights. But the practice may in addition have ramifications beyond the fields of international institutional law and international human rights. In this respect two related issues are relevant: the principle of non-intervention and the recognition of governments in international law. These issues are linked as policies espousing the non-recognition of governments may be in conflict with the principle of non-intervention.[8] Non-intervention has been discussed previously; first, in relation to Article 2(7) of the UN Charter and UN membership; and second, when examining the constitutions of organisations with a restricted membership. Mitrany's warning against the formation of ideological unions was based on his belief that it is the 'genius of each people'[9] to work out their own institutions. Thus, intervention in the affairs of another state to impose democratic institutions would be contrary to Mitrany's vision of international cooperation. Over fifty years later, Roth also emphasised his concern with the practice of delegitimation of governments on the basis that it is 'inherently aggressive',[10] potentially leading to situations where intervention is advocated to 'implant democratic systems'.[11] The evidence presented and the conclusions reached in this work should not be taken as an argument for increasing external intervention in states, including military intervention. Chapter 6 highlights that the practice on admission and exclusion can be distinguished from more forceful forms of pro-democratic

[8] For a discussion of this relationship, see Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford University Press, 1999).

[9] David Mitrany, *The Progress of International Government* (New Haven, CT: Yale University Press, 1933), p. 131.

[10] Roth, *Governmental Illegitimacy*, p. 426. [11] *Ibid*., p. 427.

policies on two bases. First, where states desire to ratify, or have ratified, the constituent instruments of international organisations containing admission and exclusion criteria, they have consented to the application of the conditions to applicants and existing members respectively.[12] Second, decisions to suspend a member have not been accompanied by military intervention on behalf of the organisation (although other sanctions may have been implemented) and in most cases the organisations have been keen to stress that dialogue with the relevant government continues.

The broad range of practice on membership conditions may also have implications for the recognition of governments. State practice on the law of recognition draws a distinction between the recognition of a new state and the recognition of a new government. Such a distinction is largely irrelevant to the membership of international organisations as membership is granted to a state rather than a particular government. Therefore, apart from the discussion of General Assembly credentials decisions, this study has been concerned with the practice of organisations in relation to applicant and member states. However, almost uniformly, when international organisations such as the OAS, the Commonwealth and the OSCE have excluded members, they have been quick to affirm that the action has been taken against the government of a member and not against its people. Thus, the relevant organs have condemned the government rather than the state when suspending a member. However, without an alternative representative, suspension effectively removes the state (including its people) from some or all of the privileges of membership.

Previous studies have examined the relationship between admission to an international organisation (usually the UN) and the recognition of a state in the international community.[13] Although such a link has its attractions in a community where no body is tasked with the role of

[12] See discussion at Chapter 6, p. 303.

[13] Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press, 1947), pp. 400–3; Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, 1963), pp. 11–57; John Dugard, *Recognition and the United Nations* (Cambridge: Grotius Publications, 1987); James Crawford, *The Creation of States in International Law*, 2nd edn (Oxford University Press, 2006), pp. 192–3; Thomas D. Grant, *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization* (Boston: Martinus Nijhoff Publishers, 2009), pp. 252–7. See also the discussion at the First Assembly of the League of Nations on the question whether admission to the League implied *de jure* recognition of a state by other members in Chapter 1, pp. 73–4.

recognising the existence of a new state, there are problems with equating UN membership to statehood.[14] The decision of an international organisation, whether universal or regional, to admit or exclude a state on the basis of its democratic and human rights record has little bearing on whether an organisation or its members believes that a particular state fulfils the criteria of statehood.[15] But leaving the recognition of states to one side, such a decision (particularly a decision to exclude a member) certainly reveals something about the organisation's attitude towards the government of a member. The trend amongst states has been to move away from the practice of recognising governments, lest such recognition be taken as a sign of support for a government installed through revolutionary or unconstitutional means.[16] Current practice emphasises that a state's attitude towards a new government in another state should be implied from concrete actions, including the creation of trading ties and diplomatic relations.[17] Notwithstanding this practice, as members of an international organisation, states have demonstrated a willingness to collectively condemn a government installed by unconstitutional means. Thus, despite the fact that states individually have moved away from formal pronouncements of recognition or non-recognition of governments, when acting in concert through the organs of an international organisation they have been more inclined to censure other (undemocratic) governments.

Although the evidence presented in this book on membership practice could suggest that we are moving closer to collective non-recognition of undemocratic governments, support for this principle is equivocal.[18] For example, although an international organisation may suspend a recalcitrant member state, this does not mean that all members will refuse to

[14] See Crawford, *Creation of States*, p. 193.

[15] However, human rights and democracy conditions may be relevant to the recognition of an entity as a state, which in turn could lead to membership of an organisation: see discussion of ex-Yugoslav republics in Chapter 2, pp. 101–3.

[16] See, for example, 'Written Answer by Secretary of State for Foreign and Commonwealth Affairs', reproduced in Geoffrey Marston, 'United Kingdom Materials on International Law 1980' (1980) 51 *Brit. Y.B. Int'l L.* 355 at 367.

[17] See, for example, Minister for Foreign Affairs and Trade, 'Recognition of Governments – Change in Australian Policy', Press Release, reproduced in (1992) 12 *Aust. Y.B. Int'l L.* 357.

[18] Similarly, Roth has concluded more generally that '[n]othing has yet happened to demonstrate that the international community posits democracy, however defined, as a *sine qua non* of governmental legitimacy': Roth, *Governmental Illegitimacy*, p. 417. See also Sean Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' (1999) 48 *Int'l & Comp. L.Q.* 545.

deal with the relevant government on a bilateral basis. It may also be the case that the suspension of a state from a regional organisation is supported by the majority of members, but the ability of a universal organisation to suspend the same state would be denied on the basis that the principle of universality takes precedence. Therefore, just as it is difficult to imply collective recognition of a state from the act of admission to an organisation, it is also difficult to imply collective non-recognition of a government from the act of suspension. Nevertheless, within the organs of an organisation, states have positively asserted their readiness to explicitly condemn a defaulting government and exclude it from the advantages of membership.

Of course, the most significant consequences of this study concern the design of international organisations and their membership provisions. The findings in relation to the role and legitimacy of human rights and democracy as admission and exclusion conditions have important ramifications for the adoption of membership criteria, as well as the way in which they are applied. This in turn will impact on the functioning and efficacy of international organisations.[19] In the end, the use of these conditions will be judged by the outcomes of the practice for the legitimacy of the organisation as a whole. A number of writers have offered different views on the way in which the legitimacy of an international organisation should be assessed, using criteria such as an organisation's ability to fulfil its functions, its power to attract members and the level of democracy exhibited by its organs.[20] International organisations will be judged by all these factors; however, the use of human rights and democracy in membership criteria highlights that organisations have tied their legitimacy to the way in which their membership is perceived by external groups and actors, as well as by their own members. The fact that in many cases such decisions are politically motivated and are the result of differing ideological forces within an organisation[21] does not detract from this conclusion.

Questions remain as to whether the adoption and use of human rights and democracy criteria in the admission and exclusion processes of an

[19] Grant highlights that 'the efficacy of new international organizations . . . will depend in large part on how the authors of the constituent instruments define criteria for admission – and how the original member States in practice apply them': Grant, *Admission to the United Nations*, p. 296.

[20] See Chapter 1, pp. 28–30.

[21] Thomas Buergenthal, *Law-Making in the International Civil Aviation Organization* (New York: Syracuse University Press, 1969), p. 13.

international organisation result in the organisation's decisions being perceived as more legitimate. Whether the suspension of Fiji from the Commonwealth, the addition of admission criteria to the ASEAN Charter or the detailed conditions for entry into the EU result in more just, fair or appropriate decisions in these organisations is a matter for further exploration. Whether Montenegro's record on democracy will enhance the legitimacy of decisions made by the UN may be doubted, but perhaps what is of greater significance in these cases is the discussions and processes rather than the result. The continual affirmation of the relevance of human rights and democracy in one of the most important decisions made by international organisations confirms the trend towards the integration of these principles into the organisations' decision-making processes. This in turn suggests that human rights and democracy have an important role to play in the future development of international institutional law.

SELECT BIBLIOGRAPHY

Abbott, Frederick M., Breining-Kaufmann, Christine and Cottier, Thomas *et al.* (eds.), *International Trade and Human Rights – Foundations and Conceptual Issues* (Ann Arbor: University of Michigan Press, 2006).

Abi-Saab, Georges, 'The Newly Independent States and the Rule of International Law: An Outline' (1962) 8 *How. L.J.* 95.

Acharya, Amitav, *Constructing a Security Community in Southeast Asia – ASEAN and the Problem of Regional Order* (London: Routledge, 2001).

Akinyemi, A. Bolaji, 'The Organization of African Unity and the Concept of Non-Interference in Internal Affairs of Member-States' (1972–3) 46 *Brit. Y.B. Int'l L.* 393.

Alston, Philip, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 *Eur. J. Int'l L.* 815.

(ed.), *Labour Rights as Human Rights* (Oxford University Press, 2005).

Alston, Philip with Bustelo, Mara and Heenan, James (eds.), *The EU and Human Rights* (Oxford University Press, 1999).

Alvarez, José E., 'Book Review Essay: The Quest for Legitimacy: An Examination of *The Power of Legitimacy among Nations* by Thomas Franck' (1991) 24 *N.Y.U. J. Int'l L. & Pol.* 199.

'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (2001) 12 *Eur. J. Int'l L.* 183.

International Organizations as Law-Makers (Oxford University Press, 2006).

(Panel), 'The Move from Institutions?' (2006) 100 *A.S.I.L. Proceedings* 287.

Amerasinghe, C. F., *Principles of the Institutional Law of International Organizations*, 2nd edn (Cambridge University Press, 2005).

Anderson, Jeffrey, *Regional Integration and Democracy – Expanding on the European Experience* (Lanham: Rowman & Littlefield, 1999).

Anghie, Antony, 'Civilization and Commerce: The Concept of Governance in Historical Perspective' (2000) 45 *Villanova L.R.* 887.

Imperialism, Sovereignty and the Making of International Law (Cambridge University Press, 2004).

Arangio-Ruiz, Gaetano, 'The "Federal Analogy" and UN Charter Interpretation: A Crucial Issue' (1997) 8 *Eur. J. Int'l L.* 1.

Archer, Clive, *International Organizations*, 3rd edn (London: Routledge, 2001).

Arnull, Anthony and Wincott, Daniel (eds.), *Accountability and Legitimacy in the European Union* (Oxford University Press, 2002).

Atik, Jeffery, 'Democratizing the WTO' (2001) 33 *G.W. Int'l L.R.* 451.

Bacchus, James, 'A Few Thoughts on Legitimacy, Democracy, and the WTO' (2004) 3 *J. Int'l Eco. L.* 667.

Barderin, Mashood and McCorquodale, Robert (eds.), *Economic, Social, and Cultural Rights in Action* (Oxford University Press, 2007).

Beetham, David, *Democracy and Human Rights* (Cambridge: Polity Press, 1999).

Bekker, Peter, *The Legal Position of International Organizations – A Functional Necessity Analysis of their Legal Status and Immunities* (Dordrecht: Martinus Nijhoff Publishers, 1994).

Berting, Jan *et al.* (eds.), *Human Rights in a Pluralist World – Individuals and Collectivities* (Westport, CT: Meckler, 1990).

Bissell, Richard E., *Apartheid and International Organizations* (Boulder, CO: Westview Press, 1977).

Bloed, Arie (ed.), *The Conference on Security and Cooperation in Europe: Analysis and Basic Documents 1972–1993* (Dordrecht: Kluwer Academic Publishers, 1993).

Blokker, Niels and Schermers, Henry (eds.), *Proliferation of International Organizations – Legal Issues* (The Hague: Kluwer Law International, 2001).

Blum, Yehuda Z., *Eroding the United Nations Charter* (Dordrecht: Martinus Nijhoff Publishers, 1993).

'UN Membership of the "New" Yugoslavia: Continuity or Break?' (1992) 86 *Am. J. Int'l L.* 830.

'Was Yugoslavia a Member of the United Nations in the Years 1992–2000?' (2007) 101 *Am. J. Int'l L.* 800.

Bobbio, Norbetto, *The Age of Rights*, Allan Cameron (trans.) (Cambridge: Polity Press, 1996).

Bodansky, Daniel, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *Am. J. Int'l L.* 596.

Bodin, Jean, *Six Books of the Commonwealth*, M. J. Tooley (trans.) (Oxford: Blackwell, 1955).

Boniface, Dexter S., 'Is There a Democratic Norm in the Americas? An Analysis of the Organization of American States' (2002) 8 *Glob. Gov.* 365.

Bothe, Michael *et al.* (eds.), *The OSCE in the Maintenance of Peace and Security – Conflict Prevention, Crisis Management and Peaceful Settlement of Disputes* (The Hague: Kluwer, 1997).

Bowring, Bill, 'Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes' (1997) 4 *Eur. Hum. Rts. L.R.* 638.

Brandtner, Barbara and Rosas, Allen, 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice' (1998) 9 *Eur. J. Int'l L.* 468.

Brett, Rachel, 'Human Rights and the OSCE' (1996) 18 *Hum. Rts. Q.* 668.

Buergenthal, Thomas, *Law-Making in the International Civil Aviation Organization* (New York: Syracuse University Press, 1969).

Bühler, Konrad G., *State Succession and Membership in International Organizations – Legal Theories Versus Political Pragmatism* (The Hague: Kluwer, 2001).

Bull, Hedley, *The Anarchical Society – A Study of Order in World Politics* (New York: Columbia University Press, 1977).

Burley, Anne-Marie, 'Toward an Age of Liberal Nations' (1992) 33 *Harv. Int'l L.J.* 393.

Butterfield, Herbert and Wight, Martin (eds.), *Diplomatic Investigations – Essays in the Theory of International Politics* (London: George Allen & Unwin, 1966).

Caron, David D., 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87 *Am. J. Int'l L.* 552.

Carpenter, Ted and Conroy, Barbara, *NATO Enlargement: Illusions and Reality* (Washington, D.C.: Cato Institute, 1998).

Cass, Deborah Z., *The Constitutionalisation of the World Trade Organization – Legitimacy, Democracy, and Community in the International Trading System* (Oxford University Press, 2005).

Cass, Deborah Z., Williams, Brett G. and Barker, George (eds.), *China and the World Trading System – Entering the New Millennium* (New York: Cambridge University Press, 2003).

Cassese, Antonio, *Self-Determination of Peoples – A Legal Appraisal* (Cambridge University Press, 1995).

Cecil, Lord Robert, *A Great Experiment* (London: Jonathan Cape, 1941).
All the Way (London: Hodder & Stoughton, 1949).

Charlesworth, Hilary, Chiam, Madelaine, Hovell, Devika and Williams, George (eds.), *The Fluid State – International Law and National Legal Systems* (Sydney: Federation Press, 2005).

Charlesworth, Hilary, Chinkin, Christine and Wright, Shelley, 'Feminist Approaches to International Law' (1991) 85 *Am. J. Int'l L.* 613.

Charnovitz, Steve, 'The Emergence of Democratic Participation in Global Governance (Paris, 1919)' (2003) 10 *Ind. J. Global Legal Stud.* 45.

Chayes, Abram and Handler Chayes, Antonia, *The New Sovereignty – Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995).

Chigara, Ben, *Legitimacy Deficit in Custom – A Deconstructionist Critique* (Aldershot: Ashgate, 2001).

Ciobanu, Dan, 'Credentials of Delegations and Representation of Member States at the United Nations' (1976) 25 *Int'l & Comp. L.Q.* 351.

Clapham, Andrew, 'On Complementarity: Human Rights in the European Legal Orders' (2000) 21 *Hum. Rts. L.J.* 321.

Clapham, Christopher, Sidiropoulos, Elizabeth, Morner, Anna and Mills, Greg (eds.), *Regional Integration in Southern Africa: Comparative International Perspectives* (Johannesburg: SAIIA, 2001).

Clark, Ian, *Legitimacy in International Society* (Oxford University Press, 2005).

Claude, Inis L., 'Collective Legitimization as a Political Function of the United Nations' (1966) 20 *Int'l Org.* 367.

Swords into Plowshares – The Problems and Progress of International Organization, 4th edn (New York: Random House, 1971).

Coicaud, Jean-Marc, 'Reflections on International Organisations and International Legitimacy: Constraints, Pathologies and Possibilities' (2001) 53 *Int'l Soc. Sci. J.* 523.

Coicaud, Jean-Marc and Heiskanen, Veijo (eds.), *The Legitimacy of International Organizations* (Tokyo: United Nations University Press, 2001).

Cook Rebecca (ed.), *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994).

Cornwell, Richard, 'Madagascar: First Test for the African Union' (2003) 12(1) *Afr. Sec. R.* 41.

Cottier, Thomas, Pauwelyn, Joost and Bürgi, Elisabeth (eds.), *Human Rights and International Trade* (Oxford University Press, 2005).

Crawford, James, 'Democracy and International Law' (1993) 64 *Brit. Y.B. Int'l L.* 113.

The Creation of States in International Law, 2nd edn (Oxford University Press, 2006).

Cremona, Marise (ed.), *The Enlargement of the European Union* (Oxford University Press, 2003).

Dagtoglou, Prodromos, 'The Southern Enlargement of the European Community' (1984) 21 *Common Mkt. L.R.* 149.

Dahrendorf, Ralf, 'The Third Way and Liberty – An Authoritarian Streak in Europe's New Center' (1999) 78(5) *Foreign Aff.* 13.

Darrow, Mac, *Between Light and Shadow – The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford: Hart Publishing, 2003).

Davidson, Paul J., 'The ASEAN Way and the Role of Law in ASEAN Economic Cooperation' (2004) 8 *Sing. Y.B. Int'l L.* 165.

Davis, Kathryn, *The Soviets at Geneva: The USSR and the League of Nations, 1919–1933* (Westport, CT: Hyperion Press, 1977 reprint).

Debeljak, Julie, 'Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights' (2002) 26 *Melb. U.L.R.* 285.

Degras, Jane, *Soviet Documents on Foreign Policy* (London: Oxford University Press, 1953), vol. III.

Deng, Frances M. and Lyons, Terrence (eds.), *African Reckoning: A Quest for Good Governance* (Washington, D.C.: Brookings Institution, 1998).

Deutsch, Karl, and Hoffman, Stanley (eds.), *The Relevance of International Law – Essays in Honor of Leo Gross* (Cambridge, MA: Schenkman, 1968).

DiNunzio, Mario R. (ed.), *Woodrow Wilson: Essential Writings and Speeches of the Scholar-President* (New York University Press, 2006).

Dimitrijević, Vojin and Milanović, Marko, 'The Strange Story of the Bosnian Genocide Case' (2008) *Leiden J. Int'l L.* 65.

Dixon, Martin, *Textbook on International Law*, 6th edn (Oxford University Press, 2007).

Donnelly, Jack, 'Cultural Relativism and Universal Human Rights' (1984) 6 *Hum. Rts. Q.* 400.

'Human Rights, Democracy and Development' (1999) 21 *Hum. Rts. Q.* 608.

International Human Rights, 2nd edn (Boulder, CO: Westview Press, 1998).

Doswald Beck, Louise and Vité, Sylvian, 'International Humanitarian Law and Human Rights Law' (1993) 293 *Int'l R. Red Cross* 94.

Douzinas, Costas, *The End of Human Rights* (Oxford: Hart Publishing, 2000).

Doyle, Michael, 'Kant, Liberal Legacies and Foreign Affairs' (1983) 12 *Phil. & Pub. Aff.* 205.

Dugard, John, *Recognition and the United Nations* (Cambridge: Grotius Publications, 1987).

Dutt, Sagarika, *The Politicization of the United Nations Specialized Agencies – A Case Study of UNESCO* (Lewiston: Mellen University Press, 1995).

Editorial, 'Britain and the Future Roles of the Commonwealth' (1995) *The Round Table* iii.

Efraim, Athena D., *Sovereign (In)equality in International Organizations* (The Hague: Martinus Nijhoff Publishers, 2001).

El-Erian, Abdullah, 'Relations between States and Inter-Governmental Organizations' [1963] 2 *Y.B Int'l L. Comm.* 159.

Engel, Salo, '"Living" International Constitutions and the World Court (The Subsequent Practice of International Organs under their Constituent Instruments)' (1967) 16 *Int'l & Comp. L.Q.* 865.

European Movement, *European Movement and the Council of Europe* (London: Hutchinson, 1949).

Falk, Richard and Strauss, Andrew, 'On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty' (2000) 36 *Stan. J. Int'l L.* 191.

Farber, Henry S. and Gowa, Joanne, 'Polities and Peace' (1995) 20(2) *Int'l Sec.* 123.

Farer, Tom (ed.), *Beyond Sovereignty – Collectively Defending Democracy in the Americas* (Baltimore: John Hopkins University Press, 1996).

Fawcett, J. E. S., 'The Place of Law in an International Organization' (1960) 36 *Brit. Y.B. Int'l L.* 321.

Fenwick, C. G., 'The Issues at Punte Del Este: Non-Intervention v Collective Security' (1962) 56 *Am. J. Int'l L.* 469.

Firth, Stewart, 'A Reflection on South Pacific Regional Security, Mid-2000 to Mid-2001' (2001) 36 *J. Pacific Hist.* 277.

Fitzmaurice, Gerald, *The Law and Procedure of the International Court of Justice* (Cambridge: Grotius Publications, 1986), vol. I.

Fisch, Jörg, 'When Will Kant's Perpetual Peace Be Definitive?' (2000) 2 *J. Hist. Int'l L.* 125.

Flack, Horace E. and Marburg, Theodore (eds.), *Taft Papers on League of Nations* (New York: Macmillan, 1920).

Fowler, Michael Ross and Bunck, Julie Marie, *Law, Power, and the Sovereign State – The Evolution and Application of the Concept of Sovereignty* (Pennsylvania State University Press, 1995).

Fox, Gregory, 'The Right to Political Participation in International Law' (1992) 17 *Yale J. Int'l L.* 539.

Fox, Gregory and Roth, Brad (eds.), *Democratic Governance and International Law* (Cambridge University Press, 2000).

Franck, Thomas, 'Clan and Superclan: Loyalty, Identity and Community in Law and Practice' (1996) 90 *Am. J. Int'l L.* 359.

Fairness in International Law and Institutions (Oxford: Clarendon Press, 1995).

'The Emerging Right to Democratic Governance' (1992) 86 *Am. J. Int'l L.* 46–91.

The Power of Legitimacy among Nations (New York: Oxford University Press, 1990).

Friedlander, Lilian M., 'The Admission of States to the League of Nations' (1928) *Brit. Y.B. Int'l L.* 84.

Fung, Archon and Wright, Erik Olin, *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (London: Verson, 2003).

Gallagher, Peter, Low, Patrick and Stoler, Andrew (eds.), *Managing the Challenges of WTO Participation* (Cambridge University Press, 2005).

Gardiner, Richard K., *Treaty Interpretation* (Oxford University Press, 2008).

Gartzke, Erik, 'Kant We All Just Get Along? Opportunity, Willingness, and the Origins of the Democratic Peace' (1998) 42 *Am. J. Pol. Sci.* 1.

Gaventa, John, 'Triumph, Deficit or Contestation? Deepening the "Deepening Democracy" Debate' (Institute of Development Studies Working Paper No. 264, 2006).

Ghai, Yash, 'Human Rights and Governance: The Asia Debate' (1994) 15 *Aust. Y.B. Int'l L.* 1.

Ghebali, Victor-Yves, *The International Labour Organization – A Case Study on the Evolution of UN Specialized Agencies* (Dordrecht: Martinus Nijhoff Publishers, 1989).

Glendon, Mary Ann, *Rights Talk: The Impoverishment of Political Discourse* (New York: Macmillan, 1991).

Goodman, Ryan and Jinks, Derek, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 *Duke L.J.* 621.

Goodrich, Leland M., Hambro, Edvard and Simons, Anne Patricia, *Charter of the United Nations – Commentary and Documents*, 3rd edn (New York: Columbia University Press, 1969).

Grabbe, Heather, 'How Does Europeanization Affect CEE Governance? Conditionality, Diffusion and Diversity' (2001) 8 *J. Eur. Pub. Pol.* 1013.

Grant, Thomas D., *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization* (Leiden: Martinus Nijhoff Publishers, 2009).

Griffin, Matthew, 'Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy through its Accreditation Process and Should it?' (1999) 32 *N.Y. J. Int'l L. & Pol.* 725.

Griller, Stefan (ed.), *International Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order* (Vienna: Springer, 2003).

Gross, Leo, 'Comment: On the Degradation of the Constitutional Environment of the United Nations' (1983) 77 *Am. J. Int'l L.* 569.

'Progress towards Universality of Membership in the United Nations' (1956) 50 *Am. J. Int'l L.* 791.

'Was the Soviet Union Expelled from the League of Nations?' (1945) 39 *Am. J. Int'l L.* 35.

Grynberg, Roman (ed.), *WTO at the Margins: Small States and the Multilateral Trading System* (Cambridge University Press, 2006).

Guan, Ang Cheng, 'Myanmar: Time for a Unified Approach' (2001) 32 *Sec. Dial.* 467.

Haas, Michael, *The Pacific Way – Regional Cooperation in the South Pacific* (New York: Praeger, 1989).

Hafner-Burton, Emilie M., 'Trading Human Rights: How Preferential Trade Agreements Influence Government Repression' (2005) 59 *Int'l Org.* 593.

Halverson, Karen, 'China's WTO Accession: Economic, Legal and Political Implications' (2004) 27 *Boston Coll. Int'l & Comp. L.R.* 319.

Hassouna, Hussein A., *The League of Arab States and Regional Disputes – A Study of Middle East Conflicts* (Dobbs Ferry: Oceana Publications, 1975).

Hathaway, Oona, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale L.J.* 1935.

Held, David, *Democracy and the Global Order – From the Modern State to Cosmopolitan Governance* (Cambridge: Polity Press, 1995).

Models of Democracy, 3rd edn (Cambridge: Polity Press, 2006).

Henkin, Louis, *How Nations Behave*, 2nd edn (Cambridge: Polity Press, 1979).

International Law: Politics and Values (Dordrecht: Martinus Nijhoff Publishers, 1995).

The Age of Rights, 2nd edn (New York: Columbia University Press, 1990).

Higgins, Rosalyn, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994).

The Development of International Law through the Political Organs of the United Nations (London: Oxford University Press, 1963).

Hilderbrand, Robert C., *Dumbarton Oaks: The Origins of the United Nations and the Search for Postwar Security* (Chapel Hill: University of North Carolina Press, 1990).

Hirsch, Mosche, *The Responsibility of International Organizations towards Third Parties – Some Basic Principles* (Dordrecht: Martinus Nijhoff Publishers, 1995).

Howse, Robert, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann' (2002) 13 *Eur. J. Int'l L.* 651.

Hudson, Manley O., 'Membership in the League of Nations' (1924) 18 *Am. J. Int'l L.* 436.

Hyde, Alan, 'The Concept of Legitimacy in the Sociology of Law' (1983) *Wisc. L.R.* 379.

Imber, Mark F., *The USA, ILO, UNESCO and IAEA – Politicization and Withdrawal in the Specialized Agencies* (London: Macmillan, 1989).

Ingram, Derek, 'A Much-Too-Timid Commonwealth' (1999) *The Round Table* 497.

Inter-American Institute of International Legal Studies, *The Inter-American System – Its Development and Strengthening* (Dobbs Ferry: Oceana Publications, 1966).

Jackson, Robert, *The Global Covenant – Human Conduct in a World of States* (Oxford University Press, 2000).

Jayasuriya, Kanishka (ed.), *Asian Regional Governance – Crisis and Change* (New York: Routledge, 2004).

Jenks, C. Wilfred, 'Due Process of Law in International Organizations' (1965) 19 *Int'l Org.* 163.

'Expulsion from the League of Nations' (1935) 16 *Brit. Y.B. Int'l L.* 155.

'Some Constitutional Problems of International Organizations' (1945) 22 *Brit. Y.B. Int'l L.* 11.

Jhabvala, F., 'The Credentials Approach to Representation Questions in the UN General Assembly' (1977) 7 *Cal. W. Int'l L.J.* 615.

Jiang-Schuerger, Di, 'The Most Favoured Nation Trade Status and China: The Debate Should Stop Here' (1997–98) *J. Marshall L.R.* 1321.

Jusys, Oskaras and Sadauskas, Kaestutis, 'Why, How, Who, and When: A Lithuanian Perspective on NATO Enlargement' (1997) 20 *Fordham Int'l L.J.* 1636.

Kant, Emmanuel, *Perpetual Peace: A Philosophical Sketch (1795)*, in Nicholas Murray Butler [prefaced], *Perpetual Peace* (Los Angeles: US Library Association, 1932).

Kelley, Judith, 'International Actors on the Domestic Scene: Membership Conditionality and Socialization by International Institutions' (2004) 58 *Int'l Org.* 425.

Kelsen, Hans, *General Theory of Law and State*, Anders Wedberg (trans.) (Cambridge, MA: Harvard University Press, 1946 edn).

The Law of the United Nations – A Critical Analysis of its Fundamental Problems (London: Stevens, 1950).

'The Old and New League: The Covenant and the Dumbarton Oaks Proposals' (1945) 39 *Am. J. Int'l L.* 45.

Kempe, Ronald Hope, 'Toward Good Governance and Sustainable Development: The African Peer Review Mechanism' (2005) 18 *Governance* 283.

Keng-Liam, Koh and Robinson, Nicholas A, 'Strengthening Sustainable Development in Regional Inter-Governmental Governance: Lessons from the "ASEAN Way"' (2002) 6 *Sing. Y.B. Int'l L.* 640.

Kennedy, David, 'The Move to Institutions' (1987) 8 *Cardozo L.R.* 841.

Keohane, Robert O., *After Hegemony – Cooperation and Discord in the World Political Economy*, 2nd edn (Princeton University Press, 2005).

'International Institutions: Can Interdependence Work?' (Spring 1998) *Foreign Pol.* 82.

Keohane, Robert O. and Nye, Joseph S., Jr, 'Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democracy Legitimacy' (Working Papers Series, John F. Kennedy School of Government, Harvard University, 2001).

'Democracy, Accountability and Global Governance' (Working Papers on International Relations, John F. Kennedy School of Government, Harvard University, 2001).

Khan, Rahmatullah, *Implied Powers of the United Nations* (Delhi: Vikas Publications, 1970).

Kirgis, Frederic, 'Admission of Palestine as a Member of a Specialized Agency and Withholding the Payment of Assessment in Response' (1990) 84 *Am. J. Int'l L.* 218.

International Organizations in their Legal Setting, 2nd edn (St Paul, MI: West Publication Company, 1993).

Klabbers, Jan, *An Introduction to International Institutional Law* (New York: Cambridge University Press, 2002).

'Institutional Ambivalence by Design: Soft Organizations in International Law' (2001) 70 *Nordic J. Int'l L.* 403.

'The Paradox of International Institutional Law' (2008) 5 *Int'l Org. L.R.* 5.

Klare, Karl E., 'Legal Theory and Democratic Reconstruction: Reflections on 1989' (1991) 25 *U. Brit. Colum. L.R.* 69.

Koremenos, Barbara, Lipson, Charles and Snidal, Duncan, 'The Rational Design of International Institutions' (2001) 55 *Int'l Org.* 761.

Koskenniemi, Martti, 'Responses, "Intolerant Democracies": A Reaction' (1996) 37 *Harv. Int'l L.J.* 231.

'The Future of Statehood' (1991) 32 *Harv. Int'l L.J.* 397.

Krasner, Stephen (ed.), *International Regimes* (New York: Cornell University Press, 1983).

Kreijen, Gerard (ed.), *State, Sovereignty, and International Governance* (Oxford University Press, 2002).

Ku, Charlotte and Jacobson, Harold K. (eds.), *Democratic Accountability and the Use of Force in International Law* (Cambridge University Press, 2003).

Lagos, Enrique and Rudy, Timothy D., 'In Defense of Democracy' (2004) *U. Miami Inter-Am. L.R.* 283.

'The Third Summit of the Americas and the Thirty-First Session of the OAS General Assembly' (2002) 96 *Am. J. Int'l L.* 173.

Lauterpacht, Elihu, 'The Development of the Law of International Organizations by the Decisions of International Tribunals' (1976) 152 *Recueil des Cours* 377.

Lauterpacht, Hersch, *Recognition in International Law* (Cambridge University Press, 1947).

'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 *Brit. Y.B. Int'l L.* 48.

The Development of International Law by the International Court (Cambridge: Grotius Publications, 1958).

Layne, Christopher, 'Kant or Cant – The Myth of the Democratic Peace' (1994) 19(2) *Int'l Sec.* 5.

Leino, Päivi, 'A European Approach to Human Rights? Universality Explored' (2002) 71 *Nordic J. Int'l L.* 455.

'Rights, Rules and Democracy in the EU Enlargement Process: Between Universalism and Identity' (2002) 7 *Austrian R. Int'l & Eur. L.* 55.

Leuprecht, Peter, 'Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?' (1998) 8 *Transnat'l L. & Contemp. Probs.* 313.

Levitt, Barry S., 'A Desultory Defense of Democracy: OAS Resolution 1080 and the Inter-American Democratic Charter' (2006) 48 *Latin Am. Pol. & Soc.* 93.

Magliveras, Konstantinos, *Exclusion from Participation in International Organisations: The Law and Practice behind Member States' Expulsion and Suspension of Membership* (The Hague: Kluwer Law International, 1999).

Magliveras, Konstantinos D. and Naldi, Gino J., 'The African Union – A New Dawn for Africa?' (2002) 51 *Int'l & Comp. L.Q.* 415.

Makarczyk, Jerzy, 'Legal Basis for Suspension and Expulsion of a State from an International Organisation' (1982) 25 *German Y.B. Int'l L.* 476.

(ed.), *Theory of International Law at the Threshold of the 21st Century – Essays in Honour of Krysztof Skubiszewski* (The Hague: Kluwer Law International, 1996).

Maluwa, Tiyanjana, 'The Constitutive Act of the African Union and Institution-Building in Postcolonial Africa' (2003) 16 *Leiden J. Int'l L.* 157.

Mancini, G. Federico and Keeling, David T., 'Democracy and the European Court of Justice' (1994) 57 *Mod. L.R.* 175.

Mansfield, Edward D. and Snyder, Jack, 'Democratic Transitions, Institutional Strength, and War' (2002) 56 *Int'l Org.* 297.

Marburg, Theodore, *Development of the League of Nations Idea* (New York: Macmillan, 1932), vols. I and II.

Marks, Susan, *The Riddle of All Constitutions – International Law, Democracy and the Critique of Ideology* (Oxford University Press, 2000).

Martin, Lisa L. and Simmons, Beth A. (eds.), *International Institutions – An International Organization Reader* (Massachusetts: MIT Press, 2001).

Mbaku, John Mukum and Saxena, Suresh Chandra (eds.), *Africa at the Crossroads – Between Regionalism and Globalisation* (Westport, CT: Praeger, 2004).

McCorquodale, Robert, 'An Inclusive International Legal System' (2004) 17 *Leiden J. Int'l L.* 477.

'Self-Determination: A Human Rights Approach' (1994) 43 *Int'l & Comp. L.Q.* 857.

McCorquodale, Robert and Dixon, Martin, *Cases and Materials in International Law*, 4th edn (Oxford University Press, 2003).

McIntyre, D., 'Dramatic, Tragic, Business-Like and Progressive: The Auckland CHOGM Sets New Standards' (1996) 21 *N.Z. Int'l R.* 2.

McWhinney, Edward, 'Credentials of State Delegations to the UN General Assembly: A New Approach to Effectuation of Self-Determination for Southern Africa' (1976) 3 *Hast. Con. L.Q.* 19.

Mearsheimer, John, 'Back to the Future: Instability in Europe after the Cold War' (1990) 15(1) *Int'l Sec.* 5.

'The False Promise of International Institutions' (1994) 19 *Int'l Sec.* 5.

Meron, Theodor and Sloan, Jeremy, 'Democracy, Rule of Law and Admission to the Council of Europe' (1996) 26 *Israel Y.B. Hum. Rts.* 137.

Miller, David Hunter, *The Drafting of the Covenant* (New York: G. P. Putman's Sons, 1928), vols. I and II.

Mitchell, Sara McLaughlin, 'A Kantian System? Democracy and Third-Party Conflict Resolution' (2002) 46 *Am. J. Pol. Sci.* 749.

Mitrany, David, *A Working Peace System – An Argument for Functional Development of International Organization* (London: Royal Institute of International Affairs, 1943).

The Functional Theory of Politics (London: Martin Robertson, 1975).

The Progress of International Government (London: George Allen and Unwin, 1933).

Moinuddin, Hasan, *The Charter of the Islamic Conference and Legal Framework of Economic Cooperation Amongst its Member States* (Oxford: Clarendon Press, 1987).

Moore, John Norton, 'Solving the War Puzzle' (2003) 97 *Am. J. Int'l L.* 282.
Moravcsik, Andrew, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' (2002) 40 *J. Com. Mkt. Stud.* 603.
Morgenstern, Felice, *Legal Problems of International Organizations* (Cambridge: Grotius Publications, 1986).
Mudde, Cas, 'EU Accession and a New Populist Center-Periphery Cleavage in Central and Eastern Europe' (Working Paper No. 62, Centre for European Studies, Harvard University, 2005).
Muller, A. S., *International Organizations and their Host States* (The Hague: Kluwer, 1995).
Müllerson, Rein, 'NATO Enlargement and the NATO-Russian Founding Act: The Interplay of Law and Politics' (1998) 47 *Int'l & Comp. L.Q.* 192.
Murray, Rachel, *Human Rights in Africa – From the OAU to the African Union* (Cambridge University Press, 2004).
Murphy, Sean, 'Democratic Legitimacy and the Recognition of States and Governments' (1999) 48 *Int'l & Comp. L.Q.* 545.
Musgrave, Thomas, *Self-Determination and National Minorities* (Oxford University Press, 1997).
Myers, Denys P., 'Contemporary Practice of the United States relating to International Law' (1961) 55 *Am. J. Int'l L.* 697.
Nash, Marian, 'Contemporary Practice of the United States relating to International Law' (1998) 92 *Am. J. Int'l L.* 491.
National Peace Council London, *The United Nations Charter: A Commentary* (National Peace Council London, 1945).
Nawaz, M. K., 'The Meaning and Range of the Principle of Self-Determination' (1965) *Duke L.J.* 82.
Neuwahl, Nanette and Rosas, Allan (eds.), *The European Union and Human Rights* (The Hague: Martinus Nijhoff Publishers, 1995).
Nowak, Manfred, 'Is Bosnia and Herzegovina Ready for Membership of the Council of Europe?' (1999) 20 *Hum. Rts. L.J.* 285.
O'Keefe, Roger, 'The Admission to the United Nations of the Ex-Soviet and Ex-Yugoslav States' (2001) 1 *Baltic Y.B. Int'l L.* 167.
Oosthuizen, Gabriel, 'Playing the Devil's Advocate: The United Nations Security Council is Unbound by Law' (1999) 12 *Leiden J. Int'l L.* 549.
Osieke, Ebere, 'Admission to Membership in International Organizations: The Case of Namibia' (1980) 51 *Brit. Y.B. Int'l L.* 189.
Otto, Dianne, 'Challenging the "New World Order": International Law, Global Democracy and the Possibilities for Women' (1993) 3 *Transn'l L. & Contemp. Probs.* 371.
'Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law' (1997) 18 *Aust. Y.B. Int'l L.* 1.

Otto, Dianne and Wiseman, David, 'In Search of "Effective Remedies": Applying the International Covenant on Economic, Social and Cultural Rights to Australia' (2001) 7 *Aust. J. Hum. Rts*. 5.

Packer, Corinne A. A. and Rukare, Donald, 'The New African Union and its Constitutive Act' (2002) 96 *Am. J. Int'l L*. 365.

Papadopolous, A. N., *Multilateral Diplomacy within the Commonwealth – A Decade of Expansion* (The Hague: Martinus Nijhoff Publishers, 1982).

Petersmann, Ernst-Ulrich, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 *Eur. J. Int'l L*. 621.

Pevehouse, Jon C., *Democracy from Above – Regional Organizations and Democratization* (Cambridge University Press, 2005).

Pevehouse, Jon C., 'Democracy from the Outside-In? International Organizations and Democratization' (2002) 56 *Int'l Org*. 515.

Piccone, Ted and Youngs, Richard (eds.), *Strategies for Democratic Change – Assessing the Global Response* (Washington, D.C.: Democracy Coalition Project, 2006).

Political and Economic Planning, *European Organisations* (London: George Allen & Unwin, 1959).

Quiroga, Cecilia Medina, *The Battle of Human Rights – Gross, Systematic Violations and the Inter-American System* (Dordrecht: Martinus Nijhoff Publishers, 1988).

Radan, Peter, *The Break-Up of Yugoslavia and International Law* (London: Routledge, 2002).

Rehman, Javaid, *International Human Rights Law* (Harlow: Pearson Education, 2003).

Reinisch, August, 'The Obligation of the Security Council to Respect Human Rights and Humanitarian Law in Adopting Economic Sanctions' (2001) 95 *Am. J. Int'l L*. 853.

Reisman, W. Michael, 'Coercion and Self-Determination: Construing Charter Article 2(4)' (1984) 78 *Am. J. Int'l L*. 642.

Reiss, Hans (ed.), *Kant's Political Writings* (Cambridge University Press, 1970).

Ritter, Khadine, 'The Russian Death Penalty Dilemma: Square Pegs and Round Holes' (2000) 32 *Case W. Res. J. Int'l Law* 129.

Rolfe, Jim, 'The Pacific Way: Where "Non-Traditional" is the Norm' (2000) 5 *Int'l Neg*. 427.

Roth, Brad R., *Governmental Illegitimacy in International Law* (Oxford: Clarendon Press, 1999).

Royal Institute of International Affairs, *The Future of the League of Nations* (London: Oxford University Press, 1936).

Rudzinski, Aleksander W., 'Admission of New Members – The United Nations and the League of Nations' (1952) 480 *Int'l Concil*. 143.

Russett, Bruce, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (Princeton University Press, 1993).

Sadurski, Wojciech, Czarnota, Adam and Krygier, Martin (eds.), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Vienna: Springer, 2006).

Sakamoto, Yoshikazu, 'Introduction: The Global Context of Democratization' (1991) 16 *Alter*. 119.

Sands, Philippe and Klein, Pierre, *Bowett's Law of International Institutions*, 6th edn (London: Sweet & Maxwell, 2009).

Schachter, Oscar, 'The Legality of Pro-Democratic Invasion' (1984) 78 *Am. J. Int'l L*. 645.

Scheman, L. Ronald, 'Admission of States to the Organization of American States' (1964) 58 *Am. J. Int'l L*. 968.

Schermers, Henry G., and Blokker, Niels M., *International Institutional Law: Unity within Diversity*, 4th edn (Leiden: Martinus Nijhoff Publishers, 2003).

Schiff, Maurice and Winters, L. Alan, *Regional Integration and Development* (Washington, D.C.: World Bank, 2003).

Schimmelfennig, Frank, 'The Double Puzzle of EU Enlargement: Liberal Norms, Rhetorical Action, and the Decision to Expand to the East' (ARENA Working Paper No. WP 99/15, 1999), www.arena.uio.no/publications/wp99_15.htm.

The EU, NATO and the Integration of Europe – Rules and Rhetoric (Cambridge University Press, 2003).

Schimmelfennig, Frank and Sedelmeier, Ulrich (eds.), *The Europeanization of Central and Eastern Europe* (Ithaca, NY: Cornell University Press, 2005).

Schnably, Stephen J., 'The Santiago Commitment as a Call to Democracy in the United States: Evaluating the OAS Role in Haiti, Peru and Guatemala' (1994) 25 *U. Miami Inter-Am. L.R*. 395.

Schofield, Mark, 'Global Subsidiarity and the WTO: An Analysis Using Dworkin's Conception of Democracy' (2004) 23 *Pol. & Sec*. 46.

Schreiber, Anna P., *The Inter-American Commission on Human Rights* (Leiden: Sithoff, 1970).

Schumpeter, Joseph, *Capitalism, Socialism and Democracy*, 6th edn (London: Unwin, 1987).

Schwarzenberger, Georg, *The League of Nations and World Order* (London: Constable & Co, 1936).

Scott, Robert E., 'China Can Wait' (Economic Policy Institute Briefing Paper, May 1999), www.epi.org/briefingpapers/china99.pdf.

Serdy, Andrew, 'Bringing Taiwan into the International Fisheries Fold: The Legal Personality of a Fishing Entity' (2004) 75 *Brit. Y.B. Int'l L*. 183.

Shachor-Landau, Chava, 'Democracy: The Case of the European Union' (1996) 26 *Israel Y.B. Hum. Rts*. 157.

Shapiro, Ian and Hacker-Cordón, Casiano (eds.), *Democracy's Edges* (Cambridge University Press, 1999).

Shaw, Jo and More, Gillian (eds.), *The New Legal Dynamics of European Union* (New York: Clarendon Press, 1995).

Sidorsky, David (ed.), *Essays on Human Rights – Contemporary Issues and Jewish Perspectives* (Philadelphia: Jewish Publication Society of America, 1979).

Simma, Bruno, Mosler, Hermann, Randelzhofer, Albrecht, Tomuschat, Christian and Wolfrum, Rudiger (eds.), *The Charter of the United Nations* (Oxford University Press, 1995).

Simpson, Gerry, *Great Powers and Outlaw States – Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004).

'Imagined Consent: Democratic Liberalism and International Legal Theory' (1994) 15 *Aust. Y.B. Int'l L*. 103.

'Two Liberalisms' (2001) 12 *Eur. J. Int'l L*. 537.

Singh, Nagendra, *Termination of Membership of International Organizations* (London: Stevens, 1958).

Slater, Jerome, 'The Limits of Legitimization in International Organizations: The Organization of American States and the Dominican Crisis' (1969) 23 *Int'l Org*. 48.

Slaughter, Anne-Marie, 'International Law in a World of Liberal States' (1995) 6 *Eur. J. Int'l L*. 503.

Smidt, Michael L., 'The International Criminal Court: An Effective Means of Deterrence?' (2001) 167 *Mil. L.R*. 156.

Sneek, Th. J. W., 'The CSCE in the New Europe: From Process to Regional Arrangement' (1994) 5 *Ind. Int'l & Comp. L.R*. 1.

Sohn, Louis B., 'Expulsion or Forced Withdrawal from an International Organization' (1964) 77 *Harv. L.R*. 1381.

Spiro, David E., 'The Insignificance of the Liberal Peace' (1994) 19(2) *Int'l Sec*. 50.

Stein, Eric, 'International Integration and Democracy: No Love at First Sight' (2001) 95 *Am. J. Int'l L*. 489.

Stein, E. and Carreau, D., 'Law and Peaceful Change in a Subsystem: "Withdrawal" of France from the North Atlantic Treaty Organization' (1968) 62 *Am. J. Int'l L*. 577.

Steiner, Henry, Alston, Philip and Goodman, Ryan, *International Human Rights in Context – Law, Politics and Morals*, 3rd edn (Oxford University Press, 2008).

Stephan, Paul B., 'The New International Law – Legitimacy, Accountability, Authority, and Freedom in the New Global Order' (1999) 70 *U. Colo. L.R*. 1555.

Sunstein, Cass, 'Rights and their Critics' (1995) 70 *Notre Dame L.R*. 727.

Suttner, Raymond, 'Has South Africa Been Illegally Excluded from the United Nations General Assembly?' (1984) 17 *Comp. & Int'l L. J. Sth Africa* 279.

Tasker, Robert and Hiebert, Murray, 'Dysfunctional Family' (July 1998) 161 *Far East Eco. R.* 20.

Taylor, Paul, *The Limits of European Integration* (London: Croom Helm, 1983).

Temperley, H. W. V. (ed.), *A History of the Peace Conference of Paris* (London: Henry Forde and Hodder & Stoughton, 1924).

Tesón, Fernando, 'The Kantian Theory of International Law' (1992) 92 *Colum. L.R.* 53.

Thayer, Carlyle A., 'ASEAN: From Constructive Engagement to Flexible Intervention' (1999) 3(2) *Harv. Asian Pacific R.* 67.

Tondel, Lyman M. (ed.), *The International Position of Communist China – Background Papers and Proceedings of the Fifth Hammarskjöld Forum* (Dobbs Ferry: Oceana Publications, 1965).

Trifunovska, Snežana (ed.), *Yugoslavia through Documents: From its Creation to its Dissolution* (Dordrecht: Martinus Nijhoff Publishers, 1994).

Turack, D. C., 'The African Charter on Human and Peoples' Rights: Some Preliminary Thoughts' (1983–84) 17 *Akron L.R.* 365.

Tushnet, Mark, *An Essay on Rights* (1984) 62 *Texas Law Review* 1363.

Udombana, Nsongurua J, 'Articulating the Right to Democratic Governance in Africa' (2002–03) 24 *Mich. J. Int'l L.* 1209.

Vachudova, Milada, *Europe Undivided – Democracy, Leverage and Integration Post Communism* (Oxford University Press, 2005).

'The Leverage of International Institutions on Democratizing States: Eastern Europe and the European Union' (Working Paper No. 2001/33, Robert Schuman Centre for Advanced Studies, 2001).

Van Dijk, P and Bloed, A, 'The Conference on Security and Cooperation in Europe: Human Rights and Non-Intervention' (1983) 5 *Liv. L.R.* 117.

Van Westering, Jolanda, 'Conditionality and EU Membership: The Cases of Turkey and Cyprus' (2000) 5 *Eur. Foreign Aff. R.* 95.

Vanenzuela, Arturo, 'Paraguay: The Coup That Didn't Happen' (1997) 8 *J. Dem.* 43.

Vasak, Karl (ed.), *The International Dimensions of Human Rights* (Westport, CT: Greenwood Press, 1982), vol. I.

Virally, Michel, 'Definition and Classification: A Legal Approach' (1977) 29 *Int'l Soc. Sci. J.* 58.

Vradenburgh, Anna, 'The Chapter VII Powers of the United Nations Charter: Do They "Trump" Human Rights Law?' (1991–2) 14 *Loyola LA Int'l & Comp. L.J.* 175.

Walters, F. P., *A History of the League of Nations* (London: Oxford University Press, 1952), vol. II.

Wasserman, Ursula, 'WIPO: The Exclusion of South Africa' (1980) 14 *J. World Trade L.* 79.

Webster, C. K. and Herbert, Sydney, *The League of Nations in Theory and Practice* (London: George Allen & Unwin, 1933).

Weiler, Joseph H. H., *The Constitution of Europe, 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press, 1999).

The EU, the WTO and the NAFTA – Towards a Common Law of International Trade (Oxford University Press, 2000).

Weller, Marc, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 *Am. J. Int'l L.* 569.

Wells, Clare, *The UN, UNESCO and the Politics of Knowledge* (London: Macmillan, 1987).

White, Nigel, *The Law of International Organisations*, 2nd edn (Manchester University Press, 2005).

Williams, Andrew, 'Enlargement of the Union and Human Rights Conditionality: A Policy of Distinction?' (2000) 25 *Eur. L.R.* 601.

Williams, Douglas, *The Specialized Agencies and the United Nations – The System in Crisis* (London: C. Hurst, 1987).

Williams, John, *Legitimacy in International Relations and the Rise and Fall of Yugoslavia* (New York: St Martin's Press, 1998).

Wilson, Florence, *The Origins of the League Covenant – Documentary History of its Drafting* (London: Leonard and Virginia Woolf, 1928).

Winkler, Hans, 'Democracy and Human Rights in Europe: A Survey of the Admission Practice of the Council of Europe' (1995) 47 *Austrian J. Pub. & Int'l L.* 147.

Woodliffe, John, 'The Evolution of a New NATO for a New Europe' (1998) 47 *Int'l & Comp. L.Q.* 174.

Woolf, Leonard, *International Government* (London: George Allen & Unwin, 1916).

(ed.), *The Framework of a Lasting Peace* (London: George Allen & Unwin, 1917).

Wright, Shelley, *International Human Rights, Decolonisation and Globalisation – Becoming Human* (London: Routledge, 2001).

Zaid, Mark S., 'Taiwan: It Looks Like It, It Acts Like it, Is It a State? The Ability to Achieve a Dream through Membership in International Organizations' (1998) 32 *New Eng. L.R.* 805.

Zemanek, K., 'The Legal Foundations of the International System – General Course on Public International Law' (1997) 266 *Recueil des Cours* 163.

Zimmern, Alfred, *The League of Nations and the Rule of Law 1918–1935* (London: Macmillan, 1945).

INDEX

CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW

Books in the series

The Participation of States in International Organisations: The Role of Human Rights and Democracy
Alison Duxbury

Theatre of the Rule of Law: The Theory, History and Practice of Transnational Legal Intervention
Stephen Humphreys

Science and Risk Regulation in International Law: The Role of Science, Uncertainty and Values
Jacqueline Peel

Vicarious Liability in Tort: A Comparative Perspective
Paula Giliker

Legitimacy and Legality in International Law: An Interactional Account
Jutta Brunnée and Stephen J. Toope

The Public International Law Theory of Hans Kelsen: Believing in Universal Law
Jochen von Bernstorff

The Concept of Non-International Armed Conflict in International Humanitarian Law
Anthony Cullen

The Challenge of Child Labour in International Law
Franziska Humbert

Shipping Interdiction and the Law of the Sea
Douglas Guilfoyle

International Courts and Environmental Protection
Tim Stephens

Legal Principles in WTO Disputes
Andrew D. Mitchell

War Crimes in Internal Armed Conflicts
Eve La Haye

Humanitarian Occupation
Gregory H. Fox

The International Law of Environmental Impact Assessment: Process, Substance and Integration
Neil Craik

The Law and Practice of International Territorial Administration: Versailles, Iraq and Beyond
Carsten Stahn

Cultural Products and the World Trade Organization
Tania Voon

United Nations Sanctions and the Rule of Law
Jeremy Farrall

National Law in WTO Law Effectiveness and Good Governance in the World Trading System
Sharif Bhuiyan

The Threat of Force in International Law
Nikolas Stürchler

Indigenous Rights and United Nations Standards
Alexandra Xanthaki

International Refugee Law and Socio-Economic Rights
Michelle Foster

The Protection of Cultural Property in Armed Conflict
Roger O'Keefe

Interpretation and Revision of International Boundary Decisions
Kaiyan Homi Kaikobad

Multinationals and Corporate Social Responsibility
Limitations and Opportunities in International Law
Jennifer A. Zerk

Judiciaries within Europe
A Comparative Review
John Bell

Law in Times of Crisis
Emergency Powers in Theory and Practice
Oren Gross and Fionnuala Ní Aoláin

Vessel-Source Marine Pollution
The Law and Politics of International Regulation
Alan Tan

Enforcing Obligations Erga Omnes in International Law
Christian J. Tams

Non-Governmental Organisations in International Law
Anna-Karin Lindblom

Democracy, Minorities and International Law
Steven Wheatley

Prosecuting International Crimes
Selectivity and the International Law Regime
Robert Cryer

Compensation for Personal Injury in English, German and Italian Law
A Comparative Outline
Basil Markesinis, Michael Coester, Guido Alpa, Augustus Ullstein

Dispute Settlement in the UN Convention on the Law of the Sea
Natalie Klein

The International Protection of Internally Displaced Persons
Catherine Phuong

Imperialism, Sovereignty and the Making of International Law
Antony Anghie

Necessity, Proportionality and the Use of Force by States
Judith Gardam

International Legal Argument in the Permanent Court of International Justice
The Rise of the International Judiciary
Ole Spiermann

Great Powers and Outlaw States
Unequal Sovereigns in the International Legal Order
Gerry Simpson

Local Remedies in International Law
C. F. Amerasinghe

Reading Humanitarian Intervention
Human Rights and the Use of Force in International Law
Anne Orford

Conflict of Norms in Public International Law
How WTO Law Relates to Other Rules of Law
Joost Pauwelyn

Transboundary Damage in International Law
Hanqin Xue

European Criminal Procedures
Edited by Mireille Delmas-Marty and John Spencer

The Accountability of Armed Opposition Groups in International Law
Liesbeth Zegveld

Sharing Transboundary Resources
International Law and Optimal Resource Use
Eyal Benvenisti

International Human Rights and Humanitarian Law
René Provost

Remedies Against International Organisations
Karel Wellens

Diversity and Self-Determination in International Law
Karen Knop

The Law of Internal Armed Conflict
Lindsay Moir

International Commercial Arbitration and African States
Practice, Participation and Institutional Development
Amazu A. Asouzu

The Enforceability of Promises in European Contract Law
James Gordley

International Law in Antiquity
David J. Bederman

Money Laundering
A New International Law Enforcement Model
Guy Stessens

Good Faith in European Contract Law
Reinhard Zimmermann and Simon Whittaker

On Civil Procedure
J. A. Jolowicz

Trusts
A Comparative Study
Maurizio Lupoi

The Right to Property in Commonwealth Constitutions
Tom Allen

International Organizations Before National Courts
August Reinisch

The Changing International Law of High Seas Fisheries
Francisco Orrego Vicuña

Trade and the Environment
A Comparative Study of EC and US Law
Damien Geradin

Unjust Enrichment
A Study of Private Law and Public Values
Hanoch Dagan

Religious Liberty and International Law in Europe
Malcolm D. Evans

Ethics and Authority in International Law
Alfred P. Rubin

Sovereignty Over Natural Resources
Balancing Rights and Duties
Nico Schrijver

The Polar Regions and the Development of International Law
Donald R. Rothwell

Fragmentation and the International Relations of Micro-States
Self-determination and Statehood
Jorri Duursma

Principles of the Institutional Law of International Organizations
C. F. Amerasinghe