CHAPTER 5

Non-State Actors of International Law

Reading

Clapham, A, *Human Rights Obligations of Non-State Actors* (Oxford University Press, Oxford, 2006).
Sands, P and Klein, P (eds), *Bowett's Law of International Institutions* (5th ed, Sweet & Maxwell, London, 2001).

Aim

By the end of this chapter you should know and understand:

- how to identify subjects of international law other than states;
- the organisational structure of the United Nations; and
- other actors of international law.

Principles

[5.10] States, as the principal subjects of international law, possess the greatest range of legal rights, duties and powers on the international stage (see Chapters 1 and 4). As one of the ultimate sources of international law, states have the power to confer rights and duties on other entities such as international organisations, multinational corporations and individuals such that they also become subjects of international law (see Chapters 1 and 2). Such legal personality at international law is usually a consequence of rights and/or duties conferred upon them by treaties (see Chapter 8).

International Organisations

Definition

[5.20] International organisations exist in diverse forms. Sands and Klein state that an international organisation must have the following characteristics:

- *'its membership must be composed of states and/or other international organisations;*
- *it must be established by treaty;*
- *it must have an autonomous will distinct from that of its members and be vested with legal personality; and*
- *it must be capable of adopting norms addressed to its members.' (Sands and Klein 2001, p 16)*

The functions of international organisations are as diverse as their form. An international organisation might have political functions concerned with 'the preservation of international peace and security', for example, such as the UN; others might be concerned 'with more specific technical aims in the economic and social fields' such as the Organisation for Economic Co-operation and Development (OECD); or with judicial functions such as the ICJ or the European Court of Justice (Sands and Klein 2001, p 18). Aside from states, international organisations are probably the most significant legal subjects of public international law in terms of influence. It is worthwhile noting that, unlike other non-state entities on the world stage, international organisations are typically composed of member states, which no doubt assists their status as subjects of international law. Some international organisations do admit entities that are not strictly states, or they admit states that have not been recognised as such by other states. For example, the WTO has admitted the European Communities, Taiwan and Hong Kong as members.

The fact that international organisations are endowed with legal personality at international law does not mean that they have the same characteristics as a state (Ijalaye 1978, p 3). As Sands and Klein comment:

> *'The attribution of legal international personality simply means that the entity upon which it is conferred is a subject of international law and that it is capable of possessing international rights and duties. The precise scope of those rights and duties will vary according to what may reasonably be seen as necessary, in view of the purposes and functions of the organisation in question, to enable the latter to fulfil its tasks. (Sands and Klein 2001, p 473)*

The status of international organisations as legal subjects was recognised by the ICJ in the *Reparations* case and subsequently in the *Certain Expenses* case. In the *Reparations* case, the ICJ qualified its finding that the UN was a subject of international law by stating (at 179):

> *'That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. … What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.'*

Legal personality and functions

[5.30] The same approach should be taken to defining the legal personality of an international organisation as is taken to determining the personality of a state: paying close attention to the legal context within which an international organisation is operating. The primary source of an organisation's legal personality and its functions will be its constitutive documents. As a treaty, the constituent document will be governed by the 1969 VCLT (see Chapter 9). Further evidence as to the status and function of an organisation can be found in the ways in which states relate to it. In the *Reparations* case, the ICJ reasoned that (at 179):

> *'the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate on an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.'*

This case demonstrates how the constituent documents of an organisation need not explicitly refer to the organisation's legal personality but that capacity can be implied:

- in its objects and purpose,
- as well as its function, and
- the fact that states treat it as having its own autonomous legal personality bearing international rights and obligations distinct from that of its member states.

Alternatively, the intention to endow the organisation with legal personality may be explicit. Sometimes, legal personality is given in terms of domestic or private law matters. For example, art 9(2) of the *Articles of Agreement of the International Monetary Fund* state that it 'shall possess full juridical personality, and in particular, the capacity

(a) to contract; (b) to acquire and dispose of immoveable property; (c) to institute legal proceedings'. An example of explicit international legal personality can be found in art 176 of the 1982 UNCLOS with respect to the International Seabed Authority:

> *'Article 176*
>
> *Legal status*
>
> *The Authority shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.'*

In the *Namibia* case, the ICJ held (at [22]) that an established body of practice may also form an integral part of the rules of procedure of an organisation. In that case, the practice was the effect of abstention by Permanent Members of the Security Council from voting by that organ. The Government of South Africa contended that the Council had not followed the correct voting procedures when it adopted the resolution asking the ICJ for its opinion and the ICJ did not, therefore, have jurisdiction. In particular, the South African government argued that two of the Permanent Members of the Security Council had abstained from voting, to which the ICJ opined that the voluntary abstention of a permanent member had for a long period consistently been interpreted by states as not constituting a bar to the adoption of resolutions by the Security Council. Hence, the practice was considered a valid rule.

Rights and obligations

[5.40] As an international subject, an international organisation, if permitted by its constituent documents, may enter into treaties with states and with other international organisations; it is also subject to the rules of international law including treaty law and customary law. In its *WHO Regional Offices* Advisory Opinion, the ICJ held (at 89-90):

> *'International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.'*

Another feature of the international personality of an international organisation is its right to a range of privileges and immunities against states. See, eg, the 1946 *Convention on the Privileges and Immunities of the United Nations*. Australia implemented that Convention in the *International Organisations (Privileges and Immunities) Act 1963* (Cth). The provisions of the *Diplomatic Privileges and Immunities Act 1967* (Cth) also provide certain privileges and immunities to a number of international organisations in Australia (see Chapter 6).

Finally, it should be noted that the acts of international organisations may serve as evidence of *opinio juris* in the process of determining the emergence of an international right or obligation (see Chapter 2). The resolutions of the UN General Assembly are a good example of this, discussed below.

The United Nations

Charter

[5.50] The UN was established by its Charter, which came into force on 24 October 1945. The purposes of the UN are set out in art I of its Charter:

> 1. *'To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;*
> 2. *To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;*
> 3. *To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and*
> 4. *To be a centre for harmonizing the actions of nations in the attainment of these common ends.'*

The Charter is a multilateral treaty that is not subject to reservations. Also to be noted is art 103 of the Charter, which provides:

> *'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'*

The competence of the UN is limited by art 2(7) of the Charter, which explicitly asserts that nothing in the Charter authorises the UN 'to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement'. Although commentators increasingly declare that fields such as human rights law or international environmental law challenge the principles of territorial integrity and sovereign equality, the ineffective implementation of these norms on the ground suggests the normative value of these declarations is weak.

Structure of the UN

[5.60] The UN consists of six principal organs:

1. The General Assembly (GA)
2. The Security Council (SC)
3. The Economic and Social Council (ECOSOC)
4. The Trusteeship Council
5. The ICJ
6. The Secretariat.

The powers and functions of the ICJ are discussed in Chapter 9. In March 2005, the UN Secretary-General Kofi Annan prepared a report on the reform of the UN called

In Larger Freedom: Toward Development, Security and Human Rights for All. In that report, he recommended that the Charter be amended to eradicate the 'enemy clauses', the Trusteeship Council and the Military Staff Committee, all of which are outdated. However, given the challenges involved in amending the Charter (amendment requires the consent of all five Permanent Members of the Security Council), these and other reforms that require changes to the Charter have not yet been implemented. However, some major reforms have been implemented. One such reform is the replacement of the UN Commission on Human Rights by the Human Rights Council as a subsidiary of the GA (see Chapter 14). Another reform is to enable ECOSOC to assess progress in the UN development agenda and to serve as a high-level development co-operation forum (see figure XXXX).

General Assembly (GA)

[5.70] The GA is the principle deliberative, policy-making and representative organ of the UN. In particular, it has the authority to consider and approve the budget and it elects the members of the other deliberative bodies, including the Security Council. The GA comprises all member states which have equal voting entitlements. In practice, most GA resolutions are approved by consensus, a practice which has been criticised by the Secretary-General Kofi Annan in his report *In Larger Freedom* on the basis that the debates become focused on process rather than substance resulting in 'many so-called decisions' doing no more than 'to reflect the lowest common denominator of widely different opinions' (see below) (Annan 2005, at [139]).

The GA generally makes recommendations rather than legally binding decisions in its resolutions. Nonetheless, GA resolutions may provide evidence of state practice and *opinio juris*, which lend them a certain normative status. In *Legality of the Threat or Use of Nuclear Weapons*, for example, the ICJ held (at [70]):

> *'General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an* opinio juris. *To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an* opinio juris *exists as to its normative character. Or a series of resolutions may show that gradual evolution of the* opinio juris *required for the establishment of a new rule.'*

Through its resolutions, the GA not only expresses particular concerns of its member states regarding issues of international relations but also formulates the need and provides the means for the creation of treaties and international conferences (Sands and Klein 2001, p 30). The GA also considers 'the general principles of co-operation in the maintenance of international peace and security' (art 11(1)) and discusses 'any questions relating to the maintenance of international peace and security' (art 11(2)). These powers overlap with those of the Security Council, as does the power to recommend 'the peaceful adjustment of any situation regardless of origin, which it deems likely to impair the general welfare' (art 14). As Sands and Klein observe, 'whilst concurrent powers might exist in these spheres, a conflict is sought to be avoided by art 11(2), which, in the last sentence, provides that: "Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion"' (Sands and Klein 2001, p 32). Further powers of the GA are to be found in arts 13-17 of the Charter. Many issues are also referred to specialised committees and subsidiary bodies. As the diagram above indicates, the GA has six main committees. Other committees deal with the procedures of the GA, the credentials

of membership and general administration. The GA also has power to establish subsidiary organs (art 22). These include the UN Disarmament Commission (GA Res 502 (VI) (1952)) and the Open-Ended Working Group on the Strengthening of the UN System (GA Res 49/252 (1996)).

In his report *In Larger Freedom*, Secretary General Kofi Annan states (at [159]):

> '*In recent years, the number of General Assembly resolutions approved by consensus has increased steadily. That would be good if it reflected a genuine unity of purpose among Member States in responding to global challenges. But unfortunately, consensus (often interpreted as requiring unanimity) has become an end in itself. It is sought first within each regional group and then at the level of the whole. This has not proved an effective way of reconciling the interests of Member States. Rather, it prompts the Assembly to retreat into generalities, abandoning any serious effort to take action. Such real debates as there are tend to focus on process rather than substance and many so-called decisions simply reflect the lowest common denominator of widely different opinions.*'

After making a number of recommendations, the Secretary-General concludes (at [164]):

> *'It should be clear that none of this will happen unless Member States take a serious interest in the Assembly at the highest level and insist that their representatives engage in its debates with a view to achieving real and positive results. If they fail to do this the Assembly's performance will continue to disappoint them and they should not be surprised.'*

Security Council (SC)

[5.80] The SC has primary responsibility for the UN's objective of maintaining international peace and security by means of a system of collective security (see Chapter 10). The SC consists of 15 members, five of whom are permanent: China, France, the Russian Federation, the United Kingdom, and the United States (art 23). The ten other members are elected for two-year terms by the GA. These positions are staggered so that five states are elected each year by a two-thirds majority vote (Sands and Klein 2001, p 42). The ten seats are allocated on a geographical basis: Afro-Asia is given five; Eastern Europe is given one; Latin America and the Caribbean are given two, Western Europe and others are given two (see GA Res 1991 (XVIII)). SC decisions on all substantive matters require the affirmative votes of nine members. A veto, but not an abstention, by a permanent member prevents adoption of the decision, even if it has received the required number of affirmative votes.

The functions and powers of the SC are set out in arts 24-26 of the Charter. There is a large body of jurisprudence discussing the interpretation of these articles, which should be referred to in any determination of when and how the SC can act. The section below merely describes the content of the articles themselves. The responsibility of the SC with regard to international peace and security is specified in Chapters VI and VII of the Charter, which are considered in more detail in Chapter 10. Chapter VI is entitled 'Pacific Settlement of Disputes'. This Chapter enables the SC to 'investigate any dispute, or any situation which might lead to international friction or give rise to a dispute' (art 34). The Council may 'recommend appropriate procedures or methods of adjustment' if it determines that international peace and security is being endangered (art 36). These recommendations are not binding on UN members. Under Chapter VII, which is entitled, 'Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression', the SC has power to determine measures to be taken in situations involving 'threats to the peace, breaches of the peace, or acts of aggression' (art 39). They

can involve the use of force and sanctions, complete or partial suspension of economic relations, rail, sea, air, postal, telegraphic, radio and other means of communication and the severance of diplomatic relations (art 41). Resolutions passed under Chapter VII are binding on all UN members. Note that Chapter VIII authorises and encourages the existence and utilisation of regional organisations such as NATO, although art 53 provides that 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council'.

In addition to the explicit powers conferred by Chapters VI, VII, VIII and XII, state practice demonstrates that the SC also has implicit powers as are required for it to perform its functions (Sands and Klein 2001, p 43). The SC may also be given power by treaties other than the Charter. For example, art 13 of the *Rome Statute* gives the SC authority to refer cases to the Court, where the Court could not otherwise exercise jurisdiction (see Chapter 15).

In his report *In Larger Freedom*, Secretary-General Kofi Annan recommends that the SC be reformed so that it is 'broadly representative of the realities of power in today's world' (Annan 2005, at [169]). It is worth considering the two models he proposed: Model A provides for six new permanent seats, with no veto being created, and three new two-year term, non-permanent seats, divided among the major regional areas as follows (Annan 2005, at [170]):

Regional area	No of States	Permanent seats (continuing)	Proposed new permanent seats	Proposed two-year seats (non-renewable)	Total
Africa	53	0	2	4	6
Asia and Pacific	56	1	2	3	6
Europe	47	3	1	2	6
Americas	35	1	1	4	6
Totals A	**191**	5	6	13	24

Model B provides for no new permanent seats but creates a new category of eight four-year renewable-term seats and one new two-year non-permanent (and non-renewable) seat, divided among the major regional areas as follows (Annan 2005, at [170]):

Regional area	No of States	Permanent seats (continuing)	Proposed four-year renewable seats	Proposed two-year seats (non-renewable)	Total
Africa	53	0	2	4	6
Asia and Pacific	56	1	2	3	6
Europe	47	3	2	1	6
Americas	35	1	2	3	6
Totals B	191	5	8	11	24

Both models have regard to art 23 of the Charter and to the following principles (see Annan 2005, at [169]):

- to increase the involvement in decision-making of those who contribute most to the UN financially, militarily and diplomatically;
- among developed countries, to achieve or make substantial progress towards the internationally agreed level of 0.7 per cent of GNP for official development assistance as an important criterion of contribution;
- to bring into the decision-making process countries more representative of the broader membership, especially of the developing world;
- not to impair the effectiveness of the Security Council; and
- to increase the democratic and accountable nature of the body.

ECOSOC

[5.90] ECOSOC has 54 member states elected for three-year terms by the GA. Seats on ECOSOC are allotted geographically, with 14 allocated to Africa, 11 to Asia, six to Eastern Europe, ten to Latin America and the Caribbean, and 13 to Western Europe and other states. ECOSOC operates under the authority of the GA (art 60) and assumes responsibility for the discharge of the functions listed in Chapter IX of the Charter (arts 55–60). Article 55 provides:

> *'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:*
>
> *(a) higher standards of living, full employment, and conditions of economic and social progress and development;*
>
> *(b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and*
>
> *(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'*

Articles 56–59 concern the establishment of specialised agencies (see below) and the implementation of the above aims. ECOSOC is given further powers under Chapter X of the Charter. They include making studies and reports with respect to international economic, social, cultural, educational, health, and related matters (at 62(1)). ECOSOC may then make recommendations to the GA and to the relevant specialised agencies (art 62). ECOSOC may make recommendations for the purpose of promoting respect for, and the observance of, human rights and fundamental freedoms (at 62(2)). It also prepares draft conventions for submission to the GA and calls international conferences with respect to matters falling within its competence (at 62(3)). ECOSOC was recently given new powers at the 2005 World Summit to convene Annual Ministerial Reviews to assess progress in achieving the internationally agreed development goals arising out of the major conferences and summits, as well as a biennial Development Cooperation Forum designed to enhance the coherence and effectiveness of activities of different development agencies (GA Res 60/1 (2005)) endorsed by the General Assembly in November 2006 (GA Res 61/16 (2006)).

Specialised agencies

[5.100] Specialised agencies are international organisations of limited competence established by special agreements under the auspices of the UN. These agencies have their own independent legal personality. Examples include the International Labour Organization (ILO), the International Monetary Fund and the World Bank.

Subsidiary organs

[5.110] The GA has established a number of subsidiary organs that have become significant organisations in their own right. Examples include: the International Law Commission (ILC) mandated to undertake the codification and development of international law; the United Nations Children's Fund (UNICEF); the UN High Commissioner for Refugees (UNHCR); the office of the High Commissioner for Human Rights (OHCHR); and the United Nations Conference on Trade and Development (UNCTAD).

Individuals

The nationality of claims rule

[5.120] Traditionally, individuals have been described as objects of international law rather than its subjects. This means that international laws are directed at, or used to regulate, individuals; but individuals (in contrast to states) are neither a direct source of, nor do they have standing to apply, international laws. Consequently, an individual cannot generally bring a claim on the international plane against a state that has committed an internationally wrongful act causing harm to the individual. The claim can, however, be pursued by the state of which the individual is a national under principles of diplomatic protection. This is known as the nationality of claims rule.

The PCIJ states in *Panevezys-Saldutiskis Railway* case (at 16), 'in taking up the case of one of its nationals by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its nationals, respect for the rules of international law.' Any decision by a state to protect its nationals in those ways is entirely discretionary. When a state does choose to act on behalf of one of its nationals, generally that right is not challenged. In cases where an individual has dual nationality or has recently changed their nationality, however, the issue may arise as to which state is entitled to make the claim of diplomatic protection.

In the *Nottebohm* case, Mr Nottebohm, a German-born national, had been living and working in Guatemala for 34 years since he moved there in 1905. On 9 October 1939, after war had been declared against Germany, Nottebohm, through his attorney, applied to become a citizen of Liechtenstein. Nottebohm travelled to Liechtenstein and was naturalised on 13 October 1939. Having obtained his new passport, Nottebohm returned to Guatemala at the beginning of 1940 where he resumed his life until 19 October 1943 when he was arrested by the Guatemalan authorities, who were acting at the instance of the US government. He was turned over to the US forces on the same day and later deported to the US where he was interned for two years and three months. In 1944, a series of legal proceedings were commenced against him in Guatemala designed to expropriate without compensation all of his property. Liechtenstein sought to bring a claim against Guatemala on the grounds that it had breached its obligations under international law by arresting, detaining, expelling and refusing to re-admit Nottebohm and seizing his property. In response, Guatemala claimed that the

naturalization of Nottebohm in Liechtenstein, even if properly acquired in accordance with Liechtenstein law, was not in conformity with international law, and that became the issue before the ICJ: whether Nottebohm's Liechtenstein nationality had to be recognised by Guatemala for the purposes of the admissibility of Liechtenstein's right to exercise its protection. The ICJ applied the 'real and effective nationality' test by asking the question (at 24): 'At the time of his naturalisation does Nottebohm appear to have been more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to Liechtenstein than to any other State?' The point of the test is to examine whether the link between the state offering diplomatic protection and the individual who has suffered injury is both effective and genuine such that it ought to be recognised on the international plane. Effectively, the ICJ was stating that a state cannot grant nationality to a person merely for the purpose of bringing a claim on the international plane and expect it to be recognised without question as a matter of international law. A majority of the ICJ considered a number of different factors the importance of which would vary from case to case, including (at 22): 'the habitual residence of the individual concerned … the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.' Throughout his life, Nottebohm had retained his connections with family members and businesses in Germany, as well as some in Liechtenstein. He also had family members in Guatemala and that is where his life was centred until he was deported to the US. The majority found his connections with Liechtenstein were weak; he had no residence there nor any other bond of attachment other than fiscal obligations and found against the admissibility of Liechtenstein's claim. Somewhat ironically, the majority found that Nottebohm's real and effective ties were with Guatemala, the state that had had him deported as an enemy alien.

A similar situation arose in the *Barcelona Traction* case, where a number of natural and corporate Belgian nationals with shares in a Canadian company suffered damage as a result of acts contrary to international law committed by the Spanish state and its organs. Since the individual shareholders did not have legal personality at international law they could not themselves bring a claim in international judicial proceedings against Spain; but Belgium also failed in its claim of protection on their behalf. It was held that only Canada, the state where the company was registered, could bring a claim against Spain, and then only on behalf of the company, not the shareholders. The ICJ held (at [44], [46]):

> *'the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. Thus no legal conclusion can be drawn from the fact that the same event caused damage simultaneously affecting several natural or juristic persons. … [w]henever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed. … Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected.'*

Of course, if the direct legal rights of a shareholder are affected then a state would have a right to bring a claim of diplomatic protection in relation to that infringed right. However, that is not the basis on which Belgium had made its claim. In the

Elettronica Sicula SpA case, the ICJ did hear a US claim against Italy on behalf of US corporate shareholders of an Italian company but that was because a treaty between Italy and the US gave the ICJ jurisdiction to do so. Since the majority focused on the rights and obligations set out in the treaty itself, it did not consider the relevance of the corporate structure and shareholders' rights under international law. The case can therefore be distinguished on its facts. However, it is worth noting that the principles laid down in the *Barcelona Traction* case were considered by Judge Oda, who agreed with the majority that Italy had not violated the treaty but for the separate reason that the general principle of law concerning the rights or status of shareholders of a corporation 'may not be altered by any treaty aimed at the protection of investments unless that treaty contains some express provision to that end.' (at 86)

It must be noted that a 'State enjoys complete freedom of action' to decide whether its protection is to be granted (*Barcelona Traction* case, at [79]). It should also be noted that an individual in the service of an international organisation with legal personality may be offered protection. In such a case, the individual would have a simultaneous right to be protected by his or her state. See, eg, the *Reparations* case, which related to injuries suffered by an individual in the service of the UN.

A state can waive the application of the nationality of claims rule by treaty. An example would be a human rights treaty that provides for any state party to the treaty to make a claim against another state party for a breach of the treaty on behalf of any individual whose rights have been violated, even if that individual is not a national of the state making the claim. In principle this is of great benefit to individuals who look to international human rights law for protection against their state government, particularly since it is state governments that are charged with the implementation and enforcement of human rights law in their respective domestic territories. However, the likelihood that another state would be willing to offer an individual protection at international law from a violation of their human rights or freedoms is frustrated by political considerations and a reluctance to interfere in the domestic affairs of other states.

Direct claims by individuals

[5.130] In the *Postal Services in Danzig* case, the PCIJ held that treaty states could endow individuals with direct standing to pursue international claims. However, the doctrinal and political significance of state sovereignty and its monopoly on international legal decision-making still places serious limitations on those individuals who look to international law for protection. Avenues that individuals might pursue to obtain protection of their rights at an international level are financially and procedurally difficult to attain and they too must be established by the consent of states party to the relevant dispute settlement mechanism. An example where individuals are increasingly granted the right to bring claims against states is in the provisions of investment treaties. See, eg, the 1966 Convention on the Settlement of Investment Disputes.

Responsibility of individuals

[5.140] The responsibility of individuals at international law has a much longer history. The most significant field of international law concerned with individual responsibility is international criminal law (see Chapter 15). Suffice to note here, piracy is perhaps the most longstanding international crime; the Genocide Convention was adopted in

1948 making genocide an individual crime; and in 1998 a number of states adopted the Rome Statute, which came into force in 2002 and vests jurisdiction in the International Criminal Court over individuals 'for the most serious crimes of international concern' (Art 1). More recently, individuals have also been held responsible for civil wrongs at international law such as environmental torts (see Chapter 13).

Minorities

[5.150] In general, minority rights are those rights applicable to the protection of individuals who belong to an ethnic, religious or linguistic minority. Insofar as these rights concern a group of people, they can be seen as a form of collective right meant to protect minority groups against state power. Traditionally, states have not recognised ethic and indigenous minorities as legal subjects on the international plane; they have tended to remain objects of international law. For example, the *Framework Convention for the Protection of National Minorities* provides an example of a regional treaty aimed at preserving the language of minorities in Europe by placing obligations on states to promote and protect minority rights rather than giving rights and obligations at international law directly to minorities. There is no reference in either the UN Charter or the *Universal Declaration of Human Rights* to the rights of minorities. Article 27 of the ICCPR states:

> *'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'*

Further, in 1992, the *Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities* was adopted by the GA. Article 1 of the Declaration provides:

> *'States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.'*

Article 8(4) provides:

> *'Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States.'*

Some minorities, including indigenous peoples, claim the right to self- determination over their traditional lands and the right to become subjects of international law. In most contemporary cases, claims to external self-determination are denied pursuant to the principle of territorial integrity, which maintains that state borders ought not be re-drawn and that sovereign power within an existing territory ought not be shared or transferred except by means of law already in existence within that territory (see Chapter 4).

Aboriginal and Torres Strait Islander peoples in the territory we now call Australia, for example, often refer to themselves as constituting several nations within that territory. Moreover, within those nations, Aboriginal and Torres Strait Islander peoples possess and exercise a number of rights and responsibilities according to their own traditional laws and customs, which are not recognised as an exercise of sovereign rights at the

international level but are recognised as such by Aboriginal and Torres Strait Islander peoples themselves. In addition to being subject to these laws, Aboriginal peoples who have survived the colonisation of their traditional lands are now considered Australian citizens in terms of nationality. However, as Chesterman and Galligan observe, they 'had no say about being subject to such rule, which was imposed by force, and no share in the rights and entitlements that ordinary citizens enjoyed' (Chesterman and Galligan 1997, pp 2-3). Indeed, when Australia acquired its own Parliament, one of the first laws passed was the *Commonwealth Franchise Act 1902* (Cth), which prohibited voting by Aboriginal people. Laws such as these were followed by harsh policies throughout Australia aimed at 'regulating and confining what white society considered to be an undesirable racial minority' (Chesterman and Galligan 1997, p 8). Indigenous peoples in Australia were thus excluded from membership of the sovereign state and political representation at both the domestic and international level in the attempt to build Australia as a settler nation. Today, indigenous peoples in Australia do have the right to vote but their social, cultural and economic rights have been violated to such an extent that their communities within Australia are sometimes considered in international humanitarian terms as 'failed states'. One might query why the label is not attached to the Australian state as a whole. As a consequence, many indigenous peoples have turned to international law to advocate their rights.

The primary international instrument concerned with the rights of indigenous peoples is the *Declaration on the Rights of Indigenous Peoples*, adopted by the GA on 13 September 2007. The Declaration is not legally binding on states. Of the more controversial articles in the Declaration is the right to unrestricted self-determination (art 4); another is an inalienable collective right to the ownership, use and control of lands, territories and other natural resources (art 26). The Permanent Forum on Indigenous Issues, established by ECOSOC on 28 July 2000, is a standing body that advises ECOSOC on issues of economic, cultural and social development, the environment, education, health and human rights as they apply to indigenous peoples.

Rebels, insurgents, belligerents and national liberation movements

[5.160] The relevance of international law to groups of rebels, insurgents, belligerents and national liberation movements generally arises because these groups are fighting to become the authorised government of an existing state, or perhaps are fighting to secede from an existing state as an independent nation pursuant to the right to self-determination. Examples include the African National Congress or the Palestinian Liberation Organization. Two main issues for international lawyers to determine in cases where armed force is being used by a group of people against a state government are:

- the point at which the armed conflict ceases to be a domestic issue and becomes subject to international law; and
- whether or not to recognise the new government and/or nation-state.

The recognition of governments and states is discussed in Chapter 4. As stated in that chapter, recognition is a politically charged process and often the recognition of insurgents will be based less on their democratic legitimacy and rather more on their control of valuable resources or territory.

In the past, states have been reluctant to treat the activities of individual insurgents as violations of international law because they fear that such treatment will confer international legal status to such groups and thus lend them a recognised legal status.

However, the increase in the activities of international criminal tribunals has meant that increasing numbers of individuals are being held to account at international law. Nonetheless, as Wilson argues, 'to suggest that entities other than States may legitimately use force, and that international wars need not necessarily be inter-State wars, challenges conventional ideas about the nature of international society' (Wilson 1988, p 2). Determining the status of an internal armed conflict is a matter of fact, which depends largely on the intensity of the violence and how much effective control the insurgent group has over the relevant territory. Regardless of the level of intensity, international human rights law will apply (see Chapter 14). Ascertaining when international humanitarian law, also known as the law of war or armed conflict, will also apply is more difficult (see Chapters 10 and 15). Article 1(2) of Protocol II Additional to the Geneva Convention states that, 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature' are not armed conflict, such that international humanitarian law does not apply. The International Criminal Tribunal for the Former Yugoslavia held in the *Tadić* case (at [70]) that 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'. According to the International Committee of the Red Cross, 'in non-international armed conflict non-governmental armed groups fight either among themselves or against governmental forces … with a level of intensity exceeding that of isolated and sporadic acts of violence: and with a level of collective organisation enabling them to carry out sustained and concerted operations' (International Committee of the Red Corss 2008, at [3.1.1]). Once international humanitarian law is found to apply, it invests the insurgents with rights and obligations under both customary international law and various treaties. For an example of a treaty that applies to a number of different armed groups, read the Geneva Convention II on the treatment of prisoners of war, which refers to members of armed forces as well as members of militias, voluntary corps, and organised resistance groups. Moreover, if an insurgent group is ultimately successful in taking control of a state or territory, it will be responsible at international law for any unlawful acts it committed during the period of insurgency (see Chapter 7).

Corporations

[5.170] Although corporations are created under domestic law, it is arguable that in some contexts they do possess elements of international personality by treaty. An example would be where a multinational corporation is engaged in activities in a state and has entered into a concession agreement with the government of that state whereby permission is given to the company to exploit particular resources or provide services in return for valuable consideration such as a licence fee or a share in the profits or some other benefit. Often the corporation will also agree to provide additional socio-economic benefits to the conceding state designed to foster further development of the state's economy and people. A corporation involved in these kinds of agreements is granted a range of significant rights in relation to territory and its resources, the possession of property and customs incentives and immunities. As a result, it is arguable that the scope of its rights and obligations endows it with a legal personality of a public nature arising out of an international transaction. However, the corporation essentially remains a private entity and the transaction is more likely to be considered to fall within the realm of private international law or the domestic laws of the state granting

the concession, or indeed the laws of the state in which the corporation is registered. Hence, it is correct to argue that corporations remain subject to national laws, although they may be given certain rights, immunities or responsibilities under those national laws of an international character.

Diplomatic protection of corporations

[5.180] Since corporations are not considered subjects of international law, they are treated as if they were a citizen or national of the state exercising diplomatic protection. In the *Barcelona Traction* case, for example, Belgium sought to bring a claim against Spain on behalf of its nationals, who were individual and corporate shareholders in the Barcelona Traction, Light and Power Company, which was incorporated and had its registered office in Canada. The right of Belgium to exercise diplomatic protection of individual Belgium shareholders is considered above in [5.90] on individuals at international law. Belgium also argued that it had a right to exercise protection of the company itself. The company was Canadian, not Belgian, but Belgium argued that it nonetheless had a right to bring a claim on its behalf if Canada chose not to act. The ICJ (at 40-47) did suggest that there may be special circumstances when such protection might be permitted, such as if a company has ceased to exist, or its national state lacks capacity to take action on its behalf. In such circumstances, if a state could demonstrate that it has some real connection to the company, it might be justified in claiming a right to bring a claim under the principles of diplomatic protection. In such a case, the test of effective control set out in the *Nottebohm* case could be applied to make the argument. In that regard, see the Separate Opinion of Judge Tanaka in the *Barcelona Traction* case. The ICJ made it clear in the *Barcelona Traction* case, however, that a lack of capacity does not include the discretionary decision by the state of which the company is a national *not* to exercise the right of diplomatic protection.

Responsibilities of corporations

[5.190] Where a state is held directly responsible for failing to effectively regulate the illegal activities of corporations within its territory (see Chapter 7), such corporations may be held indirectly responsible at international law. However, even though corporations may be endowed with legal personality, and thus responsibility, under public international law, this begs the question of how their conduct can be enforced. If, for example, a corporation is in violation of international human rights law, the issue of who would have standing to bring claims against it and who would enforce any judgment raises the same types of challenges as those faced by individuals against the state.

The UN Sub-Commission for the Promotion and Protection of Human Rights provides a list of *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises*. In 2005, a Special Representative of the UN Secretary-General was appointed by the HRC to identify ways through which the accountability of transnational corporations for human rights violations might be improved (UNHRC Resolution 2005/69). The Special Representative submitted a final report to the Human Rights Court on 3 June 2008, which was 'welcomed' in a resolution extending his mandate by three years (United Nations Human Rights Council 2008). The report provides a conceptual policy framework organised around three core principles. The first is the state duty to protect against human rights abuses by third parties, including

business. The second principle is the corporate responsibility to respect human rights in a legal, social and moral sense. The third principle is the need for more effective access to remedies for victims of human rights abuses involving companies. Interestingly, the report focuses on the creation of good governance structures, that is, political remedies, rather than on legal reform.

Practice Questions

5.1 If a humanitarian crisis were to occur as a result of a natural disaster, what powers would the GA and/or the SC have to intervene in relation to the crisis?

5.2 Do minorities have legal rights and obligations at international law? Do they have international legal personality? Why or why not?

Answers to Practice Questions

5.1 Through its resolutions, the GA might express particular concerns of the member states regarding any issues of international concern that arise from the disaster. Much of the relief would be addressed by specialised agencies that deal with humanitarian assistance and development such as ECOSOC and the UN Development Programme. There is no general set of international principles dealing with disaster relief but GA Res 46/182 did lead to the creation of what is now the Office for the Coordination Of Humanitarian Affairs (OCHA) to 'mobilise and coordinate the collective efforts of the international community, in particular those of the UN system, to meet in a coherent and timely manner the needs of those exposed to human suffering and material destruction in disasters and emergencies'. The United Nations Disaster Assessment and Coordination System (UNDAC) can dispatch teams within 12 to 24 hours of a natural disaster or sudden emergency to gather information, assess needs, and co-ordinate international assistance. Otherwise, the powers of the GA to intervene are limited, particularly by art 2(7) of the Charter, which explicitly asserts that nothing in the Charter authorises the UN 'to intervene in matters which are essentially in the domestic jurisdiction of any State or shall require Members to submit such matters to settlement'. The recent humanitarian disaster in Myanmar is a case in point. The GA does consider 'the general principles of co-operation in the maintenance of international peace and security' (art 11(1)) and discusses 'any questions relating to the maintenance of international peace and security' (art 11(2)). If the facts of the case are such that they result in a threat to peace and security it is possible that the GA may invoke its powers under art 11. These powers overlap with those of the SC, as does the power to recommend 'the peaceful adjustment of any situation regardless of origin, which it deems likely to impair the general welfare' (art 14). Further functions and powers of the SC are set out in arts 24–26 of the Charter.

5.2 A minority may gain international legal rights and obligations if it comprises a group of peoples with the right of self-determination or an insurgent group involved in armed conflict against a state government over territory. However, minority groups are objects and not subjects of international law. Since they are not 'legal persons' at international law they cannot bring judicial claims at the international level unless such rights have been granted to them by treaty.

Tutorial Question

Think of contemporary insurgent groups across the world currently fighting to occupy and control territory. Consider what evidence would be needed for these groups to be recognised as having international legal personality. What considerations (legal and political) are relevant? If the UN fails to intervene in such a conflict and a humanitarian crisis results, can the UN be held responsible for that omission at international law?

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