

Jurisdictional Immunity of Regional Organizations: Substantive Unity in Instrumental Diversity?

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1. Introduction

Regional organizations are usually not the most popular ones in the study of international organizations.¹ They are, by definition, not so relevant for everyone and are often perceived as being quite limited in their objectives and substantive scope. Some, like NATO, the EU, the Arab League or OPEC can regularly find themselves referred to in global newspapers, but the fair share of them live their lives in relative anonymity. As we will see, the lack of attention – also from institutional legal scholars – does not do justice to the far-reaching, sometimes integrative, objectives of many regional organizations, nor to the fact that there are simply far more regional organizations than the well-known universal ones.

Regional organizations are usually defined as international organizations the membership of which is limited to states in a certain global region.² The regional character is often reflected in the name of the organization, as exemplified by the African Union, the Organization of American States, the Caribbean Community, the Association of Southeast Asian Nations, the Mercado Común del Sur, the Arab League, or the European Union. In a sense, regional organizations are a special type of ‘closed’ organizations (as opposed to ‘universal’ organizations). Other closed organizations have limited their membership on the basis of special characteristics of states, such as their involvement in the production and export of oil (OPEC) or a certain level of economic development (OECD). It is not always easy to clearly define the region, and legal as well as political reasons may play a role in membership decisions. The Organization for Security and Cooperation in Europe (OSCE) does not merely cover Europe, but the entire northern hemisphere and can thus hardly be seen as ‘regional’. European Union membership is open to “any European State”,³ but the treaty falls short in defining ‘Europe’. Similar issues have arisen in the framework of the Council of Europe when decisions had to be taken on membership applications by Armenia, Azerbaijan and Georgia.⁴ In a similar vein, despite internal political debates on definitional elements, the

¹ For instance, the most comprehensive study on the law of international organizations today, J. Cogan, I. Hurd and I. Johnston (eds.), *Oxford Handbook of International Organizations* (Oxford University Press, 2016), does not devote a specific chapter to regional organizations.

² Cf. H.G. Schermers and N.M. Blokker, *International Institutional Law* (Brill|Nijhoff, 2011) at 53.

³ Art. 49 of the Treaty of European Union (TEU).

⁴ See Schermers and Blokker (n 2) 53. All three transcaucasian countries joined.

Arab League is open to “any independent Arab State”,⁵ the sub-regional nature of the central African CEMAC is put into perspective by its openness to *any* African State that shares the ideals of the founding States, and the Economic Cooperation Organisation (ECO) in Asia, makes membership dependent on either the geographical location or on sharing the objectives.

The purpose of the present chapter is not to analyse the nature of regional organizations as such. In the context of the present Volume, it will merely focus on one specific aspect: their jurisdictional immunity. The number of regional and sub-regional organizations is quite high as it is not uncommon for (neighbouring) states to institutionalise their cooperation in a specific area.⁶ Over the past twenty years or so, not only the number of regional organizations has increased, but also their competences. More and more organizations have been granted with competences in the field of regulation and law-making, and increasingly the acts of regional organizations not only affect their member States, but also the private persons and companies within these states,⁷ leading to an increase of non-governmental interests in these organizations.⁸ Obviously, an increase in the impact of international decisions on individuals potentially leads to more legal conflicts or claims and hence a need to have these acts legally assessed. While over the years many judicial dispute settlement mechanisms have been established within regional organizations,⁹ domestic courts are also still frequently asked to settle disputes.

The immunity of international organizations is more generally analysed in previous chapters of this Handbook.¹⁰ The purpose of granting immunity to international organizations is to allow them to function independently from any interference by the domestic law of the

⁵ Art. I of the Charter of the League of Arab States.

⁶ See also P. Pennetta, ‘International Regional Organizations: Problems and Issues’, in R. Virzo and I. Ingravallo (eds.), *Evolutions in the Law of International Organizations* (Brill/Nijhoff, 2015), pp. 70-115. Apart from the organizations mentioned above, Pennetta *inter alia* refers to the Council of Europe, the Unión de Naciones Suramericanas (UNASUR), the Organization of Black Sea Economic Cooperation (OBSEC), the Asia-Pacific Economic Cooperation (APEC), the Indian Ocean Rim Association (IORA), Foro del Pacífico Latinoamericano, Cooperation Council of the Arab States in the Gulf (GCC), the Council of Baltic Sea States (CBSS). But many more examples can be mentioned here, including the Nordic Council, the Economic Community of West African States (ECOWAS), the Andean Community, or the Southern African Developments Community (SADC). I have not been able to find a complete overview, and I hesitate to mention that many other regional organizations can be found on: https://en.wikipedia.org/wiki/List_of_intergovernmental_organizations#Regional_organizations.

⁷ Pennetta (n 6) 75. More in general, a lot has been written on the law-making activities of international organizations. See, for instance, N.D. White, ‘Lawmaking’, in Cogan, Hurd and Johnston (n 1) 559-580; J. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005); J. Wouters and Ph. De Man, ‘International Organizations as Law-Makers’ in J. Klabbers and Å Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar Publishing, 2011), p. 190; R.A. Wessel, ‘Institutional Lawmaking: The Emergence of a Global Normative Web’, in C. Bröllman and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing, 2016), pp. 179-199; and on ‘informal international organizations’: J. Pauwelyn, R.A. Wessel and J. Wouters (eds.), *Informal International Lawmaking* (Oxford University Press, 2012).

⁸ E. Tino, *Non-Governmental Interests in International Regional Organizations* (Brill/Nijhoff, 2018).

⁹ E. Tino, ‘Settlement of Disputes by International Courts and Tribunals of Regional International Organizations’, in Virzo and Ingravalla (n 6), pp. 468-508 at 469. Tino *inter alia* refers to a visible ‘judicialization’ process in organizations in Africa (COMESA, ECOWAS, EAC), in Central and Latin America (SICA, MERCOSUR) and in the Caribbean (CARICOM, OECS).

¹⁰ See in particular the Chapters by Boon and Blokker.

host state or of other states.¹¹ Most regional organizations we see today were founded after 1945 and were inspired by the granting of immunities to the United Nations, underlining the ‘functional’ need for the organization’s immunity to allow it to carry out its tasks.¹² The instruments of some regional organizations reflect the General Conventions adopted by the UN, namely the ‘Convention on the Privileges and Immunities of the United Nations’ and the ‘Convention on Privileges and Immunities of the Specialised Agencies’.¹³ And, apart from specific instruments, privileges and immunities may be dealt with in the Headquarters Agreements concluded between the organization and the host state.

Jurisdictional immunity and the concomitant immunity from execution or enforcement measures,¹⁴ can be seen as the key elements of the immunity of international organizations.¹⁵ While ‘functional immunity’ is clearly linked to the exercise of tasks and competences by the organization, the specific instruments adopted by the organization or of the Headquarters Agreement concluded with the host State often go further by providing an ‘absolute immunity’ for all activities by the organization. This has made it increasingly difficult to sue international organizations before domestic courts.¹⁶ The same holds true for top officials of international organizations. Lower officials would usually enjoy immunity for their official tasks only.¹⁷

The need for immunities of international organizations also depends on the extent to which they can act separately from their member States. While these days the legal personality of international organizations is hardly subject to debate (and should in fact be seen as part of their ‘organizationhood’¹⁸), the extent to which states have actually transferred competences to the organization still varies considerably. In that sense, immunity may be more relevant for organizations showing a large amount of *integration* and perhaps less for

¹¹ See more extensively A. Reinisch, ‘Privileges and Immunities’, in Cogan, et al. (n 1) 1048-1068. On balancing immunities and rights of individuals see also the Advisory Report on *Responsibility of International Organisations* (Advisory Committee on Issues of Public International Law (CAVV), 2015) ([http://cms.webbeat.net/ContentSuite/upload/cav/doc/Report_no_27_-_Responsibility_of_international_organisations\(2\).pdf](http://cms.webbeat.net/ContentSuite/upload/cav/doc/Report_no_27_-_Responsibility_of_international_organisations(2).pdf)).

¹² Art. 105 of the UN Charter provides: “The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.”

¹³ See, for instance, the General Convention on the Privileges and Immunities of the Organizations of African Unity, in the framework of the African Union (see further below). Cf. also M.F. Orzan, ‘International Organizations and Immunity from Legal Process: An Uncertain Evolution’, in Virzo and Ingravallo (n 6) 364-380, at 366.

¹⁴ Usually immunity from jurisdiction implies immunity from enforcement, but even in the absence of immunity from jurisdiction, immunity from enforcement may have been agreed upon. Cf. Orzan (n 1313) 377-378.

¹⁵ Cf. Reinisch (n 11) 1051.

¹⁶ A. Reinisch, *International Organizations before National Courts* (Cambridge University Press, 2000); A. Reinisch (ed.), *Challenging Acts of International Organizations Before National Courts* (Oxford University Press, 2010); C. Ryngaert, ‘The Immunity of International Organizations before Domestic Courts: Recent Trends’ (2010) *International Organizations Law Review*, pp. 121-148.

¹⁷ See also the chapter by Walter, elsewhere in this Volume.

¹⁸ See more extensively R.A. Wessel, ‘Legal Status (Personality)’, in C. Ryngaert, I.F. Dekker, R.A. Wessel and J. Wouters (eds.), *Judicial Decisions on the Law of International Organizations* (Oxford University Press, 2016), pp. 6-10; and in the same volume R.A. Wessel, ‘Reparation for Injuries Suffered in the Service of the United Nations’ pp. 11-18. Cf. also N.M. Blokker and R.A. Wessel, ‘Revisiting Questions of Organizationhood, Legal Personality and Membership in the OSCE: The Interplay Between Law, Politics and Practice’, in M. Platise Steinbrück, C. Moser, A. Peters (eds.), *Revisiting the Legal Status of the OSCE*, 2018 (forthcoming). Cf. also the definition used by the ILC in de Articles on the Responsibility of International Organizations (ARIO): “[I]nternational organization’ means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.” (art. 2(a))

organizations merely aiming to facilitate *cooperation* between states. In the end, an act should be attributable to the organization and proceedings must first be aimed at the organization for immunities to kick in. The question of whether or when institutionalised cooperation between states actually leads to the creation of an international organization is at the core of the study of the law of international organizations. Sometimes the term ‘soft organization’ is used to point to institutionalised frameworks or even entities that do not fit the traditional definitions of international organizations, for instance because of the absence of a constitutive treaty.¹⁹ The perhaps best-known example in Europe is the OSCE,²⁰ but the phenomenon is particularly popular in Asia, as illustrated by ASEAN (which, like the OSCE, gradually evolved towards a ‘hard’ organization), as well as a number of smaller soft organizations.²¹

On the other side of the spectrum we find very well-developed regional organizations aimed at the integration of certain policy areas of their member states (sometimes referred to as ‘supranational’ organizations,²² although this term too is often more confusing than helpful). The European Union is usually seen as the best example of this type of organization, but the example was followed by many other organizations in other regions.²³ Thus, Latin America has the Andean Community (CAN); in Africa we find the Central African Economic and Monetary Community (CEMAC), *L’Union Economique et Monétaire Ouest Africaine* (UEMOA) and the East African Community (EAC); and the Caribbean region has the Organization of Eastern Caribbean States (OECS). Indeed, these organizations (among others) are said to have been based on the ideas and rules that laid at the basis of the current European Union, and their dispute settlement mechanisms reveal similarities to the elaborate system of the EU.²⁴

The main question tackled in this chapter, is how and in which form regional organizations have regulated their immunities as well as the immunities of their staff and the representatives of their member States. Also, is there some uniformity in the substantive rules as well as in the instruments used? Do some specific situations stand out? And to what extent is the difference in the nature of regional organizations reflected in the rules on immunities? Given the proliferation of regional organizations over the past decades in combination with the limited space available, we will analyse the arrangements of a number of key regional organizations only, with some excursions to specific ‘smaller’ organizations. Also, the focus

¹⁹ See for instance J. Klabbers, ‘Institutional Ambivalence by Design: Soft Organizations in International Law’ (2001) *Nordic Journal of International Law*, 403; A. Di Stasi, ‘About Soft International Organizations: An Open Question’, in Virzo and Ingravallo (n 6) 44-69.

²⁰ Cf. Blokker and Wessel (n 18).

²¹ Pennetta (n 6 at 98) mentions, inter alia, APEC (the Asia-Pacific Economic Cooperation), IORA (the Indian Ocean Rim Association) and BIMSTEC (the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation).

²² See for instance W. Schroeder and A.T. Müller, ‘Elements of Supranationality in the Law of International Organizations’, in U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. von Schorlemer, and C. Vedder *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press, 2011), pp. 358-378; A. Skordas, ‘Supranational Law’, in *Max Planck Encyclopedia of Public International Law* [MPEPIL], 2014.

²³ Cf. P. Pennetta, *Integración e integraciones: Europa, América Latina y el Caribe* (Planeta Colombia, 2011).

²⁴ Pennetta (n 6) at 99-100; as well as L. Burgorgue-Larsen, ‘Pendre les droit communautaires au sérieux ou la force d’attraction de l’expérience communautaire européenne en Afrique et Amérique Latine’, in C. Blumann et al. (eds.), *Les dynamiques de droit européenne en début du siècle. Études en l’honneur de Jean-Claude Gautron* (Pedonne, 2014), p. 563.

will be on organizations with a general rather than a specific competence,²⁵ largely leaving out organizations such as the Asia-Pacific Fishery Commission, the Inter-African Coffee Organization, the Pan American Health Organization, or the European Patent Office. Finally, the scope of the Chapter does not allow to analyse the (domestic) case law related to the immunities of regional organisations, apart from an occasional example. While writing this Chapter, it became clear that specific documents (such as Protocols on privileges and immunities, Headquarters Agreements, or even constitutive documents of organizations) are often not in the public domain and are difficult to retrieve. This contribution is therefore written under the caveat that the analysis is, by definition, far from complete and merely aims to serve as a first inquiry into the way regional international organizations have regulated their immunities.

2. Africa and the Middle East

2.1 Pan African and Arab Organizations

Africa may very well be the continent hosting the largest number of regional organizations, partly with overlapping mandates and membership.

The African Union (AU; 55 members) is the main organization open to all African States, and all states are a member.²⁶ The AU is the successor of the Organization of African Unity (OAU). Its main objective is to “achieve greater unity and solidarity between the African countries and the peoples of Africa”, with explicit aims to ensure peace and security; to enhance democratization and human rights; and to ensure development and an improvement in living standards and health.²⁷ The Constitutive Act of the African Union does not entail a provision on the privileges and immunities of the organization. For these matters the AU continues to rely on the General Convention on the Privileges and Immunities of the Organization of African Unity, which is largely based on the UN Convention on Privileges and Immunities. Article II(1) states that:

“The Organization of African Unity its premises buildings, assets and other property wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case the Organization of African Unity has waived such immunity in accordance with the provisions of this General Convention. It is, however, understood that no waiver of immunity shall extend to any measure of execution.”

Article(II(2) adds:

“The premises and buildings of the Organization of African Unity shall be inviolable. The property and assets of the Organization of African Unity, wherever located and by whomsoever held, shall be immune from search,

²⁵ Perhaps with a slight preference for economic (integration) organizations.

²⁶ With the exception of the Spanish territories Ceuta, Melilla, and the Plazas de soberanía; and the offshore islands that are part of non-African countries. See more extensively A.A. Yusuf and F. Ouguergouz (eds.), *The African Union: Legal and Institutional Framework: A Manual on the Pan-African Organization* (Brill|Nijhoff, 2012).

²⁷ Art. 3 (a) of the Constitutive Act of the African Union (AU Act). See more extensively F. Viljoen, ‘African Union (AU)’, *MPEPIL* (n 22), 2011.

requisition, confiscation, expropriation and from any other form of interference, whether by executive, administrative, juridical or legislative action.”

This is followed by provisions on the inviolability of the archives (par. 3) and the right to hold or transfer funds, gold or currency (par. 4). Article V extends the regular immunities to “Representatives of Member States to the principal and subsidiary institutions, as well as to the Specialized Commission of the Organization of African Unity, and to conferences convened by the Organization [...] while exercising their functions and during their travel to and from the place of meetings.”

Also the rule we know from the UN Convention (Section 14) on the of waiver immunity returns (Article V(4)):

“Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the Organization of African Unity. Consequently, a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.”

Throughout this Chapter we will see similar rules, albeit that provisions do not always include a *duty* to use a waiver when the immunity would impede the course of justice.

The immunities of experts performing missions for the organizations (Article VII) are also taken from the UN Convention (Section 22). Finally, specific rules on immunities can be found in the 1980 Additional Protocol to the OAU General Convention on Privileges and Immunities. These include, for instance, the regulation of the status of staff and experts of the organization and its Agencies during travel, including the AU ‘Laisser-Passer’ to grant diplomatic status to certain staff members.

The other more general²⁸ pan-African Organization is the African Economic Community (AEC). The AEC was established within the AU framework, with AU provisions prevailing over AEC rules in case of conflicts.²⁹ The aim of the AEC is to promote economic, social and cultural development as well as African economic integration in order to increase self-sufficiency and endogenous development and to create a framework for development, mobilisation of human resources and material. The AEC further aims to promote co-operation and development in all aspects of human activity with a view to raising the standard of life of Africa's people, maintaining economic stability and establishing a close and peaceful relationship between member states.³⁰ Like the AU, the AEC is sometimes listed as a ‘supranational’ organization, with “formal supranational structures that resemble those of the

²⁸ Many States are members of continental organizations focusing on co-operation in communications and transport such as the African Telecommunications Union, the Pan-African Postal Union, the African Civilian Aviation Commission, and the Pan-African Railways Union. There are also a number of regional organizations dealing with commercial issues such as the Inter-African Conference for the Insurance Market (Conférence Interafricaine des Marchés d’Assurances), the African Regional Industrial Property Organization, and the African Intellectual Property Organization. See M. Killander, ‘Regional Co-operation and Organization: African States’, *MPEPIL* (n 22), 2008.

²⁹ Art. 33 (2) AEC Constitutive Act.

³⁰ Art. 4 AEC Constitutive Act (the ‘Abuja Treaty’).

EU”.³¹ At the same time, it is clear that the African organizations “are flexible and operate without strong bureaucracies”.³²

The AEC Treaty (the ‘Abuja Treaty’) came into force in May 1994. It provided for the African Economic Community to be set up through a gradual process, which would be achieved by coordination, harmonisation and progressive integration of the activities of existing and future regional economic communities (RECs) in Africa (see further below). The RECs are regarded as the building blocks of the AEC, and include the AMU (Arab Maghreb Union), ECCAS (Economic Community of Central African States), COMESA (Common Market of Eastern and Southern Africa), SADC (Southern African Development Community), and ECOWAS (Economic Community of West African States). The AEC could thus largely be seen as an ‘umbrella organization’. The Headquarters are the same as those of the AU.³³ This close link with the AU and the fact that the AEC is composed of various sub-regional organizations may explain why the Abuja Treaty does not contain any provisions on privileges and immunities, despite the fact that the AEC has organs of its own, such as a Council of Ministers, a Court of Justice and a General Secretariat.³⁴

Specific immunities of the parliamentarians are, however, regulated in the 2001 Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament. It is interesting to note that especially the rights of Parliamentarians are regulated quite extensively, albeit with a reference to other existing Conventions. On the basis of Article 8:

“1. The Pan-African Parliamentarians, while exercising their functions, shall enjoy in the territory of each Member State the immunities and privileges extended to representatives of Member States under the General Convention on the Privileges and Immunities of the OAU and the Vienna Convention on Diplomatic Relations.
2. Without prejudice to Paragraph (1) of this Article, the Pan-African Parliament shall have the power to waive the immunity of a member in accordance with its Rules of Procedure.”

And, Article 9 adds:

“1. The Pan-African Parliamentarians shall enjoy parliamentary immunity in each Member State. Accordingly, a member of the Pan-African Parliament shall not be liable to civil or criminal proceedings, arrest, imprisonment or damages for what is said or done by him or her within or outside the Pan-African Parliament in his or her capacity as a member of Parliament in the discharge of his or her duties.
2. Without prejudice to Paragraph (1) of this Article, the Pan-African Parliament shall have the power to waive the immunity of a member in accordance with its Rules of Procedure.”

An organization that is open to “any independent Arab state”³⁵ is the Arab League (AL; 22 members).³⁶ Its main objectives include “the strengthening of the relations between the member-states, the coordination of their policies in order to achieve co-operation between

³¹ Skordas (n 22).

³² Ibid.

³³ Art. 96 AEC Constitutive Act.

³⁴ Art. 7 of the AEC Constitutive Act.

³⁵ Art. I Charter of the League of Arab States.

³⁶ R.W. MacDonald, *The League of Arab States: A Study in Dynamics of Regional Organization* (Princeton University Press, 2015).

them and to safeguard their independence and sovereignty; and a general concern with the affairs and interests of the Arab countries.”³⁷ On the basis of Article XIV of its Charter:

“The members of the Council of the League as well as the members of the committees and the officials who are to be designated in the administrative regulation shall enjoy diplomatic privileges and immunity when engaged in the exercise of their functions.”

It is interesting to note that the Charter is silent on the immunities of the organization as such, or its staff. These, however, are – nevertheless – dealt with in the 1953 Convention of the Privileges and Immunities of the League of Arab States,³⁸ as well as in the 1995 Headquarters Agreement concluded with Belgium. Article 1 of this Agreement provides that the goods and assets which the League uses for the exercise of its official activities in Belgium enjoy immunity from jurisdiction (except if this immunity is waived). The Agreement became subject to a case before a Belgian Court initiated by an employee. The problem, however, was that the Headquarters agreement was not yet approved by the Belgian Federal Parliament, a prerequisite under Belgian law for the government to ratify the agreement. The question was whether a bilateral treaty concluded with an international organization that had not been approved by parliament could give rise to legal consequences in the Belgian legal order and whether the Arab League was immune from jurisdiction in the Belgian courts.³⁹ The Court of Cassation held that there is no general principle of international law recognizing immunity from jurisdiction of international organizations with respect to states having established or recognized them, leading to a denial of the immunity of the League in the present situation.⁴⁰

2.2 Sub-regional organizations

The number of sub-regional organizations in Africa is quite large – with quite a few so-called regional economic communities (RECs)⁴¹ – allowing us to zoom in on a few of them only. Two organizations are also known for their ‘supranational’ characteristics:⁴² the Central African Economic and Monetary Community (CEMAC)⁴³ and *L’Union Economique et Monétaire Ouest Africaine* (UEMOA).⁴⁴

³⁷ Art. II Charter of the League of Arab States.

³⁸ This Convention does not seem to be in the public domain.

³⁹ *League of Arab States v T.*, Belgian Court of Cassation, 127 ILR (2005) 94, 12 March 2001. See on this case C. Ryngaert, ‘League of Arab States v T.’, in C. Ryngaert, I.F. Dekker, R.A. Wessel and J. Wouters (eds.), *Judicial Decisions on the Law of International Organizations* (Oxford University Press, 2016).

⁴⁰ In a case in The Netherlands, however, the Iran-US Claims Tribunal could invoke its immunity on the basis of an exchange of letters despite the absence of parliamentary approval as “under customary international law, a state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent”. See District Court of The Hague, Iran U.S. Claims Tribunal Den Haag, 23 June 2010.

⁴¹ See S. Karangizi, ‘Regional Economic Communities’, in Yusuf and Ouguergouz (n 26), pp. 231-249.

⁴² Pennetta (n 6) at 100.

⁴³ Sometimes referred to as CAEM

⁴⁴ The West African Monetary and Economic Union (UEMOA; 8 members) has a number of objectives that will sound familiar to European Union experts: to create a common market among the Member States, based on the free movement of persons, goods, services, and capital, the right of establishment of self-employed or salaried persons, as well as a common external tariff and common market policy. The West African Monetary and Economic Union (UEMOA; 8 members) has a number of objectives that will sound familiar to European Union experts: to create a common market among the Member States, based on the free movement of persons, goods, services, and capital, the right of establishment of self-employed or salaried persons, as well as a common

The 1994 Treaty establishing the Central African Economic and Monetary Community (CEMAC; 6 members) was adopted on 16 March 1994, but the text was amended by the Revised Treaty on the Economic and Monetary Community of Central Africa of 25 June 2008 ('Revised Treaty'). As was already noted, it is interesting that despite its origin in 'Central Africa' and its current membership, any African State that shares the ideals of the founding States may request membership in the CEMAC.⁴⁵ Article 5 of the Revised CEMAC Treaty briefly refers to the immunities of the organization and its staff:

“La Conférence des Chefs d’État arrête, par voie d’acte additionnel, le régime des droits, immunités et privilèges accordés à la Communauté, aux membres de ses institutions et à son personnel.”

This additional act was adopted in 1999,⁴⁶ and largely reflects the regular rules on privileges and immunities. Article 4 provides:

“Les locaux de la Communauté sont inviolables. Les agents ou fonctionnaires d’un État membre, qu’ils soient administratifs, judiciaires, militaires ou de police, ne peuvent y pénétrer, pour exercer leurs fonctions officielles que sur la demande et avec le consentement du Premier responsable légal de l’organe intéressé ou de son représentant, notamment pour y rétablir l’ordre ou pour en expulser toute personne dont la présence est jugée indésirable.

Le consentement est présumé acquis en cas de sinistre grave et de force majeure nécessitant des mesures d’intervention et de protection immédiates.”

The presumption of consent ‘in the event of a serious disaster and *force majeure* requiring immediate intervention and protection measures’ cannot be found in the UN Convention and thus adds something extra, although it is not unusual for Headquarters Agreements between international organizations and host states to include such a presumption and it echoes the respective provision in the Vienna Convention on Consular Relations.⁴⁷ Article 11 provides the general rule on jurisdictional immunity:

“La Communauté jouit, en toutes matières, de l’immunité de juridiction et d’exécution, sauf renonciation expresse de sa part, dans un cas particulier, notifiée par le 1er responsable de l’organe intéressé.”

This ‘absolute’ immunity seems to be extended to all staff of the Community, whereas the Members of the Council of Ministers as well as other state representatives enjoy immunities ‘for the exercise of their functions with the Community’.⁴⁸

external tariff and common market policy. On the basis of Article 10 of the Treaty, the privileges and immunities are dealt with in an additional decision, that does not seem to be in the public domain.

⁴⁵ Art. 55 CAEMC Revised Treaty. See more extensively L. Savadogo, ‘Central African Economic and Monetary Community (CAEMC)’ *MPEPIL* (n 22), 2011.

⁴⁶ ACTE ADDITIONNEL N° 6 /99/ CEMAC-024-CCE-0 Relatif au Régime des Droits, Immunités et Privilèges accordés à la Communauté aux Membres de ses Institutions et à son Personnel (<http://www.izf.net/upload/Documentation/JournalOfficiel/AfriqueCentrale/AADD699.htm>).

⁴⁷ Art. 31(2): “The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.”

⁴⁸ Art. 16 of the Acte Additionnel.

Among the ‘Regional Economic Communities’, is the Economic Community of West-African States (ECOWAS; 15 members).⁴⁹ Its immunities are regulated in Article 88(4) of the 1975 ECOWAS Treaty, which refers to a General Convention on Privileges Immunities of the Community and to the Headquarters Agreements. This 1978 Convention lists the usual immunities for “Representatives of Member States to the institutions as well as to the Technical and listed Commissions of the Community and to conferences convened by the Community”.⁵⁰ Immunity is also established for the Community as such. Waivers of immunity shall not extend to any measure of execution.⁵¹

On the other side of the continent one can find the East African Community (EAC; 5 members). The 1999 Treaty establishing the EAC grants immunities to “persons employed in the service of the Community” and “experts or consultants rendering services to the Community and delegates of the Partner States”.⁵² Immunities of the organizations as such are covered by the provision that “[e]ach of the Partner States undertakes to accord to the Community and its officers the privileges and immunities accorded to similar international organizations in its territory”,⁵³ which, perhaps interestingly, makes the actual immunities dependent on what states have agreed upon with other international organizations in international agreements, Headquarter agreements or domestic law. Finally, a special provision is devoted to the judges of the EAC Court, who are “immune from legal action for any act or omission committed in the discharge of their judicial functions under this Treaty.”⁵⁴

In the South there is the Southern African Development Community (SADC; 14 members).⁵⁵ Article 31 of the 2015 SADC Treaty refers to those immunities of the Community and its staff “as are necessary for the performance of their functions”. More specific rules are to be found in the 1992 Protocol on Immunities and Privileges. Article 5(1) of this Protocol grants immunities to “officials of SADC” as far as acts performed in the course of duty are concerned. The highest officials shall, in addition, be granted immunities comparable to officials of similar ranks in other international organizations. Again, we see a reference which makes the exact scope of the immunities dependent on what has been regulated elsewhere. The usual immunities are also granted to representatives of Member States at or traveling to SADC,⁵⁶ as well as for experts on mission.⁵⁷ With regard to the Member States’ representatives it is again stressed that the immunities are not granted “for their personal benefit [...] but to safeguard the independent exercise of their functions in connection with SADC”.⁵⁸

⁴⁹ Cf. D. Seck (ed.), *Regional Economic Integration in West Africa* (Springer, 2014).

⁵⁰ Art. 6 of the General Convention on Privileges and Immunities of the Economic Community of West African States (ECOWAS).

⁵¹ Art. 3 of the General Convention on Privileges and Immunities of the Economic Community of West African States (ECOWAS).

⁵² Art. 73 EAC Treaty.

⁵³ Art. 123(3) EAC Treaty.

⁵⁴ Art. 43 EAC Treaty.

⁵⁵ W. -C. Peters, *The Quest for an African Economic Community: Regional Integration and its Role in Achieving African Unity - The Case of SADC* (Peter Lang, 2010); E. Tino, ‘The Southern African Development Community and Its ‘New’ Tribunal: Some Remarks’, in T. Hartzenberg and G. Erasmus (eds.), *Monitoring Regional Integration, Yearbook 2015/2016* (Tralac, 2017), pp. 103-127.

⁵⁶ Art. 6 of the 1992 Protocol on Immunities and Privileges.

⁵⁷ Art. 7 of the Protocol.

⁵⁸ Art. 6(2) of the Protocol.

The Common Market for Eastern and Southern Africa (COMESA; 19 members) is based on the COMESA Treaty. Article 5 of this Treaty provides the familiar rule that

“The Member States undertake to accord the Common Market and its staff the privileges and immunities accorded to similar international organizations in their territories and in accordance with the Agreement on Privileges and Immunities.”

A similar rule can be found for the Economic Community of Central African States (ECCAS; 11 members).⁵⁹

3. America

3.1 Pan-American Organizations

The only organization aiming to bring together States in both South and North America is the Organization of American States (OAS; 35 members).⁶⁰ It constitutes the main political, juridical, and social governmental forum in the region. It is also the world’s oldest regional organization, dating back to the First International Conference of American States, held in Washington, D.C., from October 1889 to April 1890. The OAS as an international organization came into being in 1948 and its Charter was amended on several occasions.

Article 133 of the current (1992) version of the OAS Charter regulates the immunities of the organization as follows:

“The Organization of American States shall enjoy in the territory of each Member such legal capacity, privileges, and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes.”

Thus, as we have seen in many other cases, the ‘functional’ link is expressly made. The subsequent provisions deal with the position of persons in similarly familiar ways:

“The representatives of the Member States on the organs of the Organization, the personnel of their delegations, as well as the Secretary-General and the Assistant Secretary-General shall enjoy the privileges and immunities corresponding to their positions and necessary for the independent performance of their duties”.⁶¹

And, finally, special (multilateral) agreements are foreseen for

“The juridical status of the Specialized Organizations and the privileges and immunities that should be granted to them and to their personnel, as well as to the officials of the General Secretariat”.⁶²

⁵⁹ Article 87(3) of the *Traité Instituant la Communauté Économique des États de l’Afrique Centrale*: “Les privilèges et immunités accordés aux fonctionnaires de la Communauté sont les mêmes que ceux dont jouissent les diplomates au pays du siège de la Communauté et dans les États membres. De même, les privilèges et les immunités accordés au secrétariat général sont les mêmes que ceux dont jouissent les missions diplomatiques au pays du siège de la Communauté et dans les États membres.”

⁶⁰ M. Herz, *The Organization of American States (OAS): Global Governance Away From the Media* (Routledge, 2011).

⁶¹ Art. 134 OAS Charter.

⁶² Art. 135 OAS Charter.

Irrespective of the fact that the Charter thus merely seems to refer to additional agreements in specific cases, in 1949 a general Agreement on Privileges and Immunities of the Organization of American States was also concluded. Article 2 provides that:

“The Organization and its Organs, their property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case the immunity has been expressly waived. It is understood, however, that no such waiver of immunity shall make the said property and assets subject to any measure of execution.”

Indeed, this provision seems more ‘absolute’ when compared to Article 133 of the OAS Charter. The subsequent provisions deal with the premises of the organization and of its organs and their property and assets,⁶³ the archives of the organization and of its organs, and all documents belonging to them or in their possession,⁶⁴ and property, funds and assets.⁶⁵

Immunities of the representatives of the member States are regulated in familiar terms in Article 7 of the Agreement, and Article 8 provides special and extensive immunities for “the Secretary General and the Assistant Secretary General of the Organization, their spouses and minor children”, who “shall be granted the privileges and immunities, exemptions and facilities granted to diplomatic envoys.”. Extensive immunities are also extended to the staff of the General Secretariat of what is still called the ‘Pan American Union’ in the Agreement:

“The officials and other members of the staff of the Pan American Union shall: a) be immune from legal process of any kind in respect of words spoken or written and all acts performed by them in their official capacity [...]”.⁶⁶

These rather extensive immunities (approaching “the threshold of absolute immunity”⁶⁷) for both the organization and the Member State representatives are mitigated by a number of clear obligations to waive immunities in case the exercise of immunities would impede the course of justice. Waivers, however, are always dependent on express decisions. While for the staff this decision is taken by the Secretary General, Member States are allowed to make their own judgement as far as their representatives are concerned.⁶⁸

In addition to multilateral agreements, bilateral headquarters agreements usually complete the picture. These may be particularly helpful when a host state has not become a party to a multilateral agreement, as is the case with the United States and the OAS.⁶⁹

⁶³ Art. 3 of the Agreement on Privileges and Immunities of the OAS.

⁶⁴ Art. 4 of the Agreement.

⁶⁵ Art. 5 and 6 of the Agreement.

⁶⁶ Art. 10 of the Agreement.

⁶⁷ Cf. Charles H Brower, II, ‘United States’ in A. Reinisch, *The Privileges and Immunities of International Organizations in Domestic Courts* (n 16) 305.

⁶⁸ Arts. 13 and 14 of the Agreement on Privileges and Immunities of the OAS.

⁶⁹ Brower (n 67) 305. See Headquarters Agreement between the Organization of American States and the Government of the United States of America, article 4 (1), 14 May 1992: “The Organization shall enjoy immunity from suit and every form of judicial process. Such immunity can only be waived by the Organization expressly, with respect to the particular matter in issue, and in writing.”; <<http://www.oas.org/legal/english/docs/BilateralAgree/us/sedeusa.htm>>

3.2 Sub-regional organizations

Most American organizations only cover part of the continent, the South in particular having been quite successful in setting up a number of regional organizations.⁷⁰ For Northern America, the North American Free Trade Agreement (NAFTA; between the USA, Canada and Mexico) can be mentioned. Despite the fact that it is an agreement only, it is seen as the source for the creation of some actual institutions.⁷¹ Thus, the Border Environment Cooperation Commission and the North American Development Bank have been set up between the US and Mexico. Article IV of the Agreement provides the regular immunities to the Border Environment Cooperation Commission and jurisdictional immunity is dealt with more specifically in section 3 of that Article: The Community “shall enjoy the same immunity from suit as is enjoyed by foreign governments” (with a possibility of waiver). The Director and staff enjoy “immunity from legal process with respect to acts performed by them in their official capacity, except when the Commission expressly waives the immunity”.⁷²

An example of an ambitious regional organisation in terms of scope and membership is the Latin American and Caribbean Economic System (SELA; 26 members). Its constitutive document describes SELA as “a permanent regional body for consultation, coordination, cooperation and joint economic and social promotion, with its own international juridical personality. It is composed for sovereign Latin American States”.⁷³ The constitutive treaty is brief on the organisations’ immunities and refers the matter to the Headquarter Agreements:

“SELA, its organs, staff members of the Permanent Secretariat and governmental representatives shall enjoy, in the territory of each Member State, such legal status, privileges and immunities as are necessary for the exercise of their functions. To this end, appropriate agreements shall be entered into with the Government of Venezuela and other Member States.”⁷⁴

The Caribbean Community (CARICOM; 15 members) is an organization of Caribbean nations and dependencies whose main objective is to promote economic integration and cooperation among its members, to ensure that the benefits of integration are equitably shared, and to coordinate foreign policy. Article 229 of the CARICOM Treaty⁷⁵ refers to the Headquarters Agreement concluded with the Government of Guyana as the basis for relations between the Community and the host country, and Article 21 provides that the privileges and immunities to be recognised and granted by the Member States in connection with the Community shall be laid down in a Protocol. This Protocol on Privileges and Immunities to

⁷⁰ Credits are due to Prof. René Urueña at the Universidad de Los Andes in Colombia, for supplying me with many documents on Southern-American organisations. See in general also T.A. O’Keefe, *Latin American and Caribbean Trade Agreements: Keys to a Prosperous Community of the Americas* (Brill, 2009); and M. Odello and F. Seatzu (eds), *Latin American and Caribbean International Institutional Law* (Springer, 2015).

⁷¹ J.A. McKinney, *Created from NAFTA: The Structure, Function and Significance of the Treaty’s Related Institutions* (Routledge, 2000).

⁷² Art. IV, Section 8 of the Agreement establishing the Border Environment Cooperation Commission and the North American Development Bank. See for the text McKinney (n 71).

⁷³ Art. 2 of the 1975 Panama Convention establishing the Latin American Economic System (SELA).

⁷⁴ Art. 37 of the Panama Convention.

⁷⁵ The Revised Treaty of Chaguaramas Establishing the Caribbean Community, including the CARICOM Single Market and Economy (2001).

govern relations between the Community and its Member States was concluded in 1985.⁷⁶ Article 2 of this Protocol provides for immunities of the organization in general:

“The Community, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. No waiver of immunity shall extend to any measure of execution.”

Subsequent provisions deal with the inviolability of premises, archives, funds, and communication. The Protocol also has quite extensive rules to protect the immunity of representatives “while present on the business of the Community in the territory of another Member State”.⁷⁷ This immunity “from legal process of every kind” [...] “shall continue although the person concerned has ceased to be a representative.”⁷⁸ Article 10 lays down the immunities of the “Officials of the Community” in similar terms, with additional immunities that are normally accorded to heads of diplomatic missions in accordance with international law “for the Secretary-General [...] his spouse and children.”⁷⁹ Finally, also “Experts employed on missions on behalf of the Community, while present in the territory of a Member State party to this Protocol” are fully protected against personal arrest and detention.⁸⁰ Any waivers are subject to the discretion of the Secretary-General.⁸¹

With regard to the Caribbean Court of Justice and the Regional Judicial and Legal Services Commission, a Special Protocol was adopted in relation to their privileges and immunities.⁸² Interestingly, both institutions “possess full juridical personality and, in particular, full capacity to: (a) contract; (b) acquire and dispose of immovable and movable property; (c) institute legal proceedings”.⁸³ The immunities of both institutions are regulated in the same way as we would usually see for (full) international organizations: “The Court, the Commission, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case such immunity has been expressly waived. No waiver of immunity shall extend to any measure of execution.”⁸⁴ The Protocol also contains rules on the inviolability of the premises and the archives.⁸⁵ Furthermore, immunity from legal process is provided for “Judges and officers of the Court and members of the Commission engaged in the business of the Court or Commission, as the case may be, in the territory of the Government”.⁸⁶ Similar rules are included for “Counsel appearing in proceedings before the Court while present in the territory of the Government”.⁸⁷

⁷⁶ Protocol on the Privileges and Immunities of the Caribbean Community, Georgetown, Guyana, 14 January 1985.

⁷⁷ Art. 8 of the Protocol on the Privileges and Immunities of the Caribbean Community.

⁷⁸ Art. 8(2) of the Protocol.

⁷⁹ Art. 11 of the Protocol.

⁸⁰ Art. 12 of the Protocol.

⁸¹ Art. 14 of the Protocol.

⁸² Protocol on the Privileges and Immunities of the Caribbean Court of Justice and the Regional Judicial and Legal Services Commission.

⁸³ Art. II(1) of the Protocol.

⁸⁴ Art. III(1).

⁸⁵ Arts. IV and V of the Protocol.

⁸⁶ Art. IX of the Protocol.

⁸⁷ Art. X of the Protocol.

A smaller Caribbean organisation is the Organisation of Eastern Caribbean States (OECS; 7 full members and 3 associate members).⁸⁸ All members of the OECS are either full or associate members of CARICOM. Article 21.4 of the organisation's constitutive treaty provides that:

“The privileges and immunities to be granted to the members of the OECS Commission and to the senior officials of the Organisation at its headquarters and in the Member States shall be the same accorded to members of a diplomatic mission accredited at the headquarters of the Organisation and in the Member States under the provisions of the Vienna Convention on Diplomatic Relations of 18 April 1961. Similarly the privileges and immunities granted to the OECS Commission at the headquarters of the Organisation shall be the same as granted to diplomatic missions at the headquarters of the Organisation under the said Convention. Other privileges and immunities to be recognised and granted by the Member States in connection with the Organisation shall be determined by the OECS Authority.”

The provision thus does not deal with the organisation as such, but rather with one of its five organs,⁸⁹ specifically the OECS Commission, i.e., “the principal Organ responsible for the general administration of the Organisation”.⁹⁰ Additional privileges and immunities shall be determined by the OECS Authority, composed of the Member States represented by their Heads of Government.⁹¹

More to the south, we find the Southern Common Market (MERCOSUR; 4 members), founded in 1991 with the purpose of establishing a common market. Despite its extensive institutional structure, MERCOSUR is largely considered to be more intergovernmental in nature, as, with the exception of the Permanent Review Court and the Administrative Secretariat, the organs consist of representatives of the Member States taking decisions unanimously.⁹² While the Southern Common Market (MERCOSUR) Agreement does indeed primarily establish ‘a common market’,⁹³ the institutional structure reveals the entities’ nature as an international organization,⁹⁴ albeit with no reference to either its legal personality or to privileges and immunities. Nevertheless, the organization’s “legal personality under international law” is recognised in a special Protocol.⁹⁵ It is interesting to note that the international legal personality is mentioned, but that no reference is made to the status of MERCOSUR in its Member States. The same Protocol, however, does refer to the need to make Headquarters agreements.⁹⁶

Established in 1969, the Andean Community of Nations (CAN; 4 members) was created to promote greater economic, commercial and political integration under a new

⁸⁸ The 1981 Treaty of Basseterre was replaced by the 2011 Revised Treaty of Basseterre (Revised Treaty).

⁸⁹ Art. 7 of the Treaty mentions as the other organs: the Authority of Heads of Government of the Member States; the Council of Ministers; the OECS Assembly; and the Economic Affairs Council.

⁹⁰ Art. 12.1 of the Treaty.

⁹¹ Art. 8.1 of the Treaty. The additional arrangements do not seem to be in the public domain.

⁹² A. Dreyzin De Klor, ‘The Legal-Institutional Structure of MERCOSUR’, in M.T. Franca Filho, L. Lixinski, M.B. Olmos Giupponi (eds.), *The Law of MERCOSUR* (Hart, 2010).

⁹³ Art. I of the Treaty Establishing a Common Market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (Treaty of Asunción).

⁹⁴ See Chapter II of the Treaty; as well as the Additional Protocol to the Treaty of Asunción on the Organisation Structure of the MERCOSUR (Ouro Preto Protocol), republished in L. Carvalho, ‘An Introduction to the English Version of MERCOSUR Treaty and Protocols’, in Franca Filho, Lixinski, Olmos Giupponi (n 92), 425-472.

⁹⁵ See Art. 34 of the Ouro Preto Protocol (n 94).

⁹⁶ Art. 36 of the Ouro Preto Protocol (n 94).

Andean Integration System.⁹⁷ More than MERCOSUR, it is seen as an organization having supranational structures and organs, including a Commission, a General Secretariat, a Parliament, and a very active Court of Justice (the ‘ACJ’).⁹⁸ An arrangement with MERCOSUR allowed the members of that organization to become ‘associate members’ of the CAN. Since 2011 the CAN and MERCOSUR Members together form the Union of South American Nations (UNASUR; see below). Unlike the MERCOSUR agreement, the constitutive treaty of the CAN⁹⁹ is far more explicit about the legal status of the organization and its immunities. Article 48 provides that “The Andean Community is a subregional organization with an international legal capacity or status” and Article 49 continues by granting “the privileges and immunities required for the fulfilment of their objectives” to “the General Secretariat, the Court of Justice, the Andean Parliament, the Andean Development Corporation, the Latin American Reserve Fund, and the Social Conventions that are part of the System”.¹⁰⁰ Similar rules have been created for Member State representatives and international staff “to carry out their duties in relation to this agreement with independence.” An interesting provision can be found in relation to the premises, which “are inviolable and their goods and property are immune to all judicial proceedings, unless expressly waived.” Yet, “such a waiver shall not apply to any judicial measures of execution”, underlining the difference between legal process and execution and, in this case, simply excluding execution in general (and omitting some of the general exceptions in cases of emergency).

As indicated above, the Union of South American Nations (UNASUR) was established to combine MERCOSUR and the CAN into a European Union-like institution.¹⁰¹ Yet, the constitutive Treaty of the Union of South American Nations is far less extensive and merely seems to serve as an umbrella to bring the existing frameworks together.¹⁰² Nevertheless, there is an institutional structure and the organization has “international legal personality” (“*personalidad jurídica internacional*”).¹⁰³ On the basis of Article 22 of the Treaty,

“UNASUR shall enjoy, in the territory of each of its Member States, the privileges and immunities necessary for the performance of its duties. The representatives of UNASUR’s Member States and its international staff shall

⁹⁷ C. Rosales Fariás, *The Andean Community in the International Context: Difficulties of Integration and Importance of Its Common Foreign Policy* (Müller Verlag, 2010); T.A. O’Keefe, ‘Institutional Framework of the Andean Community and How the Andean Economic Integration Process Functions’, in O’Keefe (n 70) 243-274.

⁹⁸ The ACJ (Andean Community of Nations, Court of Justice) is considered as the third most active international court, following the ECtHR and the CJEU in Europe. K.J. Helfer and L.R.Alter, ‘Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice’ (2010) *International Organization* 64, 563-92.

⁹⁹ Andean Subregional Integration Agreement (Cartagena Agreement)

¹⁰⁰ For the Court’s magistrates and the staff the immunities have been regulated in Article 13 of the Treaty Creating the Court of Justice of the Cartagena Agreement: “Within the territories of Member Countries, the Court and its magistrates shall enjoy all the immunities acknowledged by international conventions, particularly the Vienna Convention on diplomatic relations [...]”. Magistrates, the Court Secretary and the officials appointed by the latter as international representatives in the host country, shall enjoy the immunities and privileges corresponding to their category. To this effect, the category of magistrates shall be equivalent to that of Chiefs of Mission; the categories of other officials shall be established by mutual agreement between the Court and the Government of the host country.”

¹⁰¹ *UNASUR: infrastructure for regional integration* (United Nations, 2012); http://repositorio.cepal.org/bitstream/handle/11362/3120/1/S2012342_en.pdf.

¹⁰² 2008 Treaty of the Union of South American Nations (entry into force 2011).

¹⁰³ Art. 1 of the Treaty of the Union of South American Nations.

likewise benefit from the privileges and immunities necessary for the independent exercise of their duties related to this Treaty.”

The same provision mentions that with one member, Ecuador, the organization shall formalise the corresponding Headquarters Agreement, which shall establish the specific privileges and immunities.¹⁰⁴ Specific Headquarters Agreements can be concluded for specific UNASUR bodies, as exemplified by the Headquarters Agreement with Argentina for the Center for Strategic Defense Studies of the South American Defense Council of UNASUR. This agreement deals with the regular immunities of the Center and its staff.

Finally, the Pacific Alliance (*Alianza del Pacífico*; 4 members) is an organization aimed at ‘deep’ regional integration in the West.¹⁰⁵ The constitutive treaty (the *Acuerdo Marco de la Alianza del Pacífico*) does not refer to the legal status of the organisation, nor to any privileges and immunities.¹⁰⁶

4. Asia and the Pacific

4.1 Pan-Asian Organizations

Unlike other global regions, “Asia is characterized by a singular lack of regional organizations as compared with Europe, the Americas and Africa”.¹⁰⁷ There is no true pan-Asian (let alone a pan-Asian/Pacific) Organization.¹⁰⁸ However, the Asia-Pacific Economic

¹⁰⁴ The Agreement does not seem to be in the public domain, but references to it indicate that it has indeed been concluded.

¹⁰⁵ Cf. Art. 3(1a) of the *Acuerdo Marco de la Alianza del Pacífico*: “construir, de manera participativa y consensuada, un área de integración profunda para avanzar progresivamente hacia la libre circulación de bienes, servicios, capitales y personas”.

¹⁰⁶ No specific protocols have been found, and it is assumed that immunities are dealt with a an Headquarters agreement.

¹⁰⁷ Ph. Sands and P. Klein, *Bowett’s Law of International Institutions* (6th ed.), (Sweet & Maxwell, 2009), at 231; as well as C.-H. Wu, ‘The EU’s Engagement with the Asia Pacific’, in R.A. Wessel and J. Odermatt (eds.), *Research Handbook on the EU’s Engagement with International Organisations* (Edward Elgar Publishing, 2018, forthcoming): “The region commenced regional economic integration rather recently, and has been characterized by weak region building and loose institutionalization, which stands in contrast to the European experience of integration”. See on Asian and Pacific Organizations also N.M. Blokker, ‘Asian and Pacific International Organizations: Mainstream or Sui Generis?: An International Institutional Law Perspective’, in Cheng Chia-Jui (ed.), *The New International Legal Order – 10th Anniversary of the Xiamen Academy of International Law* (Brill/Nijhoff, 2016); also published as *Grotius Centre Working Paper 2016/052-PIL* (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2739717). Despite the statement by Sands and Klein, Blokker was able to identify no less than 58 (mostly quite specific) international organizations in the Asian-Pacific region and also notes that “arrangements for judicial protection of staff members of Asian and Pacific IOs seem to be largely absent. Only the Asian Development Bank has its own administrative tribunal”. And also Pennetta provides a quite extensive survey and analysis of regional cooperation in Asia: P. Pennetta, *Il regionalismo multipolare asiatico: Contributo al diritto della cooperazione istituzionalizzata fra Stati* (G Giappichelli Editore, 2003).

¹⁰⁸ Cf. also S. Chesterman, ‘Asia’s Ambivalence About International Law and Institutions: Past, Present, and Futures’ (2016) 26 *European Journal of International Law* 4 (2016), 945-978: “[t]here are no Asia-wide regional frameworks comparable to the African Union, the Organization of American States, or the European Union. Those few sub-regional organizations that have been created have tended to be intended for limited functions, or exist primarily as a structured series of meetings rather than an independent entity as such”. See also M. Wesley (ed.), *The Regional Organizations of the Asia Pacific: Exploring Institutional Change* (Palgrave Macmillan, 2003).

Cooperation (APEC; 21 members) deserves to be mentioned under this heading as it at least has the ambition to function as a forum for facilitating economic growth, cooperation, trade and investment in the Asia-Pacific region. APEC's membership includes Canada and the US. Its secretariat functions as a facilitator of what is seen as a 'forum' or a 'process' rather than as a fully-fledged international organization.

4.2 Sub-regional organizations

The most well-known organization is perhaps ASEAN (10 members), the Association of Southeast Asian Nations, founded in 1967 primarily for security reasons.¹⁰⁹ The ASEAN Declaration (Bangkok Declaration) is just two pages long and establishes a very light organizational structure. The 2007 Asian Charter further institutionalized ASEAN as an international organization, explicitly acknowledging its legal personality.¹¹⁰ Privileges and immunities were laid down much later in a separate 2007 Agreement on the Privileges and Immunities of the Association of Southeast Asian Nations, which also defines the exact competences of ASEAN on the basis of its legal personality.¹¹¹ This agreement is, again, largely based on the UN Convention. Article 3 deals with the immunity of the property and assets of ASEAN "from every form of legal process except insofar as in any particular case it has expressly waived its immunity," adding that "no waiver of immunity shall extend to any measure of execution." It also provides that the premises of ASEAN as well as all forms of communication and the archives shall be inviolable. Article 4(3) regulates the status of the Secretary-General and the staff, who shall "while in the performance of and for the independent exercise of their respective duties, functions and responsibilities: (a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity; [...]" Paragraph 6 adds the well-known reason for a possible waiver:

"Privileges and immunities are granted to the Secretary General of ASEAN and staff of the ASEAN Secretariat [...] in the interests of ASEAN and not for the personal benefit of the individuals themselves. The Secretary-General of ASEAN shall have the right and the duty to waive the immunity of any member of the staff of the ASEAN Secretariat in any case where, in his or her opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of ASEAN."

In contrast to what we have seen in other regional organizations, here even the immunity of the Secretary-General may be waived. This can then be done "by the ASEAN Summit, or by whomsoever authorised by the ASEAN Summit." Experts on missions for ASEAN enjoy

¹⁰⁹ S. Inama and E.W. Sim, *The Foundation of the ASEAN Economic Community: An Institutional and Legal Profile* (Part of Integration through Law: The Role of Law and the Rule of Law in ASEAN Integration) (Cambridge University Press, 2015).

¹¹⁰ See the 2007 Charter of the Association of Southeast Asian Nations, Art. 3. This has also allowed ASEAN to enter into a large number of international agreements. See M. Cremona, D. Kleimann, J. Larik, R. Lee and P. Vennesson, *ASEAN's External Agreements: Law, Practice and the Quest for Collective Action* (Cambridge University Press, 2015).

¹¹¹ <http://www.asean.org/storage/images/archive/15thsummit/Agreement-on-Privileges-and-Immunities.pdf>. See Art. 2(1): "1. As a legal person, ASEAN shall have the following capacities: under domestic laws: (a) to enter into contracts; (b) to acquire and dispose of movable and immovable property; and (c) to institute and defend itself in legal proceedings. It is not often that one comes across this clear, and correct, distinction between personality and capacities. See more extensively on this issue: R.A. Wessel, 'The International Legal Status of the European Union' (1997) *European Foreign Affairs Review* 1, 109-129.

immunities in the ASEAN Member States on the basis of Article 5(1), with a waiver possibility by the Secretary-General on the basis of paragraph 2.

A somewhat special (although not fully unique) provision seems to be Article 4(5), which makes a general exception for “persons [...] who are nationals of or permanently resident in the granting Member State”, although they will still be immune from legal process. The exception does seem to make sense as it aims to be related to issues that are more relevant for non-nationals, such as being exempt from taxation on the salaries and emoluments paid to them by ASEAN, being immune from national service obligations; as well as from immigration restrictions and alien registration. Yet, one could argue that nationality does not really matter the moment these persons work for ASEAN or carry out duties under the mandate of the organization.

Also, this is one of the few examples where an express reference is made to the Vienna Convention on Diplomatic Immunities. Article 6 provides that:

“the relevant provisions on privileges and immunities relating to diplomatic missions in the Vienna Convention shall apply mutatis mutandis to the Permanent Mission.”

A reference to the Vienna Convention is also made in relation to “the Permanent Representatives, to officials on ASEAN duties and members of their families while they are in the host Member State” (Article 7(1)), and to “members of the administrative and technical staff of the Permanent Mission and members of their families” and “members of the service staff of the Permanent Mission.” (Article 8). Finally, Article 9 deals with the immunities of officials of the Member States “while participating in official ASEAN activities or representing ASEAN in the Member States”.

4.2 Sub-regional organizations

Only a limited number of IOs in Asia and the Pacific have separate multilateral agreements on privileges and immunities.¹¹² The South Asian Association for Regional Cooperation (SAARC; 8 members) has mainly social-economic objectives.¹¹³ Its Charter does not refer to the legal status or the immunities of the organization.¹¹⁴ Instead, the Headquarters Agreement regulates some of the immunities.¹¹⁵ Indeed, here we find the provision that

¹¹² Blokker (n 107) mentions the 1996 Agreement on the Legal Status of the Economic Cooperation Organization (ECO), National Representatives and International Staff; the 2004 Agreement on Privileges and Immunities of the Shanghai Cooperation Organization and the 2009 Privileges and Immunities Agreement of the Association of South East Asian Nations.

¹¹³ L. Sez, *The South Asian Association for Regional Cooperation (SAARC): An Emerging Collaboration Architecture* (Routledge, 2011).

¹¹⁴ Blokker (n 107), however, refers to the fact that a SAARC sub-organization has a more explicit provision: “The SAARC Arbitration Council, its Director-General and staff “shall enjoy such immunities and privileges as are necessary for the effective functioning of the Council to be specified in the Headquarters Agreement between the Council and the Host Member State” (Article III.6)

¹¹⁵ Headquarters Agreement Between His Majesty’s Government of Nepal and the Secretariat of the South Asian Association for Regional Cooperation (SAARC); http://saarc-sec.org/uploads/digital_library_document/5_HQ_AGREEMENT_SAARC.doc.

“The Secretary General, Officers, and where applicable their dependents, shall enjoy within and with respect to the territory of the Kingdom of Nepal: (i) immunity from legal processes of any kind in respect of words spoken or written and acts performed by them in their official capacity and in the discharge of their duties.”

Immunity from legal process is also spelled out: “immunities from the civil, administrative, criminal jurisdiction, personal arrest or detention”¹¹⁶ However, the Agreement is silent on the regulation of immunities of staff in other member states or of member States representatives joining SAARC meetings.

In central Asia,¹¹⁷ the Economic Cooperation Organization (ECO; 10 members) is a political and economic intergovernmental organization which was founded in 1985 in Tehran by the leaders of Iran, Pakistan and Turkey (and the offices are also located in these countries).¹¹⁸ The objective is to establish a single market for goods and services. For the immunities of the Secretariat, the ECO Constitutive document (the 1996 Treaty of Izmir)¹¹⁹ refers to an “Agreement between the Government of the Islamic Republic of Iran and Economic Cooperation Organization (ECO) relating to the Rights, Privileges and Immunities of the ECO Secretariat approved by the Council of Ministers and signed between the Foreign Minister of the host country and the Secretary-General.”¹²⁰ A more general reference can also be found in the Treaty itself:

“The Economic Cooperation Organization shall enjoy in the territory of each of its Member States such legal capacity and privileges and immunities as may be necessary for the exercise of its functions and the fulfilment of its objectives under the conditions laid down in the Agreement on the Legal Status of the Economic Cooperation Organization (ECO), National Representatives and International Staff which shall be an annex to this Treaty”.¹²¹

Thus, no less than two separate agreements were concluded. The Agreement on the Secretariat can be seen as a Headquarters Agreement and mainly deals with the privileges and immunities of the Secretariat (its premises and staff), whereas the Agreement on the Legal Status of ECO partly repeats these provisions, but adds provisions on the representatives of states “to the Organization [...] or “while present in the territory of another Contracting State”.¹²² Indeed, in this case, immunities are again not limited to the location of the organization but are instead connected to the activities of the organization. Finally, officials of the Secretariat also enjoy the regular privileges and immunities. The waiver possibility is in the hands of the Secretary-General, but can only be exercised “with the approval of the Member Government to which the official belongs”.¹²³

¹¹⁶ Art. 9.01(3) of the Agreement.

¹¹⁷ According to the Article XIII of the 1996 Treaty of Izmir, “Any State enjoying geographical contiguity with the ECO region and/or sharing the objectives and principles of ECO may apply to become a member of the Organization.”

¹¹⁸ E. Akram, *Ideals and Realities of Regional Integration in the Muslim World: The Case of the Economic Cooperation Organization* (Oxford University Press, 2008).

¹¹⁹ See www.eco.int.

¹²⁰ Art. IX of the Treaty.

¹²¹ Art. XIV of the Treaty.

¹²² Art. 12 of the Agreement on the Legal Status of ECO.

¹²³ Art. 21 of the Agreement on the Legal Status of ECO.

The Shanghai Cooperation Organization (SCO; 6 members) is a Chinese-Central Asian organization with the objective of promoting cooperation in politics, trade, the economy, and a large number of other areas.¹²⁴ According to Article 19 of its constitution:

“[t]he SCO and its officers shall enjoy any privileges and immunities that are needed for the purposes of performance of the functions and attainment of the goals of the Organization in the territory of each SCO member state. The scope of privileges and immunities available shall be specified in a separate international agreement”.

This provision resulted in the 2004 Convention on Privileges and Immunities of the Shanghai Cooperation Organization.¹²⁵ There only seems to be an unofficial translation of this document, which in Article 3(1) provides that

“SCO, its property and assets use immunity from any form of administrative or judicial intervention, except as specified, when the Organization itself refuses immunity. No refusal of immunity extends to judicial and executive measures.”

When the ‘refusal’ is read as a ‘waiver’ the provision is quite similar to what we have seen above. Perhaps more interesting is Article 4, which seems to allow for ‘execution’, something that is usually ruled out in more absolute terms:

“Execution of any actions according to the decision of appropriate authorities and managements of the state of stay can take place in premises of permanent bodies of SCO only with the consent of the Executive secretary or the Director, or the officials replacing them.”.

5. European Organizations

5.1 Pan-European Organizations

The Council of Europe (CoE; 47 members),¹²⁶ is “the continent’s leading human rights organization”.¹²⁷ Despite this quite specific qualification on its website, the CoE is much more than that and deserves to be mentioned in this Chapter as a general organization. The 1949 Statute of the Council of Europe mentions as the main aim of the organization “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”.¹²⁸ The Statute itself already refers to the privileges and immunities of the organization and combines those of the representatives and the staff:

“a. The Council of Europe, representatives of members and the Secretariat shall enjoy in the territories of its members such privileges and immunities as are reasonably necessary for the fulfilment of their functions. These immunities shall include immunity for all representatives to the Consultative Assembly from arrest and all legal

¹²⁴ W. Song, *China’s Approach to Central Asia: The Shanghai Co-operation Organisation* (Routledge, 2016).

¹²⁵ <http://cis-legislation.com/document.fwx?rgn=6906>

¹²⁶ S. Schmahl and M. Breuer (eds.), *The Council of Europe: Its Law and Policies* (Oxford University Press, 2017).

¹²⁷ <https://www.coe.int/en/web/about-us/who-we-are>

¹²⁸ Art. 1 of the CoE Statute.

proceedings in the territories of all members, in respect of words spoken and votes cast in the debates of the Assembly or its committees or commissions.”¹²⁹

The same article, however, announces that all of this will be further defined in an agreement defining the privileges and immunities to be granted in the territories of all members as well as in a Headquarters agreement with France. This resulted in the 1949 General Agreement on Privileges and Immunities of the Council of Europe, which lists the usual rules.¹³⁰ Part II deals with the regular immunities in relation to property and assets (“immunity from every form of legal process” with a possibility for waiver by the Committee of Ministers in cases other than execution or detention of property), the buildings and premises of the Council, as well as the archives of the Council, and in general all documents belonging to it. Parts IV and V deal with immunities of representatives of member states to the Committee of Ministers and to the Consultative Assembly (now the Parliamentary Assembly). Representatives at the Committee of Ministers enjoy “immunity from legal process of any kind” for “all acts done by them in their official capacity, immunity from legal process of every kind”. For the representatives of the Assembly slightly different wording is used as they “shall be immune from all official interrogation and from arrest and all legal proceedings [...] in the exercise of their functions.” For the Secretary General and Deputy Secretary General, Part VI refers to “the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with International Law.”

The Council of Europe is the organization in the framework of which the European Convention for the Protection of Human Rights and Fundamental Freedoms was concluded. Hence, in light of the European Court of Human Rights case-law allowing for international organizations to maintain their immunities only when there are “reasonable alternative means to protect effectively their rights”,¹³¹ one would have expected to see a specific rule on this. Perhaps reassuring in that respect is Article 21 of the General Agreement, which provides for arbitration in the case of “[a]ny dispute between the Council and private persons regarding supplies furnished, services rendered or immovable property purchased on behalf of the Council.” Similar rules on litigation between the CoE and staff members may be found in the Staff Regulations, with the Administrative Tribunal of the Council of Europe providing “comprehensive legal protection”.¹³²

The other organization with a pan-European scope is the Organization of Security and Cooperation in Europe (OSCE; 57 members).¹³³ Its Secretariat is based in Vienna, but the OSCE has offices in many other places, including Warsaw, Prague, The Hague and Copenhagen. The organization spans the entire Northern hemisphere, so one could hardly see it as a ‘regional’ organization. Despite its name, the legal status of the organization is still subject to political debates.¹³⁴ As the OSCE started as a ‘Conference’ (the CSCE), it should not come as a surprise that the original 1972 ‘Helsinki Final Act’ does not refer to the

¹²⁹ Art. 40 of the CoE Statute.

¹³⁰ See also M. Breuer, ‘The Council of Europe and International Institutional Law: An Appraisal’, in Schmahl and Breuer (n 126).

¹³¹ Case Waite and Kennedy; see on this case the contribution by [...].

¹³² Breuer (n 126) 967.

¹³³ See Platise Steinbrück, Moser, Peters (n 18).

¹³⁴ See Blokker and Wessel (n 18).

immunities of the organization. The 1993 Rome Decision merely recommended that participating States grant (and harmonise) *national* legal capacities and privileges and immunities to particular institutions but not to the OSCE as such.¹³⁵ And fourteen years later, in 2007, a Convention drafted to regulate the *international* legal personality, legal capacity and privileges and immunities of the OSCE still proved a bridge too far.¹³⁶ As at the time also no Headquarters Agreements were concluded, a law adopted in the Netherlands in 2002 concerning the OSCE's High Commissioner on National Minorities (based in The Hague) provided that:

“For the purpose of this law, the OSCE is regarded as equal to a public international organization of which the High Commissioner is a part. The privileges and immunities included in this law will be applied in the same way as those given to other IOs based in the Netherlands.”¹³⁷

Indeed, legal capacities and privileges and immunities have been regulated in many of the domestic legal orders of the participating States.¹³⁸ This was only recently followed by the conclusion of two Headquarters agreements: the OSCE Headquarters Agreement with the Republic of Austria and the Arrangement between the OSCE and the Republic of Poland on the Status of the OSCE in the Republic of Poland.¹³⁹

Finally, another organization that should perhaps be left out from the present overview because of its specific focus – and not so much for a lack of pan-European ambitions¹⁴⁰ – is the North Atlantic Treaty Organization (NATO; 29 members).¹⁴¹ The reason to nevertheless include it, relates to its political function alongside its security objectives. The 1949 North Atlantic Treaty hardly deals with the institutional structure of the organization and does not regulate the privileges and immunities. These are dealt with in a number of separate agreements: the 1951 Ottawa Agreement, for the civilian side, and the 1952 Paris Protocol to the NATO Status of Forces Agreement (SOFA) for the military headquarters.¹⁴² The Ottawa

¹³⁵ See CSCE, Fourth Meeting of the Council, CSCE and the New Europe – Our Security is Indivisible, Decisions of the Rome Council Meeting, no. CSCE/4-C/Dec.2, 1 December 1993.

¹³⁶ OSCE, Fifteenth Meeting of the Ministerial Council, 2007 draft Convention on the international legal personality, legal capacity, and privileges and immunities of the OSCE, Annex to MC.DD/28/07, 29 November 2007, 65–77.

¹³⁷ Netherlands, Wet van 31 oktober 2002, houdende bepalingen inzake rechtspersoonlijkheid, privileges en immuniteiten van de Hoge Commissaris inzake Nationale Minderheden (Wet HCNM), (translated from the original), 31 October 2002, Art. 2.2, available at: <http://wetten.overheid.nl/BWBR0014169/2003-01-01>.

¹³⁸ See further Blokker and Wessel (n 18).

¹³⁹ On these two agreements, see H. Tichy and C. Quidenus, ‘Consolidating the International Legal Personality of the OSCE: A Headquarters Agreement with Austria’ (2017) 14 *International Organizations Law Review* 2, 403-413; J. Arsić-Dapo, ‘Another Brick in the Wall – Building up the OSCE as an International Organization One Agreement at a Time’, (2017) 14 *International Organizations Law Review* 2, 414-429.

¹⁴⁰ Cf. Art. 10 of the North Atlantic Treaty: “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.”

¹⁴¹ J. Lindley-French, *The North Atlantic Treaty Organization: The Enduring Alliance* (Routledge, 2006).

¹⁴² See respectively the Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff; and the Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty. See much more extensively on NATO's immunities: P. Olson, ‘Immunities of International Organizations A NATO View’ (2013) 10 *International Organizations Law Review*, 2, 419-433.

Agreement provides the familiar provision for the organization itself, that is again almost identical to the corresponding clause of the UN Convention:

“The Organization, its property and assets, wheresoever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case the Chairman of the Council Deputies, acting on behalf of the Organization, may expressly authorize the waiver of this immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution or detention of property.”¹⁴³

With regard to the Military Headquarters, a slightly different approach was taken. The Paris Protocol contains a similar broad immunity from execution, although not from the jurisdiction of domestic courts:

“No measure of execution or measure directed to the seizure or attachment of its property or funds shall be taken against any Allied Headquarters”.¹⁴⁴

These general agreements are supplemented by individual headquarters agreements and with separate specific status arrangements with Host Nations in which NATO is active.¹⁴⁵ Finally, given NATO’s activities abroad, the status and immunities of NATO forces is the subject of the 1951 Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces. While this ‘SOFA’ deals with the status of forces in other member states, separate agreements are concluded with third states each time NATO missions operate in those states.¹⁴⁶

5.2 Sub-regional organizations

Obviously, the European Union (EU; 28 members) is the organization to be mentioned here.¹⁴⁷ The EU is usually seen as special because of its well-developed institutional structure and its competence to enact rules that are also valid within the legal orders of its Members (with possibilities for individuals and companies to invoke many of those rules before their national courts).¹⁴⁸ Despite the fact that the ‘EU as a global actor’ has become a widely

¹⁴³ Art. V of the Agreement. The Chairman of the Council Deputies was subsequently redesignated as Secretary General.

¹⁴⁴ Paris Protocol, Art. xi.2. Exceptions are made for except for purposes of paragraph 6 a. of Article vii (judicial cooperation) and Article xiii (customs and fiscal) of the NATO Status of Forces Agreement (SOFA).

¹⁴⁵ See further Olsen (n 142) 423. The immunities of NATO have been subject of debate in cases before domestic courts. *Chapman v Belgium*, for instance, concerned an employment-related dispute with NATO, in which the Brussels Labour Court of Appeals considered the NATO Appeals Board as an effective internal mechanism. See P. Schmitt, ‘Western European Union v Siedler’, in Ryngaert *et al.* (n 39). Another relevant case in relation to NATO is *Gasparini v Italy and Belgium*, European Court of Human Rights, 12 May 2009, App. No. 10750/03.

¹⁴⁶ See more extensively: M. Zwanenburg, *Accountability of Peace Support Operations* (Brill/Nijhoff, 2005); as well as the Chapter by Aurel Sari in the present Volume.

¹⁴⁷ For a quick legal overview use R. Schütze, *An Introduction to European Law* (Cambridge University Press, 2015).

¹⁴⁸ See more extensively C. Eckes and R.A. Wessel, ‘The European Union: An International Perspective’, *Amsterdam Centre for European Law and Governance Research Paper* No. 2017-01 (also in T. Tridimas and R. Schütze (eds.), *Oxford Principles of European Union Law – Volume 1: The European Union Legal Order* (Oxford University Press, 2018).

studied theme,¹⁴⁹ studies on the immunities of the EU are very hard to find.¹⁵⁰ The European Union also stands out as a regional organization because of its extensive relations with other international organizations, in some of which it acts as a full member.¹⁵¹

The situation that the Union is a party to a dispute taking place within one of its Member States is foreseen by the Treaty, and in fact a role of the national courts is not excluded. This absence of full jurisdictional immunity results in a special situation, which is highly exceptional for international organizations. Article 274 of the Treaty of the Functioning of the European Union (TFEU) provides:

“Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.”

Yet, the provision in Article 274 should be seen in the context of other rules and principles in EU law. Given the extensive (and often exclusive) jurisdiction of the CJEU,¹⁵² the jurisdiction of the domestic courts in these cases will be residual at best.¹⁵³ At the same time Article 343 TFEU provides for the regulation of privileges and immunities in the Member States:

“The Union shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol of 8 April 1965 on the privileges and immunities of the European Union. The same shall apply to the European Central Bank and the European Investment Bank.”

A similar provision can be found in Article 191 of the Treaty establishing the European Atomic Energy Community (EAEC or Euratom), an international organization that is part of the EU family and shares its institutions.

¹⁴⁹ Among the many examples, see B. Van Vooren, S. Blockmans and J. Wouters (eds.), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press, 2013); J. Czuczai and F. Naert (eds.), *The EU as a Global Actor – Bridging Legal Theory and Practice* (Brill/Nijhoff, 2017).

¹⁵⁰ Yet, see R.A. Wessel, ‘Immunities of the European Union’ (2013), 10 *International Organizations Law Review*, pp. 395-418; also published in N.M. Blokker and N.S. Schrijver (eds.), *Immunities of International Organizations* (Brill/Nijhoff, 2015). The present section is partly based on that publication, but a more detailed analysis can be found there. See also M. Benlolo-Carabot, ‘Les immunités de l’Union Européenne dans les États tiers’ (2009) *Annuaire Français de Droit International*, pp. 783-818; and S. Barbier and M. Cuq, ‘Les immunités de l’Union Européenne’, in M. Benlolo-Carabot, U. Candas and E. Cujo (eds.), *Union Européenne et Droit International* (Pedone, 2012), pp. 407-427.

¹⁵¹ Wessel and Odermatt (n 107).

¹⁵² See M. Cremona, A. Thies and R.A. Wessel (eds.), *The European Union and International Dispute Settlement* (Hart Publishing, 2017).

¹⁵³ See also Barbier and Cuq (n 150) 413. A case in point is the one in which the Dutch appeals court had ordered the public prosecutor to charge Euratom with infringing Dutch environmental regulations at its establishment in the Netherlands; see LJN: BA9173, Hoge Raad (Supreme Court of the Netherlands), 01984/07 CW, 13 November 2007. Another case concerned the Western European Union (WEU), the main tasks of which are now integrated in the European Union. At the time of its existence, however, the WEU did not have a Court. In *Western European Union v Siedler*, the Belgian Court of Cassation was confronted with the conflict between the immunity from jurisdiction of an international organization and the right to a fair trial as contained in art. 6(1) of the ECHR and held that the mere existence of a dispute- settlement mechanism within the international organization was not sufficient to pass the *Waite and Kennedy* test, underlying the importance of impartiality. See *Siedler v Western European Union*, Brussels Labour Court of Appeals, 17 September 2003, *Journal des Tribunaux*, 2004, p. 617; and Schmitt (n 145).

Protocol No. 7 on the Privileges and Immunities of the European Union regulates the immunities and privileges in more detail and forms the backbone of the EU's legal regime in this area. Chapter 1 deals with the inviolability of the premises and buildings of the Union. Article 1 provides that the property and assets of the Union shall not be the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice and Article 2 provides that the archives of the Union shall be inviolable. This provision thus reflects the Union's immunity from execution in quite absolute terms.¹⁵⁴ The question of whether and when the 'property and assets' are really at stake may nevertheless be difficult to answer. In a case in the UK it became clear that, in the eyes of the Commission, the 'property and assets of the Union' "can include some else's property or assets if a measure of constraint upon it would interfere with the functioning of the Commission".¹⁵⁵ The Court, in any case, held that funds held by Sierra Leone, although partly granted by the Commission in the framework of an agricultural aid programme in the framework of the Lomé Convention, could not be considered as property of the European Community in the sense of the Protocol.¹⁵⁶

Chapter 3 deals with special privileges and immunities for members of European Parliament. The privileges, immunities and facilities of Representatives of Member States taking part in the work of the institutions of the Union (including their advisers and technical experts) are the subject of Chapter 4 of the Protocol. Furthermore, Chapter 5 lists an extensive number of privileges for officials and other servants of the Union in the territories of the Member States. It includes the right to be immune from legal proceedings in respect of acts performed by them in their official capacity; the right not be subject to immigration restrictions or to formalities for the registration of aliens; the right to be accorded the same facilities as are customarily accorded to officials of international organizations; the right to import and export free of duty their furniture; and the right to import free of duty a motor car for their personal use. In addition, officials and other servants of the Union shall be liable to a tax for the benefit of the Union on salaries, wages and emoluments paid to them by the Union and they shall be exempt from national taxes on salaries, wages and emoluments paid by the Union. Finally, Chapter 6 regulates the position of missions of third countries accredited to the Union; they have to be accorded the customary diplomatic immunities and privileges.

In addition to the rules on the privileges and immunities, the EU Treaty contains quite extensive rules on contractual and non-contractual claims. Irrespective of the general rules on immunities described above, the Union thus *a priori* accepts that it can be confronted with claims. On the basis of Article 340 TFEU, the contractual liability of the Union shall be governed by the law applicable to the contract in question. The underlying contract will normally determine the applicable dispute settlement procedure. It is important to distinguish between cases where the implementation of EU external aid projects or programmes is executed on a centralised basis, with the European Commission acting as contracting authority, and cases where it is executed on a decentralised basis, with the administration of the beneficiary third state acting as contracting authority. The clauses of the external aid contracts in which the European Commission is the contracting authority either designate a

¹⁵⁴ Cf. Benlolo-Carabot (n 150) 810.

¹⁵⁵ See Court of Appeal, 24 November 1994, *Philipp Brothers v. Sierra Leone and Commission of the European Communities*, 107 ILR, pp. 517-535.

¹⁵⁶ Benlolo-Carabot (n 150) 811.

court in the EU (usually the Belgian courts in Brussels) as competent court for any contractual dispute or provide for arbitration. The contract, as a rule, encourages the parties to the contract to previously resolve the dispute amicably.¹⁵⁷

In relation to non-contractual claims, Article 340 TFEU furthermore provides that the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties. The personal liability of its servants towards the Union is governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them. On the basis of Article 268 TFEU, the Court of Justice of the European Union (CJEU) has exclusive jurisdiction in disputes relating to compensation for damages in the case of non-contractual liability. Furthermore, Article 46 of the Statute of the Court of Justice provides that proceedings in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto.

The special situation of Member States' staff seconded to the EU bodies and acting on their behalf *within* EU Member States, is regulated by the 2003 EU Status of Forces Agreement (SOFA) on deployment in other EU Member States.¹⁵⁸ Whereas SOFAs usually deal with the position of EU staff in non-EU countries (see below), the purpose of this very agreement is to define the legal position of the military and civilian personnel, as well as the forces and headquarters, deployed by one EU Member State in the territory of another Member State in the context of the EU's Common Security and Defence Policy (CSDP). The EU SOFA grants certain immunities to military and civilian staff seconded to the institutions of the EU and provides for the mandatory waiver of these immunities in certain circumstances.¹⁵⁹

The extensive rules on claims and in particular on the (exclusive) role of the EU's Court of Justice in dealing with those claims underlines the special nature of the European Union in this respect. Whereas most international organizations lack a judicial forum for individuals to bring claims, the EU's well-developed legal order allows any natural or legal person (*whatever his nationality or residence*) to institute proceedings against a decision addressed to him or which is of direct and individual concern. On the basis of Articles 263 and 265 TFEU, the CJEU can decide on the legality of acts of the European institutions that produce legal effects (or can establish a failure to act). Whereas the Court thus serves as a judicial forum for both EU Member States and their citizens and legal persons, its jurisdiction is limited by the Treaties.¹⁶⁰

¹⁵⁷ See the informal note issued by the European Commission in March 2010 (available online at http://www.coe.int/t/dlapil/cahdi/Source/state_immunities/EU%20Immunities.pdf)

¹⁵⁸ Concluded by the Representatives of the Governments of the Member States meeting within the Council in 2003, OJ C 321/6, 2003.

¹⁵⁹ See more extensively A. Sari, 'The European Union Status of Forces Agreement (EU SOFA)' (2009) 14 *Journal of Conflict and Security Law*, 353-391.

¹⁶⁰ With respect to the Union's external relations, the most important exception concerns (most) acts adopted under the Union's common foreign and security policy (CFSP) and common security and defence policy (CSDP) (Articles 24 (1) TEU and 275 TFEU). Since the entry into force of the Lisbon Treaty, however, the Court is competent to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, reviewing the legality of decisions providing for restrictive measures against natural or legal person. This is the result of the proliferation of sanctions targeted at individuals in the (global) fight against terrorism. The implication is that, even if the restrictive measures are only laid down in CFSP measures, the Court has jurisdiction once the plaintiff is directly and individually concerned. See more extensively, and for

Apart from the provisions in the EU Treaties and the Protocol, a more specific regulation of the EU's immunities is laid down in the agreements concluded between the EU and third states or other international organizations, the two most important types of agreements being agreements on the establishment of an EU Delegation in a third state or with an international organization; and status of forces/mission agreements (SOFAs and SOMAs) in the area of the Union's security and defence policy. Although they are not in the public domain, the current Establishment Agreements continue to reveal the extensive scope of the Delegation's privileges and immunities.¹⁶¹ The Agreements usually see the regulation of 'privileges and immunities' as an integral element of the agreement on the 'establishment' of an EU Delegation. Often the Vienna Convention on Diplomatic Relations is used as a basis and the EU in a way 'contracts in' by accepting the application of the Convention, which leads to immunity of the EU Delegation and inviolability of its premises.¹⁶²

The EU Model SOFA and SOMA¹⁶³ grant personnel involved in EU missions immunity from the criminal jurisdiction of the host state "under all circumstances".¹⁶⁴ At the same time, the Sending State retains "all the criminal jurisdiction and disciplinary powers conferred on them by the law of the Sending State".¹⁶⁵ Furthermore, the mission's personnel are exempted from the civil and administrative jurisdiction of the host state "in respect of words spoken or written and all acts performed by them in the exercise of their official functions".¹⁶⁶ It is acknowledged that the privileges and immunities for members of EU crisis management operations are quite extensive.¹⁶⁷

More generally, with regard to lawsuits in third countries, practice offers a variety of different situations. In practice such situations have included traffic incidents involving EU Delegation's staff (where in each case the EU examines whether to lift immunity or not for the purpose of local proceedings) as well as criminal proceedings against a contracted staff member of an EU mission, where the local authorities put the person in question in prison, in clear violation of the relevant provisions of the Status of Mission Agreement (but where the host country reminded the EU that the SOMA also calls for mission staff to respect local laws and where the staff member could only be released after some diplomatic effort). Also, the question may arise whether an employment contract with local personnel was concluded by the Head of Delegation in his private or official capacity.¹⁶⁸

further references, C. Hillion and R.A. Wessel, 'The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP', in S. Blockmans and P. Koutrakos (eds.), *Research Handbook on EU Common Foreign and Security Policy* (Edward Elgar Publishing, 2018; forthcoming).

¹⁶¹ See much more extensively S. Duquet, *The Contribution of the European Union to Diplomatic and Consular Law*, PhD-thesis KU Leuven, 2018.

¹⁶² Duquet (n 161).

¹⁶³ See Draft Model Agreement on the status of the European Union-led forces between the European Union and a Host State, Council of the European Union (SOFA), 20 July 2007, Doc. 11894/07; and Draft Model Agreement on the Status of the European Union Civilian Crisis Management Mission in a Host State (SOMA), Council of the European Union, 15 December 2008, Doc. 17141/08.

¹⁶⁴ Art. 6(3), EU Model SOFA; Art. 6(3), EU Model SOMA (n 163).

¹⁶⁵ Art. 8, EU Model SOFA; Art. 8, EU Model SOMA.

¹⁶⁶ Art. 6(4), EU Model SOFA; Art. 6(4), EU Model SOMA.

¹⁶⁷ As held by Sari (n 159 at 82): "it is difficult, if not impossible, to decide on the basis of normative considerations whether the restrictions imposed by CSDP status agreements on the right to access courts is proportionate to the aim they pursue [...]". P. Koutrakos, *The EU Common Security and Defence Policy* (Oxford University Press, 2013) provides some possible reasons for the extensive immunities of EU missions (at p. 20).

¹⁶⁸ Wessel (n 150).

6. Conclusion: Substantive Unity in Instrumental Diversity?

The aim of this Chapter was to provide a first insight into the regulation of immunities by regional organizations. Despite its somewhat descriptive nature, some more conceptual points can be made on the basis of this analysis. ‘Chaotic’ is definitely the first qualification that comes to mind when confronted with the various ways in which regional organizations regulate their immunities.

First of all, a general observation is that even while many regimes reflect the rules of the UN Convention, *hardly any rule is phrased exactly the same*, leading to variations in the scope of the immunities for each and every organization, its staff or representatives acting in the framework of the organization. This not only makes it important to spell out the various rules, but also makes it difficult to draw comparisons.

Secondly, the *extent to which international organizations have spelled-out the details* of their immunities differs strongly. While some organizations use quite elaborate special instruments to regulate each and every detail, other organizations have opted for a mere short reference in a constitutive treaty, or have left any regulation of immunities out altogether.¹⁶⁹ We noted the use of special Conventions or Protocols with extensively described privileges and immunities in the case of, for instance, larger organisations such as the African Union, the Arab League, ASEAN, NATO, CARICOM, but also for smaller ones, with sometimes more than one special instrument dealing with immunities (ECO). The level of detail thus varies from a mere short reference to the organization’s immunities in the constitutive agreement to a very detailed description of all possible dimensions of immunity in one or more extensive documents.

Thirdly, and related to the previous point, there is *hardly any unity in the instruments* regional organizations use to deal with their immunities. Options range from the constitutive Treaty, to special (multilateral) Conventions or Protocols, or (merely) Headquarter Agreements. There does not seem to be any consistency in the choices that have been made. It is striking that in some cases no reference at all is made to immunities in the constitutive agreement of an organization (e.g. AU, Arab League, MERCOSUR, Pacific Alliance, ASEAN, SAARC, NATO), whereas other agreements at least contain a provision that immunities are to be subject to a separate convention or Headquarters Agreement (e.g. ECOWAS), thus linking the various instruments. Combinations are also possible, as when the constitutive document briefly lays down the general rules and details can be found in additional agreements (e.g. the OAS, SELA, CARICOM, ECO, Council of Europe, EU). Furthermore, while one would perhaps expect a number of references to the Vienna Convention on Diplomatic Immunities, this is in fact exceptional (see, for instance, ASEAN). And, finally, it proves to be possible to ignore immunities in constitutive as well as additional agreements, and merely deal with these exclusively in ad hoc Headquarters Agreements (OSCE).

Fourthly, *in substantive terms immunities may be more absolute or allow for legal process* (or even execution) in certain situations, mostly on the basis of waivers that are either

¹⁶⁹ The question to which extent they would nevertheless be bound by customary law in this respect is dealt with by Niels Blokker in this Volume.

mandatory or facultative and in the hands of the Head of the organization, or the member State. In ASEAN or CARICOM, even the immunity of the Secretary-General may be waived. And, with regard to the SCO execution is possible on the basis of an internal decision. At the same time, for instance, CEMAC as well as the EU or the OAS were revealed to have extended immunities of their staff in quite absolute terms. Other organizations have placed more emphasis on a more functional approach to immunities (e.g. SADC). And, often immunity of execution is not upheld in case of emergency, but sometimes it is (CAN).

Fifthly, it is striking that some organisations have hardly regulated the immunities of the organization as such, but have adopted *extensive rules for some of their organs*, such as the Parliament (AEC), the Court (CARICOM), the Commission (OECS), or rather for all their organs (CAN).

Finally, *there does not seem to be a link between the nature or complexity of an organisation and the extent to which it has regulated its immunities*. Regional organizations that are often regarded as being more ‘supranational’, such as the European Union (EU), the Andean Community (CAN), the Central African Economic and Monetary Community (CEMAC), *L’Union Economique et Monétaire Ouest Africaine* (UEMOA), the East African Community (EAC), or the Organization of Eastern Caribbean States (OECS) do indeed often have separate Protocols on privileges and immunities or have dealt with this extensively in their constitutive treaties. Yet, we find the extensive regulation in some other organizations as well.

The regulation of jurisdictional immunities thus seems to reflect the variety (and related legal security) that is part and parcel international organizations more generally. Given that the regulation of immunities is important for international organizations, regardless of their objectives or functions, this variety in both scope and instruments is striking. A case could still¹⁷⁰ be made for some uniformity of the various rules and the terms in which these are expressed, although we do realise that this is wishful thinking given both the impossibility to renegotiate the existing agreements and the diverging preferences of the regional organizations and their members.¹⁷¹ Furthermore, it is clear that sharing basic documents is not high on the agenda of many organizations. Yet, if we see regional organizations as belonging to the ‘normative institutional framework’ that forms our global level of governance¹⁷² – acknowledging individuals’ right of access to justice¹⁷³ – some awareness by

¹⁷⁰ The International Law Commission (ILC) spent more than thirty-one years trying to reach a consensus on the topic of relations between states and international organizations, but abandoned its efforts in 1992. See K. Boon, ‘Prewitt Enterprises, Inc. v Org. of Petroleum Exporting Countries’, in Ryngaert, *et al.*, (n 39), as well as M. Möldner, ‘International Organizations or Institutions, Privileges and Immunities’, in *Max Planck Encyclopedia of Public International Law* (2008) p. 2.

¹⁷¹ See already more than forty years ago: D.B. Michals, *International Privileges and Immunities: A Case for a Universal Statute* (Springer, 1971).

¹⁷² R.A. Wessel, ‘Institutional Lawmaking: The Emergence of a Global Normative Web’, in C. Bröllman and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing, 2016), pp. 179-199.

¹⁷³ P. Schmitt, *Access to Justice and International Organizations: The Case of Individual Victims of Human Rights Violations* (Edward Elgar, 2017).

many of these organizations on the importance as well as the openness and availability¹⁷⁴ of existing rules could be welcomed.

¹⁷⁴ Indeed, as a naive institutional legal scholar this author expected all international organisations websites to have one entry under which at least all primary law documents could be found. This, however, does not seem to be seen as something most international organisations see as a function of their website.